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

By: Martin Aquilina[1]

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 legislation[4]. In *Heffel*, the Federal Court of Appeal[5] 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

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.cnbc.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 Pissarro

By: Amelia L.B. Sargent[1]

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 Pissarro'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 issue[4], 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 suspiciously 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 condition 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 purloined 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 *encubriador.* 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 *encubriador*.

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-Bo[]rnemisza 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. Nandan[1]

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 abruptly 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-

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Extending Anti-Money Laundering Laws to Art and Antiquities Dealers: Pros And Cons

Introduction By: Armen R. Vartian, Editor[1]

As we go to "press", Congress has just passed the 2021 Defense Authorization Act, within which is a provision amending the Bank Secrecy Act to extend the BSA's anti-money laundering provisions to any "person engaged in the trade of antiquities", and directing appropriate U.S. Government officials to prepare implementing regulations. The Act suggests that regulations might require, among other things, identification of actual purchasers of antiquities (as opposed to their "agents or intermediaries") as well as identification of all participants in the antiquities trade. The impact of such requirements on customary art-market confidentiality is obvious. Two prominent voices in the debate concerning AML issues and the art market are Tess Davis and Peter Tompa, whose kind contributions to our Newsletter appear below. ♦

[1] Principal, Law Offices of Armen R. Vartian, Manhattan Beach, CA and Chicago, IL.

Costly Regulations Should Be Imposed Based on Facts Not Advocacy

By: Peter K. Tompa[1]

The small businesses of the art and antiquities trade have suffered significant financial losses during the pandemic. Yet, the House recently passed legislation that foists onerous red tape and substantial costs on these small businesses in the name of "protecting them" from money laundering schemes.[2] Fortunately, the bills- which make "antiquities dealers" (however that may be defined) subject to the Bank Secrecy Act (BSA)- face bipartisan opposition from Senators worried that such costs are not warranted without real proof money laundering is a serious industry -wide problem. However, the bills' sponsors have attempted to bypass legitimate opposition by attaching these provisions to a non-germane must-pass defense bill.

Caution is warranted given the shifting nature of justifications for such regulations. Initially, the legislation's proponents, a coalition of archaeological advocacy groups and anti-money laundering (AML) compliance contractors, claimed the legislation was necessary to help keep items looted by ISIS

Increased Regulation Deters Crime — and is Good for the Art Market

By: Tess Davis[1]

This fall, the Office of Foreign Assets Control (OFAC) joined a growing chorus in sounding the alarm that criminal misuse of the art market is threatening not only U.S. national security and economic integrity—but also responsible collectors, dealers, galleries, auction houses, and museums. In an October 30, 2020 advisory targeting art market actors, OFAC warned that America's enemies have exploited the sector's vulnerabilities to evade sanctions, and provided guidance for countering such threats. It highlighted known examples from Hezbollah, North Korea, and Russia.[2]

This past July, a bipartisan Congressional report had exposed that Russian oligarchs, brothers Arkady and Boris Rotenberg, had laundered millions through American auction houses and art dealers, evading U.S. sanctions on Vladimir Putin's inner circle.[3] A Senate subcommittee had launched an inquiry into the effectiveness of these sanctions, which since 2014 have sought to counter Russia's invasion of Ukraine and annexation of Crimea, due to a growing concern that blacklisted individuals like the

second largest Christian Church. Ecumenical Patriarch Bartholomew is the leader of 300 million Orthodox Christians worldwide. More specifically, the Ecumenical Patriarch has direct jurisdiction over the Greek Orthodox Archdiocese of America and thus is the spiritual and ecclesiastical leader of its 1.5 million adherents. As such, the Ecumenical Patriarch is, in a sense, also an American spiritual leader and should be afforded the protections of an American spiritual leader. Unfortunately, rather than safeguarding the Ecumenical Patriarch, the Turkish government has at times seized the Ecumenical Patriarch properties, and continues to deny the Ecumenical Patriarch's legal personality and international status. On multiple occasions, the European Court for Human Rights has ruled unanimously (including the Court's Turkish representative) in favor of the Ecumenical Patriarchate.

With respect to recent MOUs, the Department of State unfortunately has not shared the specific text of what the MOUs say until they are published. However, it is clear that by acknowledging the Turkish government's right to control cultural heritage by repatriating it to Turkey under the terms of any MOU and 19 U.S.C. § 2609, the U.S. will both harm the interests of religious minorities within Turkey and embolden the Turkish government to continue its persecution. Any MOU between the United States and Turkey that authorizes import restrictions on archaeological or ethnological materials by necessity recognizes the Turkish government's rights to ownership or control of such artifacts. Erdogan's government would easily and predictably spin U.S. recognition of Turkey's rights to movable property subject to import restrictions as a *de facto* recognition of the Turkish Government's rights to all such property, including churches. The re-conversions of the Hagia Sophia and Church of the Holy Saviour in Chora, along with the Turkish government's efforts to destroy or convert numerous minority cultural and religious sites, are clear displays of President Erdogan's obvious intentions.

