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Analysis of the Holocaust Expropriated Art Recovery Act of 2016

*Jennifer Anglim Kreder**

What makes this particular crime even more despicable is that this art theft, probably the greatest in history, was continued by governments, museums and many knowing collectors in the decades following the war. This was the dirty secret of the post-war art world, and people who should have known better were part of it.

Testimony of Ronald S. Lauder to a Senate Judiciary Committee on June 7, 2016.¹

More than seventy years after World War II, second and third generation descendants of Holocaust survivors use databases such as Ancestry.com and Jewish Genealogy Portal to discover who their relatives were. People are still searching and finding newly declassified, searchable sources of evidence about what happened to their families. Likewise, evidence regarding people's uniquely identifiable belongings, such as cultural property and art, have recently become searchable. However, such information is scattered across countries and archives. A skilled researcher fluent in multiple languages can—with a lot of diligence and a little luck—unearth uniquely identifiable property linked to a specific person. When that happens, is there any reason the survivor or her heirs should not be able to reclaim that property today? As in so many other areas of law, the answer is, "it depends," and law and morality may not point to the same answer.

This article introduces readers to the problems facing Holocaust victims and their heirs today as they seek to recover art stolen during the Nazi era. It provides essential history,

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¹ *The Holocaust Expropriated Art Recovery Act--Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 The Holocaust Expropriated Art Recovery Act Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (statement by Ronald S. Lauder).

beginning with Hitler's rise to power, so that readers can understand the Holocaust Expropriated Art Recovery Act (hereinafter the "HEAR Act"), a bipartisan piece of legislation currently under consideration by the Senate Committee on the Judiciary (as of December 5, 2016).² Part I provides the essential pre-war and WWII-era history. Part II informs readers about the essential decisions a plaintiff must make before filing suit. Part III analyzes the key cases and legal developments concerning Nazi-looted art recovery since 1998. Part IV analyzes the HEAR Act. Part V concludes that the HEAR Act is a positive development that would allow survivors and their heirs a fair chance at recovering their stolen art.

I. PRE-WAR AND WWII-ERA ART HISTORY

Many people do not realize that one core part of the Nazis' "Final Solution" was the destruction of Jewish culture and the targeted pillaging of its art.³ Hitler sought to eliminate Jewish culture from the Third Reich, including modern art, which he deemed "degenerate."⁴ The Nazis targeted this art either to destroy it or profit from it, with the latter often involving sales through Swiss dealers to raise foreign currency.⁵

On April 26, 1938, the Nazis passed one of their Nuremberg Laws, which required Jews with more than 5000 Reichmarks ("RM") in property to periodically declare and inventory their assets.⁶ The Jews could not sell their property without authorization from the Nazi Property Control Office.⁷ The Nazis obsessively documented their thefts to make them appear ordinary and legal.⁸

Why were Hitler and the Nazis so concerned with art? In his twenties, Hitler tried to make a living painting bland, unoriginal watercolors in Vienna. He believed he was great, but he wasn't, and he was out of step with the modern art movements of the day.⁹ Those *avant-garde* art movements, such as Expressionism,

² See S. 2763, 114th Cong. (2016).

³ MICHAEL J. KURTZ, AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES 14–15 (2006).

⁴ JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 54–55 (1996).

⁵ NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 59 (2000); PETROPOULOS, *supra* note 4, at 60–61.

⁶ GÖTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 42 (Jefferson Chase trans., Metro Books 2005); HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS 51 (2001).

⁷ ALY, *supra* note 6, at 136.

⁸ WILLIAM L. SHIRER, 20TH CENTURY JOURNEY: THE NIGHTMARE YEARS, 1930–1940 30 (1984).

⁹ ADOLF HITLER, MEIN KAMPF, Vol. I Ch. I, http://www.hitler.org/writings/Mein_Kampf/mkv1ch01.html (describing Hitler's youthful interest in painting and architecture, and his

were often affiliated with leftist politics, including Communism.¹⁰ Some of the successful artists were Jews. Hitler resented them and the art world's rejection of him in favor of them.

Hitler bottomed out in Vienna in his twenties. He was homeless and often went hungry—a long fall from his middle class upbringing in Linz, Austria. He joined the German military to fight in the First World War. He was injured and found himself down and out again in Bavaria. It is there that he found like-minded, miserable individuals in various paramilitary organizations.¹¹

Hitler envisioned a revival of classic, realistic and patriotic art.¹² Although Hitler failed to gain entry to the esteemed Vienna Academy of Fine Arts, he viewed himself as an artistic intellectual.¹³

Hitler juxtaposed this view of classical art with his disdain for modern art styles, raging against modern art as “a great and fatal illness.”¹⁴ To Hitler, art meant symmetry, order, natural color tones, and realistic physiology in portraits. This worship of order carried through into Hitler's political drive for control.

Works of art like paintings and sculptures are also relatively easy to transport throughout the world. The Nazis robbed Germany and its occupied territories of artistic wealth while simultaneously introducing ideological Nazi art into German society as the new cultural movement.¹⁵ To follow the Nazi war machine trampling over Europe, Hitler created the *Einsatzstab Reichsleiter Rosenberg* (“ERR”) in 1940 for the special task of confiscating and destroying art in the occupied territories, with a particular focus on the West.¹⁶

belief that he was destined to be a great artist) [<http://perma.cc/MDE8-XXHB>].

¹⁰ Ralph Croizier, *The Avant-Garde and the Democracy Movement: Reflections on Late Communism in the USSR and China*, 51 *EUROPE-ASIA STUDIES* 3, 483, 485 (1999).

¹¹ IAN KERSHAW, *HITLER: A BIOGRAPHY* 51 (2008).

¹² HITLER, *supra* note 9, at Vol. I Ch. II (“What had to be reckoned heavily against the Jews in my eyes was when I became acquainted with their activity in the press, art, literature, and theater . . . [i]t goes without saying that the lower the intellectual level of one of these art manufacturers, the more unlimited his fertility will be, and the scoundrel ends up like a garbage separator, splashing his filth in the face of humanity.”).

¹³ KERSHAW, *supra* note 11, at 16.

¹⁴ Godfrey Baker, *The unfinished art business of World War Two*, BBC NEWS (Nov. 4, 2013), <http://www.bbc.com/news/world-europe-24812078> (citing Hitler's opening speech to the *Haus der Kunst* “degenerate art” exhibition) [<http://perma.cc/XUS6-PRJG>].

¹⁵ See, e.g., LYNN NICHOLAS, *RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR* (1995).

¹⁶ Marc Balcells, *Plundering Boys: A Cultural Criminology Assessment of the Power of Cultural Heritage as a Cause for Plunder in Armed Conflicts Along History*, in *CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT* 329, 338 (Joris Kila & James Zeidler eds., 2013).

Despite internationally accepted rules of law forbidding the theft of art and cultural property, some dating back to Roman times, pillaging an enemy's cultural heritage during times of warfare is often seen as a symbol of the conqueror's total victory.¹⁷ Additionally, art often is valuable. It was an easily moveable commodity readily seized by the Nazis along with the currency, jewelry, and other assets of German Jews after 1933.¹⁸

Hitler amassed a hoard of artworks for his proposed *Führermuseum* in Linz, his childhood town.¹⁹ The *Sonderauftrag Linz* took orders directly from Hitler regarding which works of art to appropriate from the occupied territories for the Linz Museum.²⁰ Hitler was not the only Nazi leader with an affinity for the arts, however; Hermann Göring also held himself as a sophisticated purveyor of fine art.²¹ The stolen collections of both men and other Nazi officers grew during the Second World War.²² The systematic plunder of art from occupied Europe supplied the private and public collections of Nazi Germany with many thousands of works.²³

Hitler and the Nazis did not merely target the nineteenth century classic art works. Through the systematic takeover of German culture by the Nazis, they realized that Nazi-sponsored art served as powerful visual propaganda when displayed to the public.²⁴ Similarly, they knew the destruction and seizure of works deemed undesirable had propaganda value as well.²⁵ The Nazi platform decreed that modern art was anti-German and mandated all modern art be turned over to the state.²⁶ Even

¹⁷ *Id.* at 340.

¹⁸ MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION 202 (2003).

¹⁹ KERSHAW, *supra* note 11, at 7.

