

Art & Cultural Heritage Law Newsletter

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Caveat Venditor: Exporting Cultural Property from Canada Is Not as Simple as It Seems

By: Martin Aquilina¹

The recent and unprecedented decision in *Canada (Attorney General) v. Heffel Gallery Limited*² brings clarity to the interpretation of the *Cultural Property Export and Import Act*³ (the “CPEIA”) and the concepts of “outstanding significance” and “national importance” that are at the core of this legislation⁴. In *Heffel*, the Federal Court of Appeal⁵ ruled that a cultural object created in a foreign country may nonetheless be of “national importance” to Canada, allowing it to receive special tax treatment under the Canadian *Income Tax Act* as well as protection in export and import transactions under the CPEIA.

Heffel resulted from a legal dispute involving French artist Gustave Caillebotte’s impressionist painting *Iris bleus, Jardin du Petit Gennevilliers* (1892) (the “painting” or “*Iris bleus*”) and a Toronto auction house. The dispute originated in 2016 following the auction of the painting by a Toronto-based owner, Heffel Fine Art Auction House, to a commercial gallery in London, UK. The day after the auction sale, Heffel applied to the Department of Canadian Heritage for a cultural property export permit to send the painting abroad, which permit was refused.

In Canada, cultural properties that are more than 50 years old and whose creator is no longer living are subject to inclusion in the Canadian Cultural Property Export Control List established under the authority of the CPEIA (the “Control List”). The Control List divides cultural properties into eight groups, each setting out its own distinct criteria for inclusion:



Group I: Objects recovered from the Soil or Waters of Canada (archaeological objects, and fossils and minerals);

Group II: Objects of Material Ethnographic Culture (ethnographic objects including Aboriginal, Métis and Inuit objects);

Group III: Military Objects;

Group IV: Objects of Applied and Decorative Arts;

Group V: Objects of Fine Arts;

Group VI: Scientific and Technological Objects;

Group VII: Textual Records, Graphic Records and Sound Recordings (archival

material including documents, photographs, maps, sound recordings and films); and

Group VIII: Musical Instruments.

The fact that an object is included in the Control List does not mean that its exportation is automatically restricted. The Control List merely serves to indicate which cultural properties must be submitted to the federal Department of Canadian Heritage ("Canadian Heritage") for an assessment of whether the object is of "outstanding significance" and "national importance". Should both of these criteria be met, an export permit will not be issued, irrespective of the reason(s) for exporting the cultural property, whether the property will be sent away permanently or temporarily, or the length of time during which the property has been in Canada.⁶ It is a criminal offence to export or attempt to export objects that are in the Control List without an export permit. Penalties include fines, imprisonment or both.⁷

In *Heffel*, Canadian Heritage refused to issue such a permit, a decision that Heffel sought to have reviewed by the Canadian Cultural Property Export Review Board (the "Review Board"). In rejecting Heffel's application, the Review Board concluded that *Iris bleus* met the CPEIA's requirements of "outstanding significance" and "national importance". Cultural objects are of "outstanding significance" when they are "closely associated with Canadian history or national life" or have "singular and striking aesthetic qualities" or where the nature of the property is of "great value in the study of the arts or sciences". "National importance" is different from "outstanding significance" insofar as the former applies to objects that have "such a degree of national importance that their loss to Canada would significantly diminish the national heritage".⁸

After confirming that the painting met the criteria subjecting it to the Control List under Group V, the Review Board determined that the work was both of "outstanding significance" and "national importance", highlighting that apart from *Iris bleus*, there is only one other work by Caillebotte in Canada. The Metropolitan Museum of Art in New York, notwithstanding its prominence, also only has one painting from the artist, which seriously limits opportunities for Canadians to study Caillebotte's art.⁹ The Review Board considered *Iris bleus* to be of "outstanding significance" for its value in the study of arts since the artist was one of the leading exponents of French Impressionism.

