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What Happens to Ukraine's Art and Cultural Property in the Face of Russia's Invasion?

By: Leslie Lloyd M. Ocean[1]

As the Ukrainian people fight to preserve their lives and their sovereignty against Russia's 2022 invasion, what could happen to the rich art and cultural property of this country? If history is used as a guide, the answer would largely depend on the outcome of the current conflict and the voracity of any challenge under international law.

Art & Cultural Property Under International Law

According to the Geneva and Hague Conventions (to which both Ukraine and Russia are parties) art and cultural property expectedly includes: art, buildings, and books among many other items.[i] Interestingly, these Conventions define cultural heritage as: oral traditions, performing arts, and social practices.[ii] This international law system attempts to protect cultural property from hostility and in times of conflict.[iii] International organizations such as the Blue Shield help protect cultural property by advising and actively assisting in the protection of cultural property before, during, and after conflict.[iv]

Ukraine's Art & Cultural Property

Kyiv, Ukraine's capital and the recent target of Russian missiles, is home to some of the country's most famous cultural property. Saint Sophia Cathedral, a popular city landmark, was built approximately 900 years ago and is listed as a UNESCO World Heritage Site.[v] Artifacts from the Scythians dating back to 7th BC have been discovered as recently as May 2022 during the conflict.[vi] These works, Ukraine's cultural property, have not been spared from the effects of

Russia's invasion.[vii] As of April 2022 more than 150 partially damaged or destroyed cultural sites were identified in Ukraine.[viii]

Considering Russia's 2014 annexation of Crimea and continued disregard for Ukrainian sovereignty, Ukraine could foreseeably face challenges to the ownership and possession of her art and cultural property. With insights from the past, it appears that what happens to Ukraine's cultural property would probably depend on the outcome of their conflict with Russia.

If Russia Annexes Part of Ukraine

Despite Russia's 2014 annexation of Crimea and declaration of the same as a Russian subject, the international community largely recognizes Crimea as an occupied territory.[ix] Ukraine's challenge to Russian-backed Crimean independence has included challenges to the ownership of certain art and cultural property.[x] In October 2021 Ukraine successfully challenged in Dutch courts the return of Scythian Gold, on loan to museums in the Netherlands, to Crimea.[xi] The court ruled that the Ukrainian Minister of Culture's right to possession trumped the Russian-backed Crimean Museums' return request.[xii] Presumably, this means that Ukraine would continue to legally challenge, where possible, future Russian ownership claims.

What should be noted about this case is first that the court "avoided the tricky question of who *owns* the Scythian Gold in favor of the… easier one…*possession* of them."[xiii] Second, the artifacts were returned to Ukraine's hands from Dutch hands.[xiv] It remains to be seen how successful Ukraine's legal challenge would have been if the artifacts were held by a country less inclined to adhere to the current rules-based international system. As for the cultural property within Crimea's walls, considering Russia's physical takeover of Crimea, it is unlikely that any legal challenge, even if successful and regardless of the forum, would result in the release of said property from Russian claims of ownership or even possession.[xv]

If Russia Seizes All of Ukraine

If Russia seizes all of Ukraine, two primary questions arise. The first is what Ukraine-as-a-Russian-subject looks like. Looking to Crimea, we could expect Russian control and rebranding, but we need not expect the destruction of art and cultural property.[xvi] In fact, Russia at one point unveiled plans to turn the enveloped-Crimea into a cultural capital of the Russian state.[xvii] The second question is whether there exists any anti-Russian Ukrainian leadership who would challenge Russia's claim against Ukrainian sovereignty. With an entire country under Russian control, the best route to the reversion of Ukrainian ownership and possession would probably be the reestablishment of the Ukrainian government.

