COMMENTS

PROBLEMATIC PROVENANCE: TOWARD A COHERENT UNITED STATES POLICY ON THE INTERNATIONAL TRADE IN CULTURAL PROPERTY

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1. INTRODUCTION

The 1980s have seen United States policy gradually retreat from the trend, traceable from the United Nations Educational, Scientific and Cultural Organization Convention of 1970 ("UNESCO Convention") through the much-discussed McClain decisions\(^1\) of 1979, toward

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\(^1\) The McClain case resulted in two proceedings and two appeals, United States v. McClain, 545 F.2d 988 (5th Cir. 1977), \textit{reh'g denied}, 551 F.2d 52 (5th Cir. 1977), and United States v. McClain, 593 F.2d 658 (5th Cir. 1979). In the first appeal, the defendants were convicted of theft under the National Stolen Property Act, 18 U.S.C. §§ 2314, 2315 (1970 & Supp. 1990) [hereinafter NSPA], for dealing in pre-Columbian objects exported from Mexico in violation of Mexican law purporting to vest title to all such property in the Mexican government. Articulating the theory underlying the convictions, the court reasoned that, for purposes of the NSPA, which forbids the transportation in interstate commerce or the receipt of stolen goods, illegally exported artifacts subject to such a national declaration of ownership are "stolen." The second McClain appeal resulted in a reversal of the substantive NSPA conviction (although the court of appeals sustained convictions for conspiracy) on the grounds that the particular statute upon which the Mexican government based its claim was too vague to satisfy United States constitutional standards for criminal proceedings. However, the decision left open the possibility that a person might be convicted under the NSPA for conduct like that of the McClain defendants under similar circumstances. (Indeed, the court implied that in McClain itself the United States Department of Justice might have secured a conviction had it rested its case on another, more recent Mexican statute than the one actually relied upon by the prosecution. McAlee, \textit{From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art Into the United States}, 85 \textit{Dick. L. Rev.} 565, 584 (1981) [hereinafter McAlee, \textit{From the Boston Raphael}] (citing McClain, 593 F.2d at 662). See generally P. BATOR, \textit{The International Trade in Art} 74-78 (1983) (possible negative consequences of McClain in criminal and civil suits involving exported cultural property reposing in the United States); Fitzpatrick, \textit{A Wayward Course: The Lawless Customs Policy Toward Cultural Properties}, 15 \textit{N.Y.U. J. Int'l L. & Pol.} 857, 873-74 (1983) (problems raised by McClain); McAlee,\textit{ supra}, at 578-99 (critical discussion of McClain cases and their consequences); Note, \textit{The Current
enormous — almost complete — deference to foreign parties complaining of having been unjustly stripped of culturally significant property. In the wake of the current explosion in the worldwide market for art and antiquities, as well as the soaring popularity of art objects as economic investments rather than pieces intended primarily for sensory delectation, the United States appears to have reawakened to its own national interests and, perhaps, been jolted into appreciating the tenuousness of its long-held status as a central participant in the flourishing art trade.

The present Comment will attempt to demonstrate how recent developments in United States statutory and decisional law have brought the United States closer than at any point in the past two decades to establishing a coherent policy with respect to its position in the world art market. This convergence in the United States' legislative and judicial treatment of disputes involving the international movement of cultural property seems to portend a practical resolution to the problem of conflicting national policies with which United States courts and legis-
lators have sporadically struggled, often without focus, throughout this nation's history\(^6\) and more intensely over the past twenty years.

2. **Defining the Problem**

2.1. **Policy Conflicts**

At the heart of the problem lies the difficulty in attempting to reconcile two fundamental desires of the United States government. On one hand, the United States would like to maintain friendly diplomatic relations with art exporting countries and to acknowledge the right of each country to keep within its borders objects representative of its national patrimony. Doing so may require severe limits on the importation and trade in artworks in the United States. On the other hand, United States policymakers would like to encourage free trade in works of historical or aesthetic merit. A healthy art market stimulates the American economy as well as makes the United States a repository for works of beauty and cultural value originating in various lands.\(^7\)

2.2. **Problems in Deterring Illegitimate Trade in Art**

The challenge faced by the various branches of the United States government — executive, legislative, and judicial — of curbing the illegitimate art trade without inhibiting the flow of art through legitimate commercial channels is especially thorny because there is often no clear separation between the two markets.\(^8\) Second, determining which of two or more conflicting parties has good title to a work of art obtained through international trade is complicated by issues of interpretation and conflict of laws\(^9\) whose resolution frequently bears on sensitive dip-

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\(7\) See generally Merryman, *Two Ways of Thinking*, supra note 2 (extensive discussion of policies among various nations of “cultural nationalism,” which, fearing “decontextualization,” advocates the retention of cultural property by its country of origin, or “cultural internationalism,” which emphasizes the legitimacy of the international movement of art and antiquities for scholarly and economic purposes); see also P. Bator, supra note 1, at 18-34 (consideration of values regarding cultural property leading to conclusion that, subject to certain qualifications, “there should be a large international trade — at fair prices — in those nonmonumental art treasures whose export does not jeopardize the legitimate cultural patrimony — that is, whose export will leave standing a rich and representative collection at home”); Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. Int’l L. & Pol. 757 (1983).

\(8\) See infra text accompanying notes 34-36, 141.

\(9\) See, e.g., Kunstsammlung zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir.
lomatic relations between the United States and the exporting country.\textsuperscript{10} Third, even established principles of United States law (e.g., those embodied in the provisions of the Uniform Commercial Code) are difficult to apply where the basic assumptions of those rules, for example, that title to an object is void because the work has been stolen, are controverted.\textsuperscript{11} Given these complications it is not hard to see why Congress and the courts have for so long been unable to formulate a coherent body of rules that might be applied to generate a satisfactory outcome — fair to all the interests, private and public, international and domestic — in almost every case.

### 3. NEW SOLUTIONS: BALANCING POLICY INTERESTS

In addition to according greater consideration to the United States' own economic interests, the recent legal developments with which this Comment deals give appropriate weight to the rights of foreign claimants. These developments, including ratification of the Convention on Cultural Property Implementation Act\textsuperscript{12} and the judicial balancing process employed by the Court of Appeals for the Second Circuit in the important case of DeWeerth v. Baldinger,\textsuperscript{13} complement American efforts in both public and private arenas\textsuperscript{14} to deter black market art...
transactions and limit the wholesale pillage of culturally significant objects from countries whose political or economic weakness may belie their wealth in desirable works of art. Thus, the United States has moved closer to a justly equilibrated foreign policy, supported by legal actions demonstrating both internal and external consistency, with regard to issues concerning the status of imported artworks.

3.1. The Convention on Cultural Property Implementation Act

The Convention on Cultural Property Implementation Act (hereinafter CPIA), ratified in 1983 and effectuated in 1986, has set a course for judicial action in line with a national policy to advance United States economic and cultural interests in addition to recognizing the rights of other nations to preserve their cultural heritages.

The terms of the CPIA as enacted embody Congress' intent to preserve the central place of the United States in the burgeoning global international diplomatic cooperation, see infra text accompanying notes 165-73 & note 173; legal regulation of the art trade at state and local levels, see sources cited infra note 21, 160; and self-regulation by professional organizations, see infra note 172.

A more cautious approach toward foreign export restrictions will set the stage for a healthy regulated, but not smothered, art trade in the United States. See P. Bator, supra note 1, at 41-43 ("The ineffectiveness of embargo: Ten easy lessons on how to create a black market"); S. Williams, The International and National Protection of Moveable Cultural Property 126 (1978) (administration of rigid export controls encourages illegal activity); 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, 334 (1983) (less stringent import regulations allow the legitimate art trade to flourish).

See, e.g., Comment, The Evolution of American Attitudes, supra note 6, at 623-24 (generally recognized character of the "illicit flow of objects from art-rich, economically poor third-world countries to wealthy art-importing nations").

19 U.S.C. §§ 2601-2613 (1982). United States Customs regulations providing the mechanism through which to enforce the Act were at last promulgated on March 31, 1986 (19 C.F.R. §§ 12.102-12.104). The ratification of the Convention on Cultural Property Implementation Act made the United States an active party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), reprinted in 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention]. As discussed below, the CPIA contains a number of modifications of the original terms of the Convention, limiting its broad sweep with respect to the enforcement of claims for the return of cultural property to foreign governments. See, e.g., Fitzpatrick, supra note 1, at 872, 876-77; Merryman, Thinking About the Elgin Marbles, 83 Mich. L. Rev. 1881, 1891-92 n.30 (1985); Comment, The Evolution of American Attitudes, supra note 6, at 630-31. See also Note, The Illicit Movement of Art and Artifact, supra note 14, at 64-65 (provisions of the original draft of the UNESCO Convention itself were "amended and watered down" to gain wider acceptance by parties, with United States registering formal reservations to final terms proscribing acquisition of illegally exported material by institutions).

See supra note 17.
art trade,\(^\text{10}\) to foster international cultural exchange, and to help, with the participation of other nations, stem illegal traffic in art and antiquities.\(^\text{20}\) Some inconsistency remains in the United States' treatment of claims regarding cultural property residing in or entering the country as a result of international trade, whether lawful or illicit.\(^\text{21}\) But the CPIA provides for the first time clear guidelines for United States courts presented with claims for the recovery of cultural property exported from other nations, particularly in situations where the validity of those claims turns on provisions of another country's domestic law.

The uncertainty engendered by the controversial 

\(^{10}\) But see Comment, The Evolution of American Attitudes, supra note 6, at 633-35 (joining the UNESCO Convention and passing the CPIA may in fact have put the United States in a vulnerable position with respect to other major art importing countries which adopt laissez-faire attitudes toward illicit traffic in cultural property and which refuse to sign onto the Convention). See also McAlee, supra note 1, at 604 (discussing concerns, expressed prior to passage of the CPIA, that United States adoption of the UNESCO Convention would do little to curb the black market in cultural property but instead would divert trade to other art importing nations). These fears were recently given credence in the remark of André Emmerich, a prominent New York dealer who formerly traded in pre-Columbian antiquities, concerning the effect of recent United States policy: "It all goes to Geneva now. Don't kid yourself. The market continues, but not here." Grimes, The Antiquities Boom: Who Pays the Price?, N.Y. Times Magazine, July 16, 1989, at 24; cf. also Honan, Second Missing Manuscript Turns Up in German Hands, N.Y. Times, June 16, 1990, at A1, col. 1 (noting leniency of Swiss law regarding traffic in art of questionable provenance).

\(^{20}\) Professor Fitzpatrick has written:

As the comprehensive statement of U.S. policy on the importation of cultural properties, the Cultural Property Law [CPIA] reflects the painstaking efforts of Congress to balance the legitimate but sharply competing goals of archaeologists and anthropologists, art dealers and collectors, museum directors, the academic community, and the bureaucrats from the State and Justice Departments, the United States Information Agency and the Customs Service.

\(^{21}\) Variations exist among standards expressed in state and local laws regulating the art market, for example, state "art laws" extant in some jurisdictions, such as New York and California (e.g., statutes cited in Note, The Current Status, supra note 1, at 63 n.58); local regulations such as New York's Arts and Cultural Affairs and Consumer Protection Laws (see generally Note, The Illicit Movement of Art and Artifact, supra note 14, at 74-80; Putting Price Tags in Art Galleries, N.Y. Times, Sept. 18, 1988, § 1, at 58, col. 3); state common law (see, e.g., Comment, The Recovery of Stolen Art, supra note 4, at 1147-48 (contrasting certain New York and New Jersey decisions in cases dealing with stolen art)); and interpretations of Uniform Commercial Code provisions (see, e.g., Note, Title Disputes in the Art Market, supra note 4 (discussing New York decision imposing hitherto unique prerequisites for art merchants to achieve status of good faith purchasers under the Code)). In addition, administrative actions by the United States Customs Service do not currently square with federal law governing the implementation of international treaties concerning the movement of cultural property. See infra note 181.
sions that permit the judicial and executive branches of the United States government to implement the policies underlying the CPIA without usurping the United States' right as a sovereign nation to control persons and property within its jurisdiction.

