



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 13 | Number 2

Article 7

12-1-1990

International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers

Karen Theresa Burke

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers*, 13 Loy. L.A. Int'l & Comp. L. Rev. 427 (1990). Available at: <https://digitalcommons.lmu.edu/ilr/vol13/iss2/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?

*[C]ultural property is the product and witness of the different traditions and of the spiritual achievements of the past . . . it is indispensable to preserve as much as possible . . . so that [its] significance and message . . . become a part of the spirit of peoples who thereby may gain consciousness of their own dignity*¹

I. INTRODUCTION

“Art theft has in recent years become the second most serious international crime form after drug smuggling.”² Estimates show that, worldwide, 45,000 to 53,000 art thefts occur annually.³ At one point, 450 to 500 art objects were disappearing throughout the world each day.⁴

Thieves undoubtedly encounter little trouble finding buyers for their illegally acquired property. Art sales continue to reach spectacular heights as the demand for art objects steadily increases.⁵ As a

1. L. PROTT & P. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: VOLUME I DISCOVERY AND EXCAVATION* 9 (1984) (quoting UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968)).

2. Degraw, *Art Theft in Perspective*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 3 (1987) (quoting Raguideau & Martinez, *Flowering Industry—Theft of Art Works*, 118 REVUE DE LA POLICE NATIONALE 5-17 (1982)). Art theft presents a significant problem for countries striving to preserve their cultural heritage: “Much, perhaps most, of the antique art in Western museums was brought there in questionable ways from countries whose current governments would like it back. The best known example is the Greek government’s longstanding demand that the British Museum return the Parthenon’s Elgin Marbles.” Wash. Post, Aug. 10, 1989, § A, at 24. “In the early days of excavating in territories under Turkish control, the usual practice was to obtain a *firman* from the Sultan permitting the collection and removal of antiquities. Under this system Lord Elgin removed marbles from the Acropolis in Athens in 1799 and took them to England” L. PROTT & P. O'KEEFE, *supra* note 1, at 43. The Parthenon’s treasure is often referred to as the “Elgin Marbles.” Dicke, *The Instruments and the Agencies of the International Protection of Cultural Property*, in INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: COLLOQUY ON EUROPEAN LAW 18 (1984).

3. Degraw, *supra* note 2, at 3.

4. *Id.* Some estimates indicate that thieves steal a piece of art from Italy every half-hour. Meiser, *Art and Avarice*, L.A. Times, Nov. 12, 1989, (Magazine), at 10.

5. Degraw, *supra* note 2, at 2. For example, during one week of auctioning at Christie’s

result, illegal art trade has become a billion dollar per year industry.⁶

The dramatic increase in art sales and soaring art prices may be attributed to the corporate investor's newfound interest in collecting antiquities.⁷ The October 1987 stock market crash demonstrated the uncertainties of the stock market and has perhaps encouraged investors to find more stable enterprises, such as art, in which to invest their money.⁸ Several other factors also work to promote cultural property as a lucrative field for dishonest activities. "[T]he publicity surrounding the [high] volume of . . . art trade, [art's] soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached" are all factors which attract illegally acquired goods to the auction and sales rooms of "art market" states.⁹ Furthermore, policing the international art market is extremely difficult given its players' financial incentive to look the other

and Southeby's in May 1986, the auction houses handled \$66.3 million in art sales. This inflation is partially due to the increased value of mixed-medium works that were previously in a lower price range. For example, an 1893 Toulouse-Lautrec charcoal drawing sold for \$2.86 million. This figure was almost double the amount of its presale evaluation. *Id.*

6. See Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYRACUSE J. INT'L L. & COM. 323, 327 (quoting *ABC Closeup: Alias A. John Blake: The Underworld of the Art World* (ABC television broadcast, July 16, 1983)).

7. N.Y. Times, July 16, 1989, § 6, at 17. Edward H. Merrin, one of the world's top antiquities dealers, commented on the soaring antiquities market: "What really made the collecting of antiquities go into a steep ascent was the October 19, [1987] crash That very day started an unprecedented boom in our business." *Id.*

8. *Id.* A recent art auction at Southeby's in New York demonstrates the record-breaking sums being paid for classical antiquities. In what was described as a classical confrontation, two of the world's top antiquities dealers bid for a nine-inch marble Cycladic head. The head, sculpted five thousand years ago in the Greek islands, once formed part of a whole figure. At the end of the day, one dealer walked away with the prize. The price was a record-breaking \$2.09 million, the highest amount of money ever paid for a classical antiquity at an auction. The dilemma for the world of art was described as follows:

For archaeologists, the crack of the auctioneer's hammer sounded an alarm. They have been at war with the marketplace for 25 years, but the entry of corporate investors brings a new intensity to the conflict. Archaeologists fear that dirt will fly everywhere from Peru to Iran as picks, shovels and bulldozers go to work digging for treasure—and destroying sites. Artifacts, no matter how beautiful, cannot tell a story unless they are properly excavated. Witnesses to the unfolding of human history, they become mute when divorced from their original context. . . . Museum curators, too, . . . envisioned an anonymous horde of speculators entering the market, forcing prices ever upward, and secreting their "investments" in bank vaults.

Id.

9. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 345 (1983). "Art market" states include the United States, Western European states, and Japan. See Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 L. & POL'Y INT'L BUS. 932, 934 (1975).

way.¹⁰

Thieves rarely keep stolen treasures for themselves.¹¹ “[S]ooner or later the piece will find its way back into the stream of legitimate commerce—a worldwide, art-hungry market not given to probing the origins of the art work it consumes.”¹² Once the piece of art is placed back into the stream of commerce, the true owner encounters many obstacles in locating his property.¹³ The highly secretive nature of the art industry is one such obstacle. Artifacts are often said to come from “old collections,” a cliché of the trade, and collectors do not routinely research the origins of the works they buy.¹⁴ Dealers claim they must protect their clients’ privacy and therefore, often sell antique pieces without offering a detailed list of previous owners.¹⁵ As a result, the fact that the art was acquired by theft remains a secret.¹⁶ This confidentiality delays true owners from locating their possessions and often precludes its ultimate recovery.¹⁷

Once a stolen piece of art is located, however, the true owner’s principal means of obtaining possession is through a civil action in replevin.¹⁸ When an unknowing purchaser acquires a stolen work of art through an international sale, the determination of who will be awarded possession of the work is a difficult issue.¹⁹ Traditionally, most countries apply the *lex situs* rule to actions involving international transfers of chattels.²⁰ Under this rule, the transfer of ownership is governed “by the law of the State where the object is situated at the time of the alleged transfer.”²¹

10. Wash. Post, *supra* note 2.

11. Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1123-24 (1980).

12. *Id.* at 1124.

13. *Id.*

14. N.Y. Times, *supra* note 7; see also *Menzel v. List*, 24 N.Y.2d 91, 98, 246 N.E.2d 742, 745, 298 N.Y.S.2d 979, 983-84 (1969) (party’s defense states that in the art world, it is considered an “insult” to question a reputable art dealer as to his title to a work of art).

15. L.A. Times, *supra* note 4.

16. *Id.*

17. See Comment, *supra* note 11, at 1124-25.

18. *Id.* at 1125. The common law action of “‘replevin’ allowed owners to recover specific lost or stolen personal property. . . . [R]eplevin’ is most commonly and conveniently used as a generic label for all actions to recover . . . property.” *Id.* at 1125 n.13.

19. Byrne-Sutton, *Who is the Rightful Owner of a Stolen Work of Art? A Source of Conflict in International Trade*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 500 (1988).

20. *Id.* “Lex situs,” a Latin term, means “the law of the place where property is situated.” BLACK’S LAW DICTIONARY 822 (5th ed. 1979).

21. Byrne-Sutton, *supra* note 19, at 500.

Unfortunately, "the *lex situs* rule results in the application of national [commercial] laws whose solutions are extremely variable."²² Some legal systems protect bona fide purchasers²³ by allowing them to acquire immediate ownership of stolen objects.²⁴ Other legal systems allow true owners to reclaim their stolen property many years after the theft occurs.²⁵ These conflicting commercial laws apply to all movable property without distinction and make no exceptions for works of art. As a result, a legal framework exists that, when applied to art, "not only creates legal uncertainty for all those concerned by international art trade, but enables calculating dealers or purchasers to deal in countries whose solutions favor their personal transactions, thus potentially enhancing the black market."²⁶ Such a system is inadequate for the sale of art.

This Comment will discuss the historical evolution of the legal protection of cultural property. It will examine the development and current status of the laws governing the transfer of personal property in several art-importing and art-exporting nations, including the United States, Germany, Italy, and Switzerland.²⁷ Specifically, this Comment will compare and contrast the laws of each nation regarding bona fide purchasers, analyze the resulting legal status of stolen cultural property, and examine the effects of these conflicting laws on transnational litigation. Furthermore, it will illustrate the need for the distinct treatment of cultural property in commercial laws governing the sale of goods and the international harmonization of laws governing cultural property. Finally, a law will be proposed for universal application, which favors the true owner in situations where a thief has transferred an object of art to a bona fide purchaser for value.²⁸

22. *Id.*

23. A "bona fide" or "good faith" purchaser is "[o]ne who has purchased property for value without any notice of any defects in the title of the seller." BLACK'S LAW DICTIONARY 161 (5th ed. 1979).

24. Byrne-Sutton, *supra* note 19, at 500.

25. *Id.*

26. *Id.*

27. The United States has become the world's largest importer of works of art. Merzlyman, *American Law and the International Trade in Art*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 425 (1988).

28. This Comment presumes that cultural heritage is of great value to humanity and should, therefore, be preserved. However, as several commentators have explained, legislators may need to be convinced of this fact. Arguments favoring the protection of cultural property are described as follows:

[1] Though geography, language, history and other barriers may separate human

II. INTERNATIONAL AND NATIONAL PROTECTION OF CULTURAL PROPERTY

Any meaningful discussion of art trade requires definitions of "art" and "cultural property." Although these terms are inherently subjective, a common understanding of their essential content has been established.²⁹ A practical definition offered by the United Nations Educational Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("UNESCO Convention")³⁰ is described as follows: "property which, on religious or secular grounds, is . . . of importance for archaeology, prehistory, history, literature, art or science . . ." ³¹ Such property includes, but is not

groups from one another, human intellectual achievements may provide paths between them. The material objects through which the highest achievements of the human spirit are embodied must therefore be treasured.

[2] The cultural heritage is also an important source of inspiration . . . the individuality of every cultural achievement may . . . contribute to a sense of national identity.

L. PROTTE & P. O'KEEFE, *supra* note 1, at 8-9.

29. Chatelain, *International Trade in Art and the Law*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 23 (1988).

30. Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 I.L.M. 289 (1970) [hereinafter UNESCO Convention].