²⁰ The *Sonderauftrag Linz* was formed in 1939 and, along with the ERR, served as Hitler's primary means of capturing artistic spoils of war. DAVID ROXAN & KEN WANSTALL, THE RAPE OF ART: THE STORY OF HITLER'S PLUNDER OF THE GREAT MASTERPIECES OF EUROPE 174 (1965).

²¹ JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY 2 (2000).

²² The Berghof was Hitler's Bavarian estate and Carinhall was Göring's countryside retreat near Berlin.

²³ ROXAN & WANSTALL, *supra* note 20, at 174 ("It must be a conservative estimate to state that at least 100,000 works of art were looted by the Nazis during their years in power."). This estimate seems to be about just one of the Allies' 1050 central collection points throughout Europe.

²⁴ Balcells, *supra* note 16, at 347 (describing the use of visual displays and military processions as propaganda to convince the German masses of total Nazi cultural dominance).

²⁵ Point 23 of The Program of the N.S.D.A.P. stated: "We demand legal prosecution of artistic and literary forms which exert a destructive influence on our national life, and the closure of organizations opposing the above made demands." Document No. 1708-PS. Central Publishing House of the N.S.D.A.P., <http://sourcebooks.fordham.edu/mod/25points.asp> [<http://perma.cc/W5NX-7WK2>].

²⁶ FERNANDO BAEZ, A UNIVERSAL HISTORY OF THE DESTRUCTION OF BOOKS: FROM ANCIENT SUMER TO MODERN-DAY IRAQ 211 (2008). The Reich Culture Chamber

though the party turned against modernism, Joseph Goebbels and other prominent Nazis were modern art collectors who saw expressionism as powerful images of “aryan” strength; they maintained their private collections despite the seizure of modern works from the German public.²⁷

The Nazis, realizing the powerful role art and architecture play in political propaganda, targeted their political opponents. Political opposition to the Nazis through artistic expression was shut down. Modern artists like George Grosz, a communist whose modern art served as political commentary, challenged the Nazi rise to power and was seen as a political threat that could not be tolerated. Modern art works by Grosz, Paul Clay, Otto Freundlich, Otto Dicks, Max Beckman, and Ernst Kirchner were denounced as “degenerate art,” and confiscated by the Nazis from museums and private owners. Nazi painter and ideologist Adolf Ziegler was a Nazi darling. He spoke at the opening of *die Ausstellung Entartete Kunst*, the Exhibition of Degenerate Art, held during the latter half of 1937.²⁸ The six-month Munich exhibition pressured the German populace to label modern art as “degenerate art unfit for the sophisticated German master race, which placed value on classical styles of order and symmetry.”²⁹ To influence Germans further, the Nazis launched a concurrent exhibition of Nazi-favored art to serve as an example of what Nazism believed art to truly be—a counter-balance to the degenerate exhibition.³⁰

The Nazi ideology also claimed Slavic cultural influences had weakened Germany.³¹ The Nazis set out to systematically seize control over all aspects of the German way of life as self-proclaimed saviors of German heritage amid the influx of

(Reichskulturkammer) was established in September of 1933 under the supervision of Joseph Goebbels to “stimulate the Aryanization of German culture and to prohibit, for example, surrealism, cubism, and Dadaism.” *Id.*

²⁷ PETER ADAM, *ART OF THE THIRD REICH* 56 (1992); accord PETROPOULOS, *supra* note 21, at 1–2.

²⁸ NICHOLAS, *supra* note 15, at 18.

²⁹ *Id.*

³⁰ For the first time in history, works from both the “degenerate art” exhibit and the Nazi-approved art exhibit were on exhibition side-by-side at the Neue Galerie Museum for German and Austrian Art in New York. *Degenerate Art: The Attack on Modern Art in Nazi Germany, 1937* (Mar. 13–Sept. 1, 2014), <http://www.neuegalerie.org/content/degenerate-art-attack-modern-art-nazi-germany-1937> [<http://perma.cc/SQ2Q-URBA>]. This was the most recent exhibition of “degenerate art” in the United States since the 1991 exhibition “Degenerate Art”: Fate of the Avant-Garde in Nazi Germany at the Los Angeles County Museum of Art.

³¹ Marsha L. Rozenblit, *Review of Steven E. Aschheim, Brothers and Sisters: The East European Jew in German and German-Jewish Consciousness*, 6 *MODERN JUDAISM* 311 (1986).

outsider influences.³² Art in all forms became subject to harsh “Germanic culture laws” mandating the “aryanization” of personal property owned by those deemed by the Nazis to not be true German citizens based on factors such as race, ethnicity, religion, and mental capacity.³³ Although only a marginal percentage of Germans were Jewish, the Nazis labeled European Jews as a major cause of both Germany’s misfortunes in World War I and the failure of the Weimar Republic’s attempt to strengthen Germany once again.³⁴

Others were added to the private collections of German art dealers like Hildebrand Gurlitt after being processed and “aryanized,” the systematic transfer from Jews to non-Jews by Nazi bureaucratic documentation after coerced sales.³⁵ Shortly after the public burning, public institutions like the Basel Museum in Switzerland and private modern art connoisseurs sought to buy the “degenerate art” the Nazis purged from the German museums.³⁶ To purge German society of “degenerate art” while also generating a profit, the Nazis arranged large auctions that took place in Switzerland and Berlin wherein stolen works by Picasso, Van Gogh, and other renowned artists were sold.³⁷ Funds from these auctions went directly to the German state.³⁸

The Allied forces became aware of the level of destruction the Nazi war machine wrought on Europe’s ancient landmarks and the theft of cultural treasures. The London Declaration was an international agreement among the Allies that sought to ensure the ultimate restitution of cultural property stolen by the Nazis.³⁹ The London Declaration stated, in relevant part:

[The Allies] [h]ereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly the governments making this declaration . . . reserve all

³² See MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* (2008) (explaining the theft component of the Nazi genocide).

³³ RICHARD GRUNBERGER, *THE 12 YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933–1945* 424–25 (1971).

³⁴ Rozenblit, *supra* note 31, at 311.

³⁵ Balcells, *supra* note 16, at 338. Germans utilized legal mechanisms of the Nazi state to coerce sales from Jewish art dealers and others classified as having subservient legal rights.

³⁶ Baker, *supra* note 14 (citing Hitler’s opening speech to the *Haus der Kunst* “degenerate art” exhibition).

³⁷ NICHOLAS, *supra* note 15, at 4.

³⁸ *Id.* at 5.

³⁹ Multilateral Declaration on Forced Transfers of Property in Enemy Controlled Territory (“London Declaration”), 3 Bevans 754 (1943), 1943 U.S.T. LEXIS 188.

their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever . . . This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.⁴⁰

The Declaration singles out neutral countries because the Nazis sold off the undesired art in Switzerland to raise foreign currency. Lynn Nicholas' excellent 1995 book, *Rape of Europa*, described the process in detail, including how American middlemen purchased art that eventually was acquired by American museums.⁴¹ Unfortunately, the declaration alone was not enough to ensure post-war restitution.⁴²

The Allied military forces formed the Monuments, Fine Arts, and Archives ("MFAA") agency, which was responsible for countering the ERR's impact by mitigating damage to cultural monuments and reclaiming stolen works in war-torn Europe during the Allied advance.⁴³ The Art Looting Investigation Unit ("ALIU") also sought out Nazi-looted art and worked under the auspices of the Office of Strategic Services ("OSS"). Although the MFAA and ALIU were able to retrieve many thousands of works seized by the Nazis during their reign of terror, many pieces remain missing.⁴⁴ Furthermore, as in every war, soldiers stole art. Some American soldiers sent artworks back to the United States. The American government did much to find and return such stolen property. In contrast, Soviet soldiers took back artworks by the train load, including "trophy brigades" specifically tasked with the objective of appropriating art. The Russians thus far have expressed no intent to return stolen works, which they view as substitutionary compensation for the massive loss of human and cultural life in Eastern Europe at the hands of the Nazis.

⁴⁰ *Id.*

⁴¹ LYNN NICHOLAS, *RAPE OF EUROPA* (First Vintage Books Ed., 1995).

⁴² See Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT. LAW 49, 60 (2011), <http://ejil.oxfordjournals.org/content/22/1/49.full> (discussing the 1943 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control to address Nazi plunder from occupied territories and addressing the difficulty of providing restitution in international law for seizure by the Nazis of German Jews' property) [<http://perma.cc/D7JC-NF6P>].