3.2. Common Law

At the same time, recent judicial opinions, notably DeWeerth v. Baldinger, decided in 1987 by the United States Court of Appeals for the Second Circuit, have shown increasing concern for protecting good faith purchasers of artworks obtained through international commerce. DeWeerth, a civil suit brought in federal court under diversity jurisdiction, is of particular importance since it was decided under the law of New York, the principal locus of the art trade in the United States. The DeWeerth court struck a balance between the interests of a

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22 See supra note 1.
23 See, e.g., CPIA, supra note 17, §§ 302(7)(A), 305, 19 U.S.C. §§ 2602(a)(1), 2604. Adherence to the spirit of the final version of the CPIA, forged after endless hours of Congressional debate, would in effect vitiate the need for an amendment the NSPA or similar legislation intended to prevent its application to future cases with facts similar to McClain. See Nafziger, Repose Legislation: A Threat to the Protection of the World's Cultural Heritage, 17 CAL. W. INT'L L.J. 250 (1987) (criticizing proposed federal Cultural Property Repose Act, since defeated, as contrary to balance of national and global interests struck by the CPIA) (see H.R. 2389, 99th Cong., 1st Sess. (1985), and S. 1523, 99th Cong., 1st Sess. (1985)). But see A Bill to Amend Sections 2314 and 2315 of Title 18, United States Code, Relating to Stolen Archaeological Material; to the Committee on the Judiciary, S. 605, 99th Cong., 1st Sess., 131 CONG. REC. S2611-12 (daily ed. March 6, 1985).
24 This right is well established by internationally recognized conflict of law principles. See, e.g., Note, The Illicit Movement of Art and Artifact, supra note 14, at 68 (citing Bassion, Reflections on Criminal Jurisdiction in the International Protection of Cultural Property, 10 SYRACUSE J. INT'L L. & COM. 281, 305-06 (1983)) (brief discussion of territoriality theory of jurisdiction, under which "a state formulates and enforces law within its own territory, and will not enforce a foreign or penal law"). The choice of United States jurisdictional principles, rather than foreign statutory declarations, as guideposts for judicial decisions, allows the United States to enforce a selective import policy with respect to art and antiquities, rather than granting a "blank check" to foreign governments in enforcing their domestic laws and regulations in United States courts. See generally Note, The Current Status, supra note 1, at 71-79 (discussion of "blank check" and "selective" approaches to import control); see also Fitzpatrick, supra note 1, at 871 ("Significantly, the Senate committee report on the Cultural Property Law [CPIA] states that U.S. policy will not turn on foreign declarations of ownership, but on U.S. determinations.").
foreign claimant seeking the return of cultural property and the interests of the successful defendants, a bona fide purchaser and the reputable art gallery from which she purchased the disputed piece. The DeWeerth decision brings case law in this area into conformity with the implicit goal of the CPIA's modifications of the 1970 UNESCO Convention by promoting stability in art trade transactions occurring within the United States. Maintaining such commercial stability will allow the United States to remain a viable participant in the international art market.

4. BACKGROUND

4.1. The Nature of the Art Market

This Comment deals with international commerce in works of art. This concept requires some elaboration, because both "international commerce" and "works of art" are terms seemingly open to limitless different constructions. Generally, the Comment assumes that international trade in art consists of transactions, both legitimate and illegitimate (notions which are, as discussed below, themselves subject to diverse interpretations), whose ultimate object is the sale of a given piece to a private or institutional consumer.

4.1.1. The Notion of "Cultural Property"

The Comment is concerned mainly with the market in fine art, i.e., paintings, sculpture, and graphic works. Other types of imported cultural property, including historic artifacts such as relics, documents, and decorative or utilitarian objects, are likely to be controlled by identical rules and principles, although laws and treaties that contemplate the disposition of narrowly defined types of cultural materials also ex-
Therefore, the Comment employs "cultural property," "art," and like terms in a general sense and as virtually interchangeable, except where the text specifies a particular category of art or artifact.

4.1.2. General Description of Art Market Transactions

Typically, a chain of art market transactions begins with the removal or export, subsequent to discovery or purchase, of artwork from a country other than the United States. The artwork is then imported — or smuggled — into the United States, where it may be retained by the importer, sold — privately, through a dealer, or at auction — or otherwise transferred to another party or series of parties. In this way the work may enter the possession of a merchant, a private

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31 E.g., Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, July 17, 1970, United States-Mexico, art. I, ¶1(a), 22 U.S.T. 494, T.I.A.S. No. 7088 (bilateral agreement specifically concerning pre-Columbian art and artifacts); Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-2095 (1976). Although even the broadest legislation usually includes some definitions or statement of scope, see, e.g., UNESCO Convention, supra note 17, art. I (definition of "cultural property"), the cited examples illustrate United States governmental responses to very specific problems of archaeological pillage. See P. BATOR, supra note 1, at 6-7. See also generally Kimmelman, Indian Art vs. Artifact: Problem of Ambiguity, N.Y. Times, May 1, 1989, at Cll, col. 1 (discussing problem of defining Canadian or American Indian materials in museums as "art, artifacts, or something else altogether").

32 In one recent article, Professor Merryman has observed: "The entire question of the proper definition of cultural property for legal and policy purposes is a large and unruly one . . . . Works of art and archaeological and ethnological objects surely qualify under any definition . . . ." Merryman, Two Ways of Thinking, supra note 2, at 831 n.1; cf. UNESCO Convention, supra note 17, art. I.

33 For example, Mayan stelae. UNESCO Convention, supra note 17, art. I.

34 "Discovery" may also encompass the unauthorized looting of monuments and archaeological sites. See generally K. MEYER, THE PLUNDERED PAST (1973); see also L. PROTT & P.J. O'KEEFE, supra note 20, at 4 (scope of terms used in title).

35 While this Comment concentrates on disputes surrounding artworks which have at some point been imported into the United States, one must observe that the United States, too, is a fertile source of desirable — and marketable — cultural property, from Native American archaeological treasures to contemporary works by living artists. These resources must also be considered by legislators and judges in formulating national policy to govern the treatment of American art and antiques. See generally Comment, The Evolution of American Attitudes, supra note 6 (thorough consideration of legislation to preserve domestic cultural property, particularly Native American materials); Note, The Current Status, supra note 1, at 66 n.68 (citing discussion of United States export controls in Prott, supra note 15, at 333); cf. Visual Artists' Rights Act, S. 1619, 100th Cong., 1st Sess. (1987), 133 CONG. REC. § 11,502 (daily ed. Aug. 6, 1987) (statement of Sen. Kennedy: "In our country, as in every other country and civilization, artists are the recorders,[sic] and preservers of the national spirit. The creative arts are an expression of the character of the Nation — they mirror its accomplishments, warn of its failings, and anticipate its future."); see also L. PROTT & P.J. O'KEEFE, supra note 20, at 64-65 (summary of current United States laws intended to preserve indigenous material culture).
4.2. Art Market Disputes

4.2.1. The Context in Which Claims Arise

Controversy over rightful title to the artwork may arise at any point in the transactional chain. Claims to possession of a given object may be asserted by private parties or by foreign governments and may be dealt with through private, diplomatic, administrative, or legal channels. Such claims may be litigated in criminal or civil actions, depending on the factual context of each case. The present discussion will focus on controversies concerning artworks already at the point of entry into the United States or reposing in United States collections, including works intended for sale in exchanges governed by United States federal, state, or local laws.

4.2.2. The Concept of National Patrimony

a. Definitional Problems

Behind the difficulty in resolving artwork title disputes lies the elusive definition of "national patrimony." Whether an object is considered by a given nation to be an important part of its cultural heritage, and therefore worthy of legal actions to keep the object in that nation, may be crucial to the United States' designating the object as stolen or wrongfully exported. The status of the work in its country of export may thus be decisive in the United States determination of whether the importer should be penalized or made to disgorge the object.

What constitutes a country's national patrimony is thus a subjective inquiry. It begins in the United States with an examination of the art object's provenance and the claims of the nation or nations where the object originated or has resided for some period of time deemed sufficient to create a valid interest in the object. Historically, art-producing and art-amassing nations have given attention to maintaining or recovering the artistic products of their own cultures as well as the imported aesthetic treasures residing in domestic collections, primarily during wartime.86 Public and private attempts to retrieve art lost dur-

ing wartime continue today as works seized or purloined during World War II surface in the United States. However, art-rich countries have recently perceived a general and urgent need for protective legislation to maintain art objects as a cultural legacy. This concern springs partly from a nascent sense of autonomy and ethnic self-determination among nations which have sought or achieved independence since World War II, partly in response to publicity in the past two decades about the ongoing, but previously unrecognized or ignored, pillage of archaeological treasures, and partly from a general heightened sensitivity to the value and ephemeral nature of cultural property.

In addition, as one observer has noted, "[t]he political pressure exerted on the State Department by these art-rich nations to address this problem [destruction of national patrimony] has coincided with an increasing U.S. need for Latin American political and economic cooperation." The United States' use of "cultural property as a bargaining chip" in the battle against international drug traffic has no doubt enhanced the tendency of art exporting states to view cultural property as a valuable national resource.

As a number of current sources reveal, "[t]he traffic in stolen or smuggled art, now estimated at more than $1 billion a year, has re-


39 See UNESCO Convention, supra note 17, preamble. See generally L. PROTT and P. J. O'KEEFE, supra note 34, at 7-12; Note, The Illicit Movement of Art and Artifact, supra note 14, at 58.


41 Note, Emerging United States Policy, supra note 39, at 166.

42 Stille, supra note 38, at 32. Stille suggests, to cite one example, that bilateral agreements between the United States and Mexico, and between the United States and Peru, to curtail commerce in illicitly obtained pre-Columbian art were executed in exchange for affirmative measures on the parts of those nations to curb the production of illegal drugs that make their way illicitly across the United States border. Cf. infra note 43 and accompanying text.
cently become second only to drugs in the world’s black-market economy.\textsuperscript{43} Supplementing this development has been the growing interest, described above,\textsuperscript{44} of art-rich lands in preserving an intact material record of their ethnic heritages. In many cases, this interest leads to the passage of export restrictions, title-vesting statutes, and preservation laws that define as contraband much of the cultural property formerly considered fair game for art traders.\textsuperscript{45} Hence, the exponential increase in illegal trafficking in cultural property reflects not just a surge in activity among art thieves and smugglers, but an expanded concept of “illicit trade.”

b. Legal Problems

In any event, the divergence among national policies on what should be considered “patrimony” represents an enormous, and possibly insuperable, hurdle in the consistent interpretation and administration of cultural property law. This hurdle exists even where the provisions of an applicable document, such as the UNESCO Convention,\textsuperscript{46} attempt to clarify that ultimately subjective notion.

Still less definitive guidance has existed for courts faced with

\textsuperscript{43} Stille, \textit{supra} note 38, at 32; \textit{cf.} Nafziger, \textit{The New International Legal Framework, supra} note 36 (citing Christian Sci. Monitor, Sept. 22, 1982 (Midwestern & Western Editions), at 19, col. 2). Lyndel Prott has observed:

[T]he publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities, and to attract illicitly acquired goods to the auction and sales rooms of the ‘art market’ states.


\textsuperscript{44} \textit{Supra} notes 38-42 and accompanying text.


\textsuperscript{46} UNESCO Convention, \textit{supra} note 17, art. 4, offers an enumeration of rather vague categories of property forming “part of the cultural heritage of each State.” Included are indigenous works “of importance to the State concerned,” \textit{id.}, art. 4(a), and “cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.” \textit{Id.}, art. 4(e). Clearly, such terms offer little help to authorities dealing with claims to cultural property by a foreign state since the provisions leave the determination of what is “of importance” to the claimant. The question of which party has superior rights to a given object remains to be thrashed out by the disputants. Similarly, while the CPIA, \textit{supra} note 17, refers specifically to “cultural patrimony,” \textit{e.g., id.}, § 303, neither the UNESCO Convention nor the CPIA defines the term. Rather, requests by state parties for import restrictions on objects forming part of the allegedly endangered cultural patrimony are evaluated by a Cultural Property Advisory Committee on an ad hoc basis, assuming that the property at issue falls within certain general qualifications set forth in CPIA § 302, 19 U.S.C. § 2601. See \textit{id.}, § 306, 19 U.S.C. § 2605. \textit{But see infra} note 71.
claims against United States holders of exported cultural property by
genations not party to agreements like the UNESCO Convention. For example, Italy has been particularly vigorous in asserting claims arising
from the export of artworks the government deems part of the Italian
cultural patrimony.  
Like other European countries with a significant
stake in the international art trade, Italy has not adopted the UNESCO
Convention, but chooses to take unilateral action based on Italian do-

5. THE EXAMPLE OF JEANNERET V. VICHY

5.1. Facts of the Case

In 1970, the plaintiff Jeanneret, an art dealer and Swiss national,
purchased a painting by Matisse in New York City. When she

47 P. BATOR, supra note 1, at 17 ("[T]here are persistent complaints, primarily in
Italy and England, that the national patrimony is being depleted by the export of art
treasures."). Concerning one possible interpretation of "patrimony," i.e., as national
capital, Professor Bator also observes that England considers "imported" treasures —
notably the Elgin marbles — as part of its own national patrimony. Id. at 27; cf.
Merryman, supra note 17. For a description of the selective export controls imple-
mented by England, see P. BATOR, supra note 1, at 43-45; see also Kimmelman, The
Case of the Vanishing Art, N.Y. Times, May 14, 1989, § 2-1, at col. 2 (lamenting loss
to foreign buyers of the United States' cultural heritage, defined to include foreign-
produced works of art residing in United States public collections).