If Ukraine Completely Expels Russia

Unfortunately, even if Ukraine expels Russia, Ukraine would still probably face an uphill battle because of the art and cultural property looted from its land.[xviii] Even though Russia enacted a restitution law for displaced cultural property, Vladimir Putin also once posited that post-World War II German art work in Russian possession were "paid for in Soviet blood."[xix]

In the end, even with a fact-intensive historical analysis, the answer to what happens to Ukrainian art and cultural property cannot be predicted with certainty. Dishearteningly, what is certain is that while the conflict unfolds countless pieces of Ukrainian art and cultural property will continue to absorb the damage caused by this war. Some cultural property might be saved, while others might already be lost to everyone, forever. ♦

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[i] *Defining Cultural Heritage And Cultural Property,* Blue Shield International (Feb. 11, 2020), https://theblueshield.org/defining-cultural-heritage-and-cultural-property/.

[ii] *Id.*

[iii] *The Hague Peace Conventions 1907, Annex to Convention IV, Section II, Ch. I, Art 27* (Oct. 18, 1907), https://ihl-databases.icrc.org/ihl/INTRO/195; *The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* Art. 53 (8 June 1977), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument.

[iv] *See Approach, Ethics, and Principles,* The Blue Shield International (2018), https://theblueshield.org/about-us/approach-ethics-and-principles/.

[v] *Kyiv: Saint-Sophia Cathedral and Related Monastic Buildings, Kyiv-Pechersk Lavra,* UNESCO World Heritage Convention (1992 – 2022), https://whc.unesco.org/en/list/527.

[vi] Tessa Solomon, *Ukrainian Soldiers Discover Archaeological Treasures While Digging Defenses in Port City Odessa*, Art News (May 16, 2022), https://www.artnews.com/art-news/news/ukrainian-soldiers-discover-archeological-treasures-while-digging-defenses-in-port-city-odessa-1234628795/.

[vii] Brian I. Daniels, *How Can We Protect Cultural Heritage in Ukraine? Five Key Steps for the Int'l Community,* Just Security (April 22, 2022), https://www.justsecurity.org/81212/how-can-we-protect-cultural-heritage-in-ukraine-five-key-steps-for-the-intl-community/.

[viii] Daniels, *supra* note 7.

[ix] *Territorial Integrity of Ukraine*, GA Res 68/262, UN DOC A/RES/68/262 (March 27, 2014).

[x] *See* Armen Vartian, *Dutch Appellate Court Affirms Decision Awarding Possession of Scythian Gold*

to Ukraine, and Not Crimea, Art & Cultural Heritage Law Newsletter, American Bar Association Section of International Law (Fall 2021).

[xi] *Id.*

[xii] *Id.*

[xiii] *Id.*

[xiv] *See id.*

[xv] Higgins, Erlanger, *Gunman Seize Government Buildings in Crimea*, The New York Times (February 27, 2014), https://www.nytimes.com/2014/02/28/world/europe/crimea-ukraine.html.

[xvi] *Kremlin plans to turn annexed Crimea into cultural capital*, Reuters World News (August 8, 2018), https://www.reuters.com/article/us-ukraine-crisis-crimea-art/kremlin-plans-to-turn-annexed-crimea-into-cultural-capital-idUSKBN1KQ0EJ.

[xvii] *Id.*

[xviii] Gettleman, Chubko, *Ukraine says Russia looted ancient gold artifacts from a museum*, The New York Times (April 30, 2022), https://www.nytimes.com/2022/04/30/world/europe/ukraine-scythia-gold-museum-russia.html.

[xix] Patricia Kennedy Grimsted, *Legalizing "Compensation" and the Spoils of War: The Russian Law on Displaced Cultural Valuables and the Manipulation of Historical Memory,* International Journal of Cultural Property, Volume 17, Issue 2 (May 2010), https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/abs/legalizing-compensation-and-the-spoils-of-war-the-russian-law-on-displaced-cultural-valuables-and-the-manipulation-of-historical-memory/F5347776CCD882D5EEF2055C0BB48655; Merkel and Putin view exhibition of disputed art, The British Broadcasting Company News (June 22, 2013), https://www.bbc.com/news/world-europe-23001274.