⁴³ Cheryl White & Thomas Livoti, *Cultural Heritage Preservation: A Tool for Coin*, in CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT 195, 202 (Joris Kila & James Zeidler eds., 2013).

⁴⁴ Stuart Eizenstat, *The Unfinished Business of the Unfinished Business of World War II*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 297, 307 (Michael J. Bazyler & Roger P. Alford eds., 2007).

After World War II, Western European nations set up special claims commissions to allow war victims to reclaim their property from the state. In some instances, the government returned property or paid a small amount of compensation, but generally the commissions did not function well. For one thing, victims forced to flee in haste often did not have evidence of what they owned. Photographs were not as commonplace then as they are today. Europe lay in ruins; Nazi archives of the property they systematically looted were destroyed, in disarray, or still classified, and it was not only Nazis who stole. Secondly, the window of opportunity to claim was far too short. And finally, yet just as importantly, those staffing the governmental bureaucracies after the war were not too uncommonly aligned with the Nazis during the war; many were anti-Semitic and biased against the victims.

While various estimates abound, no one can truly put a number on the artworks stolen and still missing today. Every once in a while, however, someone comes forward with research showing that a particular piece of art was, in fact, stolen during the war. Heirs seeking to recover such a piece of art face significant obstacles in seeing their property returned. If the survivor needs to sue, the next step would be choosing a court. That does not resolve, however, which nation's law applies to the lawsuit.

II. CHOOSING A COURT AND LAW

If a survivor or heir brings a lawsuit challenging a current possessor's title to art in the United States, the court must first determine which nation's (or state's) law applies to resolve the claim.⁴⁵ Courts apply various tests that are notoriously difficult to predict, but the outcome of the tests often dictates whether the current possessor or the theft victim will win the case. If the court applies a European nation's law, the claimant's chance of success is generally less than when U.S. law applies.⁴⁶ If the court determines it must apply U.S. law, then it must decide which state's law applies.⁴⁷ Usually this will be the state where the property is located, which typically is where the lawsuit has been filed.⁴⁸

⁴⁵ See generally *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010).

⁴⁶ See generally Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009).

⁴⁷ See *Bakalar*, 619 F.3d at 142–43.

⁴⁸ See *id.* at 143.

Although there are some differences from state to state, American law generally provides that no purchaser or donee can acquire legal ownership of the property if a thief is in her chain of title.⁴⁹ If the true owner sues in such a case, the court will declare title to be in the true owner, unless the case is otherwise barred by an applicable statute of limitations, laches, or some other legal or equitable defense.⁵⁰ If the present-day possessor succeeds, she keeps the property while not technically having legal title.⁵¹ Theoretically, there may be another forum where the true owner could assert a new claim under different law, but that risk is small and the market generally will treat the property as saleable. If the true owner succeeds, the out-of-luck buyer's only recourse is to try to recover the sales price from the person from whom she purchased the property.

Under civil law, these rules are radically different. Significantly, the successful claimant will have to reimburse a good faith purchaser the price paid for the property.⁵² Moreover, it is generally possible for title to pass to a possessor of stolen property after the passage of a sufficient number of years, often thirty. In some civil law jurisdictions, such as Switzerland, title might pass immediately to a good faith purchaser who paid for the property.⁵³ And it is important to remember that contingency fees are not permitted in Europe, which also follows the loser-pays principle and charges high filing fees based on a percentage of the value of the property claimed. Thus, it is far more expensive and risky for a claimant to file a lawsuit in a European court.

III. THE REVIVED QUEST FOR JUSTICE

Given the essential differences between United States and European laws, it might appear that a claimant would have a much better chance of recovering looted artwork in the United States than anywhere else.⁵⁴ For a while that seemed to be the case.

In 1998, New York District Attorney Robert M. Morgenthau seized *Portrait of Wally* by Egon Schiele. The painting had to be released under a New York statute, which is when the federal government stepped in to seize it. The seizures shocked the art

⁴⁹ See *id.* at 140–41 (citing *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. N.Y. Cnty. 1966)).

⁵⁰ See *id.* at 141.

⁵¹ See *id.*

⁵² See *id.* at 140.

⁵³ See *id.*

⁵⁴ See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 684–85 (2004) (filing the case against Austria in Austrian courts would have cost Altmann “approximately \$350,000,” as opposed to the filing fee of \$175 or so she would have paid to file in the U.S. District Court in California).

world. The painting was on loan from the Leopold Foundation (referred to as the Leopold Museum) in Vienna, Austria, to the Museum of Modern Art (the “MoMA”) in New York. The ground for the seizure was that the painting was stolen property transported into the United States in violation of the National Stolen Property Act. The museums sought the painting’s release.

Portrait of Wally had been owned by Lea Bondi Jaray, a Jewish Viennese gallery owner forced to flee upon the Nazi annexation of Austria in March 1938, the *Anschluss*. Nazi officer Friedrich Welz stole *Portrait of Wally* from Bondi before she managed to flee to London. She was able to re-establish herself as an art dealer there after the war.

After the war, Welz was interned on suspicion of war crimes. The U.S. army returned the artworks Welz possessed to the Austrian government, which was supposed to return property to victims pursuant to a U.S.-Austrian treaty. Ms. Bondi’s lawyers managed to get some of her property back, but not *Portrait of Wally*. The Austrians included it in a shipment of artwork restituted to another family and simultaneously sold back to the *Österreichische Galerie Belvedere* (“the Belvedere”).⁵⁵

Ms. Bondi learned of *Portrait of Wally’s* location in the Belvedere when she confronted Welz as part of one of her commission proceedings in 1954. She never could get the painting back, ran out of funds, and thought it unwise to pursue a lawsuit. A few years later, Dr. Rudolph Leopold, another Viennese Schiele collector approached her to buy more Schiele artworks. She told him about her predicament; they agreed to help each other. They never spoke again. Leopold traded other works from his own collection to the Belvedere in exchange for *Portrait of Wally*. An unsigned, handwritten note found in her London apartment after her death stated:

I myself prevent a court case with the Belvedere (Museum for Modern Art in Vienna) as I was reinstated as the proprietor of the Gallery Würthle, Gallery exclusive for Modern Art, and as this it was not possible for me to quarrel with the Museum of Modern Art and tried to get my picture back by peaceful means.⁵⁶

After the war, Austrians still indulged in the myth that the Austrian nation was the first victim of Hitlerite aggression. This

⁵⁵ Press Release, U.S. Att’y for S.D.N.Y., United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> [<http://perma.cc/PH4B-WM6X>].

⁵⁶ See Third Amended Verified Complaint at ¶ 5 (gg), *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (No. 99 Civ. 9940) (quoting Ms. Bondi’s handwritten note).

myth ignored the fact that most Austrians wanted Hitler to merge their country into the Third Reich and that the post-war restitution processes were not generous to Jews seeking compensation. Moreover, through the Austrian cultural ministry (*Bundesdenkmalamt*), the Austrian government demanded from victims donations of art to its museums in exchange for export permits for the art it was willing to return. This fact was not well known until well after the *Portrait of Wally* seizure brought the dark secret out into the light.

With an aura of justice, Deputy Secretary of the Treasury Ambassador Stuart Eizenstat, head Holocaust negotiator for the United States, was able to lead forty-four nations to sign the Washington Principles on Nazi-Confiscated Art after the Washington Conference on Holocaust-Era Assets in 1998.⁵⁷ The Washington Principles addressed key issues facing the successful restitution of Nazi-looted artworks, such as encouraging lenience for “gaps or ambiguities in the provenance” of the works and encouraging governments to inform the public of works in their collection with uncertain provenance “to locate its pre-War owners or their heirs.”⁵⁸

Inspired by these developments, Austrian investigative journalist Hubertus Czernin committed to unearthing Austria’s murky Nazi past.⁵⁹ He published evidence that the Republic of Austria possessed Nazi-looted art in the Austrian Gallery’s archives.⁶⁰ In response to these allegations, the Austrian government passed the Art Restitution Law to open the Austrian Gallery archives to provenance researchers.⁶¹ The Austrian government also established a commission to secure the safe return of any stolen art from the Austrian Gallery archives.⁶² Mr. Czernin provided his research into the Gallery’s archives to Maria Altmann, which ultimately led to her claim against Austria.⁶³ Even though the Commission found documentary evidence demonstrating the illegitimacy of the Gallery’s claims of

⁵⁷ JUDITH B. PROWDA, *VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS* 229 (2013). Eizenstat was made Special Adviser on Holocaust Issues in December 2013, tasked with “offering policy advice on Holocaust-related matters[.]” *Stuart E. Eizenstat*, U.S. Dep’t of State, <http://www.state.gov/r/pa/ei/biog/218946.htm> [<http://perma.cc/K5YY-XRRP>].