48 Italy, a principal source of cultural riches, participates in the global art market
largely as a supplier, although a brisk trade in art and antiquities is carried on within
its own borders (the world's second largest auctioneer, Christie's Ltd., for instance,
maintains auction rooms in Rome). The major centers of international commerce in
works of art, however, remain France, Switzerland, Great Britain, West Germany, the
United States, and, increasingly, Japan. Of these nations, only the United States has
been willing to participate in multilateral cooperative efforts to limit the international
black market in cultural property. See generally Grimes, supra note 19, at 24; Com-
ment, The Evolution of American Attitudes, supra note 6, at 633-35 (citing Cultural
Property Treaty Legislation: Hearings on H.R. 3403 Before the Subcomm. on Trade
of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 79 (1979)) (impedi-
ments to effectiveness of the UNESCO Convention due to refusal of other art import-
ning nations to sign).

49 541 F. Supp. 80 (S.D.N.Y. 1982), rev'd and remanded, 693 F.2d 259 (2d Cir.
1982). The complexity of the relevant facts in Jeanneret are typical of those surrounding
artworld transactions. Here, a painting by a French artist passed through several
countries — France, Italy, Switzerland, and the United States — as it changed hands.
Over the years the work had been transferred both by inheritance and by private sale
and had also entered the public market. See generally Comment, Jeanneret v. Vichy:
Comment, Evaporating the Cloud]; Note, Jeanneret v. Vichy: Sales of Illegally
Exported Art under the Uniform Commercial Code, 6 Nw. J. Int'l L. & Bus. 275,
282-84 (1984) [hereinafter Note, Sales of Illegally Exported Art].

50 Note, Sales of Illegally Exported Art, supra note 49, at 282-83. The painting,
learned during a 1974 visit to Italy that the painting, *Portrait sur fond jaune*, had probably been exported from Italy in contravention of Italian export laws, she attempted unsuccessfully to rescind the sale. She then sued the seller, Madame Vichey, for breach of warranty of title. Jeanneret claimed that she could neither “sell the painting nor show it” in the legitimate art market. Following the commencement of her action in the United States District Court for the Southern District of New York, the Italian government brought criminal charges against Vichey and her husband for illegally exporting the portrait.

5.2. The Jeanneret Decision

In attempting to resolve the breach of warranty claim, the United States courts focused on the matter of title without exploring other issues of important practical consequence to Jeanneret as a dealer and, indeed, to the United States art market in general. As one commentator has observed:

The broader underlying issue [raised by Jeanneret] is whether any exporting nation, by threatening actual or potential owners with fines or confiscation, can cloud the title to or impair the marketability of a work exported without the approval of the exporting nation. Neither the trial nor the appellate courts satisfactorily analyzed or answered these

*Portrait sur fond jaune*, had been imported into Italy in 1951 by the father of the seller-defendant, Madame Vichey, who in turn exported the work and brought it to New York soon after inheriting it in 1970. *Id.* at 282. Under circumstances unclear from the record, the painting was transported initially from Italy to Switzerland, then the Vicheys imported it into the United States. *Id.* at 283.

51 See Jeanneret, 693 F.2d 259, Joint Appendix at 91a, cited in Comment, *Evaporating the Cloud*, supra note 49, at 1003 n.36.

52 The French title of the picture translates to “Portrait on Yellow Background.”

53 Jeanneret, 693 F.2d at 261. Although before bringing suit Jeanneret had rejected as insufficient several offers from persons interested in buying the Matisse, *id.* at 260, at trial she introduced compelling testimonial evidence from revered dealers and auctioneers to demonstrate the virtual impossibility of selling the disputed Matisse to a reputable art merchant. *Id.* at 263.

54 Jeanneret, 541 F. Supp. at 83 n.5. The charges stemmed from the Vicheys’ having brought the painting out of Italy without seeking formal permission from that country’s government; in 1979 the Italian Minister of Culture added *Portrait sur fond jaune* to its list of artworks of particular importance to Italy’s national patrimony (the reasoning behind this characterization is unclear; see Comment, *Evaporating the Cloud*, supra note 49, at 1003 n.31, 1005 n.47; Note, *Sales of Illegally Exported Art*, supra note 49, at 286 n.82), rendering the exporters liable under Italy’s jurisdiction to the government. See Comment, *Evaporating the Cloud*, supra note 49, at 1007-12 (discussion of Italian cultural property laws); Note, *Sales of Illegally Exported Art*, supra note 49, at 284-85 nn.74-79.
questions.\(^6\)

The district court in *Jeanneret* did not think it necessary to reach the question of validity as to the Italian claim,\(^6\) holding that the mere assertion of such a claim breached the seller's implied warranty of title under UCC § 2-312.\(^5\) However, the court of appeals conditioned a final determination of whether the Italian claim\(^6\) "clouded" Jeanneret's title on her ability to establish that the export had indeed violated the letter of the applicable Italian law.\(^6\) This factual question in turn depended upon the painting's age, the issue to be tried on remand.\(^6\)

5.3. **Implications of Jeanneret**

Looking beyond the narrow holding in *Jeanneret*, both the appel-

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\(^{65}\) Note, *Sales of Illegally Exported Art*, supra note 49, at 278; accord Comment, *Evaporating the Cloud*, supra note 49, at 999 ("[T]he Court of Appeals effectively sidestepped the central legal issue the case has raised. That issue is whether any violation of Italian export laws should constitute a 'substantial cloud on title' of the painting and be a breach of implied warranty of title." (footnote omitted)). The latter observer argues cogently that for reasons of policy and law, in a case like *Jeanneret*, breach of warranty of title under Uniform Commercial Code § 2-312 as adopted in New York should not lie; by effectively granting a "blank check" to art exporting countries, such a holding would "set a dangerous and problematic precedent." *Id.* at 1019.

\(^{66}\) Even under Italian law the Italian government's claim, if any, would be enforceable only against the exporters themselves (here, the Vicheys), not against subsequent good-faith purchasers. Comment, *Evaporating the Cloud*, supra note 49, at 1010, 1016. Moreover, Italy would probably recognize that Jeanneret had acquired good title to the Matisse regardless of the Vicheys' unlawful export, and in any event the painting would probably not be subject to confiscation. *Id.* at 1009-12.

\(^{67}\) *Jeanneret*, 541 F. Supp. at 83. Significantly, however, the Italian government did not claim ownership of the Matisse, or that Madame Vichey's title to it was suspect, only that the Vicheys should be penalized for illegally removing it from the country. *See Jeanneret*, 678 F.2d at 266; *see also* Comment, *Evaporating the Cloud*, supra note 49, at 1010.

\(^{68}\) *See supra* note 54.

\(^{69}\) The litigants introduced some question as to which of two Italian laws were applicable to the Matisse as cultural property. Under a 1913 law, the painting, if at least fifty years old, would have been lawfully exported only if the Vicheys had paid a fee to obtain a government permit (the government might also have had the right to purchase the work rather than allowing its removal). *See Jeanneret*, 693 F.2d at 262; *Note, Sales of Illegally Exported Art*, supra note 49, at 289-90; Comment, *Evaporating the Cloud*, supra note 49, at 1007-08. If a 1939 law controlled, the Vicheys could be subject to the Italian government's claims, but only if the painting were, again, fifty years old at the time of export. *See Jeanneret*, 541 F. Supp. at 83; Comment, *Evaporating the Cloud*, supra note 49, at 1008-11. Hence, the court of appeals remanded the case for determination of the factual issue of the painting's age, since the exact year Matisse executed *Portrait sur fond jaune* remained in dispute. *Jeanneret*, 693 F.2d at 269.

\(^{60}\) *Jeanneret*, 693 F.2d 259. No further litigation is reported in the *Jeanneret* case. Apparently the parties settled privately after the court of appeals' decision.
late court opinion and subsequent analyses of the case reveal a general consensus that a mere export violation should not constitute a breach of warranty of title in the sale of art. Moreover, the court of appeals, expressing skepticism as to the Italian government's right to claim a twentieth-century French painting as part of its national patrimony, demonstrated sensitivity to the vulnerability of the art merchant — as well as the purchaser — in the face of even tenuous claims to artworks by foreign governments. Indeed, Jeanneret might have succeeded in obtaining a judgment had she sued the Vicheys for breach of warranty of merchantability under the Uniform Commercial Code.

61 Jeanneret, 693 F.2d at 266.
62 E.g. Note, Sales of Illegally Exported Art, supra note 49, at 279; Comment, Evaporating the Cloud, supra note 49, at 1019.
63 See Note, Title Disputes in the Art Market, supra note 4, at 443 n.4 (whether transfer of artwork exported in violation of foreign law constitutes breach of implied warranty of title under U.C.C. § 2-312 remains an open question; effect on such claims of United States' adoption of UNESCO Convention still remains to be tested).
64 The court questioned whether Portrait sur fond jaune, a "painting by a prolific French post-impressionist master . . . not claimed to be an outstanding masterpiece," constituted the "tremendous loss to the national heritage" claimed by the Italian government. Jeanneret, 693 F.2d at 263-64 n.6. Furthermore, a recent commentator observed that the Matisse apparently escaped official notice as being a national treasure when the Italian government conducted a thorough inventory of the collection of Madame Vichey's father in 1969. Comment, Evaporating the Cloud, supra note 49, at 1005 n.47; cf. P. BATOR, supra note 1, at 17 ("In my opinion the illegal export as such of [modern-era European paintings and sculpture] does not, in itself, constitute a serious problem, even though there are persistent complaints [from Italy]"); however, Italy is justified in complaining of the export of antiques and archaeological materials.
65 Although uncertain that Jeanneret's legal claim for breach of warranty of title would ultimately succeed, the court of appeals sympathized with her predicament in owning a painting she could not, according to the expert testimony at trial and briefs from several amici curiae, sell through legitimate art market channels because of questions surrounding the work's provenance. See Note, Sales of Illegally Exported Art, supra note 49, at 296-97 (citing Jeanneret, 693 F.2d at 268). Her injury represented a thwarting of the basic policy of promoting commerce which underlies the U.C.C. Note, Sales of Illegally Exported Art, supra note 49, at 297 n.163.
66 U.C.C. § 2-314. For a thorough examination of Jeanneret's possible avenues in seeking redress under the U.C.C. for her injuries through having received an unmarketable painting, see Note, Sales of Illegally Exported Art, supra note 49; cf. Note, Title Disputes in the Art Market, supra note 4, at 445 (implicit duties in some jurisdictions require that art dealers investigate title to paintings before making purchase). Apparently Jeanneret did not ask to examine the painting's export papers or other documentation of provenance. Comment, Evaporating the Cloud, supra note 49, at 1012. Once the Italian government's claim was made known, however, neither she nor other professionals in the trade wished to handle the Matisse. See supra note 53; see also Note, The Current Status, supra note 1, at 61 n.56 (discussing application of the U.C.C.'s warranty provisions to art market transactions).

The Jeanneret court's de facto endorsement of the common law principle that transgressions of foreign export regulations do not affect the title of a good-faith purchaser in the United States, and its consideration of the related merchantability problem, are consistent with the policy embodied in the CPIA. The CPIA attempts to limit the class of property subject to foreign claims and thereby ensure fair notice to importers of what materials they may deal in without danger of legal liability. Indeed, because the stability of the United States art market as

67 P. Bator, supra note 1, at 11; S. Williams, supra note 15, at 106-08. Professor Bator sets forth in his study the oft-invoked statement of "the fundamental general rule" (thrown into some question by the McClain cases, supra note 1):

The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States, and illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.

P. Bator, supra note 1, at 11. On the effect of foreign export restrictions on the ownership of cultural property, the court in United States v. McClain, 545 F.2d 988, 1002-03 (5th Cir. 1977), noted:

[Except for their] effect on jurisdiction, restrictions on exportation are just like any other police power restrictions. They do not create "ownership" in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.

Id.; see also Merryman, The Protection of Artistic National Patrimony Against Pillaging and Theft, in DuBoff, Art Law, Domestic and International 245 (1975) at 239-41, 244, cited in McClain, 545 F.2d at 1003 n.32 (discussion of Italian law).

68 Italy is not a party to the UNESCO Convention. See supra note 48 and accompanying text. The procedures for controlling the movement of cultural property outlined by the Convention and the implementing legislation therefore do not apply to claims and requests by the Italian government. Nevertheless, the judicial and administrative treatment (and perhaps also the informal resolution) of title disputes involving artworks exported from Italy and countries like it will be informed by the substantive provisions of statutes and treaties adopted by the United States. See generally UNESCO Convention, supra note 17.

69 Section 305 of the CPIA, for example, provides that, in order to obtain a United States import embargo on "archaeological and ethnological" materials (see CPIA, supra note 17, § 301, 19 U.S.C. § 2601 for a narrow definition of these terms), such materials must be placed on a list to be promulgated by the Secretary of the Treasury. The Act states in part:

The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 307 are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions.
a whole depends not only on the buyer’s ability to secure quiet title to a work, but also on his confidence in entering a transaction for purchase, protecting actual merchantability (rather than legally enforceable rights alone) must be a central policy goal in establishing cultural property. The mere possibility suggested by the *Jeanneret* case that a United States court would enforce any Italian claims — whether directed against the importer alone or against subsequent purchasers of a work of art — would certainly impede both the flow of art into the United States and the legitimate sale (or exhibition) of imported works. Art dealers and lay persons alike may be disinclined to engage in imports and purchase transactions within the United States’ jurisdiction absent the positive assurance of legal authority protecting them against such claims.