The Review Board also opined that cultural objects originating from outside Canada can meet the required degree of national importance even if they do not have any other connection with Canada. Further basis for the Review Board's decision included the scarcity of works by Caillebotte in Canadian collections, and the fact that *Iris bleus* is a "highly desirable example of Impressionist landscape painting". The provenance - *Iris bleus* came

from the inventory of Ambroise Vollard, one of the most important dealers of French contemporary art in the 20th century - authenticity and condition of the painting were also relevant in the Review Board's decision to keep it in within Canadian borders. Following the Review Board's decision, Heffel sought judicial review before the Federal Court. This was the first time an application for judicial review of cultural property export was brought since the CPEIA's coming into force.¹⁰

The Federal Court quashed the Review Board's decision and ruled that its interpretation of "national importance" was unreasonable for being overly broad; it also considered that the Review Board's determination that the painting was of "national importance" was also unreasonable. In reaching such conclusions, the court relied heavily on the fact that the author of the painting was a French artist and that his work was not in any way directly connected to Canada's cultural heritage. The judge pointed out that the painting had never been in display in Canada since its arrival in the country and was not connected to any Canadian artistic movement or style. In sum, *Iris bleus* was an international work from an international artist and therefore was not one of "national interest". The Federal Court then sent the decision back to the Review Board for reconsideration, this time under a different panel of decision-makers.

Aiming to defend Canada's interests, the Attorney General of Canada appealed the Federal Court's decision before the Federal Court of Appeal (the "FCA"). The FCA ruled that the lower court applied the wrong standard of review and erred in not deferring to the decision of the Review Board, which had taken a broader approach as to what can be considered Canadian cultural heritage. In Canadian administrative law, there are only two standards of review on judicial reviews: reasonableness and correctness. The standard of review dictates the level of deference the courts will apply to administrative decisions. Questions of law involving a decision maker's own statute, or statutes connected to the decision maker's function, as was the case in *Heffel*, should be reviewed on reasonableness.¹¹ Thus, if the original decision falls within a range of defensible solutions, the reviewing court must show a high level of deference for the decision reached by the appointed decision maker.

In the case at bar, the FCA concluded that the Federal Court did not apply a standard of reasonableness and failed to show deference to the Review Board's decision, proceeding instead with what the FCA called a "disguised correctness review". In coming to such a conclusion, the FCA took stock of the fact that expressions such as "national importance" and "national heritage" are not defined in the statute. Also, along the same line of thought, the words "significantly" and "of such a degree", which are part of the "national importance" test, are broad qualifiers calling upon the Review Board's subjective consideration. It therefore follows that it was Parliament's intention to confer upon the Review Board a wide discretion to assess and determine whether an object is of "outstanding

significance" and "national importance", and to determine on a case-by-case basis the impact of letting an object included in the Control List leave the country. Thus, the FCA ruled that the Review Board's decision not to issue an export permit could not be overturned on subjective grounds.

The Chagall Imbrolio

In 2018, another polemic situation involving a cultural object occurred although the matter was never brought to the courts. The National Gallery of Canada manifested the intention to auction the painting *La Tour Eiffel (1929)* by the French artist Marc Chagall, at Christies in New York. The National Gallery intended to use the proceeds of the sale to acquire the painting *Saint Jerome hears the trumpet of the last judgment (1779)* by Jacques-Louis David from a church in the province of Quebec. However, two other museums in Quebec also claimed to have an interest in buying this work, which led the Quebec Minister of Culture to intervene and declare Jacques-Louis David's work part of Quebec's cultural heritage.¹²

Because of the Minister's intervention, the Minister's consent would now be required before the work could be sold to a buyer outside Quebec. In addition to the Quebec Minister's intervention, a large wave of criticism and public outcry convinced the National Gallery to cancel the auction of *La Tour Eiffel* in New York. The idea that this sale would represent a loss to Canada led to questions of whether a permit to export would be necessary. This question became moot when the National Gallery decided to withdraw its offer to sell *La tour Eiffel*.

Conclusion

In conclusion, the *Heffel* decision establishes that the concepts of "outstanding significance" and "national importance" are not to be given restrictive interpretations. Parliament intentionally opted to give Canadian Heritage and the Review Board a wide discretion to assess, on a case-by case basis, the degree of importance that a cultural object holds for Canada and how its exportation would affect Canadian heritage. As such, the decision is an important precedent, with implications going beyond simply keeping cultural property in Canada.