⁵⁸ Bureau of European and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.html> [<http://perma.cc/K6GV-6ZZ4>].

⁵⁹ Associated Press, *Hubertus Czernin, 50, Reporter Who Helped Recover Stolen Art*, N.Y. TIMES (June 16, 2006), http://www.nytimes.com/2006/06/16/arts/16czernin.html?_r=0.

⁶⁰ *Altmann*, 541 U.S. at 680.

⁶¹ See BARBARA T. HOFFMAN, *ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE* 174 (2006).

⁶² *Id.*

⁶³ *Altmann*, 541 U.S. at 680.

ownership in Adele Bloch-Bauer's will, the commission never recommended the paintings be returned to their rightful owner.⁶⁴

Altmann's Supreme Court case over the applicability of § 2 of the Foreign Sovereign Immunities Act ("FSIA") of 1976 concerned her right to pursue a claim for ownership of two paintings against Austria, *Portrait of Adele Bloch-Bauer I* (1907) and *Portrait of Adele Bloch-Bauer II* (1912) by Gustav Klimt.⁶⁵ Altmann was the niece of the last rightful owner of the paintings, Ferdinand Bloch-Bauer, who bequeathed the two mentioned paintings to her. The paintings were seized by the Nazis from Bloch-Bauer's residence in Vienna after he fled in 1938 following Germany's annexation of Austria into the Reich.⁶⁶ The Court determined the FSIA applied retroactively to conduct that occurred before the FSIA's enactment, which allowed Ms. Altmann and other claimants to file suit against "political subdivisions . . . agencies or instrumentalities" of a foreign state under the FSIA.⁶⁷ Despite Altmann's successful suit, no other case has yet been tried successfully to conclusion against any nation for the return of Nazi-looted artworks.

As the *Altmann* case progressed, those involved with restitution in the United States did not think a U.S.-commission was a necessary alternative to the courts. The Presidential Advisory Commission on Holocaust Assets in the U.S., Plunder and Restitution issued its last report in December of 2000 stating that progress had been made in restitution of stolen art from American museums and encouraged publication of their provenance findings.⁶⁸ That same year, the Vilnius International Forum on Holocaust Era Looted Cultural Assets resulted in the Vilnius Forum Declaration, a reaffirmation of the 1998 Washington Principles by the Council of Europe "encourag[ing] all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as

⁶⁴ *Id.* at 681–82. According to evidence, Adele Bloch-Bauer left a will after her death in 1925 "in which she 'ask[ed]' her husband 'after his death' to bequeath the paintings to the Gallery." Because her will did not affirmatively bequeath the paintings to the Austrian Gallery, the Gallery did not gain ownership through her will. Further, Ferdinand Bloch-Bauer never transferred ownership to the Gallery. *Id.*

⁶⁵ *Id.* at 681 (affirming the Ninth Circuit's decision the Republic of Austria could not claim immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act"), 28 U.S.C. § 1602 *et seq.*, thereby allowing Ms. Altmann to successfully bring suit against Austria).

⁶⁶ *Id.* at 681–82. Ferdinand Bloch-Bauer was a Czechoslovakian Jew and Adele, the subject of both paintings Altmann sought, was his wife. Like her uncle, Altmann fled Austria in 1938. She moved to California and became an American citizen. *Id.* at 681.

⁶⁷ *Id.* at 691 (discussing Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a)).

⁶⁸ See generally Presidential Advisory Commission on Holocaust Assets in the U.S., Plunder and Restitution, Findings and Recommendations: Staff Report, Ch. 1 (Dec. 2000), http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home_Content.html [<http://perma.cc/WU7V-2SN3>].

well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.”⁶⁹

The nations committed again in 2009 to facilitate the return of art stolen by the Nazis “based upon the moral principle that art and cultural property confiscated by the Nazis . . . should be returned to [Holocaust victims] or their heirs.”⁷⁰ The nations again committed to creating commissions to oversee the enforcement of restitution claims.⁷¹ This time, many Americans thought the United States might need a commission after all. However, the Principles were international agreements, not treaties, so while the commitments under the Washington Principles are honored by some nations, “they have little or no vitality in others.”⁷²

Ironically, museums in the United States have asserted the statute of limitations against heir-claimants to shut down their claims to stolen art, even though the U.S. government has spearheaded the movement to encourage Holocaust-era restitution on the merits since 1998.⁷³ The Terezín Declaration of 2009 was a direct response to museums filing suits against individuals who claimed ownership of Nazi-looted art.⁷⁴ Forty-six states signed the Declaration, which addressed the issue of “Nazi-Confiscated and Looted Art” among others facing the victims of the Holocaust and encouraged states to refrain from applying legal provisions “that may impede the restitution of art and cultural property.”⁷⁵ Its most important part expressly states

⁶⁹ *Vilnius Forum Declaration on Holocaust Era Looted Cultural Assets* (Oct. 5, 2000), http://www.dfs.ny.gov/consumer/holocaust/present_day_restitution/The%20Vilnius%20Forum%20Declaration.pdf [<http://perma.cc/XRS2-M7FP>].

⁷⁰ *The Holocaust Era Assets Conference Terezín Declaration 4* (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (referring to the Washington Principles).

⁷¹ Bureau of European and Eurasian Affairs, *supra* note 58.

⁷² Charles A. Goldstein, *Restitution Experience Since the Washington Principles* (1998), <http://www.christies.com/pdf/services/2011/charles-a-goldstein.pdf> [<http://perma.cc/RU2M-LWSV>]. Also in 1998, Congress enacted the Holocaust Victims Redress Act, which expressed the sense of Congress that:

[A]ll governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner. Holocaust Victims Redress Act, Pub. L. § 105-158, 112 Stat. 15 (1998).

⁷³ Even though the United States spearheaded the Washington Principles and enacted the Holocaust Victims Redress Act in 1998 to encourage Holocaust-era art restitution, federal courts put little emphasis on the historic aspect of such claims. Most are dismissed on technical grounds having nothing or little to do with the underlying thefts.

⁷⁴ See *The Holocaust Era Assets Conference Terezín Declaration 4*, HOLOCAUST ERA ASSETS CONFERENCE (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

⁷⁵ *Id.* at 1, 4.

that claims should be resolved based on the facts and merits, not technical defenses such as the statute of limitations.⁷⁶

Nearly fourteen years have passed since *Wally* but only one case has been successful in an American court. *Bissonette* is a case with nearly undisputed facts. Dr. Max Stern inherited an art gallery in Germany.⁷⁷ He was of Jewish ancestry and quickly became a target for Nazi persecution.⁷⁸ The Nazi government, via The Reich Chamber for the Fine Arts, determined that Dr. Stern lacked personal qualities that would make him a suitable advocate for German culture.⁷⁹ Due to the determination by the Nazis, they advised Dr. Stern to liquidate the inventory and the additional property of the gallery.⁸⁰

Dr. Stern appealed the order directing him to sign over the property but was unsuccessful.⁸¹ The Lempertz Auction House (LAH), a government-approved purveyor, obtained most of the affected works and in late 1937 auctioned the pieces at well below their fair market value.⁸² Dr. Stern fled Germany after the forced sale, fearing for his life, and settled in Canada.⁸³ After his relocation, Dr. Stern tried to locate the misappropriated art, but was largely unsuccessful. When he died in 1987, his estate took over his interests in the art.⁸⁴

Unbeknownst to Dr. Stern, the painting (*Mädchen aus den Sabiner Bergen*), was purchased by Dr. Karl Wilharm and was then inherited by his step-daughter, Baroness Maria-Louise Bissonnette, in 1991.⁸⁵ Bissonnette consigned the painting to Estates Unlimited, where the painting was then scheduled for auction in 2005.⁸⁶ The Art Loss Register, a company that helps claimants find and recover stolen art, informed the Stern estate

⁷⁶ See *id.* at 4–5.

[W]e urge all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Id. at 4–5.

⁷⁷ See *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 54.