CPIA, *supra* note 17, § 305, 19 U.S.C. 2604 (emphasis added). Even in the case of stolen cultural property, under § 308 the material must be documented as taken after the effective date of the CPIA (or the effective adoption of the convention by the complaining state, whichever is later) — a provision that would have obviated the questions in *Jeanneret* as to the applicable Italian law and the painting’s age — from a “museum or . . . monument or similar institution.” CPIA, *supra* note 17, § 308, 19 U.S.C. § 2607.

70 See *supra* note 66.

71 See CPIA, *supra* note 17, § 312, 19 U.S.C. § 2611 (exemption of materials within the Act which are on temporary display and of works reposing in museums and like institutions, under specified conditions); see also 22 U.S.C. § 2459 (1965) (act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes).

72 Such transactions would include negotiations and other activities directed toward the sale of art, if not the actual contract formation or transfer of property. The court in *Jeanneret* applied New York law, rather than Swiss or Italian law, because the negotiations between Jeanneret and the Vicheys to sell the Matisse had taken place in New York. The actual payment and delivery of the painting occurred in Switzerland. *See Jeanneret*, 693 F.2d at 266. Thus every phase of the art business in America can be affected — and depressed — by unfavorable foreign law regarding cultural property. *See Note, Sales of Illegally Exported Art, supra* note 49, at 281 nn.45-46 (citing Brief of Amici Curiae, *Jeanneret*, 693 F.2d at 259) (commercial worthlessness of artworks subject to third-party claims based on foreign law).

For a full treatment of the conflict of laws questions raised by *Jeanneret* (and an argument that the court erred in failing to look to the law of Switzerland, the *lex situs* of the transfer), see *Note, Sales of Illegally Exported Art, supra* note 49, at 299-307; cf. Comment, *International Law in Domestic Forums, supra* note 36 (examination of Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982), advocating a monistic approach to application of laws in international disputes and calling for the development of an international law applicable to such questions); see also Winkworth v. Christie Manson & Woods Ltd., [1980] 1 Ch. 496, [1980] 2 W.L.R. 937, [1980] 1 All E.R. 1121 (1979) (application of *lex situs* in case of disputed title to art which was stolen, exported, and then sold in another country).
7. THE CASE OF DEWEERTH V. BALDINGER

Until the DeWeerth case was adjudicated in 1987, Jeanneret remained the valid, if somewhat uncertain, statement of the common law governing private parties disputes over the legal status of artwork transferred via international trade (at least in New York, unquestionably the art market capital of the United States). Jeanneret highlights a number of the major themes in formulating law concerning the international movement of cultural property: the riddle of what constitutes national patrimony; the difficulties in choice of law and in interpretation.


Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982), an important and complex case brought in the Eastern District of New York (536 F. Supp. 829 (E.D.N.Y. 1981)) and decided on appeal by the Second Circuit the same year as Jeanneret, involved a claim by a German Democratic Republic state museum that a pair of Duerer portrait paintings, property of the German government, had been stolen during World War II. The museum sought to recover the paintings from Elicofon, an American lawyer who claimed he had purchased them from an ex-United States serviceman. Kohn, $6 Million Art Held Property of East Germany, N.Y.L.J., May 6, 1982, at 1. Elicofon thus involved a direct action by a foreign government against a United States citizen, unlike Jeanneret, where the Italian government was a third party claimant who did not enter the case, and DeWeerth, where all the litigants were private parties (although the plaintiff was a West German national, the German government laid no claim to the disputed artwork).

Nonetheless, Elicofon implicates many of the crucial problems raised by Jeanneret, including the role of purchaser and seller in investigating and documenting provenance and vexed conflict of laws questions. See generally Comment, International Law in Domestic Forums, supra note 36. Moreover, unlike Jeanneret, both Elicofon and DeWeerth were actions to recover artworks allegedly stolen during the Second World War. DeWeerth, as discussed below, altered the previous tendency of New York law to favor plaintiffs in such disputes, destroying the finality of commercial transactions involving cultural property and undercutting the foundation of the New York art trade. Compare DeWeerth, 836 F.2d 103, with Elicofon, 678 F.2d 1150, and Menzel v. List, 49 Misc. 2d 300, 367 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), affd and modified per curiam, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967). See generally Note, Title Disputes in the Art Market, supra note 4.

Since the writing of this Comment, the New York Court of Appeals has elaborated further on the issues raised in DeWeerth; see infra note 125.

"The issues raised by Jeanneret are simply an extension of the issues raised during the debates over McClain and the UNESCO Convention." Note, Sales of Illegally Exported Art, supra note 49, at 317; cf. McAlee, From the Boston Raphael, supra note 1, at 591-94 (possibility of art-related civil suits brought under the McClain doctrine); P. BATOR, supra note 1, at 75-78 (possible consequences of McClain on civil litigation arising from international art transactions).

The terms and legislative history of the CPIA, supra note 46, do not offer a definitive statement of what should be considered "national patrimony" but give some insight into the problem unavailable during the pendency of Jeanneret. Congress wished the CPIA to encompass works with "characteristics which distinguish them from other objects in the same category providing particular insights into the origins and history of a people." S. Rep. No. 564, 97th Cong., 2d Sess. 24, 25 (1982), quoted in Fitzpatrick, supra note 1, at 872 n.51.

Nafziger has suggested a "triage" approach to determining how great a part of the
The importance of documenting provenance; the responsibilities of owners, dealers, and purchasers in investigating title to the artwork; and the attendant evidentiary problems. DeWeerth claimant nation's patrimony is represented by a particular object, and how to treat that object accordingly. See Naftziger, An Anthro-Apology for Managing the International Flow of Cultural Property, 4 Hous. J. Int'l L. 189, 196-98 (1982) (summarized in Note, The Current Status, supra note 1, at 73-74 n.121).

In addition to having to decide which country's law to apply to a dispute — or to aspects of it, see Comment, International Law in Domestic Forums, supra note 36, at 191-97 (separate judicial consideration of the national interests implicated by each issue in Elicofon before choosing and applying law) — the court in cases like Jeanneret and Elicofon may find confusion, even among the foreign jurisdiction's own experts, as to the correct interpretation of applicable statutes. The dispute in Jeanneret over whether the 1913 statute was superseded by a 1939 law enacted during Mussolini's regime illustrates this potential difficulty, not unlikely in the many nations whose governments have been unstable during the past century. Cf. Comment, International Law in Domestic Forums, supra note 36 (complex litigation surrounding the Elicofon case reflects numerous changes in defining German territorial and political boundaries, leading to conflict as to applicable law and even question of standing to sue for recovery of national treasure); United States v. McClain, 545 F.2d at 997-1000, United States v. McClain, 593 F.2d at 666-71 (question as to whether controlling Mexican law, to be applied by United States court, was embodied in statute of 1897, of 1934, or of 1972, and further conflict even among Mexican authorities as to the correct interpretation of applicable law); Socialist Republic of Rumania v. Wildenstein & Co., 85 Civ. 2435 (DNE) (S.D.N.Y. 1984); Socialist Republic of Rumania v. Kimbell Art Foundation, No. CA4 84 176K (N.D. Tex. 1984) (suit by the former government of Rumania based on sale of El Greco painting by Rumania's then-King, claiming transfer void because title to property rightfully vested in the people of Rumania), cited in Malaro, The Museum's Perspective, in ART LAW 847, 854-55 (PLI 1988).

On the difficulty of enforcing penal sanctions prescribed under international cultural property agreements, see generally Note, The Illicit Movement of Art and Artifact, supra note 14, at 68-69; Naftziger, International Penal Aspects, supra note 36; see also Fitzpatrick, supra note 1, at 873-74 (problems of legal interpretation faced by United States Customs in attempts to enforce foreign claims on cultural property).

See generally Note, The Illicit Movement of Art and Artifact, supra note 14, at 71-74 (failure of art dealers, auctioneers, and museums to conduct diligent provenance investigations may require legal regulation of the art trade to discourage black market in cultural property); Note, Sales of Illegally Exported Art, supra note 49, at 281-82 (failure to document provenance breaks with current usage of the art trade, rendering art unmarketable despite "legal non-consequences" of illegal exportation; cure for unmarketability lies in protective amendments to U.C.C. §§ 2-312, 2-314); Note, Title Disputes in the Art Market, supra note 4, at 444-50 (prerequisite of investigation of title to artworks before becoming good-faith purchaser under the U.C.C. would deter illicit trade in art); Comment, The Recovery of Stolen Art, supra note 4, at 1149-57 (application of so-called "discovery rule" in cases for replevin of stolen artworks would promote salutary goal of "purchases which result from careful examination of a possessor's right to sell").

See Jeanneret, 693 F.2d at 263 (conflicting evidence as to proper application of Italian law); id. at 263-64, 269 (conflicting evidence as to date of painting's execution); cf. McClain, 545 F.2d at 997-1000, McClain, 593 F.2d at 666-71 (conflicting evidence, including difficulty in translating statutes written in Spanish and credibility of expert testimony, as to proper application of Mexican laws dating back to 1897); see also, e.g., McAlee, From the Boston Raphael, supra note 1, at 587-89 (general discussion of prosecution's problems in demonstrating the National Stolen Property Act's scienter requirement has been met; specifically, in showing defendants in McClain-type case


also reflects upon some of these themes in the context of an action to recover a painting stolen from Germany during World War II.

7.1. Facts of DeWeerth

The factual background of the DeWeerth case closely resembles that of Kunstsammlungen zu Weimar v. Elicofon, in which a pair of Duerer paintings, owned by a state museum, disappeared from the German castle in which they were stored for safekeeping during the post-World War II Allied occupation. Not until 1966 were the Durers that were discovered in the collection of a New York lawyer, the defendant in the litigation to recover the paintings, considered national treasures. In DeWeerth, the owner of a valuable painting by Monet had sent the work in 1943 to her sister, who lived in a castle in Southern Germany, for safekeeping. Following occupation of the castle in 1945 by American soldiers, DeWeerth's sister found that the Monet had disappeared from the wall where she had hung it.

After learning that the painting was missing, DeWeerth made several attempts over the next twelve years to recover it. She filed a report of loss with the post-war military government in 1946; she inquired of her lawyer in 1948 about the possibility of recovery; and in 1955 she made a single communication to an art history professor asking him to investigate the Monet's present location. Finally, in 1957 DeWeerth included the canvas in a list submitted to the West German federal bureau of investigation of artworks she had lost during the war. However, neither DeWeerth nor those she contacted found the picture,
and she took no further steps. 86

Eventually, in 1981, a relative of DeWeerth related the tale of the missing Monet to DeWeerth's nephew, Peter von der Heydt. 87 He located the painting, Champs de Blé à Vetheuil, 88 in the standard Catalogue Raisonné 89 of Monet's work and discovered that DeWeerth's canvas had been purchased from a Swiss art dealer and sold to a private collector by the New York art gallery Wildenstein & Co. 90 When Wildenstein refused to divulge the identity of the private collector, a good-faith purchaser, 91 DeWeerth was obliged to secure a court order compelling disclosure — a vivid illustration of the secretive nature of even legitimate art market transactions.

7.2. The DeWeerth Litigation

Following issuance of the order in late 1982, DeWeerth contacted the collector, Edith Marks Baldinger, and demanded the return of Champs de Blé. 93 Baldinger, an American citizen who had kept the painting in her New York City apartment since 1957, 95 refused in February 1983 to return the Monet. 96 Later that month, DeWeerth sued Baldinger in the Southern District of New York, seeking recovery of

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86 Id.
87 Id.
88 The painting's French title means "Wheatfield in Vetheuil."
89 The catalogue raisonné of a given artist's work generally contains information about every known piece by that artist. The information usually includes a physical description (and an illustration) of an object, say, a painting, as well as whatever data the author has gleaned regarding the painting's provenance, exhibition history, and bibliographic references. In many cases, scholars and art trade professionals universally refer to a celebrated artist's works using the numbers assigned each work in a particular catalogue raisonné. The catalogue becomes the standard reference as to that artist. Daniel Wildenstein's multi-volume Catalogue Raisonné of the art of Claude Monet, in which DeWeerth's nephew looked up her painting, is such an opus. See DeWeerth, 836 F.2d at 112.
90 Id.
91 The author of the Catalogue Raisonné, Daniel Wildenstein, is also the chief proprietor of the art gallery bearing his name. Historically, this century-old concern has frequently dealt — and continues to deal — in paintings by Monet and other Impressionist masters. Therefore, the apparent coincidence of DeWeerth's picture having passed through Wildenstein's hands is not surprising.
92 Id.
93 Id. at 105-06.
94 Id. at 106.
95 Id. at 104.
96 Id. at 105. While she possessed the work Baldinger displayed it publicly twice, both times in New York City, for very short durations.
97 Id. at 106.
The district judge concluded that “DeWeerth had superior title and that the action was timely as she had exercised reasonable diligence in finding the painting.” Baldinger appealed the decision to the Second Circuit, which reversed after ruling that DeWeerth’s suit was time-barred under New York’s statute of limitations.