31. *Id.* art. 1. "Cultural property" is defined in article 1 of the UNESCO Convention as follows:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- a) Rare collections and specimens of fauna, flora, minerals and anatomy and objects of paleontological interest;
- b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- d) elements of artistic or historical monuments or archeological sites which have been dismembered;
- e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- f) objects of ethnological interest;
- g) property of artistic interest, such as:
 - i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - ii) original works of statuary art and sculpture in any material;
 - iii) original engravings, prints and lithographs;
 - iv) original artistic assemblages and montages in any material;
- h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- i) postage, revenue and similar stamps, singly or in collection;

limited to, paintings, sculptures, drawings, antiques, products of archaeological excavations, ancient furniture, and exotic art.³² These objects embody cultural heritage and offer contemporary societies a tangible connection to their cultural past.³³

The international protection of cultural property has been achieved through two means. First, criminal laws provide protection by prohibiting, prosecuting, and punishing the destruction, pillage, and theft of cultural property.³⁴ Second, civil laws mandate the restitution of cultural property to its rightful owners, who may be individuals, legal entities, or states.³⁵ Until 1970, international laws regarding works of art were generally limited to provisions that protected cultural property in times of war.³⁶ After 1970, however, due to growing cultural nationalism and continually increasing demands for art, peacetime treaties and international laws emerged.³⁷ Unfortunately, neither has been effective in protecting cultural property on an international scale.

A. *International Wartime Treaties*

The first efforts to protect cultural property consisted of international treaties prohibiting the destruction and removal of art objects during times of war.³⁸ For example, the Lieber Code, adopted in the United States in 1863, stated that cultural property was not to be "seized, sold, given away, wantonly destroyed, damaged, or privately appropriated until such time as a peace treaty determined the ultimate ownership of the property."³⁹

The Hague Conventions of 1899⁴⁰ and 1907⁴¹ on the Laws and

j) archives, including sound, photographic and cinematographic archives;
k) articles of furniture more than one hundred years old and old musical instruments.

Id.

32. *Id.*

33. Comment, *The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOKLYN J. INT'L L. 55, 57-58 (1987).

34. Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 285 (1983).

35. *Id.*

36. Nafziger, *Protection of Cultural Property*, 17 CAL. W. INT'L L.J. 283-84 (1987).

37. *Id.*

38. See Bassiouni, *supra* note 34, at 289.

39. *Id.*

40. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1899), T.S. No. 403, 26 Martens Nouveau Recueil (2d) 949 [hereinafter 1899 Hague Convention].

Customs of War on Land also established numerous protections for cultural property in times of war. Pillage, the taking of spoils by force, is expressly forbidden by the Hague Conventions unless "imperatively demanded by the necessity of war."⁴² Other provisions require the following: 1) signatory states shall take action in times of war to spare buildings dedicated to art, science, and religion; 2) signatory states shall notify the enemy by marking such buildings;⁴³ and 3) the occupying power shall administer all public institutions in a way that preserves them.⁴⁴ Furthermore, parties to the conventions are subject to legal proceedings for intentional damage to institutions of arts and sciences, historic monuments, or works of art.⁴⁵ Unfortunately, the Hague Conventions failed to prevent extensive damage and destruction during the first and second world wars.⁴⁶ Specifically, Nazi Germany largely ignored international treaties designed to protect cultural property as they pillaged works of art throughout Europe during World War II.⁴⁷

Following World War II, the 1954 Convention for the Protection

41. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 Martens Nouveau Recueil (3d) 461 [hereinafter 1907 Hague Convention].

42. 1899 Hague Convention, *supra* note 40, art. 47; 1907 Hague Convention, *supra* note 41, art. 47. Provisions in international agreements designed to protect cultural property are limited by the Rule of Necessity. The Rule of Necessity permits protection of cultural property to the extent that it is not used for military purposes and is not located so near a military objective that protecting the property is impracticable. Bassiouni, *supra* note 34, at 290 n.36.

43. 1899 Hague Convention, *supra* note 40, art. 27; 1907 Hague Convention, *supra* note 41, art. 27. The 1907 Hague Convention states:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

1907 Hague Convention, *supra* note 41, art. 27; *cf.* 1899 Hague Convention, *supra* note 40, art. 27. Article 27 of the 1899 Hague Convention does not make the article's provisions mandatory for signatory states; the article's language indicates that the above-described actions *should* be taken by state parties to the Convention. 1899 Hague Convention, *supra* note 40, art. 27.

44. 1899 Hague Convention, *supra* note 40, art. 56; 1907 Hague Convention, *supra* note 41, art. 56. Article 56 states: "All seizure of, destruction or wilful damage done to . . . historic monuments, works of art and science, is forbidden and should be made the subject of legal proceedings." 1907 Hague Convention, *supra* note 41.

45. 1899 Hague Convention, *supra* note 40, art. 56; 1907 Hague Convention, *supra* note 41, art. 56.

46. See Bassiouni, *supra* note 34, at 291-93.

47. *Id.* at 292.

of Cultural Property in the Event of Armed Conflict⁴⁸ attempted to improve upon the 1899 and 1907 Hague Conventions by taking into account the events of past wars.⁴⁹ More recent treaties prohibiting the destruction and removal of cultural property during wartime include the Protocols I⁵⁰ and II⁵¹ Additional to the 1949 Geneva Conventions. The protocols require that the parties "at all times distinguish between . . . civilian objects and military objectives and accordingly shall direct . . . operations only against military objectives."⁵² Furthermore, the protocols make destroying "clearly-recognized" works of art a "grave breach."⁵³ Under these treaties, the violation of provisions protecting cultural property constitute a war crime, and the violator is subject to prosecution and punishment.⁵⁴

The Lieber Code, Hague Conventions, and Additional Protocols address the destruction and removal of cultural property only during wartime.⁵⁵ More recent developments have expanded the protection of cultural property to involve international peacetime treaties which generally apply to private conduct.⁵⁶

B. International Peacetime Treaties

The most significant multilateral treaty designed to protect cultural property in peacetime is the 1970 UNESCO Convention.⁵⁷ Over fifty countries are currently parties to the UNESCO Convention; however, the majority of these parties are exporters of cultural property.⁵⁸ The few art-importing nations included in the convention are

48. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.

49. Bassiouni, *supra* note 34, at 294.

50. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

51. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

52. Protocol I, *supra* note 50, art. 48.

53. *Id.* art. 85(4)(d).

54. Bassiouni, *supra* note 34, at 296.

55. *See id.* at 287-98.

56. Comment, *supra* note 33, at 56.

57. UNESCO Convention, *supra* note 30. "On November 14, 1970, the member countries of UNESCO adopted, by a 77-1-8 vote, the 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.'" P. BATOR, *THE INTERNATIONAL TRADE IN ART* 94 (1983).

58. Bolla, *Keynote Address*, 15 N.Y.U. J. INT'L L. & POL. 765, 768 (1983). Parties to the

the United States, Canada, and Italy.⁵⁹

The UNESCO Convention seeks to establish a balance between "retain[ing] cultural property within the country of its origin and [allowing] for a free flow of cultural objects between nations in the spirit of cultural exchange."⁶⁰ Parties to the UNESCO Convention undertake to: prevent illegal transfers of cultural property; ensure the earliest possible return of property to the true owner; and allow rightful owners to bring actions for the property's recovery.⁶¹

For various reasons, the UNESCO Convention has not been as effective as its drafters intended. For example, resolving disputes according to the terms of the convention is difficult since much of its language is rhetorical rather than substantive.⁶² One scholar described the convention as "a compromise between those provisions which contain substantive obligations on the part of the signatories, and those that pay lip service to humanistic values which are unenforceable."⁶³ Most of the convention's provisions can be dismissed as "inoperative, unintelligible, discretionary or lacking precise guidelines

convention include countries from Africa, Asia, the Arab States, Latin America, Eastern Europe, Western Europe, and North America. *Id.*

59. *Id.*; see Nafziger, *supra* note 36, at 284. "The United States voted in favor of the UNESCO Convention, and on February 2, 1972, President Nixon submitted it to the Senate for ratification. On August 11, 1972, advice and consent was voted in the Senate by a 79-0 vote." P. BATOR, *supra* note 57, at 94. Despite the Senate's advice and consent to the Convention in 1972, the United States did not become a party to it until the early 1980s. In 1982, President Reagan finally ratified the convention. Nafziger, *supra* note 36, at 284 (citing 19 U.S.C. §§ 2601-13 (1982)).

60. Comment, *supra* note 33, at 59. "[T]he text of the UNESCO Convention was . . . [designed to persuade] a majority of UNESCO to adopt a moderate and compromise position. The position of the Soviet bloc countries and many third-world countries, which would have effectively ended all international trade in cultural objects, was rejected." P. BATOR, *supra* note 57, at 68.

61. Bassiouni, *supra* note 34, at 299. The UNESCO Convention states in part:

The State Parties to this Convention undertake:

- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported . . . ;
- (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution . . . ; (ii) at the request of the State Party or origin, to take appropriate steps to recover and return any such cultural property imported

UNESCO Convention, *supra* note 30, art. 7.

62. P. BATOR, *supra* note 57, at 94-95. To understand the UNESCO Convention, the reader must realize that "only a small fraction of the Convention was intended to have serious operative consequences; the rest has only rhetorical existence." *Id.*

63. Burnham, *Book Review*, 15 N.Y.U. J. INT'L L. & POL. 1021, 1023 (1983) (reviewing P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1983)).

and substantive procedures."⁶⁴

In his book, *The International Trade in Art*,⁶⁵ Paul M. Bator provides a guide to provisions of the convention which he claims "can be safely ignored because they will have no substantive effect."⁶⁶ Article 2 of the convention illustrates Bator's point.⁶⁷ It states that the parties "undertake to oppose" the "illicit" practices that result in "the impoverishment of the cultural heritage of the countries of origin of such property."⁶⁸ The article closes with an empty resolution to "stop . . . current practices, and . . . [help] to make the necessary reparations."⁶⁹ According to Bator, article 2 and other similar provisions are rhetorical rather than substantive since these statements espouse general goals with no serious operative consequences.⁷⁰ In article 5, the parties undertake "as appropriate" to establish national services within their territories to protect their cultural heritage.⁷¹ This further illustrates Bator's point, since the effectuation of this provision depends entirely upon the discretionary actions of each state.⁷²

Other provisions in the convention are similarly discretionary and ambiguous; they contain such phrases as "to the extent feasible,"⁷³ "consistent with national legislation,"⁷⁴ and "as appropriate for each country."⁷⁵ These provisions ensure that parties to the convention are not required to take action inconsistent with their existing domestic laws.⁷⁶ As a result, the effectiveness of the convention is severely undermined because nations, particularly art market nations, are allowed to retain their national status quos in protecting cultural property.⁷⁷ These nations are, therefore, able to refrain from implementing effective changes to counter the problem of illicit art trafficking.⁷⁸

Articles 7 and 9 are the heart of the convention and contain its

64. *Id.* at 1023-24.

65. P. BATOR, *supra* note 57, at 100.

66. *Id.* at 100-01.

67. *Id.* at 101.

68. UNESCO Convention, *supra* note 30, art. 2.

69. *Id.*

70. P. BATOR, *supra* note 57, at 101.

71. UNESCO Convention, *supra* note 30, art. 5.

72. P. BATOR, *supra* note 57, at 101.

73. UNESCO Convention, *supra* note 30, art. 9.

74. *Id.* art. 7.

75. *Id.* art. 5.

76. P. BATOR, *supra* note 57, at 102.

77. *See id.*; Comment, *supra* note 33, at 64.