⁸⁶ *Id.*

about the painting; Estates Unlimited withdrew the painting from scheduled auction after learning of the other claimed interest.⁸⁷

In January 2005, the Stern estate filed a claim for the painting with the Holocaust Claims Proceeding Office (“HCPO”), a New York governmental agency that helps claimants recover stolen property. The HCPO demanded the defendant return the painting.⁸⁸ After Bissonnette refused to return the painting, the parties entered settlement negotiations. The negotiations failed, and Bissonnette shipped the painting to Germany in hopes that a German court would support her ownership rights.⁸⁹ The Stern estate sued in U.S. federal district court. Bissonnette asserted the laches defense. The laches defense applies if a plaintiff has waited too long to file suit resulting in the defendant being prejudiced by the loss of evidence and an impaired ability to defend against the claim. It can cut a claim off even if the statute of limitations has not run. The court determined that Bissonnette’s laches defense was deficient.⁹⁰

In summary, the court concluded:

A de facto confiscation of a work of art that arose out of a notorious exercise of man’s inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles. The mills of justice grind slowly, but they grind exceedingly fine.⁹¹

Bissonnette certainly got it right. The case gave reason to hope that courts would recognize the continuing injustice that occurs in depriving heirs of property that is rightfully theirs. But that hope was short-lived.

A federal court in Michigan ruled that the statute of limitations for a specific claim ran in 1941—this was before the Allies landed in Normandy and any prisoners were liberated.⁹² *Detroit Institute of Art v. Ullin* was brought by the Detroit Institute of Arts against the heirs of Martha Nathan, who had not yet turned to the judicial process, seeking declaratory judgment.⁹³ The heirs alleged that the sale of *The Diggers* by Vincent van Gogh was done while Ms. Nathan was under duress and approached the museum about their allegations.⁹⁴ Shortly

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 56; see *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 308–11 (D.R.I. 2007).

⁹¹ *Vineberg*, 548 F.3d at 58–59.

⁹² See *Detroit Institute of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *3 (E.D. Mich. Mar. 31, 2007) (finding that conversion occurred in 1938 when the painting at issue was sold and that the statute of limitations barred any claims brought more than three years later, in accordance with Michigan law).

⁹³ *Id.* at *1.

⁹⁴ *Id.*

after the heirs approached the museum, the museum responded by filing suit.⁹⁵ The museum asserted that the sale of the painting, which was located in Switzerland at the time of the 1938 sale, was voluntary because it occurred before the Nazis occupied France and after Ms. Nathan had fled Germany for Paris.⁹⁶

It is not widely known, however, that the Nazis often forced fleeing Jews to convey their property located in Switzerland back to the Reich, often in exchange for the promise of safe passage of other family members that were being held hostage.⁹⁷ As a result, *The Diggers* is still on display as if Ms. Nathan had the ability to deal freely in commercial transactions while fleeing from a genocidal regime.

Unfortunately, *Ullin* is not the only case where museums reinforced the persecution of Holocaust victims. The Toledo Museum of Art brought suit against the Nathan heirs in 2006 seeking to quiet title to Paul Gauguin's *Street Scene in Tahiti*, also a transfer in the same 1938 sale.⁹⁸ The United States District Court for the Northern District of Ohio held that the claim should have been discovered earlier; the statute of limitation had expired, thereby barring the heirs' counterclaim for conversion and restitution.⁹⁹ The court implied that Ms. Nathan knew she lacked a valid claim to *Street Scene in Tahiti* because she had pursued other looted property before her death, but not this painting.¹⁰⁰ Tragically, the court wrote in dicta that:

[T]he public debate surrounding Nazi-era assets should have led the Nathan heirs to inquire into the location of her former assets. Based upon Martha Nathan's own previous claims, as well as those of her estate, the heirs knew she was persecuted by the Nazis and sustained wartime losses. This knowledge would have led a reasonable person to make further inquiries.¹⁰¹

This statement implies that Holocaust victims' heirs were negligent if they did not pay close attention and recognize that this litigation might have a bearing on them, even though they were not parties to these other claims. It is burdensome for someone that has already faced extreme persecution to continuously look for a needle in a haystack. Given the history of these survivors, many were wary of state authority figures.¹⁰² It

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

⁹⁸ *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 807-08.

¹⁰¹ *Id.* at 807.

¹⁰² See, e.g., BOAZ KAHANA ET AL., HOLOCAUST SURVIVORS AND IMMIGRANTS 75 (2005) (explaining the feelings of survivors can cause mistrust of strangers, specifically those in

is preposterous to assume that Ms. Nathan would have known to look within the United States to find her misappropriated property. The court's opinion calls for heirs to search for property that they reasonably believed would never resurface, even if they had any idea they had a claim in the first place.

Courts heavily emphasize the statute of limitations requirement for Holocaust-era cases primarily for the protection of the defendants. A Boston Museum of Fine Arts' motion for summary judgment was granted by the United States District Court for the District of Massachusetts on statute of limitation grounds in an action filed against Dr. Seger-Thomschitz, heir of Dr. Oskar Reichel.¹⁰³ In addition to being a Jewish doctor, Dr. Reichel was an art collector and owner of a Viennese gallery.¹⁰⁴ Dr. Reichel's gallery was moved from Vienna in February 1939, following the Anschluss of Austria, and after he was forced to submit a property declaration listing all of his possessions to the Nazis.¹⁰⁵ The property declaration listed *Two Nudes (Lovers)* by Oskar Kokoschka.¹⁰⁶ The court concluded that the painting was innocently "transferred to" an art dealer in Paris for sale.¹⁰⁷

The painting was transferred to Otto Kallir-Nirenstein (known as Otto Kallir).¹⁰⁸ Kallir was Jewish and transferred legal ownership of his own gallery to his non-Jewish secretary.¹⁰⁹ He opened the *Galerie St. Etienne* in Paris and then moved to the United States in 1939 to open a New York branch of *Galerie St. Etienne*.¹¹⁰ This case and others like it challenge Kallir's reputation as a white knight helping Jews sell their art to flee the Reich.¹¹¹

The defendant museum submitted letters to the court, written by one of Dr. Reichel's sons, Raimund, to art historians that were independently researching Kokoschka's work.¹¹² Dr. Seger-Thomschitz maintained that the letters show that Kallir

a position of authority).

¹⁰³ Museum of Fine Arts, *Bos. v. Seger-Thomschitz (Seger-Thomschitz IV)*, No. 08-10097-RWZ, 2009 WL 6506658, at *1, *11 (D. Mass. June 12, 2009), *aff'd* 623 F.3d 1 (1st Cir. 2010), *cert. denied* 131 S. Ct. 1612 (2011), *reh'g denied*, 131 S. Ct. 2176 (2011).

¹⁰⁴ *Id.* at *1-2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *7.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at *2. This was a common practice that Jews were forced to endure in attempts to protect their property from Nazis.

¹¹⁰ *Id.* at *2.

¹¹¹ *See* Jason Horowitz, *Dealer with the Devil*, N.Y. OBSERVER (Sept. 11, 2007), <http://www.observer.com/2007/09/dealer-with-the-devil/> (suggesting that recent litigation dismantles Kallir's reputation) [<http://perma.cc/PAL7-D9M7>].

¹¹² *Seger-Thomschitz*, WL 6506658, at *2.

had deceived Raimund into believing Kallir also was a persecutee; thus Raimund accepted nominal consideration (\$250) for the painting. Dr. Seger-Thomschitz asked the court to toll the statute of limitations on different grounds, including that both Kallir and the museum had participated in fraudulent concealment.¹¹³ The court rejected her arguments and found no evidence of “bad faith, laches or unclean hands” on behalf of the museum.¹¹⁴

The bottom line is that the case would have been a tough one on the merits. Dr. Seger-Thomschitz was urging one view of the evidence without the ability to question any of the people involved in the deal itself. It is doubtful that Dr. Seger-Thomschitz could have won the case on the merits. Nonetheless, she should have had her day in court. The court determined only that the case was too old to be heard. There was no objective airing of the case’s merits. When a museum as esteemed as the Museum of Fine Arts, Boston, asserts the statute of limitations, it renders the Washington Principles and Terezín Declaration all but meaningless. Other American museums have asserted the statute of limitations against claimants in court and/or sued survivors to shut down their inquiries on technical defenses like laches.¹¹⁵ They are the Toledo Museum of Art, Detroit Institute of Art, MoMA, Guggenheim, and Norton Simon Museum of Art, Pasadena. They shut down any judicial inquiry into the merits of survivors’ heirs claims. They undermine the credibility of the United States as a leader seeking justice for Holocaust victims and their heirs.