Canada's *Income Tax Act* (the "ITA") provides favourable tax treatment for dispositions of certified cultural objects to designated donees, which can be charities, public bodies performing a function of government or other organizations such as museums and art galleries. This treatment includes a tax exemption for capital gains realized on the disposition of such objects and, when the disposition is by way of a gift, the provision of a tax credit or a deduction to donors. In order to benefit from these measures, a taxpayer (whether an individual or corporation) who disposes of, or proposes to dispose of, a cultural property must obtain from the Review Board a certifi-

cate establishing that the property meets the CPEIA's criteria of "outstanding significance" and "national importance". Had the Federal Court's decision not been overturned, a chilling effect on donations of foreign cultural objects to qualified donees might have emerged, affecting the ability of museums to augment their collections. The FCA's decision bodes well for the Canadian art world. ♦

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² 2019 FCA 82 (hereafter "Heffel").

³ *Cultural Property Export and Import Act* (R.S.C., 1985, c. C-51).

⁴ See s.11 (1) (a) and (b) of the CPEIA.

⁵ The Federal Court of Appeal is a Canadian appellate court that hears cases in connection with matters of federal jurisdiction. The Court has jurisdiction to hear appeals from *inter alia* the Federal Court, and judicial review applications in connection with certain federal boards and tribunals. The Court's decisions are appealable to the Supreme Court of Canada.

⁶ <https://www.canada.ca/en/canadian-heritage/services/export-permits-cultural-property.html> (last checked on June 5, 2019).

⁷ See sections 40, 41, and 45 of the CPEIA.

⁸ In addition to the CPEIA, the Outstanding Significance and National Importance framework (OS/NI) (online at <https://www.canada.ca/content/dam/pch/documents/services/movable-cultural-property/oSNIguide-eng.pdf>) provides some guidance in order to assist applicants in addressing "national importance" and "outstanding significance" in their application. According to the

OI/NI framework, "outstanding significance" is a question of nature and kind (i.e., what?) whereas "national importance" is a matter of degree (i.e., how much, to what extent?). It is notable that the OS/NI framework uses terms that are not in the CPEIA, such as "singular", "striking", and "closely associated".

⁹ Heffel, para 25.

¹⁰ Herman, Alexander. "Court decision on Caillebotte export rocks the boat". Online at > <https://ial.uk.com/court-decision-on-caillebotte-export-rocks-the-boat/>.

¹¹ See *Dunsmuir v. New Brunswick* [2008] 1 SCR 190 and *Smith v. Alliance Pipeline Ltd.* [2011] 1 SCR 160.

¹² *Ibid* footnote 9.

¹³ *Ibid* footnote 9.

The New EU Copyright Directive — Good News or Bad News?

By: Cameron M. Fathauer¹

In an unprecedented era where digital content can be accessed on demand almost anywhere in the world, content creators seek to be remunerated for their efforts. On June 7, 2019, the European Union finalized the *Copyright in a Single Digital Market* directive to strike a balance between copyright holder remuneration and content user liberation.² As a directive, it is up to the Member States to figure out how to implement the new law.³

The Directive applies to online service providers (OSPs) "whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works or other protected subject-matter uploaded by its users which it organises and promotes for profit-making purposes."⁴ The OSPs covered by this Directive must be determined on a case-by-case basis, evaluating relevant factors such as their size and effect.⁵ Start-up service providers that have been in existence for less than three years and yield a net income less than ten million euros are exempted.⁶ Non-profit organizations, educational databases (e.g., Wikipedia), shopping marketplaces (e.g., Amazon), and cloud storage services are also exempted.⁷

Articles Fifteen and Seventeen (formerly known as 11 and 13) of the Directive are highly controversial because they require OSPs to attain authorization from copyright holders and remunerate them for their work, opening the door to censorship of non-licensed copyrighted material uploaded by OSP users.⁸

Article Fifteen requires OSPs to compensate journalistic publishers for using their articles.⁹ This provision is geared toward OSPs like

GoogleNews, which use articles from other publishers,¹⁰ not "private or non-commercial uses of press publications carried out by individual users."¹¹ It seeks to protect and preserve news publications within the Member States, specifically.¹² Thus, news agencies outside of Member States do not have these copyright protections and their content can be used by OSPs without authorization.¹³

Some commentators fear that search engines will become less useful as a result of the Directive.¹⁴ But the drafters make it clear that the fair use exception to copyright infringement still applies to using unauthorized articles: "the use of individual words or very short extracts . . . should not fall within the scope . . . of this Directive."¹⁵ So, in theory at least there should be no fear that resource articles will become obsolete under this Directive—only a guarantee they will appear incomplete.