7.3. Policy Import of the DeWeerth Decision

The closing sentences of the court’s opinion suggest the policy import of the Second Circuit’s ruling:

To require a good-faith purchaser who has owned a painting for 30 years to defend under these circumstances would be unjust. New York law avoids this injustice by requiring a property owner to use reasonable diligence in locating his property. In this case, DeWeerth failed to meet that burden. Accordingly, the judgment of the District Court is reversed.

Although the appellate court’s reversal rested on the specific facts of DeWeerth, the decision represented the latest stage in the evolution of New York law and offers greater protection than ever before to the finality of legitimate art purchases and to the stability of the art market as well. Examining DeWeerth in light of its predecessors reveals an emerging judicial sensitivity to such concerns. This trend in turn echoes the increasing conservatism of federal law regarding title claims against cultural property sold or residing in the United States.

8. Analysis of DeWeerth

8.1. Choice of Law: Preference for Domestic over Foreign

The first question faced by the DeWeerth court was which law to apply, that of Germany, where the alleged theft occurred (and the cause of action thus accrued) or that of New York, where the painting was sold to Baldinger. In Elicofon, the court had also faced a

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98 DeWeerth, 836 F.2d at 106.
99 Id. at 112.
100 Id.
101 “Where, as here, the issue is the application of a legal standard — ‘reasonable diligence’ — to a set of facts, review is de novo.” Id. at 110.
102 For a thorough treatment of the accrual concept in statutes of limitations, with special reference to cases involving stolen art, see Comment, The Recovery of Stolen Art, supra note 4, at 1128-32.
103 See supra note 74 and accompanying text.
choice between United States and German law. Elicofon, the purchaser, argued that German law should apply and raised as a defense the German doctrine of *Ersitzung*, or repose. After considering the legal interests of both countries, the circuit court applied New York’s limitations law, holding that because the disputed property had been transferred to the defendant in New York and the painting had been there for over thirty years, New York’s interest outweighed Germany’s. Interestingly, the court in *Jeanneret*, also decided in 1982, applied New York law although Switzerland was the *lex situs* of the actual transfer. The rationale behind the *Jeanneret* court’s choice was that the parties had reached an oral agreement for the sale in New York.

Presumably, domestic law is more apt to favor United States inter-

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106 Elicofon, 678 F.2d at 1160; see also Comment, *International Law in Domestic Forums*, supra note 36, at 196 n.101 and accompanying text.

107 See supra note 72. Although *Jeanneret* involved a breach of warranty claim rather than suit for recovery of a stolen work as in *DeWeerth* and *Elicofon*, in each case the Second Circuit was obliged to consider domestic policy regarding the application of foreign laws before choosing to apply United States (state) law, as the court did in all three instances.

108 The district court and the appellate court agreed that, since the issue in *Jeanneret* was that of good title, the applicable law was that of the nation in which the contract was made. Comment, *Evaporating the Cloud*, supra note 49, at 1012 n. 90. However, one commentator has asserted that each court’s approach contravened the “conflict of laws principle that the *lex situs* of the cultural property at the time of transfer determines whether an innocent purchaser has acquired a valid title from the transferor.” Note, *Sales of Illegally Exported Art*, supra note 49, at 301 (emphasis added). Moreover, “New York’s choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer.” *Jeanneret*, 693 F.2d at 266, quoted in *id.* at 304. Thus the courts should have treated the determination of *lex situs* as a question of fact before reaching the merits of the case, rather than accepting the parties’ assumption that New York law should control. Note, *Sales of Illegally Exported Art*, supra note 49, at 304.

109 The often-cited case of *Menzel v. List* may be regarded as first in the line of proceedings to recover lost artworks through courts seated in New York. The plaintiff in *Menzel* brought an action in state court against the good-faith purchaser of a painting plaintiff had lost during World War II. 49 Misc. 2d 300, 302, 267 N.Y.S. 2d 804, 807 (Sup. Ct. 1966). The court applied New York law in deciding the merits of the case, rejecting the defendant’s contention that Menzel’s suit was barred by the statute of limitations. *Id.* at 304-05, 267 N.Y.S. 2d at 809.

Because the exercise of diversity jurisdiction had brought *DeWeerth*, like *Elicofon* and *Jeanneret*, to the Second Circuit, New York state law controlled. *DeWeerth*, 836 F.2d at 106 (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)). Thus *Menzel*, to the extent that it had not been superseded by later decisions, represented mandatory authority on issues including choice of law.
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ests, although as seen in McClain\textsuperscript{110} and in Jeanneret,\textsuperscript{111} this presumption has not always held true in cases dealing with the international movement of cultural property. However, the seemingly anomalous results reached in cases like McClain and Jeanneret may be because of the operation of law at two levels: first, the overarching claim (trafficking in stolen property in McClain, breach of warranty of title in Jeanneret), and second, the underlying allegation of a "wrong" defined by foreign law (e.g., the supposed "theft" in McClain and the export violation in Jeanneret).

In a case like DeWeerth, only one level of legal wrong is at issue. Because the parties in DeWeerth assumed that the Monet had probably been stolen in the traditional sense\textsuperscript{112} from its rightful owner, the issue of conflicts of law played little role in the decision. The relative simplicity of the legal claim in such a case therefore highlights the outcome-determinative role of the controlling law. Resolving this type of dispute in accordance with United States law, rather than foreign doctrines, gives the court much greater freedom to shape policy; the malleable nature of United States law (and common law in general) allows the court to mold it to serve domestic interests.

8.2. Benefit to Commerce in New York Statute of Limitations Law

Looking to New York law in the first instance then, the DeWeerth court observed that the prevailing rule dictated that New York's statute of limitations be applied to actions accruing within the state, while actions accruing outside New York might be subject to a "borrowed" limitations period.\textsuperscript{113} In any case, the borrowed period would apply only if it was shorter than the New York prescription of three years.\textsuperscript{114}

This "borrowing" rule, though certainly developed outside the art-market context of DeWeerth, afforded the benefits of sound commercial policy to the defendant-purchaser in that case. Baldinger was a citizen of New York and had acquired title to the disputed Monet in a transaction occurring in New York. Either circumstance would have allowed her to be sued in a New York court.\textsuperscript{115} There she would be granted the same degree of repose from claims against her title to the Monet whether the "cause of action" had technically arisen in New York or in

\textsuperscript{110}\textit{See supra} note 1.
\textsuperscript{111}\textit{Supra} notes 49-72, and accompanying text.
\textsuperscript{112}\textit{Cf. supra} note 1.
\textsuperscript{113}\textit{DeWeerth}, 836 F.2d at 106.
\textsuperscript{114}\textit{Id}.
another jurisdiction.\textsuperscript{118} As DeWeerth illustrates, New York’s limitations law adopts a flexible approach likely to protect those who do business—including the purchase and sale of art—in New York.\textsuperscript{117}

8.3. Extension of the Demand and Refusal Rule Regarding Accrual

The DeWeerth court thus determined that, whether the cause of action had accrued in New York or in Germany, DeWeerth’s suit would be barred if not brought within three years of that accrual.\textsuperscript{118} The next issue for the court to determine was when DeWeerth’s cause of action had accrued, or when she had achieved standing to bring suit for replevin of the missing Monet. While the applicable New York statute\textsuperscript{119} specifies three years as the time limit for bringing such actions, the presence of the events necessary to do so is largely a question for judicial discretion.\textsuperscript{120}

Under the “demand and refusal” rule of Menzel v. List,\textsuperscript{121} courts applying New York law computed the period of limitations in actions to recover stolen property (and, specifically, works of art) not from the moment of the alleged theft, but from the time the former owner demanded return \textit{and} the current owner refused.\textsuperscript{122} The requirement had

\textsuperscript{118} See infra notes 118-39 and accompanying text (discussing DeWeerth court’s treatment of concept of accrual); see also DeWeerth, 836 F.2d at 106.

\textsuperscript{117} In the world of commerce and trade, [statutes of limitations on actions for replevin of personal property] provide stability by assuring that those who have dealt in good faith with property will be made secure in their possession after a certain period of time. In this way the statutes reduce uncertainty and promote free trade of goods. Comment, The Recovery of Stolen Art, supra note 4, at 1128; see also supra note 15.

\textsuperscript{118} DeWeerth, 836 F.2d at 113; see supra note 108, and accompanying text.


\textsuperscript{120} See Comment, The Recovery of Stolen Art, supra note 4, at 1129.

\textsuperscript{121} 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), aff’d, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969); see generally Note, Title Disputes in the Art Market, supra note 4, at 451-52; Comment, The Recovery of Stolen Art, supra note 4, at 1133-36; see also supra note 109.

\textsuperscript{122} Generally, a cause of action for replevin of stolen property accrues “at the time of the wrongful taking,” so that the statute of limitations begins running against the would-be plaintiff even if he or she has no idea of the location of the property or the identity of the defendant. Comment, The Recovery of Stolen Art, supra note 4, at 1131-32. An exception to the general rule is recognized where the property has been wrongfully concealed. However, some scholars have pointed out that the traditionally private nature of the art world, see supra note 95 and accompanying text, and “the nature of possession of fine art” in practical terms makes fraudulent concealment “in many cases virtually indistinguishable from open, good faith possession, which itself necessarily involves some concealment.” Comment, The Recovery of Stolen Art, supra note 4, at 1131 n.36; see O’Keeffe v. Snyder, 170 N.J. Super. 75, 405 A.2d 840 (Super. Ct. App. Div. 1979), rev’d 83 N.J. 478, 416 A.2d 862 (1980) (statute of limitations held not to have begun running against former owner of allegedly stolen paintings until possessor had satisfied requirement of open and notorious possession by exhibiting paintings publicly). See generally Ward, The Georgia Grind: Can the Common Law Accommodate
probably been conceived in order to protect the purchaser from suit without notice; under the Menzel rule he or she became liable only after being alerted to the tainted provenance of the property and being afforded an opportunity to return it. However, the rule's practical effect could benefit the claimant more than the good faith purchaser. The latter remained vulnerable to suit and to a consequent judgment requiring him or her to forfeit honestly bought property until the claimant chose to exercise his or her right to make demand.

See, e.g., Gillet v. Roberts, 57 N.Y. 28, 34 (1874) ("[A]n innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort feasor.") (emphasis in original), quoted in Comment, The Recovery of Stolen Art, supra note 4, at 1134-35; Atlas Assurance Co. v. Gibbs, 121 Conn. 188, 195, 183 A. 690, 693 (1936), cited in Comment, The Recovery of Stolen Art, supra note 4, at 1138 n.66.


However, the DeWeerth court, relying on Menzel and Elcofon, held the requirement of demand on a good faith purchaser to be a substantive element of the plaintiff's cause of action for recovery. DeWeerth, 836 F.2d at 107 n.3. Therefore, the court concluded, the statute did not begin running until the requirement had been satisfied. Id.; see also Note, Title Disputes in the Art Market, supra note 4, at 453-54 (Elcofon decision, applying Menzel rule to allow plaintiff museum to avoid having its action barred by New York's statute of limitations, is consonant with Uniform Commercial Code's policy of placing burden of loss on party who "takes from the wrongdoer").
8.4. Announcement of the Due Diligence Rule

Observing this possible unfairness in the operation of the demand and refusal rule, the DeWeerth court stated that the claimant in such a case was under a legal obligation to avoid unreasonable delay in making demand. In support of its conclusion, the court cited Elicofon, among other cases. The DeWeerth court then took the equitable notion of timely action a step further, imposing a “substantive requirement” of timely demand on the plaintiff at bar. “This rule, focusing on the plaintiff’s conduct, conceptually starts the limitations period at the point where the plaintiff has had an opportunity to use due diligence in locating the property and making a demand, and has failed to do so.”

The court’s interpretation of the ban on unreasonable delay in Menzel-type cases represents DeWeerth’s major precedential significance. That the plaintiff’s claim was ultimately found barred by the statute of limitations is less important than the court’s articulation of its central inquiry: “Whether New York law imposes upon a person who claims ownership of stolen personal property an obligation to use due diligence in attempting to locate the property.”

8.4.1. Legal Reasoning Underlying the Due Diligence Rule

To reach an affirmative answer, the DeWeerth court adopted a rather novel approach to the concept of accrual. The discussion of this issue, found in footnotes to the court’s opinion, relies on a certain

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125 DeWeerth, 836 F.2d at 107. As this Comment goes to press, the New York Court of Appeals has, however, reinterpreted the “due diligence” rule. In Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d 143, 550 N.Y.S.2d 618 (1990), aff’d, N.Y.2d, N.E.2d, N.Y.S.2d, No. 3 (N.Y. Feb. 14, 1991) (WESTLAW WL 17119, New York Cases data base), wherein the Guggenheim Museum sued an individual purchaser of a Chagall gouache allegedly stolen from the museum’s collection, the court dismissed the purchaser’s statute of limitations defense based on DeWeerth and affirmed the Supreme Court’s denial of summary judgment for the defendant, holding that the plaintiff’s due diligence in searching for the stolen artwork goes not to the statute of limitations but, rather, forms part of a laches defense.