IV. THE HEAR ACT

The Holocaust Expropriated Art Recovery Act (the “HEAR Act”) of 2016 is a bill that would provide the victims of Holocaust-era persecution and their heirs an opportunity to recover Nazi confiscated or misappropriated artwork in a U.S. court.¹¹⁶ It seeks to unwind the damage done by the recent cases holding that claims were time-barred.

Two introductory paragraphs most succinctly state the case for why the HEAR Act is necessary:

(6) Numerous victims of Nazi persecution and their heirs have taken legal action to recover Nazi-confiscated art. These lawsuits face

¹¹³ *Id.* at *10.

¹¹⁴ *Id.* at *6.

¹¹⁵ See Jennifer A. Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 65, 85 (2012); Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 78 (2009).

¹¹⁶ See S. 2763, 114th Cong. (2016).

significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., *The Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations and other time-based procedural defenses especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is the best way to ensure that claims to Nazi-confiscated art are adjudicated on their merits.¹¹⁷

The HEAR Act would provide a statute of limitations of six years from the time the survivor or heir has actual knowledge of the theft.¹¹⁸ In practicality, this will mean the modern day after recent provenance research, not back during the war. It would eliminate the complex choice-of-law problem courts initially deal with in a case, at least as to which jurisdiction's limitations period applies. It would also eliminate the defenses of laches. The relevant text is as follows:

5. Statute of limitations

(a) In general

Notwithstanding any other provision of Federal law, any provision of State law, or any defense at law or equity relating to the passage of time (including the doctrine of laches), a civil claim or cause of action against a defendant to recover any artwork or other cultural property unlawfully lost because of persecution during the Nazi era or for damages for the taking or detaining of any artwork or other cultural property unlawfully lost because of persecution during the Nazi era

¹¹⁷ *Id.*

¹¹⁸ *Id.*

may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

- (1) the identity and location of the artwork or cultural property; and
- (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost.

(b) Possible misidentification

For purposes of subsection (a)(1), in a case in which there is a possibility of misidentification of the artwork or cultural property, the identification of the artwork or cultural property shall occur on the date on which there are facts sufficient to determine that the artwork or cultural property is likely to be the artwork or cultural property that was unlawfully lost.¹¹⁹

In terms of applicability, the Act will apply to any claim that is pending as of the date of the enactment of the Act as well as those that were filed during the period beginning on the date of enactment and ending on December 31, 2026.¹²⁰ In terms of previously dismissed claims, a claim that was brought and was dismissed before the date of the enactment and one in which final judgment has not been entered is also subject to the HEAR Act.¹²¹ This Act will change the outcome of pending and future cases.

The Senate Judiciary Committee Subcommittees on The Constitution and Oversight, Agency Action, Federal Rights and Federal Courts heard personal testimony from Agnes Peresztegi. Dr. Peresztegi has over twenty years of experience handling Holocaust property claims. Additionally, she advises non-profit organizations that represent survivors and their heirs on issues related to the restitution and compensation for human rights violations during World War II.¹²² Since 2001, Dr. Peresztegi has been the Executive Director for The Commission for Art Recovery, Europe.¹²³ Dr. Peresztegi is responsible for dealing with Holocaust era looted art claims in her position at the Commission.¹²⁴ She believes that the expropriation of the artwork is itself genocide.¹²⁵

Dr. Peresztegi correctly testified that no one else should benefit from the crimes that were committed against the victims of

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *The Lawyers*, SOFFER AVOCATS, ATTORNEYS AT LAW, <http://www.sofferavocats.com/en/the-lawyers/agnes-peresztegi-of-counsel/> (discussing the background and accomplishments of Dr. Peresztegi) [<http://perma.cc/9JZ2-LAAU>].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the S. Comm. on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (testimony of Agnes Peresztegi).

the Holocaust.¹²⁶ In her testimony, Dr. Peresztegi acknowledges that since the establishment of the Washington Conference Principles, those that currently have Nazi-era misappropriated artwork have continually tried to mischaracterize the applicable U.S. policy, even though the policy has been clear and constant for over seventy years.¹²⁷

Dr. Peresztegi testified that:

The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art should only be adjudicated on the merits.¹²⁸

Dr. Peresztegi is critical of the United States for its lack of aid for victims of the Holocaust who owned misappropriated artwork. She testified that the United States did not make progress toward this goal via the Washington Conference Principles, but believes that by enacting the HEAR Act, the United States will display its support for restoring looted artwork to its rightful owners.¹²⁹

Throughout the testimony given by Dr. Peresztegi, she referenced a case filed in 2010, *Simon v. Republic of Hungary*.¹³⁰ In this case, twelve of the plaintiffs allege they were transported from their homes in Hungary by Defendants to camps in various countries that were led by the Nazis.¹³¹ Thirteen plaintiffs further allege that their possessions and those of their families were taken as they boarded the trains, and were sold, liquidated, or otherwise used to bring revenue.¹³² The fourteenth plaintiff was not transported by the Defendant but still alleges that his property was stolen by MÁV (the Hungarian State Railway) and was never returned.¹³³ The conclusion reached by the court recognizes the atrocities that occurred during this time, but the court failed to provide redress for these families.

The Court concluded:

There is no doubt that the plaintiffs were wronged, atrociously so, and that they believed Defendant Hungary, assisted by its railway, has

¹²⁶ *Id.*

¹²⁷ *Id.* at 2.

¹²⁸ *Id.*

¹²⁹ *Id.* at 4.

¹³⁰ *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014).

¹³¹ *Id.*

¹³² *Id.* at 387.

¹³³ *Id.*

not atoned adequately for its genocidal actions. Nevertheless, there are limits to the reach of the United States courts to provide redress where the Constitution and relevant laws and treaties say otherwise. For the foregoing reasons, the Hungary Defendants' Motion to Dismiss and Defendant RCH's Motion to dismiss are granted.¹³⁴

Through this case we are provided a clear illustration of the problems that our court systems have. It is all too often that the justice system recognizes that it is not providing a just conclusion, but it is far too hard to get the correct legislation passed to correct the errors. Dr. Peresztegi acknowledges the problems that the HEAR Act may still have, but also appreciates the step that the Act takes to cure the issue.

While the federal government may be taking a step forward for protecting these victims, the museum lobby also is seeking legislative change in Senate Bill 3155 entitled "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act."¹³⁵ Under this bill, if a work is imported into the United States from a foreign state for exhibition of the work in a cultural or educational institution in the United States, and if it is determined to have cultural significance, then any activity within the United States that is associated with the piece is not considered commercial activity.¹³⁶ There is an exception for Nazi-era claims.¹³⁷

Additionally, Senators Tammy Baldwin and Marco Rubio, and Representatives Joe Crowley and Chris Smith introduced the Justice for Uncompensated Survivors Today Act (the "JUST Act") in early July 2016. This bipartisan and bicameral bill hopes to help Holocaust survivors and their families by requiring the State Department to report the progress of particular European countries as to restitution of wrongfully confiscated and transferred assets during the Holocaust.¹³⁸

Representative Smith was correct when he stated:

Holocaust survivors—witnesses to brutal murders, torture, and heartless thievery of the Nazis and their accomplices—continue to be cheated and defrauded, inexplicably as they fight for the rightful return of their stolen property. This bill will help survivors get justice instead of excuses for their governments.¹³⁹

¹³⁴ *Id.* at *444.

¹³⁵ *See* S. 3155, 114th Cong. (2016).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See* Marco Rubio and U.S. Representatives Joe Crowley and Chris Smith Introduce a Bill to Help Holocaust Survivors and the Families of Holocaust Victims, TAMMY BALDWIN: UNITED STATES SENATOR FOR WISCONSIN (July 7, 2016), <https://www.baldwin.senate.gov/press-releases/the-just-act> [<http://perma.cc/J7LT-L9UK>].

¹³⁹ *Id.*

The JUST Act seeks to build on the Terezín Declaration on Holocaust Era Assets and Related Issues of 2009, which provides that protection of property is a primary part of a democratic society and also recognizes the significance of compensating the Holocaust-based confiscations made during 1933–45.¹⁴⁰ The JUST Act will require the State Department to give reports on other countries' compliance with the progress they make toward the 2009 Terezín Declaration as well as the actions countries have taken to compensate the claims of U.S. citizens.¹⁴¹

V. CONCLUSION

Reviewing the history of judicial proceedings for Holocaust-era cases leads to the conclusion that American museums have undermined the diplomatic efforts spent on the Washington Principles and Terezín Declaration. Survivors and their heirs deserve to be heard.