Article Seventeen imposes liability on OSPs if content uploaded to their websites has not been authorized or permitted by the true owner of that content.¹⁶ The Article's first paragraph justifies this imposition of liability by stating that an OSP with unauthorized rights holder content "performs an act of communication to the public," and should, therefore, be legally responsible.¹⁷ OSPs must provide a reasonable mechanism of remuneration for the use of a copyright holder's work,¹⁸ and can escape liability by a showing of "best efforts" to (1) obtain authorization; (2) ensure the unavailability of specific works; and (3) remove unauthorized content and prevent future uploads.¹⁹

Article Fifteen requires OSPs to compensate journalistic publishers for using their articles. This provision is geared toward OSPs like GoogleNews, which use articles from other publishers, not "private or non-commercial uses of press publications carried out by individual users."

Article Seventeen is the most controversial piece of the Directive.²⁰ Editors, bloggers, and CEOs are questioning how OSPs will prevent unauthorized content from being uploaded without infringing upon democratic rights guaranteed by the 2009 Charter of Fundamental Rights.²¹ While the Directive expressly prohibits "general monitoring," there must be a liability mechanism in place for

filtering out unauthorized uploads.²² OSP users fear lawful content will be mistakenly or intentionally censored out;²³ OSP owners fear the weighty financial burdens of filter software (e.g., YouTube spent over \$100 million on their "Content ID" filter).²⁴

But Article Seventeen gives OSP users reason to celebrate the change. Users are no longer legally liable for what they upload to an OSP under the Directive because the OSP is held responsible, being more than an intermediary for data, unless the users are reaping loads of independent capital.²⁵ Regardless, going forward users know that all content they upload must be authorized content.²⁶ Wherever content is removed, the user has the legal right to be informed as to the reason for removal and a right of appeal.²⁷ Memes, gifs, and other satire are strictly protected by Article Seventeen and cannot be removed or filtered by OSPs.²⁸

While it might pose a financial burden on OSPs to accommodate the Directive, the legal benefits to their users and rights holders far outweigh this consequence. Like the legend of Robin Hood, where a thief takes from the rich to relieve the poor, smaller businesses will take fair remuneration from big tech companies for their artistry. But unlike Robin Hood, this “taking” is completely legal under the EU’s new copyright directive. ♦

¹ Indiana University Maurer School of Law, J.D. expected June 2021.

² Browne, Ryan (15 April 2019). “Article 13: EU Council backs copyright law that could hit YouTube, FB”. *CNBC*. Retrieved 15 April 2019; *See Copyright in the Digital Single Market*, 2019/790/EC, intro, ¶ 61.

³ *Ibid.* This is why the Directive will not take effect until 2021.

⁴ Art 2, ¶ 5. *See* intro, ¶ 62.

⁵ *Id.* at intro, ¶ 66.

⁶ *Id.*; Art 17, ¶ 6.

⁷ *Ibid.*

⁸ EU Parliament moved Articles Eleven and Thirteen to Articles Fifteen and Seventeen for the final legislation of 2019/790/EC.

⁹ *See* 2019/790/EC, ¶ 33.

¹⁰ *Ibid.*

¹¹ Art 15, ¶ 1.

¹² *Id.* at ¶ 32.

¹³ *Id.*

¹⁴ <https://www.nytimes.com/2018/07/05/business/eu-parliament-copyright.html>; <https://slate.com/technology/2019/04/eu-copyright-directive-article-13-wreck-internet.html>.

¹⁵ 2019/790/EC, intro ¶ 58.

¹⁶ *See* art 17, ¶ 4.

¹⁷ Art 17, ¶ 1.

¹⁸ *Id.* at intro, ¶ 46.

¹⁹ *Id.* art 17, ¶ 4 (italics added).

²⁰ <https://www.cnn.com/2019/03/28/article-13-what-eu-copyright-directive-means-for-the-internet.html>.

²¹ *See* European Union, *Charter of Fundamental Rights of the European Union*, 26 October

2012, 2012/C; <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>; <https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any>; <https://www.theverge.com/2019/3/27/18283541/european-union-copyright-directive-internet-article-13326/02>, available at: <https://www.refworld.org/docid/3ae6b3b70.html> [accessed 14 June 2019].

²² *Id.* at intro, ¶ 66; art 17, ¶ 8.

²³ <https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet>.

²⁴

<https://www.engadget.com/2018/11/07/google-anti-piracy-report/>.

²⁵ *See* Art 17, ¶ 2; <https://slate.com/technology/2019/04/eu-copyright-directive-article-13-wreck-internet.html>.