126 Id. at 107.

127 The judge-made requirement of avoiding unreasonable delay surely derives from principles of equity. Nevertheless, the opinion in DeWeerth clarified, “While this proscription against unreasonable delay has been referred to as ‘laches,’ the New York courts have explained that the doctrine refers solely to an unexcused lapse of time and not to the equitable principle of laches, which requires prejudice to the defendant as well as delay.” 836 F.2d at 107 (citations omitted); see also id. at 110.

128 Id. at 107 n.4.

129 Id.

130 Id. at 107.

131 Id. at 107 nn.3, 4.
amount of legal legerdemain to establish a foundation for imposing a “due diligence” requirement on DeWeerth. With the help of precedents, including *Menzel v. List*, the court placed a somewhat strained interpretation on the clear wording of the applicable New York statute.\(^{132}\) The *DeWeerth* argument first echoes *Menzel* in characterizing the requirement of demand on good faith purchasers as a “substantive” element — and thus a prerequisite to accrual — of a cause of action for the return of stolen personal property.\(^{133}\) Based on this reasoning, DeWeerth was allowed to escape the strictures of statutory language that on its face seems to start the limitations period as soon as the defendant acquires the disputed property, whether or not the plaintiff knows whom to sue.\(^{134}\)

The court then continued by explaining its distinction between the statutory limitations period and that “reasonable” time granted a plaintiff like DeWeerth to bring suit.\(^{135}\) The court concluded that the former should be strictly applied “only where the demand requirement is procedural.” In cases such as *DeWeerth* where demand is a substantive requisite,\(^{136}\) the “unreasonable delay rule” also applies “as a substantive requirement.”\(^{137}\) Having extracted from precedent this “unreasonable delay” bar to actions against good-faith purchasers, the court then used it as a basis for the new “due diligence” requirement.\(^{138}\)

*DeWeerth*’s elaborate construction of the New York statute of limitations thus rests on the ill-defined dichotomy between “substantive” and “procedural” elements of the cause of action. Clearly, the *DeWeerth* court took full advantage of its judicial prerogatives by grafting common law doctrines onto statutory formulations in order to reach a desired result.\(^{139}\)

### 8.4.2. Policy Underlying the Due Diligence Rule

The “due diligence” rule is intended to advance the original purpose of the demand and refusal rule — protection of the good-faith purchaser — and to eliminate the incidental anomaly of leaving the


\(^{133}\) *DeWeerth*, 836 F.2d at 107 n.3.

\(^{134}\) Id. See generally Comment, *The Recovery of Stolen Art*, supra note 4, at 1128-30 (vague statutes of limitations in many states leave presence of facts or events constituting accrual to be determined by courts; “the vast majority of states specifically hold that a lawsuit may be filed and maintained even though the identity of the defendant is unknown”).

\(^{135}\) *DeWeerth*, 836 F.2d at 107 n.4.

\(^{136}\) See supra note 128 and accompanying text.

\(^{137}\) *DeWeerth*, 836 F.2d at 107 n.4.

\(^{138}\) Id.

\(^{139}\) See supra text following note 124.
purchaser indefinitely vulnerable to suit. The DeWeerth standard achieves this goal by imposing stringent requirements on a plaintiff seeking to nullify the legitimate purchase of a work of art. Under DeWeerth, the former owner must not merely avoid "sleeping on his rights" once the property has been located and its possessor identified; he must also take affirmative steps to find and contact the possessor as soon as possible after discovering the loss.

The court of appeals found that DeWeerth, although she had initiated several inquiries about the lost Monet following the War, had not exercised sufficient diligence in her search. Reversing the district court's holding, the Second Circuit deemed the plaintiff's suit time-barred and thereby effectively granted quiet title to Baldinger, the good-faith purchaser. Hence, the actual operation of the new "due diligence" rule in DeWeerth proved as harsh to the theft victim as if the court had found her claim barred under a literal reading of the statute of limitations.

9. IMPACT OF DEWEERTH

9.1. Implications of DeWeerth for Art Market Transactions

The DeWeerth doctrine places too great a burden of investigation

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140 See DeWeerth, 836 F.2d at 108-09 ("obligation to attempt to locate stolen property is consistent with New York's treatment of the good-faith purchaser"). The court observed that the policies underlying the demand-refusal rule "would be frustrated if plaintiffs were free to delay actions for the return of stolen property until the property's location fortuitously came to their attention." Id. at 109.

141 The DeWeerth rule protects a sale of art where the purchase transaction itself was legitimate, whether or not the provenance of the work was untainted. See infra text accompanying notes 154-58. This approach views in isolation each transaction in the chain of possession of the work of art. Cf. supra text accompanying notes 34-35.

142 See supra note 135. The application of a "discovery rule" in actions for replevin of stolen art would achieve similar results, taking into account both parties' interests. See Comment, The Recovery of Stolen Art, supra note 4, at 1149-52. Proponents of the discovery rule have not gone as far as the court in DeWeerth in requiring that the victim must take expeditious action to locate the missing art. One observer has suggested that guidelines for applying the discovery rule (in which the statute of limitations would begin running only after the plaintiff has learned the relevant facts surrounding the fate of his property) should include, but not be limited to, the following: "(1) [T]he nature of the injury; (2) the availability and quality of witnesses and physical evidence; (3) the lapse of time since the initial wrongful act; (4) whether the circumstances permit the inference that the delay has been intentional or deliberate; and (5) whether the delay has unusually prejudiced the defendant." Id. at 1152.

143 See supra text accompanying notes 81-85.

144 At trial DeWeerth's counsel had argued that "no New York court has ever held that the unreasonable delay rule applies before the plaintiff has learned the identity of the person to whom demand must be made." DeWeerth, 836 F.2d at 107 (emphasis in original).
on the plaintiff, leaving the purchaser free to traffic in stolen art as long as she remains ignorant. The court's opinion may not encourage the private connoisseur to inquire deeply into the provenance of each piece she buys. However, in rendering its decision, the DeWeerth court stressed the particular facts of the case. The court felt that because DeWeerth was a sophisticated collector it was not unreasonable to expect her to have pursued a more rigorous investigation into the Monet's whereabouts. Presumably, future New York courts would

146 Regarding the varying obligations to investigate title which art sellers and purchasers may have under the U.C.C., depending on such factors as merchant status or mere familiarity with commerce in art, see Note, The Current Status, supra note 1, at 61 n.56; Note, Sales of Illegally Exported Art, supra note 49, at 307-09.

In Porter v. Wertz, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), aff'd, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (1981), a New York court did in fact hold that art merchants have some duty, implicit in their observance of "reasonable commercial standards," to investigate title in order to be considered good-faith purchasers under the U.C.C. and, therefore, to qualify for certain protections under the Code. See the discussion of this case in Note, Title Disputes in the Art Market, supra note 4, at 445-50. Compare the obligations on institutional purchasers imposed by the CPIA, summarized in Naftziger, supra note 23, at 256. Professor Naftziger's discussion of the policies and law of repose in the context of the international art trade is also illuminating. See generally id.; cf. also Note, Title Disputes in the Art Market, supra note 4, at 450 ("[T]he most effective incentive for investigating title before purchasing art from an unknown seller is the potential for losing an art work to the owner from whom it was stolen and being left with no way to recover the investment.").

146 See DeWeerth, 836 F.2d at 110 ("The question of what constitutes unreasonable delay in making a demand that starts the statute of limitations depends upon the circumstances of the case.").

147 Citing O'Keeffe v. Snyder, 170 N.J. Super. 75, 405 A.2d 840 (1979), the court stated that "when the property is valuable art, the search efforts that may reasonably be expected of an owner may be more exacting than where the property is of a different kind or of a lesser value." DeWeerth, 836 F.2d at 110. It then continued to rely on a diligence standard deduced from Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) to show that DeWeerth's search had been inadequate. DeWeerth, 836 F.2d at 111-12.

In particular, the court found "inexcusable" DeWeerth's failure to consult the Wildenstein Catalogue Raisonné of Monet's work, where her nephew quickly and easily found clues to the picture's current location. It may be said, however, in DeWeerth's favor, that although the painting was recorded and its provenance documented (though sketchily) in an easily accessible reference work, the Wildenstein Catalogue Raisonné was not published until 1974 — thirty years after DeWeerth's loss. Moreover, as the district court had recognized, earlier published references to Champs de Blé were not widely known to private individuals; an elderly woman might well not "be expected to mount the sort of investigation undertaken by the government-owned art museum in Elicofon." DeWeerth, 836 F.2d at 112 (citing DeWeerth, 658 F. Supp. at 694-95).

In any case, the difficulties involved in tracing the whereabouts of objets d'art should not be underestimated. Many an art historian has built her reputation by documenting "lost" artworks, after long and assiduous research. The considerable obstacles faced by those searching for "undiscovered masterpieces" (which are often simply housed in unpublicized private collections) are illustrated by the problems scholars have had in establishing and coordinating an international archive to help locate stolen art. What efforts have been successful have been quite useful, yet many more hurdles remain for those who would maintain a comprehensive record of the international move-
be more lenient in the case of a claimant unfamiliar with the art world and having little idea of what channels to pursue in searching for a missing painting.\textsuperscript{148}

The "due diligence" rule represents a judicial attempt to strike a just and realistic balance between the responsibilities of the claimant and the purchaser in the art market.\textsuperscript{149} As noted above, the new rule protects the bona fide purchaser from indefinite exposure to suit, yet affords the claimant a fair chance to bring her case into court.\textsuperscript{150} The \textit{DeWeerth} court recognized that the private nature of art ownership makes it impossible for the art theft victim to learn the whereabouts of property without some sleuthing effort.\textsuperscript{151} On the other hand, the court asserted, because works of art like DeWeerth's painting are nonfungible, readily recognizable objects, "the owner of stolen art has a better chance than most owners of stolen property in tracking down the

\textsuperscript{148} See \textit{supra} note 141. Interestingly, the \textit{DeWeerth} court says nothing of its expectations regarding Baldinger, the victorious defendant. Presumably the court considered Baldinger, as a private collector, justified in relying on what assurances Wildenstein had given her regarding good title to the Monet. \textit{See DeWeerth}, 836 F.2d at 105. The record does not disclose whether she was as "wealthy and sophisticated" as DeWeerth, and the opinion does not indicate what impact her level of familiarity with the art world had on her duty (if any) to investigate title to the painting she had purchased. \textit{Cf. Note}, \textit{The Current Status}, \textit{supra} note 1, at 61 n.56 (discussing bearing of purchaser's position on outcome of art market dispute under the U.C.C.).

\textsuperscript{149} See \textit{supra} note 141.

\textsuperscript{150} See generally Comment, \textit{The Recovery of Stolen Art}, \textit{supra} note 4 (statutes of limitations must balance defendant's interest in repose against ability of plaintiff to have meritorious claim heard in court).

\textsuperscript{151} \textit{DeWeerth}, 836 F.2d at 109; \textit{cf. Comment}, \textit{The Recovery of Stolen Art}, \textit{supra} note 4, at 1131 n.36, 1147 (indicating problems in establishing any "standard of openness" of possession of fine art).
item he has lost." The value of a stolen art object even on the illicit market lies not in the materials of which it is composed, but in its aesthetic merits or its historical or cultural significance. Because the object's value is thus related to its very uniqueness, it is in the seller's own interest to preserve the object in its original state. The object will indeed be easily identifiable once seen. The DeWeerth court is therefore correct in postulating the relative obviousness of an artwork's passage through the public market.

However, fair application of the DeWeerth standard will require that courts bear in mind that most art sales occur not on the auction floor but through private parties. As observed above, even legitimate artworld transactions are conducted in some secrecy. Once the art is sold, furthermore, it may seldom be seen by anyone except the ultimate purchaser. In addition to the private nature of ordinary use of a work of art, not all artworks offered for public display are accepted by institutions mounting exhibitions.

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152 DeWeerth, 836 F.2d at 109.
153 See supra notes 32-36 and accompanying text.
154 See Nafziger, International Penal Aspects, supra note 36, at 836 & n.7 (recognizability of a unique and valuable piece "seems to increase the vulnerability of art to future attack by thieves and vandals [but] also constitutes its strongest defense").
155 See, e.g., supra text accompanying notes 91-92; infra note 160.
156 See Comment, The Recovery of Stolen Art, supra note 4, at 1147 ("Even if suitable display space were available among the rather limited group of 'major metropolitan galleries and museums,' the standard of openness contemplated by [the court's opinion in O'Keeffe v. Snyder] glosses over the undeniable fact that not all works of all artists — even many works of considerable value — merit museum display."); cf. CPIA § 302(2)(C)(ii), 19 U.S.C. 2601 (embracing policy of avoiding export restrictions on archaeological or ethnological material that may be of cultural value but lacks "distinctive characteristics, comparative rarity" or significant contribution to knowledge about the people that produced it).