One problem that continues to present itself is the statute of limitations; even determining which jurisdiction's limitations period applies is a gamble. With many victims deceased and records destroyed, it seems nearly impossible to pinpoint when relatives knew or should have known that they were entitled to something they probably knew little about. Nonetheless, they are still asked to do so.

Most people view the purpose of courts as providing justice where inequity has been done. It is unfortunate when cases are dismissed for lack of evidence, or perhaps an expired statute of limitations, but institutions bringing suits against heirs of victims is the nadir of American policy on Holocaust restitution. The HEAR Act would help restore American credibility in this arena. All of the cases filed by museums against survivors or wherein museums asserted the statute of limitations against survivors would have come out differently under the HEAR Act. Each one would have been heard on the merits as envisioned in the Washington Principles and Terezín Declaration.

The JUST Act would also further the cause by requiring the State Department to report on other nations' progress in complying with the Terezín Declaration. It will be interesting to see whether focusing on other nation's developments will push the State Department to question its own past filings (in *Altmann*, *Norton Simon*, and *Cassirer*), encouraging courts to dismiss survivors and heirs' cases.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

It would be appropriate to end this article with the following testimony of Ronald S. Lauder during the June 7, 2016, hearing before the Senate Subcommittee on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts:

When the United States endorsed the Washington Principles in 1998 and the Terezín Declaration in 2009, the U.S. committed itself to the recovery of art that was confiscated by the Nazis during the Holocaust. Our adherence to this commitment requires that resolution of such cases be based on the merits of each case and not on procedural technicalities or the capacity of one party to outspend, or outwait, the other.

There are museums here in the United States that have been waiting out the clock to pass the Statute of Limitations. This also forces claimants to spend enormous amounts of money on legal fees – another strategy to make them give up. This is not justice. Stalling claims is an abuse of the system. Sadly, there are museums that feel no need to uphold the Washington Principles. Many other institutions do the very least that is required and not much more.

The fundamental question posed by the HEAR Act is, have we here in the United States done enough to ensure fair and equitable solutions? I believe we have done a great deal, but we still could and should do much more.¹⁴²

¹⁴² *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the S. Comm. on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (testimony of Ronald S. Lauder).

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The Getty Bronze and the Limits of Restitution

*Luis Li and Amelia L.B. Sargent**

In 1977, the Getty Museum acquired the ancient Greek statue known as the Victorious Youth, or the Getty Bronze (“the Bronze”). The Bronze had been hauled up by chance from the bottom of the Adriatic Sea by fishermen working out of the port of Fano, on Italy’s northeastern coast, in 1964. By 1970, Italian courts had concluded there was no evidence that the object was found in Italian territorial waters, and it was therefore not a part of the Italian patrimony. The statue has been displayed at the Getty Villa since 1978, decades longer than it purportedly was on Italian soil, and is an anchor of the Museum’s antiquities collection. During this time, the Italian government has been aware that the Getty has had the Bronze.

Yet for over a decade, the Getty has been embroiled in legal proceedings in Pesaro, Italy, litigating the Italian government’s demand that the Getty “return” the statue through a procedurally dubious forfeiture action, a remnant of a criminal charge dismissed because, among other reasons, all the criminal defendants are dead. As the Italian legal process drags on, it is worth stepping back to consider the broader justifications for restitution. What right does Italy have to a Greek statue, likely looted by Romans, shipwrecked at sea, and found by chance in international waters? While restitution is appropriate in some cases—whether for legal or ethical reasons—in other circumstances the demands go too far. This Article reviews the legal boundaries of restitution as applied to the Getty Bronze by questioning the fundamental reasons behind cultural property laws.

In Part I, this Article reviews the history of the Bronze and what is known—or at least what is assumed—of its discovery. Part II describes the early legal proceedings and investigations during the 1960s through the 1970s that preceded the Getty’s

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1977 purchase of the statue. Part III describes Italy's new demand for the statue in 2006, and outlines the ongoing legal proceedings in Pesaro. Part IV addresses broader questions of the justifications for restitution, reviewing the typical justifications in cases of injustice, and discussing the rise of national patrimony laws as a way to confer cultural ownership to a national state. It proposes that the Bronze illustrates the limits of and philosophical tensions in the current typology.

I. PART ONE

A. The Discovery of the Bronze

In June of 1964, fishermen from the town of Fano on the northeast Italian coast were fishing in the Adriatic well beyond Italian territorial waters on the trawler *Ferruccio Ferri* after a rough storm.¹ When the fishermen hauled up their nets, they brought up a heavy man-shaped object covered in shells and marine encrustations.² As it was brought aboard, one of the crew apparently cried "*C'e un morto!*"—There's a dead man!³—but it was not a body; they had instead recovered an ancient Greek statue that had been lost at sea two thousand years before.

The sculpture, a life-sized bronze figure of an athlete or "victorious youth," dated from the second or third century B.C.⁴ Greek art was much admired in the Roman Empire, and Greek art was looted for display on the Italian peninsula.⁵ In all

¹ The factual history of the Bronze must be pieced together from evidence dating nearly fifty years ago. All of the Italian witnesses are long dead, as are, likely, the original investigators whose conclusions cannot now be cross-examined. This Article relies on the findings of the Pesaro court in its 2010 order, the findings of the Italian courts of the 1960s and 1970s, and other accounts that have been publicly published. Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, 02 ottobre 2010, n.2042/07 R.G.N.R. n.3357/07 R.G.I.P. (It.), <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387> [hereinafter 2010 Ordinanza] [<http://perma.cc/592E-2B7E>]. For colorful accounts of the discovery of the Bronze, albeit with their own biases, see JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE 9 (2011). See also Jason Felch, *The Amazing Catch They Let Slip Away*, L.A. TIMES (May 11, 2006), articles.latimes.com/2006/may/11/local/me-bronze11 [hereinafter Felch, *The Amazing Catch*] [<http://perma.cc/SGP3-8CMW>].

² FELCH & FRAMMOLINO, *supra* note 1, at 10.

³ *Id.*

⁴ The statue was originally attributed to the master Greek sculptor Lysippos, the fourth century B.C. court sculptor of Alexander the Great. However, based on recent art historical, technical, and scientific evidence, scholars now believe the statue was sculpted by a later Greek sculptor working in the second or third century B.C. See CAROL A. MATTUSCH, THE VICTORIOUS YOUTH 91 (Getty Publications 1997); Jerry Podany & David Scott, *The Getty Victorious Youth Reconsidered*, in 1 FROM THE PARTS TO THE WHOLE, J. ROMAN ARCHAEOLOGY SUPP. SERIES NO. 39 179 (Carol C. Mattusch, Amy Brauer & Sandra E. Knudsen eds., 2000).

⁵ See Cicero, *Against Verres*, in I THE VERRINE ORATIONS PART II BOOK I, 17 § 44–46,

likelihood, the statue was taken from Greece in the first century B.C. or A.D.—the golden age of Roman art collecting⁶—its feet and ankles broken off when it was removed from its original stone base.⁷ It never reached its destination, however, and had been lost at sea two thousand years earlier. Only because the object never reached its destination is it still preserved today; the delicate bronze likely would not have survived to modern times had it made it to land. Hardly any ancient bronze works survive today, having been lost to corrosion or historical circumstance, or melted down to reuse the valuable metal.⁸

After returning to port with their lucky find, the fisherman allegedly decided to sell it. The fishermen brought the sculpture ashore at night, hiding it under a pile of fishing nets before moving it to the home of the captain's friend, Felici Dario.⁹ Word of the remarkable find spread quickly through the small town, so the fisherman moved the statue inland, and buried it in a cabbage field.¹⁰

Two months later, in August of 1964, the fishermen sold the Bronze to Giacomo Barbetti, an antiquarian from nearby Gubbio.¹¹ Excited by the discovery, and no doubt by the chance to make a quick profit, Giacomo Barbetti borrowed 3,500,000 lire (\$43,500 2016 U.S. dollars¹²) from his cousin Pietro Barbetti to buy the statue.¹³ Several days later, the Barbettis and their friend Piero

169 (L.H.G. Greenwood trans., 1966) (discussing the multitudes of works of art the Roman Gaius Verres removed from Greece for his personal benefit, as well as earlier plunder of Greek sites by Roman generals for the benefit of the state); BRUNILDE RIDGWAY, *ROMAN COPIES OF GREEK SCULPTURE: THE PROBLEM OF THE ORIGINALS* 10–11 (1984) (“All authors, ancient and modern, agree that [the fall of Syracuse] opened up the flow of Greek works into Rome and determined subsequent interest and corresponding depredation,” including Nero’s robberies of the sanctuaries of Delphi and Olympia); JANET B. GROSSMAN, *ATHLETES IN ANTIQUITY: WORKS FROM THE COLLECTION OF THE J. PAUL GETTY MUSEUM* 6 (Univ. of Utah 2002).