78. Comment, *supra* note 33, at 64.

major substantive provisions.⁷⁹ Article 7(b), which specifically addresses the problem of stolen property, states:

The State Parties to this Convention undertake:

- i) to prohibit the import of cultural property stolen from a museum or secular public monument or similar institution in another State Party to this Convention . . . provided that such property is documented as appertaining to the inventory of that institution;
- ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.⁸⁰

Bator has described article 7(b) "as a helpful and practical way to address the problem of international trade in stolen art":

[Article 7(b)] covers those art treasures most likely to fall within the legitimate "core" of the national patrimony of other countries: known and accessioned objects forming part of the collections of significant public institutions. It is restricted to objects whose provenance is by definition known. Thus, problems of administrative enforceability and fairness are minimized and overinclusiveness avoided.⁸¹

Other commentators are, however, skeptical of article 7(b)'s effectiveness from a practical standpoint. They criticize article 7(b)(i) for lacking comprehensive protection because it limits its import prohibitions to a narrow category of cultural property.⁸² To trigger the import prohibitions, the property must have been stolen from "a museum or a religious or secular public monument or similar institution" and must be "documented as appertaining to the inventory of that institution."⁸³ If one of these elements is absent, a state party is not required under the convention to recover and return illegally exported cultural property.⁸⁴ Many countries lack the resources necessary to complete a comprehensive inventory of the kind of objects described in article 7(b)(i).⁸⁵ Consequently, the convention excludes

79. P. BATOR, *supra* note 57, at 101-02. "Articles 7 and 9 were essentially the innovations of the U.S. delegation [to the Convention]." Burnham, *supra* note 63, at 1024.

80. UNESCO Convention, *supra* note 30, art. 7(b).

81. P. BATOR, *supra* note 57, at 80.

82. See Prott, *supra* note 9, at 341-42.

83. UNESCO Convention, *supra* note 30, art. 7(b)(i).

84. Prott, *supra* note 9, at 341.

85. *Id.* at 341-42.

these objects from its scope.⁸⁶

Article 7(b)(ii) is also problematic. If an art-exporting party to the convention requests the return of cultural property stolen from a museum, religious, or secular public monument, or similar institution, that property must be returned.⁸⁷ The convention protects bona fide purchasers by requiring "that the requesting State . . . pay just compensation to an innocent purchaser or to a person who has valid title to that property."⁸⁸ The art-buying nation returning the property must also be a party to the convention in order for this provision to apply.⁸⁹

There is some opposition to article 7(b)(ii)'s requirement that the requesting state pay just compensation to an innocent purchaser.⁹⁰ Some of the countries that did not ratify the UNESCO Convention stated that their domestic legislation was incompatible with the convention's protection of bona fide purchasers.⁹¹ Article 7(b)(ii) has therefore been interpreted to apply only where it is consistent with the domestic laws of the state party.⁹² Thus, when national laws do not favor the bona fide purchaser, no compensation is required.⁹³ Again, the UNESCO Convention fails to set uniform standards and instead, accommodates the individual practices of each signatory state.

The original language of the UNESCO Convention made its measures mandatory for the signatory states. This would have substantially aided in its enforcement.⁹⁴ However, the enacted convention was significantly amended and resulted in a dramatically less effective version.⁹⁵ Parties to the convention are, therefore, not required to set up systems which effectively counter the problems of illegal art trade.⁹⁶

In summary, many factors have frustrated the overall effective-

86. *Id.* For example, objects belonging to a church which have not been inventoried in their country of origin will be excluded from the Convention's provisions. *Id.*

87. UNESCO Convention, *supra* note 30, art. 7(b)(ii).

88. *Id.*

89. *Id.*

90. Garro, *The Recovery of Stolen Art Objects from Bona Fide Purchasers*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 503, 504 n.4 (1988).

91. *Id.* Finland, the Netherlands, and the United States, for example, mentioned in their comments on article 7(b)(ii) that the provision is incompatible with their domestic legislation on the protection of bona fide purchasers. *Id.*; P. BATOR, *supra* note 57, at 106-07.

92. Garro, *supra* note 90, at 504.

93. *Id.* at 504-05.

94. Comment, *supra* note 33, at 64.

95. *Id.*

96. *See id.*

ness of the UNESCO convention on an international scale, including: the lack of participation in the convention by many nations; the convention's lack of substantive procedures and precise guidelines; and the deference given to the state parties' discretion. Implicit in both peacetime and wartime international treaties protecting art is the idea that the protection of cultural property is a basic and fundamental right of all people to maintain their cultural heritage.⁹⁷ Unfortunately, international treaties in this area have had little success in protecting these rights or controlling increasing illicit excavations and smuggling activities.

C. National Legislation

Many countries have enacted national legislation to specifically address the problems of theft and illegal transportation of cultural property.⁹⁸ Legislation of this type is usually in the form of export restrictions⁹⁹ which are enforced by criminal sanctions or, in cases where art dealers have exported objects without a license, by provisions for forfeiture.¹⁰⁰ These national efforts have proven ineffective, however, because theft and illicit art trafficking have grown to enormous proportions and are beyond the control of the individual nations.¹⁰¹

Some countries have enacted legislation imposing importation restrictions on cultural property that is exported contrary to the laws of another jurisdiction.¹⁰² The United States, for example, signed a bilateral treaty with Mexico assuring its cooperation in the repatriation

97. Bassiouni, *supra* note 34, at 289. Indeed, this principle is expressed in the Universal Declaration of Human Rights which states that "every person has a right to own property and may not be arbitrarily deprived thereof." It further states that "every person has a right to freely participate in the cultural life of the community and to enjoy the arts." *Id.* at 289 n.27 (citing Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/71 at 70 (1948)).

98. Garro, *supra* note 90, at 503.

99. Comment, *supra* note 33, at 58.

100. Garro, *supra* note 90, at 503.

101. Comment, *supra* note 33, at 58-59 (citing Prott, *supra* note 9, at 333). The author describes the individual state's problem in preventing illicit art trading:

For various reasons, the problem of illicit art trading transcends the enforcement mechanisms of individual nations: there may be too many archeological excavation sites within certain less resourceful countries for adequate policing; many countries may have overly restrictive export laws which encourage the illegal trade in artifacts; and export violations, in turn, are not enforced by art market states.

Id. at 59 n.25.

102. Garro, *supra* note 90, at 503.

of illicitly-exported, Mexican cultural property.¹⁰³ In October 1972, Congress passed legislation prohibiting the importation of illegally-exported, monumental pre-Columbian sculptures and frescos.¹⁰⁴ For two reasons, however, legislative action of this type is not an effective way to solve the problem of international trade in stolen art. First, due to their specificity, these laws protect only a small portion of the total art market.¹⁰⁵ Second, enforcement of these agreements is inadequate due to a number of factors: ineffective border patrols; topographic obstacles, particularly in remote areas of art-rich countries; and bribes accepted by susceptible guards, inspectors, and judges.¹⁰⁶

Because international treaties and national laws designed to protect cultural property have been ineffective in the international setting, litigation may be the owner's only means of recovering his property. However, transnational litigation is dependent upon the applicable national commercial laws and involves complicated legal obstacles and uncertain outcomes.¹⁰⁷ The problems and uncertainties involved in transnational litigation are discussed below.

103. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 495, T.I.A.S. No. 7088.

104. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1976)).

105. See Comment, *supra* note 33, at 58-59.

106. *Id.* at 69 n.100. Factors which have resulted in the inadequate enforcement of international cultural property agreements are summarized as follows:

[r]eliance upon control systems of guards and inspectors that are often prohibitively expensive for the art-rich developing countries; the ancillary susceptibility of poorly paid guards and inspectors to bribes; the susceptibility of other agents of law enforcement, including judges, to bribes (known as "mordida" in the Spanish-speaking countries); the lure of hard currency from foreign purchasers in preference to indigenous currency sometimes available from the government or local purchasers; topographic and logistic obstacles, particularly in the remote, often treasure-laden areas of developing countries; an iron law of inflation that sets prices on the international antiquities market beyond government control; draconian, sometimes completely proscriptive, export controls and embargoes that counter-productively drive up the market and invite disobedience; the difficulty of controlling the movement of items intended for re-export in such entrepôts as Switzerland and Lebanon; and the impossibility of sealing off borders and intercepting diplomatic pouches, which may contain contraband in cultural property. In view of such deficiencies in the municipal regime of control, it is not surprising that the laws are found to be honored more in their breach than in their observance.

Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 DEN. J. INT'L L. & POL. 231, 232-33 n.6 (1972).

107. See Garro, *supra* note 90, at 504.

III. NATIONAL LAWS GOVERNING THE SALE OF GOODS: THE BONA FIDE PURCHASER AND THE LEGAL STATUS OF CULTURAL PROPERTY

Problems presented by the illegal circulation of art objects are often resolved on a national level.¹⁰⁸ Specifically, courts play an important role in determining whether a piece of cultural property will be returned to its true owner.¹⁰⁹ Unfortunately, laws regarding the sale of personal property differ from nation to nation, resulting in uncertain outcomes in transnational litigation.¹¹⁰

In discussing the existing international disharmony in laws regarding cultural property, it is important to note that commercial laws govern the sale of cultural property; thus, the legal status of art work is indistinguishable from the legal status of any movable goods.¹¹¹ Therefore, under both common and civil law, legislation applicable to transfers of fungible goods also applies to transfers of art works.¹¹²

In the United States, transactions involving cultural property are subject to the rules of the Uniform Commercial Code ("UCC"), as adopted by the various states.¹¹³ Likewise, in Europe, works of art are governed by commercial laws and, therefore, are legally indistinguishable from ordinary property.¹¹⁴ The fact that commercial laws,

108. *Id.* at 503.

109. *See id.* at 503-04.

110. *Id.* at 514-16; Byrne-Sutton, *supra* note 19, at 500.

111. Merryman, *supra* note 27, at 426. European civil codes refer to personal property as "movable goods." *Id.*

112. *Id.* "Fungible goods" are defined as follows:

Goods of which each particle is identical with every other particle, such as grain and oil. With respect to goods or securities, those of which any unit is, by nature or usage of trade, the equivalent of any other like unit Things belonging to a class which do not have to be dealt with *in specie*.

BLACK'S LAW DICTIONARY 344 (5th ed. 1979). "A thing is said to exist *in specie* when it retains its existence as a distinct individual of a particular class." *Id.* at 406. A work of art is not identical to other works of art. By nature, a piece of art retains its existence as a distinct individual of a particular class and is, therefore, not fungible. The Uniform Commercial Code, by failing to specifically provide for art, illustrates the problem where works of art are categorized with fungible goods in commercial law. *See* U.C.C. § 2-102 (1978) (expressly stating that article 2 applies to transactions in goods) and U.C.C. § 2-105(1) (1978) (defining "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action").

113. Merryman, *supra* note 27, at 426.

114. *See* Byrne-Sutton, *supra* note 19, at 500. For example, in Switzerland, transfers of art work are governed by the Swiss Civil Law Code. This code generally defines transfers of movable, personal property. "There is no distinct legal status for works of art in Swiss private

generally designed to govern commercial sales, do not specifically provide for transfers of art is problematic. These laws fail to provide special protection for pieces of art which, because of their cultural significance, have a special importance extending beyond the parties to the particular transaction.¹¹⁵ As a result, when a true owner attempts to recover stolen property from a bona fide purchaser, his ability to do so may depend on the conflict of laws determination.