The defendant in O'Keeffe v. Snyder, 170 N.J. Super. 75, 405 A.2d 840 (1979), an action for replevin of a stolen painting, had claimed title to the picture by adverse possession and averred that the owner's claim was barred by the relevant statute of limitations. The appellate court held that the statute would be tolled only when a defendant had satisfied all of the elements of adverse possession, but that Snyder's possession had not been "open and notorious." Id. at 84, 405 A.2d at 846. His failure to meet this requirement was predicated on the fact that the disputed painting had been on public display only once during the time the defendant and the painting's previous owner — his father, who had given him the work — had possessed it. See id. at 80, 405 A.2d at 842; Comment, The Recovery of Stolen Art, supra note 4, at 1146 & nn.103-04.

The DeWeerth court declined to follow O'Keeffe's example by imposing a duty of "open and notorious possession" on good faith purchasers. But see DeWeerth, 836 F.2d at 112 (noting that the Monet had in fact been published and exhibited, although briefly, in New York since its disappearance from Germany; therefore, the court stated rather harshly that had DeWeerth "undertaken the most minimal investigation during this period, she would very likely have discovered the Monet"). The DeWeerth opinion did, however, cite O'Keeffe in support of its imposing a "duty of reasonable investiga-
The *DeWeerth* court implicitly recognized this problem as the due diligence standard by which it decided *DeWeerth*'s standing to sue included no requirement of significant public display whereby she might have been alerted to the location of *Champs de blé*. This lenient stance regarding openness of possession parallels the CPIA's approach to good faith purchasers of cultural property. For example, section 312(2) provides that cataloguing or publication, not necessarily display of the cultural object itself, can suffice to exempt objects acquired by a public institution from seizure or other remedies under the Act.

9.2. Possible Effect of *DeWeerth* on Art Market Regulation

The effect of *DeWeerth* will be to protect good faith purchasers in the vitally important New York art market and to diminish legal battles among its participants. Although the *DeWeerth* opinion does not suggest that professional art dealers have no obligation to maintain honest and fair dealings in their trade by investigating the provenance of artworks they buy and sell, the "due diligence" rule, as discussed

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157 See supra note 95.
158 CPIA § 312(2), 19 U.S.C. 2611. Only publicly owned museums are within the scope of the CPIA at all. See Note, The Illicit Movement of Art and Artifact, supra note 14, at 64-65 (noting that Convention governs only nationally controlled institutions and that Congress intends art dealers to be governed by state law rather than federal); cf. CPIA § 307, 19 U.S.C. 2606 (limiting scope of State Party's ability to invoke Customs restrictions on cultural property to documented objects).
159 See *DeWeerth* 836 F.2d at 109 (noting that the duty of reasonable diligence, among other benefits, serves the policy of protecting good-faith purchasers).
160 For an argument against the common art market practice of requiring documentation of provenance before concluding a sale, see Note, *Sales of Illegally Exported Art*, supra note 49, at 281-82:

The trade usage that reputable art dealers must document title and provenance in order to sell on the legitimate market is therefore legally superfluous — a self-imposed restriction that does not reflect legal necessity. It is not required to protect buyers or sellers from foreign governments which, barring treaty, are unable to force the return of works from beyond their borders and should be unable to confiscate them within.

Compare the discussion of *Jeanneret v. Vichey*, supra text accompanying notes 49-79.

In practice, the respected legitimate art dealer usually does offer a potential purchaser some documentation of the given work's provenance, or at least offers to produce documentation on request. The offer is made as a show of good faith, as much to assure the buyer of the quality of the pedigreed artwork as of the legality and finality of his purchase. However, unless the purchaser is especially savvy or insistent, he will receive only the dealer's representations and selected "proof" as to the artwork's history. Though often the provenance is thoroughly documented and virtually unimpeachable, it may also be sketchy or speculative as a result of the dealer's own lack of knowledge. For example, large and well-known commercial galleries, whom the lay consumer may be more likely to trust than a smaller concern or an individual, commonly buy or consign works of art via "runners," or private, free-lance dealers. Their dealings may in
above, places an onerous burden on the plaintiff seeking to challenge
the legitimacy of an art purchase, regardless of the legitimacy of
the work's provenance. Because this burden applies where a work of art
was believed to have been stolen (in the commonly accepted sense),\footnote{Compare discussion of United States v. McClain, 545 F.2d 988 (5th Cir. 1977), reh'g denied, 551 F.2d 52 (5th Cir. 1977), and United States v. McClain, 593 F.2d 658 (5th Cir. 1979), supra note 1 and accompanying text.} as in DeWeerth itself, one might comfortably speculate that New York
courts would be even less willing to penalize the good faith purchaser
— whether a private collector or a museum — in a case where a for-
eign sovereign bases a claim to title on self-declared ownership.\footnote{See discussion of McClain, supra note 1. But cf. Autocephalous Greek-Ortho-}

fact be perfectly legitimate, but the runners are frequently loath to divulge the sources
of their wares. See Grimes, supra note 19, at 24.

The secrecy associated with art market transactions results from tradition, from
privacy interests, and — probably most important — from the desire by all parties to
avoid taxation. In addition, provenance before very recent years is often difficult to
trace accurately, due to the notorious informality of many art transactions. See id.
Moreover, these transactions may be nonetheless complex and involve parties in several
countries. It seems realistic to assume that all these compelling factors will continue to
operate, making meaningful legal regulation of the art world difficult if not virtually
impossible. See Note, The Current Status, supra note 1, at 61 & n.55 (galleries and
auction houses “often unwittingly facilitate fraud because of the casual nature in which
they conduct business and the amorphous methods of authentication they utilize”).
The most effective guarantee of honesty and good faith in the art trade will remain the
danger of a dealer's losing her reputation — and her business — should legal wrangles
develop over good title to pieces she has sold. Cf. supra note 53 (inability of art
merchant to vend on the legitimate market a painting stigmatized by questionable title).

Nevertheless, numerous commentators, scholars, and legislators continue to advance a
variety of possible means to demystify and regulate the commercial art trade. See Glueck, New York Studies Regulating Art Sales Like Commodities, N.Y. Times, Jan. 16, 1991, at C9, col. 1; Mullarkey, Price Affixing, The Nation, Apr. 30, 1988, at
592 (advocating control of art galleries under New York consumer protection laws); Note, Sales of Illegally Exported Art, supra note 49, at 318-19 (suggesting amendments
to Uniform Commercial Code, Article 2, to clarify consequences of dealing in
illegally exported art); Note, Title Disputes in the Art Market, supra note 4, at 458-63
(advocating use of art-theft archives to aid in policing illicit art traffic and describing
measures currently underway); Id., at 444 n.8 (citing recent state-level legislation to
regulate art market); Id. at 449 n.45 (museum and commercial self-regulation and pro-
posals for external controls); Comment, Regulation of the New York Art Market: Has
the Legislature Painted Dealers into a Corner?, 46 FORDHAM L. REV. 939 (1978)
(attempts by New York legislature to regulate art trade); Feldman & Burnham, supra
note 147 (discussing efforts of International Foundation for Art Research to curb illegal
art trade and the general efficacy of art registries); Du Boff, Controlling the Artful
Con: Authentication and Regulation, 27 HASTINGS L.J. 973 (1976) (consumer protec-
tion mechanisms can be used in investigating art transactions; other measures such as
dealer certification would also be valuable). But see, e.g., Kramer, The Case Against
Price Tags on Art, N.Y. Times, Mar. 20, 1988, at H33, col. 1 (arguing against regulation
of art galleries as ordinary retailers). One London art dealer has acknowledged:
"[O]utside regulators could create as many problems as they solve - they may not know
the market well enough. Ideally, self-regulation is better. But if a dominant firm
stretches the unwritten norms of the past, [self-regulation] may not be enough.”
Hughes, supra note 4, at 63.

See discussion of McClain, supra note 1. But cf. Autocephalous Greek-Ortho-
less promising would be the case where a plaintiff based his claim to
title on a violation of a foreign export regulation intended to secure the
exporting country control of what it considers "national patrimony."163
Such enhanced protection of good-faith buyers will doubtless benefit the
United States economically by stabilizing art transactions and thereby
encouraging sales in New York, the national hub of the art trade.164

10. OVERVIEW OF THE CURRENT TREND IN UNITED STATES
POLICY

The policy underlying both DeWeerth and the CPIA encourages
the private resolution of title disputes over works of art.165 In addition
dox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir.
1990).

163 Cf. Note, The Current Status, supra note 1, at 76 ("International cooperation
in regulating the illicit movement of cultural property is more readily apparent with
regard to 'stolen' goods as opposed to 'illegally exported' goods.").

164 One possible problem with the more relaxed policy recently evinced by Con-
gress and the courts is the danger of the United States art market becoming a "laun-
dry" for artworks of unclean title. See id. at 75 n.131 ("[T]he United States has been
called a 'dumping ground' for stolen art."); cf. Nafziger, supra note 23, at 251 (noting
that opponents of federal legislation impeding foreign claims for the return of cultural
property "would convert the United States into a pirate's cove for contraband arti-
facts"); S. WILLIAMS, supra note 15, at 129 (stating that the United States pre-CPIA,
laissez-faire policy made "[t]he United States . . . the largest market for stolen or ille-
gal[ly] exported cultural property [in the world]"). Indeed, this type of concern led to
the harsh measures adopted during the 1970s in the United States' efforts to curb traf-
cic in looted art and antiquities. See supra notes 11, 35-36, 39 and accompanying text.

However, as many critics of overbroad restrictions on the international art trade
have noted, unilateral action by the United States will only drive the black market —
and the legitimate market — elsewhere, leaving the United States economically disad-
vantaged. See McAlee, The McClain Case, supra note 1, at 814. It is apparently this
realization that has caused the political pendulum to return from a position of great
difference to the claims of art-exporting countries to one of evincing more concern for
the rights and concerns of parties to United States art transactions. See supra text
accompanying notes 19-21.

165 Not only will the "due diligence" rule operate to curb extensive litigation by
barring many claims from going forward, but the decision seems calculated to promote
private dispute resolution. The "due diligence" rule represents a doctrinal extension of
the "demand and refusal" rule, which itself added to ordinary limitations law a re-
quirement that the parties deal with each other directly (the prospective plaintiff re-
questing her property and the potential defendant making a reply) before a cause of
action may be found. See supra notes 127-42 and accompanying text.

Indeed, since the initial submission of this Comment for publication, the "due
diligence" rule seems to have worked the predicted effect in at least one highly publi-
cized case. There, a German church filed, and later settled, a suit against the estate of
an American collector, for recovery of certain medieval art treasures and important
manuscripts believed to have been stolen by the collector from Germany during World
War II. See Honan, Those in Art Case May Settle It Themselves, N.Y. Times, July 9,
1990, at C13, col. 1 (discussing "due diligence" requirement); Honan, Looted
Treasures Returning to Germany, N.Y. Times, Jan. 8, 1991, at C11, col. 1 (reporting
settlement reached).
to the legal, political, and economic soundness of a retreat from overly zealous enforcement of foreign claims and import restrictions through legal and administrative means,\textsuperscript{166} this new "laissez-faire" policy coincides with the realities of the art trade.\textsuperscript{167} Using informal diplomatic or private means to deal with such international conflicts not only saves administrative expense and judicial resources\textsuperscript{168} and avoids political tension,\textsuperscript{169} but also is more congenial to those accustomed to the traditional informality of the art trade.\textsuperscript{170} Moreover, as one commentator has observed:

The efficacy of [the] comprehensive legal framework [for penalizing illegitimate international trade in cultural property] is debatable. Its primary effect thus far has not been so much to punish individuals, but rather to facilitate the restitution, return, or forfeiture of cultural property, and to raise public consciousness and respect for the integrity of cultural provenance and property ownership, whether public

\textsuperscript{166} See, e.g., P. Bator, supra note 1, 41-43, 77-78, 90-91 (negative consequences of enforcing broad export restrictions); S. Williams, supra note 15, at 170 (enforcement of overly restrictive export laws inhibits legitimate flow of cultural property and fosters black market); Nafziger, International Penal Aspects, supra note 36, at 846-52 (discussing problems in exercising legal control over illicit movement of cultural property); see also Note, Title Disputes in the Art Market, supra note 4, at 444-45 (indicating free trade policy underlying the U.C.C., adopted in most states). But see Note, Harmonious Meeting, supra note 1.

\textsuperscript{167} See, e.g., McAlee, From the Boston Raphael, supra note 1, at 604 (noting the practical need for reciprocity with United States enforcement of import restrictions on cultural property). As Congress considered proposed legislation to implement the UNESCO Convention, arguments before both the House and the Senate stressed that if the United States were to adopt its provisions while other art-importing nations refused to do so, the result would "not put an end to world trade in the art which it embargoes but [would] succeed only in rerouting the flow of such art from the United States to such countries as Switzerland, West Germany, England, France, and Japan." Id. (quoting Statement of the American Association of Art Dealers in Ancient, Oriental and Primitive Art at 20); see also id. at 604 n.177; Comment, The Evolution of American Attitudes, supra note 6, at 633-35 (market vulnerability of United States with respect to other major art importers).