²⁶ *Id.* at art 17, ¶ 1, 3.

²⁷ *Id.* at art 17, ¶ 9.

²⁸ *Id.* at ¶ 7.

Spain's Thyssen-Bornemisza Collection Foundation Prevails at Trial to Keep Nazi-Looted Picasso

By: Amelia L.B. Sargent¹

Introduction

Fourteen years of litigation between the Cassirer heirs and the Kingdom of Spain's Thyssen-Bornemisza Collection Foundation (TBC) regarding the fate of Camille Picasso's *Rue St. Honoré, après midi, effet de pluie* (the “Painting”), which was looted by the Nazis during World War II, culminated in a one-day trial held December 4, 2018 before Judge John F. Walter of the Central District of California. The case's past motions and appeals on the Foreign Sovereign Immunities Act and statute of limitations illuminated the contours of the ever-thorny question of using procedural defenses versus litigating “on the merits” to determine the fate of Nazi-looted artwork.

By the third appeal, the case highlighted a contrast of substantive law between the general maxim in the United States that “a thief cannot pass good title,” and the acquisitive prescription laws of many European countries, which under certain conditions rehabilitate good title to stolen moveable property.² In its decision released on April 30, 2019, the trial court ruled that the painting should remain with TBC under Spain's acquisitive prescription statute—but opined that this result, even coming “on the merits” after a trial, failed to meet the goals of the 1998 Washington Principles on Nazi-Confiscated Art and 2009 Terezin Declaration

on Holocaust Era Assets to constitute a “just and fair” solution for the Plaintiffs.³ The Plaintiffs have already noticed the case's fourth appeal and briefing is set for the fall.

The Prior Appeal Remanded Two Factual Issues Regarding Acquisitive Prescription Under Swiss and Spanish Law

In the appeal that set the stage for trial, which was described in detail in this Newsletter's Summer 2017 issue⁴, the Ninth Circuit decision identified only two factual issues for remand: (1) whether Baron Hans Heinrich Thyssen-Bornemisza (the “Baron”), who held the Painting before it was sold to TBC, possessed the Painting in good faith under Article 728 of the Swiss Civil Code; and (2) whether TBC had actual knowledge that the Painting was stolen property under Spanish law, which would qualify it as an *encubridor* (accessory-after-the-fact) and prohibit its acquisition of the painting under Article 1955 of the Spanish Civil Code. It rejected the Plaintiffs' argument that California law should apply to the transactions.

Brief Summary of The Painting's Wartime Provenance

By the time of trial, the wartime provenance of the Painting was uncontested. In 1939, Lilly

Cassirer Neubauer was forced to transfer the Painting to a Nazi art appraiser in “exchange” for exit visas to leave Germany. It was then used as “payment” for another forced sale and was subsequently confiscated from its second Jewish German owners by the Gestapo. It was sold at auction in Berlin to an unknown purchaser in 1943.

After the war, Neubauer received a judgment confirming her claim to the Painting from the court of High Restitution Appeals of the Allied High Commission (“CORA”). She also pursued a claim of compensation against Germany, which she received, although she did not relinquish her right to seek restitution of the Painting. All parties believed the Painting had been lost or destroyed during the war, but in fact, the Painting surfaced in the United States in 1950s, ending up in the collection of one Sydney Schoenberg in St. Louis, Missouri until 1976. There is evidence the American dealers involved attempted to research whether the Painting had been looted or stolen, but none of the sources consulted indicated it was.⁵

The Court Determined the Baron's Failure to Perform an Independent Investigation of the Painting's Provenance in the Face of “Red Flags” Fell Short of “Good Faith” under Swiss Law

Two subsequent transactions were under scrutiny at trial. In 1976, the Baron purchased the Painting from the Stephen Hahn Gallery of New York for \$300,000. The back of the Painting contained remnants of labels for multiple galleries, including the gallery owned by the Cassirer family, which indicated the Painting had been in Berlin—a fact omitted from the provenance information provided by the Stephen Hahn Gallery. Some of the labels appeared to have been removed intentionally; nevertheless, the Baron conducted no independent investigation into the provenance. An employee of the Baron mistakenly recorded that the Painting had been purchased in Paris.