United States and German commercial laws, for example, generally favor the true owner in transactions involving stolen personal property.¹¹⁶ These laws, therefore, protect cultural property in cases of theft. Conversely, Italian and Swiss laws governing the sale of goods favor the bona fide purchaser in cases of theft and, therefore, do not afford adequate protection to cultural property.¹¹⁷ If the conflict of laws rule requires the application of either Italian or Swiss law, the true owner may not be successful in recovering his property. For reasons discussed below, laws generally governing movable property should not apply to works of art. Instead, laws that exclusively govern transfers of cultural property should be established.

A. *Development of Laws Protecting Bona Fide Purchasers: The Underlying Policies*

National legal systems adjust the competing interests of dispossessed owners and innocent purchasers differently, resulting in disharmonious, sometimes conflicting, laws regarding commercial transactions involving thieves.¹¹⁸ When an object is stolen from its owner and subsequently transferred to a good faith purchaser, a court has the difficult task of determining whether the true owner or the bona fide purchaser will be awarded possession of the property.¹¹⁹ Each party admittedly has a claim that is worthy of recognition and protection.¹²⁰ However, their interests cannot both be satisfied. The law must favor one party over the other, recognizing that the losing

law." Steinhauer, *The Transfer of Ownership of Works of Art in Swiss Law*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 118 (1985); see also *Autocephalous Greek-Orthodox Church v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989).

115. Merryman, *supra* note 27, at 433.

116. See *infra* text accompanying notes 147-57 for discussion of United States and German law.

117. See *infra* text accompanying notes 158-66 for discussion of Swiss and Italian law.

118. Garro, *supra* note 90, at 516.

119. See Byrne-Sutton, *supra* note 19, at 500.

120. The true owner argues that, against his will, he has been dispossessed of property that is rightfully his. The bona fide purchaser argues that she purchased the property in good faith

party suffers, despite his lack of fault: "Either the rightful owner must lose the goods, which are retained by the bona fide purchaser, or the bona fide purchaser must surrender the goods to the rightful owner and lose the price which he has paid to the wrongful seller."¹²¹

Historically, under both common and civil law,¹²² a nonowner could not transfer valid title.¹²³ The general rule provided that "no man [could] by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property"¹²⁴ However, a careful weighing of policy considerations led many countries to recognize exceptions to this rigid rule favoring the owner over the bona fide purchaser;¹²⁵ such exceptions favor the "security of acquisitions"¹²⁶ over its competing concern—the "integrity of transactions."¹²⁷

These competing policies have been described as follows:

In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our

and, therefore, should not lose the price she paid to the wrongful seller. See R. BROWN, *THE LAW OF PERSONAL PROPERTY* 231 (1975).

121. *Id.*

122. Two major types of legal systems are the common law and civil law systems.

"Common Law" systems are those based, like English law, on judicial decisions supplemented by statutes on specific topics. Most English-speaking countries have such systems. "Civil Law" systems are those which were originally based on the *ius civile* (Roman law). Their law has generally been codified (hence they are also called "code law" systems) in statutes of general principle which are applied by the judges to all areas of law.

L. PROTT & P. O'KEEFE, *supra* note 1, at 5.

123. Garro, *supra* note 90, at §14.

124. *Fawcett v. Osborne*, 32 Ill. 411, 425 (1863).

125. Garro, *supra* note 90, at 514-15.

126. The term "security of acquisitions" refers generally to the preservation of the commercial market; if the law protects buyers in cases where the property is stolen, then the buyers need not inquire into every purchase they make. Buyers can rest assured that their acquisitions are secure. *Id.* at 514; Byrne-Sutton, *supra* note 19, at 500. Furthermore, the recognition of the original owner's claim against that of the innocent purchaser may be injurious to society's interest in fostering free trade and commerce. Business suffers if purchasers are not certain of the title to the goods they buy. R. BROWN, *supra* note 120, at 231.

127. The term "integrity of transactions" refers to the character of the transfer. Forcing buyers to investigate the seller's title protects the presumption of an honest transfer. Hence, stolen property is less easily transferred. See Byrne-Sutton, *supra* note 19, at 500; Garro, *supra* note 90, at 514-15.

own times.¹²⁸

Today, the good faith purchase rule represents an important exception to the general rule that a nonowner cannot transfer valid title.¹²⁹ This doctrine originally developed at common law based on equitable principles.¹³⁰ According to the good faith exception, if a movable object is transferred to a bona fide purchaser for value and is not stolen from or lost by its owner but is instead obtained through fraudulent means, the common law and most civil codes favor the bona fide purchaser.¹³¹ This is an equitable principle because the owner, in cases of fraud, is the cheapest cost avoider since he is in the best position to prevent the fraudulent transfer.¹³²

For example, fraud may occur when a purchaser gives an owner a worthless check in exchange for property.¹³³ The purchaser may then sell the fraudulently acquired property to a third party, bona fide purchaser for value. In this situation, the owner, rather than the bona fide purchaser, is the cheapest cost avoider since the owner could have phoned the purchaser's bank to verify his ability to pay. Alternatively, the owner could have demanded payment by cashier's check.

Requiring the bona fide purchaser to investigate a transferor's capacity to grant title poses a significantly greater burden.¹³⁴ The bona fide purchaser must expend much more time and effort to ensure the transfer is valid compared to the owner's relatively easy task of making a phone call or demanding payment in a particular manner. The free flow of commerce would be impeded if, in every transaction, the purchaser had a burdensome duty of investigation.¹³⁵ Following

128. *Bishopgate Motor Finances Corp. v. Transport Brakes Ltd.*, 1 K.B. 322, 336-37 (1949).

129. Dolan, *The U.C.C. Framework: Conveyancing Principles of Property Interests*, 59 B.U.L. REV. 811, 813-14 (1970).

130. R. BROWN, *supra* note 120, at 211-14. The Uniform Commercial Code in the United States and the Sale of Goods Act in England attempt to systemize the common law regarding bona fide purchasers by incorporating and expanding upon these equitable principles. Garro, *supra* note 90, at 515.

131. Garro, *supra* note 90, at 515; see U.C.C. § 2-403 (1978); Sale of Goods Act, 1979, §§ 21-23 (allowing voidable title to be obtained fraudulently).

132. *Sacks v. State*, 360 N.E.2d 21, 28 *reh'g denied*, 361 N.E.2d 190 (1977). The relevant United States statute, U.C.C. § 2-403, provides protection for the good faith purchaser in cases of fraudulent transfers. "By favoring the innocent third party, the Uniform Commercial Code endeavors to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them, the original seller." *Id.*

133. See U.C.C. § 2-403(1)(b) (1978).

134. See *Sacks*, 360 N.E.2d at 28.

135. Dolan, *supra* note 129, at 814.

these principles, courts have allowed bona fide purchasers for value to acquire good title to property obtained through fraudulent means on the theory that the true owner is in the best position to know what became of the illegally acquired property.¹³⁶ The fraudulent transferor's title is, therefore, deemed "voidable," and the transferee (the bona fide purchaser) may affirm the transaction.¹³⁷ The UCC adopts this principle by stating that "a person with voidable title has power to transfer a good title to a good faith purchaser for value."¹³⁸

English and United States law, as well as many civil law codes, treat cases of theft differently from cases of fraud. While a bona fide purchaser may acquire voidable title from a fraudulent transferor, the thief cannot transfer title, even to a bona fide purchaser, because his title is void.¹³⁹ This is also an equitable concept. Where fraud occurs, the owner is in a better position than the bona fide purchaser to prevent a fraudulent transfer.¹⁴⁰ In cases of theft, however, the owner has little control over the transfer of his property since the transfer is involuntary.¹⁴¹ In comparison, the bona fide purchaser has some opportunity to investigate the circumstances surrounding the transaction. Although the burden of investigating is high, a bona fide purchaser is, nevertheless, in a better position than the owner to pre-

136. For example, in *Western Union Cold Storage Co. v. Banker's National Bank*, 176 Ill. 260, 52 N.E. 30 (1898), the court stated:

Where a bona fide purchaser, for a valuable consideration, without notice, acquires the possession of property from one who has trusted to the personal security of another, the rule of judicial decision of this state is that such bona fide purchaser is protected, because, where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who, by his imprudence, enabled such third person to commit the fraud.

Id. at 32-33.

137. "[V]oid in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it." BLACK'S LAW DICTIONARY 812 (5th ed. 1979).

138. U.C.C. § 2-403(1) states in pertinent part:

A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . .

(b) the delivery was in exchange for a check which is later dishonored, or . . .

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

Id. Thus, in transfers of property, a seller with voidable title will not prevail in an owner's action for replevin because he is the individual who perpetrated the fraudulent act. However, he has power to pass title to a good faith transferee. *Id.*

139. See *id.*; see *supra* note 137 for the definition of "void."

140. *Sacks*, 360 N.E.2d at 28.

141. R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE 584 (3d ed. 1983).

vent the illegal transfer. Therefore, in cases of theft, a bona fide purchaser is the cheapest cost avoider.

Despite the traditional rule that a thief cannot pass title to stolen property, some countries, nevertheless, allow the bona fide purchaser to acquire title from a thief.¹⁴² This change from the traditional rule reflects a choice for commercial certainty.¹⁴³ Commerce presumably increases if buyers have no duty to inquire into the circumstances of their transfers because they are more willing to purchase goods if the title to the goods is certain.¹⁴⁴

B. Various National Laws Regarding the Bona Fide Purchaser

Most civil law systems are similar to English and United States systems in that they protect the bona fide purchaser when the true owner "voluntarily" parted with possession of his property (e.g., in cases of fraud).¹⁴⁵ However, unlike the traditional laws of England and the United States, some civil law codes favor the bona fide purchaser over the true owner even when the true owner did not voluntarily give up possession of the property.¹⁴⁶ Examples of conflicting national bona fide purchaser laws from the United States, Germany, Italy, and Switzerland are discussed below. These laws govern commercial transactions generally and do not distinguish between sales of cultural property and ordinary moveable goods.

1. United States Bona Fide Purchaser Law

United States laws governing bona fide purchasers reflect the traditional common law view regarding international trade in goods.¹⁴⁷ According to United States law, "where the owner loses or is robbed of his property and the finder or thief . . . attempts to sell or pledge it without consent, the owner may follow and reclaim it no matter in whose possession it may be found."¹⁴⁸

142. Garro, *supra* note 90, at 514-16. For example, the Italian Civil Code of 1942 is aimed at protecting the security of transactions by allowing the bona fide purchaser to acquire good title regardless of whether or not the property is stolen. *Id.*; see *infra* text accompanying notes 158-61 for discussion of Italian bona fide purchaser laws.

143. See R. BROWN, *supra* note 120, at 231-32.

144. *Id.*

145. Garro, *supra* note 90, at 515 (citing French Civil Code, arts. 2279-80; German Civil Code, §§ 932-35 and German Commercial Code, §§ 366-67; Spanish Commercial Code, art. 85; Swiss Civil Code, arts. 933-35).

146. *Id.* at 515-16.