\textsuperscript{169} Fitzpatrick, supra note 1, at 871-73 (citing reasons for critique of United States Customs Service's overenforcement of embargoes based on foreign export restrictions on cultural property); see also, e.g., Honan, Looted Treasures Returning to Germany, N.Y. Times, Jan. 8, 1991, at G11, col. 1 (chief lawyer for German plaintiffs in suit for recovery of medieval art in American hands expressed satisfaction with settlement because "the total expense for recovery of all the treasures is less than the sum originally allocated by the German Government last April for one manuscript from the hoard, the so-called Samuhel Gospels").

\textsuperscript{170} See, e.g., Nafziger, International Penal Aspects, supra note 36, at 845 ("[M]unicipal controls that bar all exports of objets d'art, such as the Mexican system, create a black market, encourage a cottage industry in forgeries, generate international tensions, and do little to prevent illegal trafficking in antiquities.") (emphasis added).

\textsuperscript{166} See supra note 160.
or private.171

The cooperation among nations and cultural institutions172 fostered by the approach recently adopted by the United States thus presents an attractive and feasible alternative to complex and problematic international litigation or administrative sanctions.173

11. FUTURE EVOLUTION OF CULTURAL PROPERTY LAW

11.1. Administrative Treatment of Art World Disputes

On the administrative or executive level, observers of cultural property law await the outcome of requests instituted under the provi-

172 See infra notes 188-93 and accompanying text. Self-regulation by museum professionals and scholarly institutions has also gained greater currency as a means to curtail illicit trading in cultural property. See P. BATOR, supra note 1, at 80-90 (discussing the responsibility of museums to regulate acquisitions with an eye to preventing illicit trade in cultural property); Note, The Current Status, supra note 1, at 63 n.60 (discussing standards governing art acquisitions, loans, etc., set by museum organizations and individual institutions); United States v. McClain, 545 F.2d 988, 996 n.14 (5th Cir. 1977) (noting numerous museums that have adopted voluntary policy of prohibiting acquisitions not "accompanyed by a pedigree"). The University of Pennsylvania Museum in 1970 was the first to adopt a voluntary policy of ascertaining clear provenance before acquiring an archaeological or ethnological object for the Museum's collection. See P. BATOR, supra note 1, at 81 n.144.
173 For a recent example of a compromise that avoided an international legal battle, see Walker, Warrant for Lee's Arrest Dropped, ART NEWS, Summer 1987, at 30. The government of France had issued an arrest warrant for Sherman Lee, director of the Cleveland Museum of Art, claiming that the museum's possession of a certain painting was unlawful. The work, by the celebrated seventeenth-century French painter Nicolas Poussin, had been removed from France without an export permit. Although the picture was legally imported into the United States, France claimed that it had the right to title. The museum, which had purchased the work in good faith from a French citizen, argued that a certain exception in French law made the export legal. France disagreed. At last the parties reached a compromise, whereby the museum retains title to the Poussin but will allow it to be displayed in France for part of each year. Compare Erlanger, Stolen Plaque Is Returned to a Bangkok Museum, N.Y. Times, Feb. 9, 1989, at C17, col. 1 (discussing return of stolen museum piece by gallery owner alerted to its illicit provenance by curator from the Metropolitan Museum of Art, New York) with Stille, supra note 38, at 33, col. 1 (discussing return, after acrimonious struggle, of legally acquired sculpture, considered a national treasure, to Thailand by Art Institute of Chicago, in return for comparable work of Thai art donated by a private foundation); see also P. BATOR, supra note 1, at 4 n.11 (discussing discreet return to Italy, by Boston Museum of Fine Arts, of smuggled Raphael).
Cf. Note, The Illicit Movement of Art and Artifact, supra note 14, at 65 (describing "broad policy statements encouraging international cooperation and assistance in preserving every nation's cultural heritage" which are included in the 1972 UNESCO Convention Concerning the Protection of World Cultural Property and Natural Heritage); McAlee, From the Boston Raphael, supra note 1, at 593 (noting initial requirement of 1970 Mexican-American treaty to request the return of stolen cultural property "through diplomatic offices," for "[i]f the nation receiving the request cannot return the stolen property, it is obliged to institute judicial proceedings for recovery").
sions of the CPIA by Bolivia and Canada. Until 1989, the first and only action completed by the United States government under the UNESCO Convention and its implementing legislation was the imposition of emergency import restrictions on certain pre-Hispanic artifacts from El Salvador, at that country’s request. Those restrictions were implemented according to the “emergency” provisions of section 304 of the CPIA, meaning that the class of objects covered is of high cultural value to the requesting country and in great jeopardy from “pillage, dismantling, dispersal, or fragmentation.”

An interesting question that will perhaps be determined by the resolution of the Canadian and Bolivian claims is whether use of these “crisis” provisions, whereby the Convention’s requirement of multilateral international action is waived, will overtake the ordinary embargo scheme the CPIA prescribes in section 307. If the Cultural Property Advisory Committee readily accepts an art-exporting nation’s own claims that its patrimony will remain in imminent peril unless the United States imposes a unilateral ban on imports of a certain class of cultural property, the regime of McClain will not have been effectively ended.

11.2. Judicial Treatment of Art World Disputes

The current viability of the McClain doctrine itself may be illuminated by the final disposition of a case pending at this writing in the United States District Court for the Central District of California. In that case, the United States Customs Service seized certain archaeological material from the Setnams, art dealers who had acquired the mate-

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174 At the writing of this Comment in 1989, the Cultural Property Advisory Committee, see CPIA § 306, 19 U.S.C. § 2605, was investigating the Canadian and Bolivian requests. United States Information Agency, Curbing Illicit Trade in Cultural Property: United States Assistance under the Convention on Cultural Property Implementation Act 10 (rev. ed. July 1988) [hereinafter USIA booklet] (available from Cultural Property Staff, U.S.I.A., Washington, D.C.). On Bolivia’s efforts to recover cultural property the Bolivian government alleged had been taken unlawfully from the country, see Stille, supra note 38, at 1, col. 1.


176 CPIA § 304(a), 19 U.S.C. § 2603.

177 Paul M. Bator, Lecture at Practising Law Institute Program on Art Law, New York City (July 15, 1988) [hereinafter P. Bator, PLI Lecture].

178 See supra note 1 (discussing McClain); text accompanying notes 36-45 (observing problems in defining “national patrimony”); cf. Fitzpatrick, supra note 1, at 871 (noting that current customs policy regarding pre-Columbian artifacts “reflects a policy that the United States will unilaterally respond to the ownership declarations of foreign countries” and in doing so “rejects one of the most important underpinnings of the Cultural Property Law [CPIA] — ‘the principle of participation in a concerted international effort’”).
The government's arguments in prosecuting the importers for illicit art trafficking rely on the McClain theory, equating with theft the unlawful exportation of artwork from a country with title-vesting or forfeiture legislation. Resolution of the Swetnam case could furnish a more current guidepost for Customs and for federal courts faced with claims alleging the illegal importation of stolen national treasures.

Further guidance may also lie in the resolution of a current conflict between the Republic of Turkey and New York's Metropolitan Museum of Art. Turkey sued the Museum seeking the recovery of ancient Lydian artifacts acquired by the museum "from two respectable

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179 In re Seizure of Pre-Columbian Objects and Business Records, No. 21491 (C.D. Cal. complaint filed in 1988), referenced in P. Bator, PLI Lecture, supra note 177. See generally Sward, U.S. Battle Over Peru's Art Treasures, San Francisco Chronicle, Apr. 24, 1989, at A1, col. 1 (giving a generally objective account of facts in the case, but reporting that the disputed works were taken from a single burial site in Peru).

Compare the description of a case in which criminal charges are being brought against a San Francisco art dealer on behalf of the Bolivian government, seeking return of garments alleged to be sacred vestments stolen from an Indian village in the Andes, in Stille, supra note 38, at 1, col. 1. The dealer in that case claimed that he purchased the textiles legitimately from local villagers. Id. at 1, col. 1.

P. Bator, PLI Lecture, supra note 177. According to Professor Bator, however, the government's arguments in the pending case are far more attenuated than in McClain. The prosecution alleges that the provenance of the disputed pre-Columbian objects is "mysterious," but that they must have been stolen from a number of countries that could have legal claim to title. Id. (Presumably this hypothesis is based on archaeological evidence regarding the origins of the objects.) The imported material would be deemed contraband — and the importer subject to conviction under the National Stolen Property Act — on the basis of the material having been taken from any one of those countries documented as having broad title-vesting or forfeiture statutes, which might cover the specific objects in question. See Sward, supra note 179, at A1, col. 3 (tracing a Peruvian provenance of objects and noting Peruvian government's contention that the objects cannot be held privately without permission of Peruvian government).

For a seminal account of the black market in such pre-Columbian objects, see Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 ART J. 94 (1969).

181 See Fitzpatrick, supra note 1, at 875; cf. McAlee, The McClain Case, supra note 1. Professor Merryman has recently observed: "Right now we have three levels of policy which are often inconsistent. ... We have the Cultural Property Act, we have the McClain decision, and we have the [Customs] Service policy which bootstraps McClain." Stille, supra note 38, at 32, col. 4. Professor Fitzpatrick, too, has commented in an interview: "The Cultural Property Act says specifically that the Customs Service is not supposed to enforce other countries' export laws, but that's what they're doing. Customs has. ... created a virtual embargo on all pre-Columbian goods." Id. But cf. Note, Harmonious Meeting, supra note 1.

dealers” during the 1960s. While the Turkish government claimed that it was unable to make demand previously because the Museum had concealed the works, the Museum, citing DeWeerth, asserted that Turkey’s claim was barred by the statute of limitations and moved for dismissal. The ultimate disposition of this case, well-known and closely watched by the art world, will test the viability of both DeWeerth and McClain.

11.3. Informal/Diplomatic Treatment of Art World Disputes

Finally, a current and highly publicized claim by the Italian government against the J. Paul Getty Museum in California will indicate the present ability of cultural institutions to settle such claims through informal channels. Italy complains that an enormous statue, which the Getty acquired in 1988, rightfully belongs to the Italian government as part of its national patrimony. The statue, dating to the 6th century B.C. may represent the Greek goddess Aphrodite. Italy insists that it was smuggled out of the country after having been excavated at an illicit dig in Sicily.

The Getty Museum had conducted a year-long investigation of the statue’s provenance and its lawyers had been informed of no claims to the statue by Italy’s Ministry of Cultural Affairs before completing purchase from a London dealer. However, critics assert that the Getty’s investigation of the statue’s “murky” provenance was insufficient. For its part, Italy will have to show proof that the statue was

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184 Stille, supra note 38, at 32, col. 4 (quoting statement by Ashton Hawkins, General Counsel of the Metropolitan Museum of Art).
185 Cf. supra notes 145-52 and accompanying text.
186 Republic of Turkey v. Metropolitan Museum of Art, 87 Civ. 3750 VLB (S.D.N.Y.); Brief for Petitioner, referenced in Doreen Small, Lecture at Practising Law Institute Program on Art Law, New York City (July 15, 1988).
187 Stille, supra note 38, at 32, col. 4. The museum also objected to Turkey’s “misguided” application of “today’s collecting standards to yesterday’s acquisitions.” Id. at 33, col. 1; cf. McAlee, From the Boston Raphael, supra note 1, at 589-90 (discussing the problem of after-acquired knowledge in the context of application of the McClain doctrine).

On July 16, 1990, during the pendency of this Comment’s publication, the United States District Court for the Southern District of New York denied the Museum’s motion for dismissal on the grounds that Turkey had unreasonably delayed its demand for return of the Lydian objects. Honan, Judge Clears Way for Trial Over Turkish Art at Met, N.Y. Times, July 20, 1990, at C25, col. 1. The court left for litigation the issues surrounding Turkey’s allegation that the objects were exported from Turkey in violation of Turkish law, which maintains that the Turkish government holds title to all artifacts found there. Id.
188 Stille, supra note 79, at 33, col. 3.
189 Id.
190 Id. (quoting statements made by Thomas Hoving, former director of the Met-
indeed removed from the illegal Sicilian dig before the government's legal claim to the Aphrodite can be considered valid.\textsuperscript{191} In any event, both the Getty and the Italian Ministry of Cultural Affairs\textsuperscript{192} have expressed the desire to resolve the controversy directly and peacefully. The Getty Museum asserts that if the Italian claim proves valid, it is prepared to return the statue, in keeping with the spirit of the UNESCO Convention.\textsuperscript{193}

\section*{12. Conclusion}

This Comment has attempted to demonstrate that a coherent resolve has emerged in the past decade among United States executive powers, legislators, and courts. This resolve, to avoid protecting the self-described national patrimony of art-exporting nations at the expense of domestic commercial interests, is embodied in the terms of the newly ratified Cultural Property Implementation Act and in the reasoning behind the \textit{DeWeerth} decision. Whether the United States will carry through the policy these recent examples seem to announce should become clear within the next few years, as foreign claimants continue to assert challenges to the good title of cultural property in American collections.

\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.} at 33, col. 4.