The Recovery of Stolen Cultural Property: A Practitioner's View - War Stories and Morality Tales

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I am privileged to have litigated some of the earliest and most noteworthy cases involving the repatriation of cultural property. In this age of changing international boundaries, cases that address the recovery of art, artifacts and cultural property often implicate a variety of fascinating yet complex non-art related issues. Practitioners must be prepared to recognize and address these issues. Since questions of recovery and repatriation necessarily have international implications, prudent counsel must not only examine the evolving case law in the United States, but also consider relevant international developments like the UNIDROIT Convention.¹

Notwithstanding these complexities, the fundamental rule that underlies all stolen art cases in the United States is simple: no one, not even a good faith purchaser, can obtain good title to stolen property.² All fifty states accept and apply this simple rule as a fundamental tenet of property law. Thus, cases involving the recovery of stolen art are, in essence, simple replevin actions.

Despite the conceptual simplicity of the cause of action, the cases that arise are a practitioner’s dream. My own career in this fascinating field began in the late 1960s. At that time, I participated as a summer associate in a case in which the Weimar Museum, located in the former East Germany, sought to recover two portraits by Albrecht Dürer stolen at the end of World War II. My initial assignment was to assess the impact of a possible suggestion of interest by the U.S. Government on the issue of whether the Federal

Republic of Germany, the named plaintiff, could represent the interests of all the German people pending the unification of the two Germanys. Little did I know at the time that the case would take some fifteen years to wind its way through the courts and that I would continue to work on the matter as a partner in the firm.

We won the case and the paintings are now hanging on the walls of the Weimar Museum. The process, however, required us to confront issues such as the non-recognition doctrine, choice of law, "renvoi," state succession, the German doctrine of prescription (known as "Ersitzung"), military law, sovereign immunity, the act of state doctrine and the like. Although these issues were all pertinent to the case, the decision was ultimately based on a more mundane issue, the New York statute of limitations.4

The Dürer case underscores the importance of the statute of limitations in the current framework of art recovery law. The issue is rendered more complex by the fact that cultural objects are often discovered abroad long after the thefts occurred at home. By that time, the cultural objects are usually in the hands of a good faith purchaser who has no privity to the thieves. The variety of statute of limitations rules that different states apply heightens the potential for uncertainty. These state statutes of limitations range from the "demand and refusal" rule,5 to discovery rules,6 to specific legislation that sets forth limitation periods for a stolen artifact or art-

3. See Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 845 (E.D.N.Y. 1981), aff'd, 678 F.2d 1150 (2d Cir. 1982). Under the German law doctrine of "Ersitzung," "title to moveable property may be obtained by a good faith acquisition of the property plus possession of it in good faith, and without notice of a defect in title, for the statutory period of ten years from the time the rightful owner loses possession." Id. at 845.

4. See id. at 830-33. Other issues relevant to art recovery claims include questions relating to the identity of the object sought to be recovered, the find site of the object and the legal basis for the plaintiff's claim for return. See generally Lawrence M. Kaye, The Future of the Past: Recovering Cultural Property, 4 CARDozo J. Int'l & Comp. L. 23 (1996). In replevin cases plaintiffs have also asserted RICO claims and state consumer protection law claims. See Republic of Turkey v. OKS Partners, 797 F. Supp. 64, 66-68 (D. Mass. 1992).

5. See Elicofon, 536 F. Supp. at 848. "The legal principle underlying the ['demand and refusal' rule] ... is that the bona fide purchaser's possession is initially lawful, and only becomes unlawful once he has refused, upon demand, to return the property to the true owner." Id. The statute of limitations does not start to run until there has been a demand and a refusal. See id. This ensures that "an innocent purchaser of personal property from a wrongdoer 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 tortfeasor for wrongful conversion." Id.

6. See, e.g., O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980). The discovery rule is applicable in the majority of states and holds that the statute of limitations begins to run when the claimant knew or with reasonable diligence should have known the whereabouts of his property.
work. In spite of this variety, the result will often be the same because the courts will often balance the equities under these different rules in similar ways.