147. Merryman, *supra* note 27, at 428.

148. R. ANDERSON, *supra* note 141, at 584.

Although each state in the United States has its own laws regarding stolen property, substantially all of these laws are modeled after the UCC.¹⁴⁹ According to the UCC, when a third party in good faith purchases from a thief, the thief has no title, and the true owner will prevail in an action for replevin.¹⁵⁰ The UCC provides: “[a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.”¹⁵¹ A purchaser, therefore, acquires only the property rights possessed by the seller.¹⁵² Hence, a thief passes no rights in stolen property, even to a bona fide purchaser.¹⁵³

2. German Bona Fide Purchaser Law

German laws governing the bona fide purchaser generally resemble the provisions in the UCC.¹⁵⁴ However, under German law, the

149. “The Uniform Commercial Code, jointly sponsored by the American Law Institute and the Conference of Commissioners on Uniform State Laws, has been enacted, with occasional variations in language and in judicial interpretations, in all of the states.” Merryman, *supra* note 27, at 426 n.3. For local statutory citations and variations, see R. ANDERSON, *supra* note 141, at 566-68.

150. Garro, *supra* note 90, at 515.

151. U.C.C. § 2-403(1). In the absence of circumstances bringing the case within the bona fide purchaser exception of U.C.C. § 2-403,

it follows that where the owner loses or is robbed of his property and the finder or thief, or anyone who has a temporary right to use it, attempts to sell or pledge it without consent, the owner may follow and reclaim it no matter in whose possession it may be found The possessor of stolen goods does not have voidable title and therefore cannot convey good title under § 2-403 regardless of how innocently the goods had been acquired by him.

R. ANDERSON, *supra* note 141, at 584.

152. U.C.C. § 2-403(1); R. ANDERSON, *supra* note 141, at 584.

153. U.C.C. § 2-403(1); R. ANDERSON, *supra* note 141, at 584.

154. Garro, *supra* note 90, at 508. In Germany, the laws applicable to bona fide purchasers of stolen property are contained in the German Civil Code. The code provisions governing the transfer of movables are *Bürgerliches Gesetzbuch* (BGB) §§ 926-36. Under these provisions, a purchaser in good faith acquires good title to property, regardless of the seller's ownership rights, unless prohibited under BGB § 935. Section 935 states in pertinent part: “The acquisition of ownership based on §§ 932-34 does not take place, if the thing has been stolen from the owner, becomes missing or is otherwise lost.” *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 839 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). In *Elicofon*, the court articulated the elements required by the code to acquire ownership from one who has no title:

(1) the owner must have voluntarily parted with his dominion over the [property], i.e., the [property] must not have been taken from the owner without his consent; (2) the person from whom the purchaser acquired the [property] must have been in possession of [it]; and (3) the purchaser must have believed in good faith that that person was the actual *owner* of the [property], and that belief must not have been grossly negligent.

bona fide purchaser benefits from additional protections not found in the UCC.¹⁵⁵ Unlike American law, the German doctrine of *Ersitzung* allows the bona fide purchaser to perfect his title in stolen property if he obtains the property in good faith and continues to hold it without notice of defect for ten years from the time the owner lost possession of the property.¹⁵⁶ Thus, under certain circumstances, the bona fide purchaser in Germany can acquire property from a thief.¹⁵⁷

3. Italian Bona Fide Purchaser Law

The Italian Civil Code of 1942 exemplifies a contrary approach to the traditional common law rule favoring the true owner.¹⁵⁸ Italian law favors the bona fide purchaser even in cases of theft where the true owner did not voluntarily give up possession of the property; it therefore discards the traditional approaches to laws governing the transfer of stolen goods.¹⁵⁹ Under Italian law, the good faith purchaser immediately acquires title, regardless of whether or not the property had been stolen or fraudulently conveyed.¹⁶⁰ Three elements must exist for a bona fide purchaser to acquire title to stolen property:

- 1) the purchaser [must be] in good faith at the time of delivery;
- 2) the transaction [must be] carried out in a manner which is appropriate [according to] the documentation effecting the sale; . . .
- and 3) the purchaser [must] not [be] aware of any unlawful origin of the goods at the time he acquires them.¹⁶¹

Once these conditions are met, a bona fide purchaser has no duty to return the stolen property to its dispossessed owner.

4. Swiss Bona Fide Purchaser Law

Swiss law also favors the bona fide purchaser. A purchaser of

Id. at 840.

155. Garro, *supra* note 90, at 508.

156. *Id.* at 509. The German doctrine of *Ersitzung* is analogous to the American concept of adverse possession. Note, *International Law in Domestic Forums: The State of the Art*, *Kunstsammlungen zu Weimar v. Elicofon*, 9 BROOKLYN J. INT'L L. 179, 189 (1983).

157. Garro, *supra* note 90, at 509.

158. See Galgano, *Aspects Juridiques du Commerce de L'art en Italie*, in GENEVA WORKSHOP: INTERNATIONAL SALES OF WORKS OF ART 121, 129 (1988). This rule, favoring the bona fide purchaser, does not apply to works of art belonging to public collections and unearthed works of art. These objects are public property, and the possessor can never own them, even if he purchases them in good faith. *Id.*

159. Garro, *supra* note 90, at 515-16.

160. *Id.* at 516; Galgano, *supra* note 158, at 129.

161. *Winkworth v. Christie Manson & Woods Ltd.*, [1980] 2 W.L.R. 937, [1980] 1 Ch. 496, [1980] 1 All E.R. 1121.

stolen property in Switzerland acquires title superior to that of the original owner if he purchases the property in good faith.¹⁶² To conclude that a purchaser did not act in good faith, "a court must *either* find that the purchaser actually knew that the seller lacked title, *or* find that an honest and careful purchaser in the particular circumstances would have [had] doubts with respect to the capacity of the seller to transfer property rights."¹⁶³

Swiss law presumes that the purchaser acted in good faith.¹⁶⁴ However, a plaintiff bringing an action in replevin may overcome this presumption by showing that "suspicious circumstances surrounded the transaction which should have caused an honest and reasonably prudent purchaser to doubt the seller's capacity to convey property rights."¹⁶⁵ If the plaintiff meets this burden, a defendant must then establish his good faith by showing that he inquired into the seller's capacity to convey property rights, and his actions reasonably resolved any doubts created by the suspicious circumstances.¹⁶⁶

The commercial laws of each of these nations promote certain public policies. United States and German laws, for example, ensure the integrity of transactions by providing that thieves cannot convey property rights to stolen goods.¹⁶⁷ Conversely, Italian and Swiss laws promote commerce by allowing thieves to convey title to stolen property.¹⁶⁸ The purchaser, therefore, has no duty to inquire into the circumstances of his transfer and is presumably more willing to buy.¹⁶⁹ The different protections provided by these laws "should be viewed as reflecting a common policy of adjusting the competing interests of dispossessed owners and innocent purchasers."¹⁷⁰ In this sense, the policies that each nation promotes are worthwhile in the context of ordinary commercial transactions.

However, ensuring commercial convenience should not be a priority in transfers involving cultural property.¹⁷¹ Works of art are not

162. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See supra* note 127 and accompanying text.

168. *See supra* note 126 and accompanying text.

169. *See R. BROWN, supra* note 120, at 231-32.

170. *Garro, supra* note 90, at 516.

171. *Id.* at 516-17.

fungible goods.¹⁷² A piece of art is inherently distinct and unique and contains within it a variety of cultural, religious, and social meanings.¹⁷³ Ensuring the integrity of transactions involving cultural property is, therefore, an important goal. The following section discusses the problems posed by divergent laws governing bona fide purchasers and illustrates why ordinary commercial laws should not govern transactions involving works of art. Cultural property, because it is inherently unique, should be governed by laws that recognize its distinct nature.

IV. EFFECTS OF DISHARMONIOUS LAWS ON TRANSNATIONAL LITIGATION

Because works of art are governed by conflicting commercial laws, the results reached in transnational litigation regarding stolen cultural property widely vary and are often unpredictable.¹⁷⁴ These unpredictable outcomes demonstrate that cultural property is not adequately protected by current laws governing the sale of goods and emphasize the need for a uniform approach in laws governing stolen cultural property.

A. *Which Substantive Law Applies? Conflict of Laws Rules in Transnational Litigation*

Once a civil action for recovery of stolen cultural property is instituted, the court faces a variety of problems. Complex issues involved in transnational replevin actions include: determining the applicable law, proving foreign law, solving questions of ownership, determining damages, and applying the appropriate statutes of limitations.¹⁷⁵ All of these factors, and in particular, the determination of who owns the stolen property and whether compensation should be provided to the bona fide purchaser, depend on the conflict of laws rule of the adjudicating state.¹⁷⁶ By applying Italian law, for example, the outcome may prove favorable to the bona fide purchaser, while the application of United States law may result in an outcome

172. See *supra* note 112 and accompanying text.

173. For example, in *Goldberg*, 717 F. Supp. at 1374, four Byzantine mosaics were stolen from a church in Cyprus. The Autocephalous Greek-Orthodox Church of Cyprus sued for the return of the antiquities, stating that the mosaics were spiritual treasures and a part of its Christian life. *Id.* at 1396; see *infra* notes 243, 245 and accompanying text.

174. Garro, *supra* note 90, at 514-16.

175. *Id.* at 504.

176. *Id.*

favorable to the true owner. The courts' methods of determining which law will apply are also problematic. One method may result in the application of Italian law, while a different approach may mandate the application of United States law. Thus, the combination of disharmonious substantive laws governing bona fide purchasers and different conflict of laws rules results in uncertain outcomes in transnational litigation.¹⁷⁷

A comparison of cases involving transnational suits for the recovery of cultural property illustrates this uncertainty and demonstrates the need for a uniform body of substantive law governing bona fide purchasers in cases of stolen cultural property. If a uniform standard favoring the owner applied in all cases involving stolen art work, the conflict of laws question would be moot since the application of either countries' law would result in identical outcomes. The reasoning in *Kunstsammlungen zu Weimar v. Elicofon*¹⁷⁸ and *Winkworth v. Christie Manson & Woods Ltd.*¹⁷⁹ reflect different approaches used by the courts to determine the applicable law.

1. *Kunstsammlungen zu Weimar v. Elicofon*

In *Elicofon*,¹⁸⁰ two Duerer paintings¹⁸¹ were stolen from their place of safekeeping during the Allied occupation of Germany in 1945.¹⁸² In 1946, the defendant, Edward I. Elicofon, a New York resident, bought the paintings for \$450 from an American enlisted man returning from Germany.¹⁸³ Elicofon's lack of knowledge as to the origin of the paintings remained undisputed.¹⁸⁴ He did not learn

177. *Id.* at 516; Byrne-Sutton, *supra* note 19, at 500.

178. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

179. [1980] 2 W.L.R. 937, [1980] 1 Ch. 496, [1980] 1 All E.R. 1121.

180. *Elicofon*, 536 F. Supp. at 829.

181. Albrecht Duerer was born in Nuremburg in 1471, the son of a goldsmith, and ranks with the handful of world masters. Since his death in 1528, only about one hundred of his oils have survived. The two paintings that are the subject of this case were said to be "perfectly genuine" by Professor Erwin Panofsky of Princeton University. Professor Panofsky is one of the world's leading art scholars and an authority on Duerer. . . . The two paintings were color portraits of Hans Tucher and his wife, Felicitas, members of a prominent Nuremburg family and were painted by Duerer in 1499.