Supreme Court Vacates Ninth Circuit in *Cassirer v. Thyssen-Bornemisza* Collection, Unsettling Fate of Nazi-Looted Painting

By: Amelia L.B. Sargent[1]

On April 21, 2022, the Supreme Court upended what had seemed the likely fate of Camille Pissaro's *Rue St. Honoré, après midi, effet de pluie*, a Nazi-looted painting that had found its way in the possession of a Spanish museum run by the Thyssen-Bornemisza Collection Foundation (TBC).

Neither party disputes the terrible circumstances under which the painting's original owner, Lilly Cassirer Neubauer, was forced to give up *Rue St. Honoré* in exchange for exit vias to leave Nazi Germany in 1939. The painting was then used as "payment" for another forced sale, confiscated from its second Jewish German owners by the Gestapo, and subsequently sold in a Berlin auction to an unknown purchaser in 1943. It was believed lost or destroyed during the war, but ultimately resurfaced in the United States in the 1950s. In 1976, Baron Hans Heinrich Thyssen-Bornemisza purchased *Rue St. Honoré* from the Stephen Hahn Gallery in New York, and ultimately transferred it to TBC in 1993 in connection with the creation of a museum. Claude Cassirer, Lily Neubauer's heir, discovered the painting on display at the Thyssen-Bornemisza Museum in 2000, and, after a petition to the Kingdom of Spain was rejected, filed suit in 2005.

That lawsuit has stretched into seventeen years of precedent-setting litigation, including four trips to the Ninth Circuit, and two previous articles in this Newsletter analyzing the issues.[2] In the latest appeal, the Ninth Circuit affirmed a post-trial judgment against the Cassirer heirs (Claude Cassirer having died in 2010), seemingly securing the TBC's ownership of the painting under Spanish law principles.[3] But now that judgment is thrown into doubt by the Supreme Court's decision, which vacates the Ninth Circuit and remands for further proceedings.

The courts had to decide whose property law (Spain's? California's?) should govern the suit, and thus determine the painting's rightful owner.

The Supreme Court's decision is narrow and procedural: The law provides jurisdiction over a foreign state or instrumentality, such as TBC, only through certain "exceptions" to the Foreign Sovereign Immunities Act of 1976 (FSIA).[4] The Cassirer heirs' suit to recover the painting was previously determined to fall into the FSIA's "expropriation exception" because it had been confiscated by the Nazis in violation of international law.[5] The FSIA thus provided the suit could go forward against the foreign entity. But, as Justice Kagan explained on behalf of the unanimous court, "go forward pursuant to what law? The courts had to decide whose property law (Spain's? California's?) should govern the suit, and thus determine the painting's rightful owner. Resolving that question required application of a choice-of-law rule—a means of selecting which jurisdiction's law governs the determination of liability."[6]

The *Cassirer* courts, relying on Ninth Circuit precedent, had earlier applied a federal choice-of-law rule to determine Spanish substantive law applied.[7] The Supreme Court unanimously disagreed, ruling the courts should have applied California's choice-of-law rule instead. Section 1606 of the FSIA provides the reason: "As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable *in the same manner and to the same extent as a private individual under like circumstances*."[8] The court analogized that a hypothetical suit brought against a private (rather than foreign state) museum in state or federal court would apply the state choice-of-law rules, not the disfavored federal common law.[9] Therefore, in matters governed by state law brought pursuant to the FSIA, courts must apply the state choice-of-law rule as well, to ensure the same substantive law will apply, and thus the potential liability of the foreign state.

Will the application of a new choice-of-law rule make a difference in the fate of the painting? Only if application of California's choice-of-law rule results in application of California law. The difference between Spanish and California **substantive** property law is determinative in the outcome of the case. California law follows the maxim that "a thief cannot pass good title," and thus, regardless of the links in the chain of ownership, good title to the painting can never pass to TBC. Spanish law, however, provides that good title to even stolen moveable property can pass after six years according to principles of adverse possession. It is only under Spanish law that the painting remains with TBC.