In Kunstsammlungen zu Weimar v. Elicofon, the court applied the "demand and refusal" rule. There, two fifteenth century Dürer portraits were moved from the Weimar Museum to Schwarzburg Castle for safekeeping during World War II. The paintings disappeared during the occupation of the castle by American troops. They were discovered some twenty years later in the possession of a Brooklyn attorney, Edward I. Elicofon. He purchased them in 1946 for $450 from an American serviceman who appeared at Elicofon's home and claimed that he had bought the paintings in Germany. The identity of the portraits was fortuitously revealed when a friend of Elicofon's, who had seen the paintings in his house, happened to recognize them in a newly published book on stolen German art works.

Under the New York "demand and refusal" rule, a plaintiff has three years to commence a lawsuit to recover stolen property in the possession of a bona fide purchaser. The period begins to run from demand and refusal. The demand and refusal occurs when the true owner demands return of the property from the possessor and the possessor refuses that demand. In Elicofon, the limitations period began to run in 1966 when Elicofon held a press conference to announce his discovery of the stolen works and was immediately confronted with demands for their return. Three parties made requests for their return: the Weimar Museum, which was later found by the court to be an instrumentality of the Government of East Germany; the Hereditary Grand Duchess of Saxony-Weimar-

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7. CAL. CIV. PROC. CODE § 338(c) (West Supp. 1996). Section 338(c) provides that an action must be commenced within three years:

[F]or taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft.

Id.

8. See Elicofon, 678 F.2d at 1150.
9. See id.
10. See id.
12. See id.
Eisenach, who claimed that her husband, the Grand Duke, owned the paintings; and the Government of West Germany, which claimed to represent all the German people pending reunification of Germany. Each of these demands were rejected. Elicofon attempted to discredit New York's demand and refusal rule and argued against its applicability to the case. After four years of hard fought litigation, the court soundly rejected his position.

In a more recent New York case, DeWeerth v. Baldinger, the plaintiff was not as fortunate. DeWeerth best illustrates how the complexities of the statute of limitations can impede the return of cultural property. There, Mrs. DeWeerth's father purchased a painting by Claude Monet in 1908. In 1945, following the departure of American soldiers who had been quartered in the family's German estate, the DeWeerth family reported the painting as missing. In 1981, Mrs. DeWeerth's nephew informed her that the painting was listed in a catalogue published by the Wildenstein Gallery in New York and had been publicly exhibited there. The gallery acquired the painting from a Swiss dealer who subsequently sold it to Mrs. Baldinger, a bona fide purchaser, in 1957.

Immediately after Mrs. DeWeerth learned the identity of the possessor, she demanded return of the painting. When Mrs. Baldinger refused her demand, Mrs. DeWeerth brought suit in federal

15. See Elicofon, 536 F. Supp. at 833. The initial claim was brought in 1969 by the Federal Republic of Germany. See id. at 830. In March of 1969, the Grand Duchess of Saxony-Weimar was granted leave to intervene as plaintiff. See id. In February of 1975, the Kunstsammlungen zu Weimar, a museum, intervened as plaintiff. See id. The Federal Republic of Germany discontinued its claim with prejudice. See id. The court dismissed the Grand Duchess' claim; therefore, the only remaining claim was that of the Kunstsammlungen. See id. at 831.

16. See id.

17. See id. at 847.

18. See id. at 846-47. See also Elicofon, 678 F.2d at 1161-64. The issue of the statute of limitations had already been decided in favor of the Kunstsammlungen. See Elicofon, 536 F. Supp. at 847. The statute does not begin to run until "a forum [is] available in which a party may enforce its cause of action," and this was not until September 1974, when the United States recognized the German Democratic Republic. See id.