Note, *supra* note 156, at 179 n.1.

182. *Elicofon*, 536 F. Supp. at 830. Following the Nazis' surrender, American troops were stationed at a German castle where the paintings had been put for safekeeping. The disappearance of the paintings coincided with the removal of American troops from the castle. *Id.* at 833-35.

183. *Id.* at 833.

184. *Id.*

of the paintings' worth until 1966.¹⁸⁵ By that time, the paintings' value had significantly appreciated to approximately six million dollars.¹⁸⁶

The district court held that New York's choice of law rules required the application of New York law. The court concluded that the plaintiff, *Kunstsammlungen zu Weimar*, was the true owner and should, therefore, be awarded possession of the paintings.¹⁸⁷ Under New York law, a thief cannot pass good title, regardless of whether the purchaser has knowledge of the theft:

It is a fundamental rule of law in New York that a thief or someone who acquires possession of stolen property after a theft "cannot transfer a good title even to a bona fide purchaser for value [because] [o]nly the true owner's own conduct, or the operation of law . . . can act to divest that true owner of title in his property"¹⁸⁸

Even though *Elicofon* did not know at the time of the transfer that the paintings were stolen, pursuant to New York law, title never passed to him.¹⁸⁹

German law on this issue differs from New York law.¹⁹⁰ Had the court applied German law, *Elicofon* might have been awarded the paintings.¹⁹¹ As stated above, although a bona fide purchaser in Germany cannot acquire title to movable property from a thief, the doctrine of *Ersitzung* allows the purchaser to perfect his title if he obtains the property in good faith and continues to possess it in good faith and without notice of defect for ten years following the time the rightful owner loses possession.¹⁹² Since *Elicofon* arguably retained the paintings for the statutory period, and since there was no evidence that he acquired the paintings in bad faith, under German law, he might have been granted possession. The court did not, however, analyze this issue given its conclusion that New York law, rather than German law, applied.¹⁹³

In its choice of law analysis, the district court applied the tradi-

185. *Id.*

186. Garro, *supra* note 90, at 506.

187. *Elicofon*, 536 F. Supp. at 845-46, 858-59.

188. *Id.* at 833.

189. *Id.*

190. *Id.* at 839-40, 845.

191. Garro, *supra* note 90, at 508.

192. *Elicofon*, 536 F. Supp. at 845.

193. *Id.*

tional doctrine of *lex loci delicti commissi* (*lex situs*).¹⁹⁴ Under this doctrine, "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."¹⁹⁵ Because the enlisted man transferred the Duerers to Elicofon in New York, New York law controlled.¹⁹⁶ The court, in justifying its use of the *lex situs* rule, looked to the *Restatement (Second) of Conflict of Laws* which provides that the substantive law of the state having the "most significant relationship" to the case applies.¹⁹⁷

In evaluating the significance of New York's relationship to the case, the court focused on the following contacts with New York: the transfer of the paintings to Elicofon in New York; the continued presence of the paintings in Elicofon's Brooklyn home; and New York's interest in maintaining the integrity of transactions within its borders.¹⁹⁸ The court stated that these contacts were "relevant to effecting [New York's] interest in regulating the transfer of title in personal property in a manner which best promotes its policy."¹⁹⁹ Based on its analysis of New York's relationship to the case, the court concluded that New York law applied.²⁰⁰ Furthermore, it deemed Germany's contacts irrelevant.²⁰¹

The court concluded that:

1) [Germany] has no interest in the security of transactions which take place beyond its borders and 2) New York [has] an interest in applying its law because its policy of protecting owners is not confined to resident owners, but extends to owners generally "as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods."²⁰²

194. *Id.* at 845-46.

195. *Id.* (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 244 (1971)).

196. *Elicofon*, 536 F. Supp. at 846.

197. *Id.* (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 222 (1971)). Section 222 of the Restatement states the general rule for determining conflict of laws questions:

The interests of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issues, has the most significant relationship to the thing and the parties under the principles stated in section 6.

Id.

198. *Id.*

199. *Id.* New York's policy is consistent with the policy of the Uniform Commercial Code. *See id.* The laws of the UCC and New York both protect the owner and the integrity of the transaction by prohibiting a thief from passing title. *Id.*

200. *Id.*

201. *Elicofon*, 536 F. Supp. at 846.

202. *Garro*, *supra* note 90, at 507-08.

Germany, however, did have significant contacts with the case despite the court's contrary conclusion.²⁰³ The paintings were created and kept in Germany by German owners for a considerable number of years; the museum based its claim on German law and on events which occurred within German borders; and, arguably, Germany had an interest in promoting its own legal policies (Germany's commercial code protects its resident owners, but also affords the bona fide purchaser certain protections which foster security in transactions).²⁰⁴ Furthermore, the district court may have erred in assuming that the purpose of New York law governing bona fide purchasers is to preserve the integrity of transactions by protecting owners generally.²⁰⁵ "Contrary to the court's view, New York's primary concern may be in meeting the demand of its resident owners to be secure in their ownership, regardless of where their stolen property might eventually come to rest."²⁰⁶ Therefore, New York bona fide purchaser law may be intended to protect only New York's residents rather than to protect true owners everywhere.²⁰⁷ According to this interpretation, since the German museum was not a New York resident, New York's interest in applying its law disappears:

If this analysis is correct and if it can be said that Germany has a government interest in applying German law [to protect its resident owners], then a "false conflict" exists, i.e., a situation in which the forum has no government interests while the foreign state does. In such a "false conflict," German law, not New York law should have been applied.²⁰⁸

If the court interpreted New York law to protect only its resident owners or gave more weight to Germany's relationship to the case, the court may have come to a different conclusion in its conflict of laws analysis. Again, the outcome may have significantly differed if the court had applied German law.

However, knowing that the application of German law would result in Elicofon's prevailing in the action, the court seems to have determined the outcome of the litigation according to its own principles of fairness.²⁰⁹ The court's comparative analysis of Germany's

203. *Id.* at 512.

204. *Id.*; see *supra* text accompanying notes 154-57 for discussion of German law.

205. Garro, *supra* note 90, at 513.

206. *Id.*

207. *Id.*

208. *Id.*

209. See Note, *supra* note 156, at 195-97.

and New York's contacts is flawed since it failed to give weight to Germany's relationship to the case.²¹⁰ Perhaps the court felt that awarding the paintings to Elicofon, who paid a small fee—\$450—for the pieces, would be grossly unfair and would deprive the plaintiff of its cultural heritage.²¹¹ One commentator's opinion regarding the court's conclusion in *Elicofon* seems accurate: "Because of the internationally recognized policy of cultural restitution involved in *Elicofon*, the court considered the issues in light of its international implications before deciding what law to apply."²¹²

2. *Winkworth v. Christie Manson & Woods Ltd.*

Unlike *Elicofon*, in *Winkworth v. Christie Manson & Woods Ltd.*,²¹³ the applicable law did not favor the true owner. In *Winkworth*, the plaintiff was the original owner of art objects which were stolen from him in England.²¹⁴ The stolen works of art were subsequently taken to Italy, where they were sold to the second defendant.²¹⁵ At the time of the sale, the property was physically situated in Italy.²¹⁶ The works of art were subsequently brought back to England and delivered to the first defendant, Christie's, to be sold.²¹⁷ The plaintiff brought an action in an English court, seeking a declaration that the works of art had, at all material times, been his property.²¹⁸ The second defendant, however, claimed that he had acquired good title under Italian law and, therefore, the works of art were his property.²¹⁹ The *Winkworth* court limited its holding to a preliminary determination: whether English or Italian law applied to the plaintiff's action for replevin.²²⁰ Under English law, a purchaser cannot acquire title from a thief.²²¹ Like American law, English law provides that a nonowner with voidable title may transfer good title to a purchaser if the purchaser is in good faith.²²² However, where the property is sto-

210. Garro, *supra* note 90, at 512.

211. See Note, *supra* note 156, at 197-98.

212. *Id.*

213. *Winkworth*, [1980] 2 W.L.R. at 937.

214. *Id.* at 939.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Winkworth*, [1980] 2 W.L.R. at 939.

219. *Id.*

220. *Id.* at 938-39.

221. Garro, *supra* note 90, at 510.

222. *Id.*

len from or lost by the true owner, the transferor's title is void and the transfer is, therefore, invalid.²²³ The court stated, without deciding the issue, that it seemed probable that if English law applied, the second defendant would not have acquired title to the goods.²²⁴

However, Italian law protects bona fide purchasers, regardless of whether the property is stolen or lost, provided that the purchaser is in good faith at the time of delivery and the transaction is appropriately conducted according to the documentation effecting the sale.²²⁵ The defendant in *Winkworth* purchased the art in good faith and, therefore, would probably be declared the possessor of the property under Italian law.²²⁶

The plaintiff argued that the case involved many contacts with England: the goods were located in England at the time of the theft; the legal action was instituted in an English court; the plaintiff was an English resident; and England had strong policy interests in protecting its resident owners from theft.²²⁷ Based on these contacts, the plaintiff attempted to convince the court that English law should apply. The court, however, refused to depart from the well-established *lex situs* rule.²²⁸ Because the transaction occurred in Italy, the court concluded that Italian law applied to the action.²²⁹ Since Italian law favors the bona fide purchaser in cases of stolen property, the defendant would likely prevail.²³⁰ The *Winkworth* court's strict application of the *lex situs* rule and the *Elicofon* court's emphasis on the parties' contacts to the case pose several problems for the protection of cultural property, discussed below.

B. *The Difficulties Posed by Conflicting Domestic Laws Governing Bona Fide Purchasers: Comparing Different Conflict of Laws Approaches*

The district court's decision in *Elicofon* demonstrates the need

223. *Id.* Note that England's applicable statute of limitations extinguishes the owner's title to the property and bars his right to claim damages against a good faith purchaser or a person who has converted the goods after six years from the date of purchase. *Id.*

224. *Winkworth*, [1980] 2 W.L.R. at 940.

225. *Id.*

226. *Id.*

227. *Id.* at 942.

228. *Id.* at 952-53.

229. *Winkworth*, [1980] 2 W.L.R. at 952-53.

230. Because the court limited its decision to the preliminary question of which law applied, it did not determine whether the plaintiff or the defendant would be granted possession of the property. *Id.* at 938-39.

for a universal law favoring the owner over the bona fide purchaser in transfers of stolen cultural property. The courts are vested with too much discretion in deciding who should be granted possession of cultural property based on a conflict of laws analysis that focuses on which state has the most significant relationship to the case. When a court is faced with conflicting laws governing bona fide purchasers, it may manipulate the conflict of laws rules to arrive at an outcome which it perceives to be fair. The *Elicofon* court's clear disregard for Germany's relationship to the case in its conflict of laws determination illustrates this manipulability.²³¹ A uniform law favoring the true owner would protect the cultural heritage of the countries of origin and would render the conflict of laws question irrelevant. The courts would no longer have to skew their conflict of laws analyses to achieve the results they feel are equitable.

In contrast to *Elicofon*, the *Winkworth* court strictly applied the *lex situs* rule in determining the conflict of laws question, without analyzing the parties' relationships to the case.²³² However, the approach used in *Winkworth* is no less flawed than that used in *Elicofon*. In *Winkworth*, the court strictly applied the law of *lex situs*.²³³ The result was more certain, but less equitable, since the true owner, through no fault of his own, would likely be dispossessed of his property.