The Baron held the Painting for at least five years—the time period required by the Swiss acquisitive prescription statute—before transferring it (and a number of other works) to Favorita Trustees Limited (“Favorita”), an entity he created to facilitate a large, long-term loan to Spain in 1988. But the trial court found that Baron’s failure to investigate the title independently at the time of his purchase from the Hahn Gallery frustrated the Swiss presumption of good faith required by the acquisitive prescription statute, Article 728 of the Swiss Civil Code. Most importantly, the district court identified the presence of the intentionally removed labels, and the torn label indicating the Painting had been in Berlin, as “actual and concrete reasons for suspicion,” raising a duty under Swiss law to conduct an inquiry into the title of the chattel at issue.⁶ This was so *even though* the court also found the Baron likely would not have discovered any information regarding Neubauer’s ownership of the Painting and its Nazi confiscation—this did not relieve the Baron of the duty to at least make the inquiry. As to the first question issued by the Ninth Circuit, then, the court concluded that the Baron lacked good title to the Painting under Swiss law when it was subsequently transferred to TBC in 1993.⁷

The Court Found TBC Had No Actual Knowledge of the Theft of the Painting and Therefore Acquired the Painting under Spanish Law

This left TBC’s acquisition of the Painting under Spanish law. As mentioned above, the Painting’s sale to TBC in 1993 was preceded by a large, long-term loan of part of the Baron’s collection (“the Loan Collection”) to the Kingdom of Spain in 1988. This involved creating TBC and dedicating the Palace Villahermosa to house the Loan Collection. In connection with the loan, Spain’s outside legal counsel conducted an independent title investigation into the Loan Collection, but based on a number of factors counsel deemed reasonable at the time—including the assumption that questions of title for the Baron’s earlier-acquired works would have at least settled via his good faith possession through Swiss acquisitive prescription—counsel decided only to investigate works acquired after 1980 (164 paintings constituting roughly one fifth of the collection). None of the investigations revealed any improprieties.

In 1993, the Kingdom of Spain and TBC purchased the collection for just over \$338 million, incurring as part of the agreement a number of

what the trial court characterized as “onerous” obligations, including most importantly promising the perpetual use of the Palace Villahermosa as the “Thyssen-Bornemisza Museum”, and agreeing to a complete prohibition against any disposal of any of the artworks whatsoever. The district court rejected the Plaintiffs’ argument that the Loan Collection was suspi-

tion of good faith. As the court found in 2015 and the Ninth Circuit confirmed, TBC had possessed the property as owner publicly, peacefully, and without interruption for more than six years, from 1993 to at least 1999.

However, Article 1956 modifies Article 1955 in providing that stolen property “may not prescribe in the possession of those who pur-



ciously discounted, finding purchase price was “fair and reasonable” in line with contemporary appraisal valuations when accounting for reductions for the encumbrances on the collection. TBC and the Kingdom of Spain conducted yet another title investigation, which again showed no irregularities.⁸

Having ruled that the Baron in fact lacked good title to the Painting to transfer to TBC, the district court turned to the second factual issue of whether TBC prescriptively acquired the painting under Spanish Civil Law Articles 1955 and 1956.⁹ Article 1955 provides a six-year period of possession, without any condi-

tioned or stole it, or their accomplices or accessories [*encubridores*], unless the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.” Spanish Civil Code Art. 1956 (English translation). The Ninth Circuit held that this extended the period of possession to the six years prescribed by Article 1955 “*plus* the statute of limitations on the original crime and the action to claim civil liability,” a period it calculated at 23 years—far longer than TBC’s possession of the Painting before the Cassirer family made its claim. *Cassirer III*, 862 F.3d at 966.

The Plaintiffs argued that TBC was an *encubridor*. According to Spain's 1870 Penal Code, "a person can be an *encubridor* within the meaning of Article 1956 if he knowingly receives and benefits from stolen property." *Cassirer III*, 862 F.3d at 967-68. At trial, the court acknowledged that "TBC has clearly benefitted from its possession of the Painting by displaying it at the Museum." But it determined TBC lacked the "willful intent" or "willful blindness" necessary to indicate any *actual knowledge* of the Nazi appropriation of the artwork from Neubauer sufficient to meet the criminal standard of receipt of stolen property as an *encubridor*.