20. See id. at 690.

21. See id. at 691.

court in New York.23 The trial court, applying the demand and refusal rule, rejected Mrs. Baldinger’s statute of limitations defense.24

Mrs. Baldinger appealed to the United States Court of Appeals for the Second Circuit.25 The Second Circuit reversed, reasoning that merely bringing suit within three years of demand and refusal was not enough; New York law required, in addition, that the plaintiff show that she had been reasonably diligent in searching for her stolen property. This, the court ruled, was what Mrs. DeWeerth had failed to do.26

Following the Second Circuit’s decision, the New York Court of Appeals revisited the New York statute of limitations issue in Solomon R. Guggenheim Found. v. Lubel.27 There, the court held that the DeWeerth court had incorrectly applied the demand and refusal rule and reaffirmed the traditional construction.28 The New York Court of Appeals held that New York law did not require any showing of reasonable diligence to overcome the statute of limitations.29 The court explained that any alleged delay in conducting a search constitutes a question of fact properly decided at trial, under the equitable doctrine of laches. Under this doctrine, the defendant would have to prove inter alia that prejudice was suffered as a result of the delay.30

Mrs. DeWeerth returned to the federal trial court and obtained a judgment, based on Guggenheim, ordering Mrs. Baldinger to surrender the Monet to Mrs. DeWeerth.31 Mrs. Baldinger, however, appealed the decision. In an “extraordinary” decision,32 an appellate panel reversed the lower court’s decision and held that even though the court had previously erred in applying the New York statute of limitations, principles of “finality” must prevail.33

24. See id. at 694-95.
25. See id.
28. See id. at 429-30.
29. See id. at 430.
30. See id. at 429. Laches is defined as the neglect to assert a claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. See Black’s Law Dictionary 875 (6th ed. 1990).
33. See DeWeerth v. Baldinger, 38 F.3d 1266, 1272 (2d Cir. 1994). The court said that Mrs. DeWeerth must suffer the consequences of having chosen to commence her suit in federal, rather than state court. See id.
The court again reversed the lower court's decision.\textsuperscript{34} The final result was that Mrs. DeWeerth was unable to recover her property that had been plundered during World War II simply because of the difficulties that arose from the application of the statute of limitations.\textsuperscript{35}

Some commentators criticize New York's demand and refusal rule as not being a statute of limitations at all because it permits a long passage of time between the theft and the suit, thereby minimizing the effect of the defense.\textsuperscript{36} As the Court of Appeals stated in \textit{Guggenheim}, however, New York law establishes a presumption in favor of the interests of the true owner, the victim of the theft, over those of the bona fide purchaser.\textsuperscript{37} The \textit{Guggenheim} decision presents a workable rule for two principal reasons. First, the bona fide purchaser is in a position to avoid the sale from a possibly questionable source. Before consummating the purchase, he or she can make due inquiry into such matters as the seller's reputation, the validity or existence of provenance documents and the availability of indemnification from the seller. Second, the rule does not, as some also argue, favor the thief over the bona fide purchaser.\textsuperscript{38} As the \textit{Elicofon} court noted, even if Elicofon had not been a bona fide purchaser (in other words, if he had known about the theft), he would have been estopped from asserting the statute of limitations defense because of his wrongful conduct.\textsuperscript{39} A thief would be treated likewise under this rule.

The Republic of Turkey (Republic), a nation rich in cultural treasures, has recently been involved in a number of repatriation actions. One highly publicized case involved the fabled Lydian Hoard antiquities, which were recovered in 1993 by the Republic of Turkey from the Metropolitan Museum of Art in New York. In the late 1960s, tumuli (ancient tombs) in Turkey's Usak region that allegedly contained treasures of the legendary King Croesus of Lydia, 

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\item \textsuperscript{34} See id.
\item \textsuperscript{35} See id. at 1272-75.
\item \textsuperscript{38} See id. The court indicated that there was a lack of consensus as to the proper procedure for retrieving stolen art. See id. "Some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the [Guggenheim] museum also argues that publicity often pushes a missing painting further underground." \textit{Id.}
\item \textsuperscript{39} See \textit{Elicofon}, 536 F. Supp. at 849.
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were plundered by local villagers. Lydian noblemen and members of the royal class were buried in the tombs with gold and silver pitchers, bowls, incense burners and other precious artifacts, carved marble sphinxes and wall paintings.