It is only under Spanish law that the painting remains with TBC.

The Cassirer plaintiffs contend that California's choice-of-law rule will lead to the application of California law. As the Supreme Court noted, "[I]f the Cassirers are right, the use of a federal choice-of-law rule in the courts below stopped Section 1606 from working: That rule led to the Foundation keeping the painting when a private museum would have to give it back."[10]

But such an outcome is not guaranteed. In fact, the district court, in a reversed 2015 opinion originally granting summary judgment to TBC, applied *both* the federal and California choice-of-law rules to determine what substantive law to apply. The court engaged in a thorough analysis and held that *both* the federal and California choice-of-law rules led to the application of Spanish law.[11] Analyzing California's governmental interest rule, the district court in 2015 held that California's interest in protecting its residents "where the original victim did not reside in California, where the unlawful taking did not occur within its borders, and where the defendant and the entity from which the defendant purchased the property were not located in California," was far less than Spain's interest in the certainty of application of its laws governing title within its own borders.[12]

Whether a court would come to a different conclusion now will remain to be seen. But at least for now, the Supreme Court has breathed new life into the Cassirer plaintiffs' suit to reclaim the painting. ♦

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[2] See A. Sargent, "Ninth Circuit Affirms Judgment that Spain's Thyssen-Bornemisza Collection May Keep Nazi-Looted Pissarro", *ABA Art & Cultural Heritage Law* Newsletter (Fall 2020); A. Sargent, "Spain's Thyssen-Bornemisza Collection Foundation Prevails at Trial to Keep Nazi-Looted Pissarro", *ABA Art & Cultural Heritage Law Newsletter* (Spring 2019).

[3] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 824 Fed. Appx. 452 (9th Cir. 2020) [*Cassirer IV*].

[4] 28 U.S.C. §1602 *et seq.*

[5] 28 U.S.C. §1605(a)(3), providing an exception for "rights in property taken in violation of international law."

[6] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1507 (2022).

[7] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 863 F.3d 951, 961 (9th Cir. 2017) (*Cassirer III*), *cert. denied* 138 S.Ct. 1992 (May 14, 2018). Oddly, the Supreme Court previously denied certiorari of the Ninth Circuit opinion applying the federal choice-of-law rule, allow-

ing the case to proceed to a bench trial and post-judgment affirmance before taking up the issue.

[8] 28 U.S.C. §1606 (emphasis added).

[9] 142 S. Ct. at 1508.

[10] *Id.* at 1509.

[11] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F.Supp.3d 1148, 1155-56 (C.D. Cal. 2015), *rev'd and remanded* 862 F.3d 951 (9th Cir. 2017).

[12] *Id.* at 1159.

Preliminary Approaches to IP in the Metaverse

By: Maria T. Cannon[1]

Introduction

Many a lawyer seeking to predict the implications of the metaverse on trademark and copyright protections in the coming months may indeed feel more like Alice falling down the rabbit hole than an informed advocate standing on solid ground. Yet, the metaverse, though challenging, is not the first new technological landscape to present complex legal problems to IP attorneys. It is important for attorneys to be aware of the potential pitfalls, because brands follow consumers, and consumers are flocking to the metaverse.

Trademark

An argument for strong trademark protection in the metaverse is that the metaverse, unlike a traditional video game, is primarily a social marketplace. Brands are vulnerable under current case law, because traditional use of trademarks in digitized versions of branding in videogames (the closest existing parallel) do not garner the same protection a physical object would receive.

In *E.S.S. Entertainment 2000 v. Rock Star Videos*, a ruling by the Ninth Circuit found that the digitized image of a strip club's logo in the video game *Grand Theft Auto* did not infringe the club's trademark, because the logo did not prominently impact or alter the player's experience.[2] The player was not likely to believe that the club sponsored the use, and, truthfully, most probably did not even notice that the image was onscreen. Perhaps most important to the Ninth Circuit was that the strip club did not show economic loss or genuine user confusion due to the alleged infringement.