If the U.S. Government agrees with the Turkish Government's proposal, President Erdogan will have the excuse that he needs to justify future conversion, destruction, or confiscation of minority religious sites and property. Rather than considering entering into cultural MoU agreements with the Republic of Turkey, we should look at ways to sanction Turkey for its violation of the UN Charter, UNESCO Convention, and U.S. laws, including IFRA, which obligates the President of the United States to take one or more of 15 enumerated actions toward a country that violates the Act. ♦

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[1] Elias Gerasoulis is Director of Legislative Affairs for the American Hellenic Institute (AHI)

Ninth Circuit Affirms Judgment that Spain's Thyssen-Bornemisza Collection May Keep Nazi-Looted Pissarro

By: Amelia L.B. Sargent[1]

In an unpublished memorandum disposition filed August 17, 2020, the Ninth Circuit affirmed the United States District Court for the Central District of California's final judgment that the Kingdom of Spain's Thyssen-Bornemisza Collection Foundation (TBC) may keep Camille Pissarro's *Rue St. Honoré, après midi, effet de pluie* (the "Painting"), because when TBC acquired the Painting in 1993 it lacked actual knowledge that the Painting previously had been stolen by the Nazi regime from its rightful owner.[2] Thus, as the district court found, TBC had acquired good title to the Painting under Spanish law. But also like the district court, the Ninth Circuit rebuked the TBC for taking a legal position seemingly counter to Spain's participation in international declarations on the return of Nazi-looted art.[3]

This is the fourth Ninth Circuit appeal in the long-wending, fifteen-year litigation between the Cassirer family and TBC. While the prior appeals focused on the myriad complex procedural issues, including issues of first impression that now routinely accompany Holocaust art cases in the United States — such as foreign sovereign immunity,[4] the statute of limitations,[5] and choice-of-law principles[6] — this appeal affirmed a final judgment on the merits from a bench trial held on December 4, 2018.[7]

As previously covered in this Newsletter,[8] the wartime provenance of the Painting is uncontested: The Nazi regime forced Lily Cassirer Neubauer to transfer the Painting in exchange for exit visas to leave Germany in 1939. Instead, the December 2018 bench trial focused on whether acquisitive prescription (adverse possession) principles under Spanish law applied such that TBC held good title to the Painting by the time Cassirer's heirs brought suit.[9]

It was thus the third appeal ("*Cassirer III*") that truly sealed the Painting's fate, when the Ninth Circuit ruled that Spanish, not California, law governed the lawfulness of TBC's acquisition of the Painting. While California law follows the maxim that "a thief cannot pass good title," Spanish law provides that good title to stolen moveable property can pass after six years via principles of adverse possession. In 2015, the district court had previously found on summary judgment (which the Ninth Circuit affirmed) that TBC had possessed the Painting as an owner publicly, peacefully, and without interruption for more than six years as prescribed by Spanish Civil Code Article 1955.

While California law follows the maxim that "a thief cannot pass good title," Spanish law provides that good title to stolen moveable property can pass after six years via principles of adverse possession.

The deciding question that the Ninth Circuit remanded for trial was whether an exception to Article 1955 applied to the situation at hand. Article 1956 of the Spanish Civil Code provides that the six-year period of Article 1955 does not apply to "those who purloined or stole [the stolen property], or their accomplices or accessories [*encubriadores*], 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."[10] In *Cassirer III*, the Ninth Circuit interpreted Article 1956 as extending the period of possession from six to twenty-three years.[11] Thus, if TBC was an *encubriador* to the Nazi appropriation of the Painting, good title did not pass.

At trial, the district court found that the TBC was not an *encubriador* to the Nazi appropriation of the Painting because it lacked "actual knowledge" that the Painting had been stolen at the time of purchase in 1993. Although TBC "benefitted from its possession of the Painting by displaying it at the Museum," the district court determined TBC lacked the "willful intent" or "willful blindness" necessary to indicate any actual knowledge.[12]

Apparently understanding that the application of Spanish law would be dispositive in the case, Plaintiffs' opening appellate brief in *Cassirer IV* took a bold gamble and requested as a threshold matter that the Ninth Circuit revisit its decision in *Cassirer III* en banc. Plaintiffs argued that the panel erred in holding that Spanish law governed their substantive claims, or that other legal principles and regimes precluded the application of acquisitive prescription under Spanish law.[13] The Ninth Circuit rejected Plaintiffs' argument because its prior holding was both law of the case and binding precedent.[14]

Plaintiffs also argued that district court applied the incorrect test to determine whether TBC had "actual knowledge" that the Painting was stolen; that the Painting's seller had actual knowledge of the Painting's origin which could be imputed to TBC (the seller being the foundation's name-

sake Baron Thyssen-Bornemisza); and that the record did not support the district court's finding that TBC lacked actual knowledge.[15] All of these were rejected as well, letting the district court's ruling stand.[16]

Like the district court, however, the Ninth Circuit admonished TBC and Spain[17] for what it viewed as the inconsistency of its litigation position with its moral obligations. The Ninth Circuit pointedly noted that Spain had previously agreed to the Washington Principles on Nazi-Confiscated Art and the Terezin Declaration on Holocaust-Era Assets and Related Issues, both of which called for participant countries to achieve "just and fair solution[s]" in remedying Nazi-era looting of art and cultural property.[18] The Ninth Circuit ultimately agreed with the district court that it could not order compliance with those declarations, saying, "It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations. But that is the state of the law."[19]