The Republic of Turkey's twenty-five year effort to reclaim the treasure began shortly after the thefts. When disputes arose amongst the thieves as to how to divide the spoils, betrayals began and the police closed in on the homes of the key people involved. Officials recovered some objects, but most quickly found their way out of Turkey to foreign dealers, and finally, to the Metropolitan Museum of Art.40

The Metropolitan Museum of Art neither announced nor displayed the acquisition.41 Rather, the objects were relegated to storerooms in the museum's basement. Rumors that the treasure was in the museum began to circulate in the early 1970s, but inquiries by Turkish officials were essentially ignored. Then, in 1984, a large number of the pieces were put on permanent exhibition by the museum as part of its so-called East Greek Treasure.42 As a result, the Republic was finally able to assert a claim.

In response to the Republic of Turkey's suit to recover the artifacts possessed by the Metropolitan Museum of Art, the museum filed a motion to dismiss based on a technicality, the statute of limitations.43 After three years of litigation on this issue alone, the court, following the ruling in the Guggenheim case, denied the motion.44


41. One of the museum's curators, however, later recalled his excitement at seeing twenty-three of the objects in 1966, noting that they were the most extraordinary silver objects he had ever seen.

42. See KAYE & MAIN, supra note 41, at 151; see also Constance Lowenthal, Met Returns Silver to Turkey, IFAR REPORTS, Oct. 1993, at 3.


44. See id. This case presented significant obstacles. The hundreds of objects at the center of the controversy had never been documented. A team of distinguished archaeologists from Turkey and the United States were able to examine the objects in the museum storeroom and make key stylistic comparisons with the objects that had been recovered in Turkey. The team also took meticulous measurements which proved that the wall painting fragments were identical in size and shape to the missing portions on the walls of the tombs from which they came. See id. In addition, statements from the thieves themselves helped to identify some of the more memorable objects.
In 1993 the case was resolved short of trial and the Lydian Hoard objects were returned to Turkey. Museum officials still maintained that the origin of the objects was a shocking revelation, despite admissions in the museum’s own documents that the true provenance was known at the time of the acquisition. Among the most telling of these documents was the acquisition committee’s minutes approving the second of the museum’s three principal purchases, which noted that the objects being acquired were said to have come from the same part of Central Anatolia as those acquired earlier.

The return of the Lydian Hoard by the Metropolitan Museum of Art has already had a salutary effect, at least in the United States, in emphasizing the need for other cultural institutions to vigorously enforce measures to ensure that treasures will not be acquired without a credible, documented provenance, and to give more credence to claims by foreign sovereigns than was given in the past. The recent changes in the acquisition policies of the Getty Museum aptly illustrate the point. The question, however, remains: will these rules be honored in the breach, as has so often occurred in the past?

The Republic of Turkey is involved in another case pending in the Federal District Court for the District of Massachusetts. The Republic is seeking to recover a hoard of ancient Greek and Lycian silver coins, dating from the 5th century B.C., which it claims were illegally excavated from a site in Southern Anatolia in 1984. Although the case has not yet reached trial, the Republic has won a number of important legal victories, including a decision by the court that confirmed the Republic’s right to recover the coins

45. Many factors influenced the museum’s decision to return the Lydian Hoard. It is unlikely that the museum finally saw the light and did the right thing, and more probable that it did not want to hear the upcoming testimony of present and former museum officials as to what the museum officials knew and when they knew it. See Kaye & Main, supra note 41, at 151.