The video game's use of the strip club's logo was not actively stealing business from the strip club. But this analysis would become trickier if the same situation played out in the metaverse, because the strip club could provide digital social experiences via the same platform. Businesses of all types increasingly envision the metaverse as an extension of their physical locations. As such, the stakes of the likelihood of consumer confusion is higher, because companies are actively entering the metaverse for their own economic gain.

Current litigation surrounding the creation of "MetaBirkins" (NFTs) by the artist Rothschild against the fashion house Hermès points to the complexity of resolving this issue in real time. In a recent opinion issued by Judge Rakoff (S.D.N.Y.), the Court denied the artist's Fed. Rules of Civil Procedure 12(b) motion to dismiss the case based on Hermès' failure to state a claim under which relief can be granted.[3]

The opinion itself offers more questions than answers.

Judge Rakoff stopped short of giving direct guidance as to whether Rothschild's use of the Hermès mark in his creation of MetaBirkins was infringing use, yet at least stated that the Lanham Act test as it appears in *Rogers v. Grimaldi*[4] was – in part – the applicable standard (under which Hermès' complaint could be dismissed on First Amendment grounds). The Court's reluctance to set a clear standard may be because it distinguished, in a footnote, two different types of NFTs which might each garner a different level of protection: NFTs linked to a digital image that is *only* a digital file versus NFTs linked to a digital image that may *also* be worn, sold, and traded in the metaverse.

Metabirkin

Which should receive more protection? According to Judge Rakoff, *Rogers* might only apply to the former type of NFT. For a "virtually wearable" NFT (where the digital image was linked to an item that could be worn by an avatar), the Court suggests that the *Rogers* standard might not even apply, because the artist would intend that the NFT be digitally worn. The reasoning behind this distinction is that, to apply *Rogers* in that instance would deprive Hermès of the chance to direct the growth of their own brand through digital, wearable fashion.

The Court, in effect, cautioned that some NFTs might be treated as an extension of a company's goods or services may warrant stronger protection for the owner, and others may not (and would be open to fair use by artists). A distinction this vulnerable to litigation may simply require a more precise definition of fair use for purposes of the metaverse.

New regulation could include a closer look at the artist's intent behind creation, looking to postings from the artist's personal social media handles. Regulation could also seek to incorporate the real-time reaction of the artist's followers, which may give courts a better idea as to whether consumer are actually being confused by the potential infringement.

On the consumer side, consumers could, independently, simply treat the metaverse itself as a truly new and original medium for artwork. Companies might disrupt consumer confusion by making it clear that artists do not represent brands unless the company announces a specific collaboration with an artist.

This might look like modeling the sale of metaverse handbags off the authorized sale of real designer purses, wherein collaborations with artists are announced through advertising campaigns and promoted through company social media channels.

Both artists and brands have the potential to bring forth unseen manifestations of culture in the metaverse, because this is truly a new era in digital branding. Yet, without proper guidance on what constitutes fair use, a meta-renaissance could come at a cost to existing trademark protections. Artists who exercise their full spectrum of creativity here may disadvantage brands, if their work prevents companies from building relationships with consumers.

Copyright

Similar to trademarks, of particular import with copyright protections will be court interpretation of fair use in the metaverse.

The Supreme Court has said that "an artistic rather than a utilitarian function" of a copyrighted work may garner stronger protection.[5] Yet this guidance presents a unique challenge for situations in the metaverse, because it is unclear whether defining the work's purpose as utilitarian or as an artistic function of a work's in the metaverse will reign supreme. In *Google LLC v. Oracle America, Inc.*, the Supreme Court found

that Google's use of software code was fair use.[6] The holding turned on the fact that the portion of software Google used was task-oriented in nature and had no visual or sensory counterpart.