Among other reasons supporting its conclusion, the court found that "but for the 1954 CORA decision (which would have been virtually impossible to find), there was no published information about [Neubauer's] prior ownership of the Painting or that the Nazis had looted it at the time TBC acquired the painting." The court also found persuasive the evidence that Spain had twice performed title investigations using reputable law firms, and the Baron's and TBC's peaceful public exhibitions of the Painting since 1976. The court held that Spain and TBC's counsel's conclusion that there might be a low risk of pre-1980 paintings having title issues was a far cry from "*certain knowledge* that the Painting was stolen, or that there was a *high risk or probability* that the Painting was stolen."¹⁰ This was a much stricter standard than that facing the Baron under Swiss law, and the TBC prevailed.

Because TBC was not an *encubridor*, Article 1955's six-year acquisitive prescription period applied with no other condition, and the court concluded that TBC was the lawful owner of the Painting.¹¹

Despite the Legal Outcome, The Court Opined that TBC and Spain Fell Short of Their Moral Obligations

In the conclusion to its ruling, however, the district court chided the Kingdom of Spain and TBC for failing to return the Painting to the Plaintiffs despite the legal outcome it had just decided. The court cited to Washington Principle No. 8: "If the pre-War owners of art that is found to have been

confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case." The court also cited to the Terezin Declaration, which reiterated that the Washington Principles "were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws as well as international obligations, in order to achieve just and fair solutions."¹² The court opined that "TBC's refusal to return the Painting to the Cassirers is inconsistent" with those articulated principles but that the court "cannot force the Kingdom of Spain or TBC to comply with its moral commitments."¹³

The court's admonition highlights the tension extant in all Holocaust art cases in American courts: In any given case, a court must balance the restitution rights of victims who suffered the Holocaust against a later third-party good-faith purchaser's guaranteed procedural due process rights and substantive legal defenses. Can this ever feel "just and fair"? Critics deriding the use of "procedural defenses" in such litigation would obviously say no, but even the Washington Principles and Terezin Declaration themselves seem to recognize that any potential solution must be "consistent with national laws" and "may vary according to the facts and circumstances surrounding a specific case." Here, Spanish law provides for the eventual settling of title for even stolen moveable goods. Nevertheless, in light of the Painting's specific wartime provenance, the trial court clearly believed its own decision failed to match TBC and Spain's moral obligations. ♦

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² Because of its adoption of civil law from the French tradition, Louisiana has an acquisitive prescription statute for moveable property as well.

³ Findings of Fact and Conclusions of Law, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, CV 05-3459-JFW (Ex), ECF 621, pp. 26, 30-34 (Apr. 30, 2019) (hereinafter "Findings").

⁴ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017) (*Cassirer III*); see Laura Tiemstra, *Ninth Circuit Revives H[eirs'] Claims to Pis[s]arro Painting in Thyssen-Bornemisza Collection*, American Bar Ass'n Section of Int'l Law, Art & Cultural Heritage Law Newsletter, at 5-6 (Summer 2017). The Kingdom of Spain was dismissed as a named defendant after the first appeal.

⁵ Findings, pp. 2-4.

⁶ The court rejected the Plaintiffs' other arguments that the price of the Painting was suspiciously low or that the Baron had intentionally misrepresented details of his purchase.

⁷ Findings, pp. 4-9 (conclusions of fact); 20-25 (conclusions of law).

⁸ Findings, pp. 9-17 (conclusions of fact).

⁹ Findings, pp. 26-30 (conclusions of law).

¹⁰ Findings, pp. 29.

¹¹ Findings, pp. 27.

¹² Findings, pp. 33.

¹³ *Id.*

Knoedler Litigation Update — No RICO remedy available to Non-U.S. Plaintiff

By: Kathleen A. Nandan¹

In the latest installment of the saga surrounding the now-shuttered Knoedler Gallery, on May 8, 2019, the U.S. District Court for the Southern District of New York handed two purchasers of forged paintings a partial victory, permitting certain of their claims to proceed to trial.²

Background

The Knoedler Gallery, founded in 1846 and continuously operated for 165 years, was "one of New York City's most venerable and respected art galleries."³ The gallery closed ab-

ruptly in 2011, the subject of a federal criminal inquiry and standing accused of having sold forged paintings to unwitting customers.