46. See Carol Vogel, Metropolitan Museum to Return Turkish Art, N.Y. TIMES, Sept. 23, 1993, at C13. Phillipe de Montebello, the director of the Metropolitan Museum of Art, stated that the museum learned through the discovery process “that the museum’s records suggested some on the museum staff in the 1960’s were probably aware that their provenance was questionable.” Id.


under its antiquities laws, provided Turkey proves that the coins in the defendants' possession came from the hoard. 51

An analysis of the most recent cases concerning the recovery of art, antiquities and cultural property reveals some basic truths about current trends in the law. First, preparation and a good understanding of the potential issues are essential to deciding whether to pursue litigation. In Government of Peru v. Johnson, 52 the Government of Peru brought an action against an art dealer/collector to recover eighty-nine pre-Columbian artifacts seized by the United States Customs Service. 53 Although Peru contended that the objects were among several hundred gold artifacts pillaged from a particular archaeological site in Peru, it could not offer evidence of identity because the objects had not been inventoried prior to their removal. 54 Apparently, there were no witnesses and no evidence available to identify the objects, leaving Peru to rely solely on expert testimony that the objects were "of Peruvian style and culture." 55 The court found this testimony insufficient and this was the principal reason that Peru failed to recover the objects. 56

A similar problem arose in Republic of Lebanon v. Sotheby's, 57 commonly known as the Sevso Treasure case. At stake was a collection of Roman silver that once belonged to a Roman general named Sevso. 58 Three separate nations laid claim to the treasure, valued at more than $80 million. 59 Lebanon instituted suit after Lord Northampton of Great Britain, who held the treasure, consigned it for sale at an auction in Zurich and arranged to have it exhibited in New York prior to the auction. 60 Since the pre-auction materials that were being circulated suggested that the treasure originated in Lebanon, the Lebanese government filed a claim in

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51. See id. at *8.
54. See id. at 812.
55. Id.
56. See id.
60. See Sotheby's, 561 N.Y.S.2d at 567; see also Montagu, supra note 37, at 97-98.
New York to recover the treasure pursuant to Lebanon's law vesting ownership of all previously undiscovered antiquities in the state.\textsuperscript{61}

Subsequently, Croatia and the Republic of Hungary intervened, also asserting claims to the treasure.\textsuperscript{62} But Lebanon withdrew its claim prior to trial, apparently because the documents that suggested that the treasure had been exported from Lebanon were discredited in the press.\textsuperscript{63} The introduction of expert and factual testimony by Croatia and Hungary failed to convince the jury that the treasure had been discovered in and removed from either country's territory. As a result, neither country could invoke its national ownership law as a predicate to establishing a property right to the treasure.

The arguments from the three competing claimants served only to remove all of them from contention. Each asserted that the treasure originated in and was unlawfully removed from its territory in violation of its ownership laws, based on a vast array of direct and indirect evidence that was essentially inconsistent. The jury verdict in favor of Northampton was sustained on appeals by Croatia and Hungary.\textsuperscript{64}

These decisions underscore the fundamental reality that where so many of the objects that eventually become the subject of repatriation and recovery cases are looted in the dead of night, from unknown sites or unexcavated tombs, the questions of geographic origin and identity become paramount issues. However, in cases such as these, there are methods to establish identity and findsite; including the testimony of experts, admissions from the defendants and other similar evidence. For example, in \textit{Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.},\textsuperscript{65} the federal

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\item \textsuperscript{61} See Sotheby's, 561 N.Y.S.2d at 568.
\item \textsuperscript{62} See Montagu, supra note 37, at 98.
\item \textsuperscript{63} See Lenzner, supra note 59, at 469, n.1; See Jury Decides Briton Entitled to Treasure, 57 N.Y. L.J. 2 (1993).
\item \textsuperscript{65} 717 F. Supp. 1374, 1375 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990). Four early sixth century Byzantine mosaics were stolen from the Kanakaria church. \textit{See id.} at 1375. These mosaics were sold to Goldberg, who claimed to have purchased them in good faith and without knowledge that they were stolen. \textit{See id.} at 1376. The uncontradicted evidence that the church owned the mosaics and the sufficient evidence showing that they were unlawfully removed resulted in a judgment awarding ownership of the mosaics to the Autocephalous Greek-Orthodox Church. \textit{See id.} at 1397, 1404-05.
\end{itemize}
court in Indiana relied on the testimony of eyewitnesses, who had seen the four sixth century mosaics in the Kanakaria church in Cyprus, in coming to the determination that the mosaics had been stolen from the church.66