Plaintiffs filed their petition for rehearing and rehearing en banc on September 30, 2020, which was denied the petition on December 7, 2020. ♦

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[1] The author submitted an amicus brief in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013) [*Cassirer II*] on behalf of the California Association of Museums in support of TBC while at a different firm, an amicus brief in the district court before trial on behalf of the Kingdom of Spain, and an amicus brief in the instant appeal, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 824 Fed. Appx. 452 (9th Cir. 2020) [*Cassirer IV*]. The views set forth in this article are the author's own.

[2] *Cassirer IV*, 824 Fed. Appx. at 455.

[3] *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

[4] *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2020) (en banc) [*Cassirer I*]

[5] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013) [*Cassirer II*]

[6] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017) [*Cassirer III*]

[7] Findings of Fact and Conclusions of Law, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, CV 05-3459-JFW (Ex), ECF 621 (Apr. 30, 2019) ["Findings"].

[8] Amelia L.B. Sargent, *Spain's Thyssen-Bornemisza Collection Foundation Prevails at Trial to Keep Nazi-Looted Pissarro*, American Bar Ass'n Section of Int'l Law, Art & Cultural Heritage Law Newsletter, at 4-6 (Spring 2019).

[9] The district court also considered whether Baron Hans Heinrich Thyssen-Bornemisza possessed the Painting in good faith for at least five years under Article 728 of the Swiss Civil Code, such that he acquired good title and passed said title to TBC. The district court ultimately found the Baron lacked such good faith.

"It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations. But that is the state of the law."

[10] Spanish Civil Code Art. 1956 (English translation).

[11] *Cassirer III*, 862 F.3d at 966.

[12] *See* Sargent, *supra*, note 8 at p. 6; Findings, *supra* note 7, at pp. 26-30.

[13] *Cassirer IV*, 824 Fed. Appx. at 455. Specifically, the Plaintiffs requested the Ninth Circuit revisit its holding that "(1) Spanish law governs their substantive claims; (2) the Holocaust Expropriated Art Recovery Act does not bar Spain's acquisitive prescriptive defense; (3) Spain's Historical Heritage Law does not prevent TBC from acquiring the Painting by acquisitive prescription; (4) Spain's acquisitive prescription laws did not violate the European Convention on Human Rights; (5) and Spain satisfied the element of public possession necessary to establish acquisitive prescription under Spanish law." *Id.*

[14] *Id.*

[15] *Cassirer IV*, 824 Fed. Appx. at 455-57.

[16] *Id.*

[17] The TBC is a state-run entity, and previously found to be an "agency or instrumentality" of the Kingdom of Spain.

[18] *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

[19] *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

Frontiers in Art: Artistic Freedom as an International Human Right

By: Martin Aquilina[1]

FREEDOM OF EXPRESSION/ARTISTIC FREEDOM

The freedom to express oneself is a fundamental human right that is an indispensable condition for the full development of the individual and of society. It is, in effect, a foundational pillar to a free and democratic society.[2] Freedom of expression is recognized in virtually all of the international and regional human rights treaties and is represented to some degree in nearly every constitution in the world. As for artistic expression, one can hardly discuss it in a legal framework without a nod to so-called cultural rights. Notwithstanding that the definition of culture presents some challenges, there is consensus in the literature that cultural rights are an integral part of human rights,[3] though the question of how and where cultural rights are to be integrated in the traditional taxonomy of economic, civil, social and political rights also presents some challenges.

One area where freedom of expression and culture intersect is in the realm of visual arts, which are of universal importance to the human experience of creation. The *United Nations Educational, Scientific and Cultural Organization* ("UNESCO") defines artistic freedom as "the freedom to imagine, create and distribute diverse cultural expressions free of governmental censorship, political interference or the pressures of non-state actors. It includes the right of all citizens to have access to these works and is essential for the wellbeing of societies."[4] Like the broader freedom of expression, artistic freedom must be considered a human right.

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Concerns regarding the freedom of expression tend to be focused on news media and journalism rather than artists and the arts, overlooking the fact that artists are at risk of human rights violations worldwide as a result of their artistic creations.[5] Perhaps more so than with journalistic information, artistic expression can be influenced and restricted by both state and non-state actors. While some restrictions are recognized and sanctioned by international or national law, others are not, thus tasking the international community with two questions: what is the value of art as personal and political expression and how does international law manage to balance the need to protect artists and their ability to create and critique while ensuring the protection of other important rights such as that the right to dignity or societal norms of decency.

THE IMPORTANCE OF ARTISTIC EXPRESSION

Art is a vessel of personal and political expression, as it serves as a means for persons to express their individual and collective thoughts and feelings, triggering the recognition of one's own humanity.[6] In addition to helping alleviate the artist and audience's own anguish, visual art may memorialize human rights abuses and suffering, providing a means of witnessing and

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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

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