Birkin

This is problematic when considering possible applications for something like a digital painting in the metaverse, because even decorative objects could feasibly serve utilitarian purposes in the metaverse, because how an actual user interacts with the metaverse is still evolving. Every image that has the purpose of replicating the sensation of lived experience will be backed by utilitarian software code, and could also facilitating an actual sale of a corresponding item.

As such, perhaps the test will weigh on the side of economic implications of the use. Yet this still brings its own set of unique challenges in the metaverse, because users such as content creators may blur the lines between educators, businesses, coders, and artists.

The balance becomes trickier still when the role of influencer is considered in light of the metaverse, because influencers often profit off of followers by nature of their relationship with their communities, even though every interaction may not result in an immediate sale.

Conclusion

Because the lines are not clearly drawn, and have yet to be fully fleshed out in the metaverse, it is important for attorneys to honestly communicate the potential for copyright and trademark infringement in the metaverse to their clients. They might also consider filing for international protections under the Madrid Protocol or Paris Convention, because the metaverse is globally accessible by nature.

With time, clearer guidelines as to how to navigate the metaverse will emerge. Until then, consider yourself one among many advocates bravely falling into Wonderland. ♦

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[2] *E.S.S. Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095 (9th Cir. 2008).

[3] *Hermès International, et al. v Mason Rothschild*, No. 22-cv-384 (JSR), Dkt. 24 (S.D.N.Y. Jan 14, 2022).

[4] *Rogers v. Grimaldi* (975 F.2d 994 (2d. Cir. 1989))

[5] 141 S. Ct. 1183 (2021).

[6] *Id.*

New York City's Repeal of its Auction Regulations — Inexplicable

By: Armen R. Vartian[1]

I have been a member of the New York Bar for over 40 years, and have represented auction houses that hold sales in New York City since the mid-1980s. I recall vividly going with clients as a young lawyer to the offices of the New York City Department of Consumer Affairs to obtain or renew their auction company or auctioneer licenses, a process that still required a personal appearance long after most bureaucratic functions could be accomplished by mail or online. I also recall helping clients, including those with no intentions of holding sales in New York City, understand that New York's affirmative requirements and prohibitions constituted best practices in the auction business, and should be applied to every auction company, wherever located. Although I'm no longer based in New York, one of my practice areas always has been making sure that my old clients – and new ones from time to time – operate their businesses in compliance with New York City's regulations.

Imagine my surprise to see that New York City had decided to abolish its auction company and auctioneer licensing requirements and regulations. One justification offered was that there had been few complaints for violations of the regulations, suggesting that industry participants were sufficiently law-abiding that they no longer needed to be regulated. ???? The other justification was simply that regulations are onerous for businesses, and fewer regulations is always better.

Many commentators, including some renowned members of this Committee, have pointed out that major art auction houses in New York such as Sotheby's and Christie's probably will continue to operate their businesses as they did when the regulations were in effect. Others disagree, and it will be hard to know for sure in any event. For example, the regulations previously required an auction house to disclose if it had a pecuniary interest in artwork it is selling – does no disclosure still mean no pecuniary interest, or simply no more disclosure requirement?

It's hard for me to see how anyone in New York City actually benefits from the regulations' repeal. If the problem was that Department staff dealing with license applications was burdensome, New York could have taken the California approach, which is no licenses but regulations which define appropriate conduct and are enforceable by the state Attorney General. Really, I'm more upset about repealing long-standing regulations which all of us in the art auction business lived by, and not because those regulations got in the way of anyone starting or expanding an auction business in New York. No auction companies asked for this repeal and as I indicated above, my clients and hopefully all the other big auction houses will continue to observe at least some of the prior regulations. In addition, I have every expectation that in future litigations accusing auction houses of wrongdoing, the courts will interpret common law concepts of duty and good faith in light of the former New York City regulations, perhaps without invoking them by name. But they'll live on -- which makes the City's casual dismissal of them even more inexplicable. ♦

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