For approximately fifteen years, beginning in the mid-1990s, Long Island art dealer Glafira Rosales sold to the Gallery, and the Gallery sold to its customers, "dozens of previously undiscovered works" purportedly by "well-known Abstract Expressionist artists," including Rothko, Pollock, and Motherwell.⁴ Rosales claimed to represent the son of a deceased art collector who had been "connected with the art world in the

mid-20th century and had acquired works out of artists' studios of that era."⁵ Those paintings, however, were forgeries, and

Rosales has since pleaded guilty to various crimes in federal court and admitted that "all of the works she sold to Knoedler were fakes created by an individual residing in Queens."⁶

This Lawsuit

The two plaintiffs in this case, Frances White and the Martin Hilti Family Trust, brought suit in 2013 against (1) the various corporate enti-



Forged Jackson Pollock painting

ties through which the Gallery had been owned and (2) Michael Hammer, who is the sole shareholder of many of those entities and whose family had operated and controlled the gallery since 1971. The plaintiffs alleged substantive RICO violations, RICO conspiracy,⁷ fraud and fraudulent concealment, conspiracy to commit fraud, and aiding and abetting fraud.

In granting in part and denying in part the plaintiffs' motion for summary judgment, the court broke no new ground and relied upon previously issued decisions addressing the lack of evidence demonstrating Hammer's knowledge of or involvement in the fraud.⁸ The court did detail in its opinion the Gallery's several layers of corporate ownership, the relationship between each of those entities, the transfer of millions of dollars between those entities, and Michael Hammer's use of monies from those entities for personal expenses, before concluding that Plaintiffs had proffered sufficient evidence to survive summary judgment on their alter ego and successor liability theories against the defendants.⁹

The court's treatment of the Trust's RICO claims, however, bears further comment. The Court dismissed all of the Hilti Trust's RICO claims, finding that the Trust's injury was not a "domestic injury" upon which RICO liability may be predicated. The Hilti Family Trust, a Liechtenstein-based trust which purchases and

owns fine art, purchased what was represented to be an "exceptional Rothko for sale" after viewing the painting in Liechtenstein.¹⁰ Although misrepresentations were made to Trust representatives in New York and although that the forgery was created in United States, the Trust purchased the painting in Liechtenstein and wired payment from its Liechtenstein bank account.¹¹ Relying upon *RJR Nabisco, Inc., v. European Community*,¹² in which the Supreme Court addressed RICO's extraterritorial reach and which held, in part, that a private RICO plaintiff "must allege and prove a domestic injury to its business or property,"¹³ the district court concluded that the Trust's RICO claims could not stand. It reasoned that, because the "focus on the domestic injury is on the location of the plaintiff's property when it is harmed, and not on the location of the defendant when wrongful conduct was committed,"¹⁴ the Trust's injury occurred overseas. The Trust therefore could not pursue its RICO claims.

The court observed that the wrongful conduct in this case occurred in the United States, and it appeared to struggle with the requirement that it analyze the domestic injury question without first considering whether the claims require extraterritorial application of RICO's substantive provisions.¹⁵ The court also acknowledged that it was unfair that U.S.-based victims of the identical scheme would have a RICO remedy while overseas victims would not.¹⁶ However, Justice

Ruth Bader Ginsburg had made the same argument in her dissent in *RJR Nabisco*, and, as such, the court believed the argument to be foreclosed.¹⁷

Trial is expected to take place in 2020, though only time will tell if that marks the end of this story. ♦

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² *Martin Hilti Family Trust v. Knoedler Gallery, LLC*, Nos. 13 Civ. 0657 and 13 Civ. 1193, 2019 WL 2024808 (S.D.N.Y. May 8, 2019).

³ 2019 WL 2024808 at *1.

⁴ *Id.* at *2.

⁵ *Id.* at *2 (internal punctuation omitted).

⁶ *Id.* at *6 (citations and internal quotation marks omitted).

⁷ The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.* ("RICO").

⁸ *Id.* at **14-15.

⁹ *Id.* at **1, 8-9.

¹⁰ *Id.* at *3-4.

¹¹ 2019 WL 2024808 at *19.

¹² 136 S. Ct. 2090 (2016).

¹³ 2019 WL 2024808 at *18 (emphasis in original).

¹⁴ *Id.* at *18, 19.

¹⁵ *Id.* at *18, n. 27 ("It is not obvious . . . that RJR Nabisco's domestic injury requirement was intended to apply to a case such as this, where RICO's substantive prohibitions are not being applied extraterritorially in the first place.").

¹⁶ *Id.* at n. 29.

¹⁷ *Id.* citing *RJR Nabisco*, 136 S.Ct. at 2115-16 (Ginsberg, J., dissenting).

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