The *lex situs* rule is "based on the idea that the law of the country where an object is physically located and visible is easily ascertainable by all those persons affected by a given transaction (seller, buyer, third parties)."²³⁴ The rule, therefore, promotes security of transactions "by encouraging the purchaser to buy without investigation of the applicable law beyond the limits of the market where the goods are located at the time of the transaction."²³⁵ Unfortunately, a strict

231. See *supra* text accompanying notes 203-04 for a discussion of Germany's relationship to the case. Whether or not the courts engage in these manipulations to bring about equitable results is irrelevant. When the courts are vested with this much discretion, nonuniform outcomes result. Cultural property that is unique should not be subject to such uncertainty. Furthermore, outcomes that favor the bona fide purchaser may encourage the black market in art. If thieves are able to transfer title to bona fide purchasers, the thieves profit from sales of stolen art work and will continue their illicit activities.

232. *Winkworth*, [1980] 2 W.L.R. at 952-53.

233. *Id.*

234. Byrne-Sutton, *supra* note 19, at 500-01.

235. Garro, *supra* note 90, at 511.

Because planning and financial and business transactions often require a high degree of certainty and predictability, and because third parties often must rely on the effect of such transactions, the conflict of laws approach in commercial dealings involving

application of the *lex situs* rule leads to inequitable results in cases of stolen cultural property. Furthermore, it may foster the laundering of art through jurisdictions favoring the bona fide purchaser.²³⁶ If thieves know that under Italian law they are able to transfer title to a bona fide purchaser, they will sell their art in Italy where bona fide purchasers are favored.²³⁷ The black market in art is thereby enhanced by domestic laws favoring the bona fide purchaser.²³⁸

A recent case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*,²³⁹ illustrates how a strict application of the *lex situs* rule may encourage art-laundering. Although the *Goldberg* court did not apply the *lex situs* rule in this case, the facts demonstrate the negative effects that the application of the *lex situs* rule may produce. In *Goldberg*, the court determined the issue of whether the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus ("Church of Cyprus"), or the defendant, Goldberg, would be granted possession of four Byzantine mosaics.²⁴⁰ The mosaics, made of small chips of colored glass and measuring approximately two feet by two feet, were removed from a larger work on the ceiling of the Panagia Kanakaria Church in Northern Cyprus in 1979, three years after the Greek Cypriots fled the area.²⁴¹ Dating to the year A.D. 530, the mosaics depict Christ as a young boy, the apostles James and Matthew, and the bust of an archangel.²⁴² They are among only a few to have survived the rule of the Iconoclast Byzantine emperors of the eighth century who ordered such images destroyed.²⁴³ Goldberg, an

movables has evolved toward rather specific and fixed rules justified by market policies. Accordingly, both English and American authorities support the view that a transfer of an interest in tangible property, effective by the law of the situs at the time of the transaction, is usually valid. As stated by an American court a long time ago, the *lex situs* "has the merit of adopting the law of the jurisdiction which has the actual control of the goods and the merit of certainty."

Id.

236. Byrne-Sutton, *supra* note 19, at 500.

237. *See id.*

238. *Id.*

239. 717 F. Supp. 1374 (S.D. Ind. 1989).

240. *Id.* at 1375.

241. *Id.* at 1378-79.

242. *Id.* at 1378.

243. *Id.* at 1377. The original Kanakaria mosaic, made up of small pieces of glass referred to as *tesserae*, depicted Christ as a boy seated in the lap of his blessed mother, the Virgin Mary, who sat on a throne surrounded by light. This scene, depicting Jesus and Mary, was bordered by a frieze containing the busts of the twelve apostles. The original mosaic was affixed to the apse of the Kanakaria Church in the village of Lythrankomi, Cyprus. During the period of Iconoclasm in the eighth century, the Byzantine emperors ordered the destruction of the religious artifacts so that religious "images" would not be the subject of veneration. The mosaic is

Indianapolis art dealer, purchased the four mosaics from a merchant in Switzerland.²⁴⁴ The Church of Cyprus, upon learning of the mosaics' whereabouts, sued Goldberg for return of the antiquities.²⁴⁵

The events leading to Goldberg's purchase of the mosaics began in June 1988 when Goldberg traveled to Amsterdam on behalf of a client.²⁴⁶ On July 1, 1988, while in Amsterdam, Goldberg met Michel van Rijn, a Dutch art dealer.²⁴⁷ Van Rijn showed Goldberg photographs of the four Byzantine mosaics and stated that the seller desired to sell the mosaics quickly.²⁴⁸ Van Rijn claimed that the seller, a Turkish antiquities dealer, "found" the mosaics in the rubble of an extinct church in northern Cyprus while serving as an archaeologist from Turkey assigned to northern Cyprus. According to van Rijn, the seller had been granted permission by Turkish Cypriot authorities to retain the mosaics and, in the late 1970s, to export them to Germany.²⁴⁹

Goldberg negotiated a contract for the sale of the mosaics at a purchase price of \$1,080,000.²⁵⁰ The mosaics were then transported by airplane from Munich, Germany, to Geneva, Switzerland.²⁵¹ "The mosaics were stored in crates in the free port area of the Geneva airport [and] never passed through Swiss customs."²⁵² Goldberg went to Geneva to inspect the mosaics. The court described the ensuing events as follows: "After arriving in Geneva, [the seller, Aydin Dikman,] met Goldberg in the free port area of the airport. This was the only time that Goldberg met Dikman. Dikman introduced him-

one of the few that has survived destruction in the period of Iconoclasm and the passage of time. *Id.*

244. *Goldberg*, 717 F. Supp. at 1382-83.

245. *Id.* at 1385. The Church of Cyprus referred to the mosaics as its "spiritual treasures." *Id.* at 1396. The Archbishop of the Church of Cyprus testified that the mosaics "were once put up on the wall and they were sanctified through the prayers and through the holy liturgy and they are part of our Christian life." *Id.* The mosaics' significance to the Church of Cyprus, therefore, transcended mere monetary considerations.

246. *Id.* at 1381.

247. *Id.* Goldberg knew that "van Rijn was once convicted in France for forging Marc Chagall's signature to prints of that artist's work and that he also had been sued by an art gallery '[f]or failure to pay money.'" *Id.* She knew very little else about van Rijn. *Id.*

248. *Id.* Van Rijn informed Goldberg that the seller wanted to sell the mosaics quickly because he "had recently become quite ill and had a cash problem." On behalf of the seller, van Rijn requested \$3 million for the mosaics. *Id.*

249. *Goldberg*, 717 F. Supp. at 1381. Cyprus did not authorize the export of the mosaics. In fact, it was very interested in recovering the property. *Id.* at 1384.

250. *Id.* at 1382.

251. *Id.*

252. *Id.*

self to Goldberg and then left. . . . Goldberg then inspected the four mosaics."²⁵³ In Geneva, the sale was completed, and the mosaics were transferred to Goldberg.²⁵⁴ Goldberg transported the mosaics to the United States.²⁵⁵

The *Goldberg* court, in deciding whether to award possession of the mosaics to the Church of Cyprus or Goldberg, faced a conflict of laws dilemma similar to the situations in *Elicofon* and *Winkworth*. The court began by determining whether Swiss or Indiana law applied to the action.²⁵⁶ According to Indiana law, a thief never obtains title to stolen items and cannot, therefore, transfer what he does not own.²⁵⁷ Thus, a bona fide purchaser cannot acquire title to or have a right of possession in stolen property.²⁵⁸ Goldberg's bona fide purchaser status was, therefore, irrelevant since the mosaics were stolen.

Swiss law, however, conflicts with Indiana law governing bona fide purchasers. As stated above, Swiss law allows the bona fide purchaser to acquire title to stolen property provided he purchases in good faith.²⁵⁹ The purchaser is presumed to be in good faith, but this presumption can be rebutted by the true owner.²⁶⁰ Any suspicious circumstances surrounding the transaction may be enough to void the transaction if the purchaser does not show that he took steps to inquire into the seller's capacity to convey property rights.²⁶¹

The court used a "most significant contacts" analysis similar to that used in *Elicofon* to determine whether Indiana or Swiss law applied.²⁶² Based on this analysis, the court concluded that Indiana had the most significant contacts,²⁶³ and therefore, Indiana law applied.²⁶⁴ Accordingly, the court awarded possession of the mosaics to the

253. *Id.*

254. *Goldberg*, 717 F. Supp. at 1383.

255. *Id.*

256. *Id.* at 1393-95.

257. *Id.* at 1398-99.

258. *Id.*

259. *Goldberg*, 717 F. Supp. at 1400.

260. *Id.*

261. *Id.*

262. *Id.* at 1393-94. In determining the conflict of laws issue, the court looked at Indiana's choice of law doctrine. *Id.* at 1393. Indiana's traditional doctrine was *lex loci delicti commissi*. *Id.* This requires that the court apply the law of the jurisdiction where the transfer took place. *Id.* According to this rule, Swiss law would apply since Goldberg purchased the mosaics in Switzerland. The court, however, stated that the traditional *lex situs* rule had been modified in Indiana. *Id.* In the areas of contract and tort law, the Indiana Supreme Court adopted a "most significant contacts" analysis to determine conflict of laws issues. *Id.* at 1393-94.

263. Indiana's contacts to the suit included the following: Goldberg's dealership company was incorporated in Indiana with its principal place of business in Indiana; the purchase of the

Church of Cyprus.²⁶⁵

The *Goldberg* court correctly refrained from strictly applying the *lex situs* rule. The mosaics were placed in storage in the free port area of the Geneva airport and remained there for only four days until being shipped to the United States.²⁶⁶ The mosaics' presence in Switzerland was, therefore, transitory, as was intended.²⁶⁷ If the court applied Swiss law merely because the mosaics were transferred to Goldberg in Switzerland, the parties to the transaction would have been allowed to benefit from rules that are substantially more favorable to bona fide purchasers than Indiana laws.²⁶⁸

Laws favoring bona fide purchasers give dealers, like Goldberg, no incentive to investigate the origins of the art work they buy. In *Goldberg*, many suspicious circumstances surrounded the sale of the mosaics. First, Goldberg understood that the mosaics came from an area that was occupied by foreign military forces; yet she accepted van Rijn's explanation that "the mosaics had been 'found' by the seller in the rubble of an 'extinct' church in northern Cyprus."²⁶⁹ Second, the very nature of the mosaics should have raised Goldberg's suspicions. Mosaics are not typically movable property since they are generally attached to walls or ceilings.²⁷⁰ Furthermore, mosaics are unique objects that "do not ordinarily enter into commerce."²⁷¹ Finally, Goldberg knew very little about either the seller or van Rijn. Van Rijn stated that "Dikman 'found' the mosaics while he was employed as 'an archaeologist from Turkey assigned to northern Cy-

mosaics was financed by a loan obtained from a bank in Indiana; and the mosaics were located in Indiana. *Id.* at 1394.

264. *Goldberg*, 717 F. Supp. at 1394.

265. *Id.* at 1400.

266. *Id.* at 1395.