Another issue that must be confronted is ownership and right to possession. This issue arises most often where the plaintiff is a sovereign claiming rights in previously undiscovered antiquities stolen from under the ground. The foreign sovereign claimant must establish that a national law gives the state rights in the property at issue. Although this may appear to be a simple task, it poses a difficult obstacle because resolution of this issue often involves taking the depositions of legal experts on both sides and holding hearings on the meaning of the language of the foreign law.67 In Peru v. Johnson,68 the lower court had a great deal of trouble interpreting Peru’s antiquities laws, which it determined were inadequate and incomprehensible.69

The procedure for making requests for the return of stolen cultural property is a function of legal rules that are being developed and refined as the number of reported cases increases. Courts have also recognized the need to take policy considerations into account. In the Guggenheim case, for example, the policy of protecting the interests of the true owner was an underpinning of the decision.70

The thriving illicit market in antiquities directly contributes to the systematic looting of archaeological sites. There are tales of smugglers dynamiting entire ancient cities to reach the specific items they want to market, and stories of the wanton mutilation of movable antiquities to make them more salable.71 The potential

66. See id. at 1390. In the Lydian Hoard case, although that matter did not go to trial, experts were able to match the wall painting fragments in the basement of the Metropolitan with the portions missing in the tombs from which they were removed. See Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).
69. See id. at 813.
70. See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991). "To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden were not met would... encourage illicit trafficking in stolen art." Id.
for destruction and loss, not only of the objects themselves, but of essential archaeological and historical data, is unfathomable. Despite the efforts of art-rich nations, as long as the illicit market thrives the looting will persist, as many of the art-rich nations have limited budgets to protect the thousands of tombs and sites not yet excavated. Strict adherence by our courts to the legal principles discussed here, coupled with principled action on the part of museums, dealers and collectors, will help decrease the flow of looted artifacts.

The success achieved by foreign claimants in cultural property cases in the United States has already had a deterrent effect on the illicit trade in cultural property. Many dealers and museums are exercising more care and more cooperation. In March 1997, a seventh century B.C. Etruscan ceremonial vase and a set of rare Villanovan and archaic ceramic wares were returned to Italy by a New York dealer.\footnote{72} In July 1996, a first century A.D. torso of the goddess Artemis was ordered returned to Italy by a New York gallery. The order of forfeiture, issued by United States District Judge Shira Scheindlin, was the first such order issued under the Convention on Cultural Property Implementation Act (Convention) in the Southern District of New York.\footnote{73}

This favorable state of legal affairs in the United States, however, is by no means sufficient in itself to diminish the flow of illicit trade in stolen art which gives rise to these cases. Litigation can be time-consuming and expensive. Many victimized source nations simply cannot afford to take advantage of the favorable legal framework available in the United States. There will always be profiteers willing to turn a blind eye to questionable provenance, as well as collectors who cannot resist the temptation to acquire unique and valuable stolen works of art.

Moreover, the legal remedies available in other countries, especially those art-importing members of the European community, are far less favorable to sovereign claimants and other victims of
cultural property theft. Many of these jurisdictions go out of their way to protect the bona fide purchaser rather than the victim of the theft. Often, these jurisdictions fail to encourage due inquiry and permit bona fide purchasers to obtain good title to stolen cultural property under a variety of circumstances.\textsuperscript{74} Also, the statutes of limitation in these countries are often short and strictly applied.\textsuperscript{75} These rules impede the ability to substantially reduce the trafficking in illicit artifacts.

For these reasons, the Republic of Turkey and other victimized source nations have been active participants in the world community's efforts over the last several years to draft a convention under the auspices of UNIDROIT Convention.\textsuperscript{76} The document that emerged from the diplomatic conference held in June 1995 is a "conciliatory draft," hammered-out in a last minute effort to save the otherwise doomed convention by attempting to reconcile the varied interests of the market and the source nations. Regardless of its faults, the Convention may yet provide the best opportunity for improved international cooperation in an effort to reduce the trade in stolen cultural property.

\textsuperscript{75} See id. at 416-20.
\textsuperscript{76} See generally UNIDROIT Convention, \textit{supra} note 2.