267. *Id.*

268. It is important to note that the *Goldberg* court, in dicta, concluded that even under Swiss law, Goldberg did not act in good faith. The circumstances surrounding the sale of the mosaics were sufficiently suspicious "to cause an honest and reasonably prudent purchaser in Goldberg's position to doubt Dikman's capacity to convey property rights to the mosaics," and Goldberg "failed to take reasonable steps to resolve that doubt." *Id.* at 1402, 1404. This Comment's discussion is, however, aimed at the broad implications of the use of the *lex situs* rule in cases like *Goldberg*. When domestic laws favor the bona fide purchaser, dealers in stolen property like Dikman and van Rijn will find jurisdictions that favor their transactions to transfer stolen goods. Furthermore, purchasers like Goldberg have no incentive to investigate their seller's capacity to convey property rights. The black market in stolen art work is, therefore, encouraged by the *lex situs* rule.

269. *Goldberg*, 717 F. Supp. at 1400.

270. *Id.* at 1401.

271. *Id.*

prus.’”²⁷² According to the court, a reasonable purchaser would have thought it strange that a “Turkish archaeologist would be in the business of selling Cypriot antiquities.”²⁷³ Furthermore, Goldberg knew that van Rijn, her primary contact with the seller, was convicted in France for art forgery.²⁷⁴ Despite these highly suspicious circumstances, Goldberg failed to make any meaningful inquiry into the seller’s capacity to convey property rights.²⁷⁵

Perhaps Goldberg failed to conduct a true investigation because she relied on Swiss law, which favors bona fide purchasers. In fact, since the mosaics were in the Geneva airport for only four days, they seem to have been transferred to Switzerland so that the transaction would be governed by Swiss law. Swiss law, therefore, seems to have diminished Goldberg’s incentive to investigate the suspicious circumstances surrounding the sale of the mosaics. A strict application of the *lex situs* rule, therefore, may encourage purchasers like Goldberg to “avert their gazes” when circumstances indicate that art objects are stolen. Furthermore, if the *lex situs* rule applies, dealers in stolen art work, like van Rijn and Dikman, may be encouraged to take their goods to jurisdictions such as Switzerland, where the laws governing bona fide purchasers favor their transactions. Thus, the *lex situs* rule facilitates the black market in stolen art.²⁷⁶

The alternative to the *lex situs* rule is a conflict of laws analysis that focuses on the relationship of the jurisdiction to the case. As discussed above in the case of *Elicofon*, this approach lacks merit in suits involving cultural property since it vests the court with too much discretion in deciding who will be awarded possession of the property.²⁷⁷

Elicofon, *Winkworth*, and *Goldberg* illustrate the problems posed by the existence of divergent national rules governing the restitution

272. *Id.*

273. *Id.*

274. *Goldberg*, 717 F. Supp. at 1402. For a detailed discussion of the suspicious circumstances surrounding Goldberg’s transactions, see *id.* at 1400-03.

275. *Id.* at 1403-04.

276. In *Goldberg*, the application of Swiss law according to the *lex situs* rule seems especially inappropriate since the mosaics were present in the Geneva airport for only four days. However, art laundering is likewise fostered by the application of the *lex situs* rule where the cultural property is not in transit and remains in a country for an extended period of time. For example, dealers in stolen art work may sell their goods to residents of jurisdictions that favor bona fide purchasers. Whether or not the goods are transitory, the application of the *lex situs* rule in transfers of cultural property encourages the illicit trafficking of art objects.

277. See *supra* text accompanying notes 209-12.

of stolen cultural property. These contrasting laws concerning the bona fide purchaser make transnational litigation to recover property unpredictable and unfair. Furthermore, the choice of law rules themselves make litigation unpredictable. The cases demonstrate a need for a uniform international bona fide purchaser law in cases of stolen art. Specifically, commercial laws governing art should uniformly favor the true owner in cases of theft; then uncertain choice of laws questions and their inherent problems would become moot.

V. POSSIBLE SOLUTIONS

Modifying the laws concerning bona fide purchasers is a viable way of discouraging art theft and protecting cultural property.²⁷⁸ Unlike the other means of protecting cultural property, which have generally failed to curb the growing number of thefts, universal modification of bona fide purchaser laws governing art transfers may offer some relief. Uniform laws favoring the true owner in cases of theft may effectively discourage art buyers from purchasing objects without first investigating their origin. Furthermore, buyers may be prevented from shopping for jurisdictions that favor their transactions. These modifications could result in an overall reduction in illegal art transactions.²⁷⁹

A. *The Need for Commercial Laws Specifically Governing Cultural Property*

Special rules for commercial transactions involving the transfer of valuable art objects must be established in a transnational context.²⁸⁰ The "rules protecting bona fide purchasers at the expense of owners were never intended to apply to the transfer of cultural goods of great importance which are found in a foreign country. They were devised and directed principally towards the furtherance and security of commercial transactions within national boundaries."²⁸¹ Some civil codes, in Italy and Switzerland, for example, preserve commercial convenience instead of protecting cultural property by encouraging purchasers to buy without investigating the seller's capacity to convey property rights.²⁸² These policies are reasonable for ordinary

278. Garro, *supra* note 90, at 516-17.

279. *Id.* at 517.

280. *See id.* at 516-17.

281. *Id.*

282. *See supra* text accompanying notes 158-66 for discussion of Swiss and Italian laws.

fungible goods. However, a piece of cultural property, with its historical significance, should not share the same status as that of an ordinary fungible good.²⁸³ In cases of stolen cultural property, then, rules favoring the owner should apply.

*B. The International Harmonization of Commercial Laws
Governing Cultural Property*

Countries with commercial laws favoring bona fide purchasers should adopt the common law rule favoring the owner in sales of stolen art.²⁸⁴ Cultural property will be effectively protected if jurisdictions favoring the bona fide purchaser change their substantive laws in cases of theft.

Necessarily, the action taken to protect cultural property must be legislative, since measures deriving from parliaments and legislatures have the "strongest possible legal force."²⁸⁵ Further, "[t]he measures must also . . . be *national measures*: in a *federal* State, they may be federal norms In a *unitary* State, they are as a rule applicable to the whole country."²⁸⁶ Finally, the impetus for these changes in national laws may be achieved by a United Nations convention governing international sales of cultural property. The convention could mandate that all signatory states establish laws favoring the owner in cases involving stolen art.

As to the buyer's remedy, the proposed convention should state that when an illegally dispossessed owner applies for restitution of cultural property, the bona fide purchaser may seek redress only from

283. A most poignant description of the uniqueness of archaeological cultural property is stated as follows:

The inheritance revealed to us by archaeology includes a sense of community with those who are unknown to us but who struggled with the same human problems. It is also a sense of the great vitality of humanity, of the infinite variety of its approaches to life, of the versatility of humanity's adaptation to the physical world and of the universal need to express the individual's intellectual, emotional and aesthetic response to it. It is also in some way an assurance of man's ability to survive.

L. PROT & P. O'KEEFE, *supra* note 1, at 10. Should works of such cultural significance share the same status as ordinary movable goods, according to the law? The answer must be a resounding "no."

284. Merryman, *supra* note 27, at 428. According to the common law, a thief cannot convey title to stolen goods. R. ANDERSON, *supra* note 141, at 584.

285. Goy, *International Protection of Cultural Property and Domestic Public Law*, in INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: COLLOQUY ON EUROPEAN LAW 47 (1984). The Council of Europe countries are firmly committed to their parliaments. Therefore, legislation deriving from parliaments has strong legal force. *Id.*

286. *Id.*

the vendor. The dispossessed owner should not be required to compensate the bona fide purchaser for two reasons:

- a. the increase in price to the final purchaser may make an application for restitution prohibitive thus sacrificing the interests of the owner who has been despoiled;
- b. the possibility of obtaining damages only against the vendor does not interfere with the action for restitution and may cause purchasers to exercise more caution.²⁸⁷

If purchasers are forced to look to their sellers for redress when the property is stolen, they will have more incentive to inquire into the seller's capacity to convey property rights.

An international computerized registry of stolen works of art should also be established in conjunction with the effectuation of laws favoring dispossessed owners.²⁸⁸ Constructive notice would, therefore, be afforded to bona fide purchasers.²⁸⁹ "Granting that an international computerized system for art registration would be very expensive and difficult to set up, it may nevertheless be possible to make this system self-supportive out of registration fees."²⁹⁰ Once such a system is established, owners who have been illegally dispossessed of their cultural property should be required to place their stolen property on the registry if they are to benefit from national laws favoring the true owner.

Strengthening the protection of the owner's title in this manner

287. Rodota, *The Civil Law Aspects of the International Protection of Cultural Property*, in INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: COLLOQUY ON EUROPEAN LAW 110 (1984).

288. Crewdson, *An International Register of Stolen Valuables*, in INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: COLLOQUY ON EUROPEAN LAW 112-13 (1984).

An international computerized register of stolen works of art is a wholly practicable proposition. The method in which information is supplied to the computer will require considerable thought, and the codification of valuables may involve the creation of a new service industry which is likely to be of interest to security companies worldwide. Computer software experts, insurance companies and police forces will inevitably be involved also, as well as fine art dealers and auctioneers. . . . It is of course essential that every owner of valuables should have a computer-coded list of the valuables in his or its possession so that in the event of a theft, the details can be immediately entered into the computer before the stolen objects reappear on the market. It will also be necessary for dealers or auctioneers to make regular use of a computer terminal through which after appropriate security checks or "passwords" have been given providing access to the registers negative clearance can be obtained in respect of items offered to them for sale or purchase.

Id.

289. Garro, *supra* note 90, at 517.

290. *Id.* at 517 n.53.

may assist in the repatriation of stolen cultural property.²⁹¹ Further, it may effectively discourage traffic in illicitly obtained art works.²⁹² In cases involving cultural property, purchasers would be more likely to investigate the origin of the objects they purchase, given their limited remedies in replevin actions.²⁹³ The existing laundering of art in jurisdictions favoring the bona fide purchaser would also be discouraged; thieves would be unable to steal property from one country and sell it in another country where the bona fide purchaser laws allow them to transfer title. The overall effect would be a reduction in the market for stolen art.²⁹⁴

VI. CONCLUSION

True owners may often look to courts to regain their stolen cultural property.²⁹⁵ Because transnational litigation depends upon the applicable national laws governing the sale of goods, which vary from nation to nation, the outcomes of litigation are uncertain.²⁹⁶ These uncertain outcomes encourage the black market in stolen cultural property.

Each nation must enact commercial laws specifically governing art. These laws should uniformly favor the true owner in transactions involving the transfer of stolen property. This would avoid uncertain conflict of laws questions and would promote respect for cultural property by recognizing that it is unique from other personal property. By changing national commercial laws regarding cultural property, nations may further the protection of art, thereby preserving cultural heritage for future generations.

*Karen Theresa Burke**

291. Merryman, *supra* note 27, at 428.

292. *Id.*; Garro, *supra* note 90, at 517.

293. *See* Garro, *supra* note 90, at 517.

294. *Id.*; Merryman, *supra* note 27, at 428.

295. *See* Garro, *supra* note 90, at 503-05.

296. *Id.* at 504-05.

* This Comment is dedicated to my parents, Michael and Carla Burke. Their patience and love have been my constant source of strength and support. To Michelle and David, for the laughter and friendship you bring to me, this is for you, too.