⁶ See, e.g., MARY BEARD, *SPQR A HISTORY OF ANCIENT ROME* 211 (2015) (noting the close “link in the Roman imagination between art and conquest”); *id.* at 213 (noting 146 B.C.E. to 44 A.D. was a “high point of Roman literature, art, and culture”).

⁷ MATTUSCH, *supra* note 4, at 23.

⁸ See POWER AND PATHOS: *BRONZE SCULPTURE OF THE HELLENISTIC WORLD* 10, 12 (2015).

⁹ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹⁰ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹¹ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11–12.

¹² Conversion of prices to 2016 dollars was done by first applying the Bretton Woods exchange rate of U.S. \$1 to 625 lire and then using the Bureau of Labor Statistics. *CPI Inflation Calculator*, BUREAU OF LABOR STAT., http://www.bls.gov/data/inflation_calculator.htm [<http://perma.cc/H5LM-HZJ4>].

¹³ Trib. di Perugia, 18 maggio 1966, No. 181, 2 (It.) [hereinafter Trib. di Perugia];

Menichetti drove to Fano to see the statue; they were told it had been found in Yugoslavian waters.¹⁴ The Barbettis purchased the Bronze and brought it back to Gubbio. It remained there while Giacomo tried in vain to find a buyer. Eventually, Giacomo, Pietro, and Pietro's brother Fabio took the Bronze for safekeeping to a Father Giovanni Nagni.¹⁵ Father Nagni became annoyed by the visitors who came to see it and in May of 1965 demanded that the Barbettis take it back.¹⁶ They obliged. The Bronze was eventually sold to, as Giacomo represented at his 1966 trial, "unknown persons."¹⁷ Following an anonymous tip, the Italian carabinieri obtained a search warrant for Father Nagni's house, but by the time they arrived, the statue was gone.¹⁸

B. Prosecutions of the Purchasers of the Statue

In 1965, the three Barbettis and Father Nagni were charged with purchasing and concealing stolen property under Article 49 of Italian Law No. 1089 (1939), a patrimony law providing that protected archaeological objects found from excavations or by chance within Italian territory belong to the Italian State, and Article 67 of the same law, which provides that one who takes possession of such archaeological objects is guilty of theft.¹⁹

Following a trial, in a decision dated May 18, 1966, the Magistrate Court of Perugia found insufficient evidence on which to convict the men.²⁰ The court concluded that the charges suffered from two primary defects. First, the prosecution had failed to prove that the statue was of historic and artistic value, the first element for the charged crime. But second and more importantly, the court concluded that the other necessary element of the crime was completely lacking: namely, proof that the statue had been found in Italian territorial waters. As the court reasoned:

[W]hen in Article 49 of the said law it is specified that "things (of value, etc.) casually discovered belong to the State" reference is obviously made to things found in the territory of the very State

FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁴ Trib. di Perugia, *supra* note 13, at 2; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹⁵ Trib. di Perugia, *supra* note 13, at 2; FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁶ Trib. di Perugia, *supra* note 13, at 2-3.

¹⁷ *Id.*; see FELCH & FRAMMOLINO, *supra* note 1, at 13 for speculative possibilities.

¹⁸ 2010 Ordinanza, *supra* note 1, at 4; FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁹ FELCH & FRAMMOLINO, *supra* note 1, at 13; Legge 1 Giugno, 8 Agosto 1939, N. 1089 G.U. Aug. 8, 1939, n.184 (It.), http://www.unesco.org/culture/natlaws/media/pdf/italy/it_law1089_39_itorof [<http://perma.cc/466Z-2YWF>]; 2010 Ordinanza, *supra* note 1, at 5.

²⁰ Trib. di Perugia, *supra* note 13, at 8.

where the law has been enacted, as only over them is it possible to exercise State authority (potestà).²¹

Because the only testimony offered at trial was that the statue was allegedly found in Yugoslavian waters, the court concluded the evidence was insufficient to sustain the criminal charges.²² Notably, the Italian national government did not intervene in the case to establish a claim to the statue.

Both the prosecution and the defendants appealed the decision, the defendants apparently seeking a more affirmative finding of their innocence. On January 27, 1967, the Court of Appeals of Perugia reversed the lower court's decision, finding that the elements of the crime were satisfied.²³ First, the Court of Appeals reckoned that the Bronze was of sufficient archeological value under the Patrimony Law because it was purchased for a not insignificant sum, and a well-known dealer named Elie Borowski had shown interest in the statue (though he had pronounced it a Roman copy). Regarding the question of its location within Italian territory, the court reasoned that the Barbettis would not have taken such steps to conceal the statue had it been lawful, and therefore they must be guilty of the crime charged. As the court stated, "this Court is also of the opinion that the first judges [of the lower court] would not have been uncertain about the place of discovery of the statue, had they considered the justifications supplied by the Barbettis in connection therewith in the light of their behavior."²⁴ The court sentenced the three Barbettis to four months' imprisonment and a 50,000 lire fine, and sentenced Father Nagni to two months in prison.²⁵

On May 22, 1968, the Supreme Court of Cassation annulled the decision of the Court of Appeals of Perugia on the ground that the lower court used inadequate legal reasoning, specifically holding that the facts introduced at trial did not resolve the question of the Bronze's "origin from excavations or chance discovery on national territory"—a necessary element of the crime.²⁶ The Supreme Court held, "[t]he origin of the statue from

²¹ *Id.* ("Infatti allorchè nell'art. 49 della richiamata legge si specificò anche "le cose (di valore ecc.) scoperte fortuitamente appartengono allo Stato" ci si riferisce ovviamente a cose inventate nell'ambito territoriale dello Stato stesso da cui la legge promana, solo su esse potendo esercitarsi la relativa potestà.").

²² *Id.* at 8.

²³ Corte di App. di Perugia, 27 gennaio 1967, No. 15, 10 (It.).

²⁴ *Id.* at 8.

²⁵ *Id.* at 10.

²⁶ Supreme Court of Cassation No. 1291, May 22, 1968, 8 (It.).

excavation or chance discovery has not been, in any way, demonstrated to the Court of Appeals in Perugia. Therefore, the verdict must be annulled”²⁷ It transmitted the case to the Court of Appeals of Rome, which on November 18, 1970 confirmed that the convictions would not stand.²⁸

II. THE GETTY ACQUIRES THE BRONZE

A. J. Paul Getty’s Negotiations for the Bronze Falter on Price

By 1971, the Bronze had apparently been exported to Brazil where it was held in a private collection. In 1971, Artemis S.A., a European art consortium, purchased the statue for \$700,000 (\$4.2 million in 2016 dollars), and one of the partners of the consortium, Heinz Herzer, brought the statue to Munich where it underwent extensive renovations.²⁹ The consortium quickly put the restored bronze up for sale. In 1972, the *New York Times* reported Artemis offered the Bronze to Mr. J. Paul Getty for \$5 million (\$31.7 million in 2016 dollars),³⁰ though by the time negotiations were serious, the price was \$3.5 million (\$20.2 million in 2016 dollars).³¹

Mr. Getty was an avid collector of art and antiquities; he had established the Getty Museum in his own ranch house in Malibu, California, and was in the process of building a separate villa to house his collection based on the Villa dei Papiri of Herculaneum, which would open in 1974.³² But even this reduced price was a record for any piece of classical sculpture at the time.

Although now disputed in Pesaro, at this early stage, the legal questions surrounding the title of the piece appeared settled. In early October of 1972, Italian counsel for Artemis provided a legal opinion to Getty’s counsel advising that the Italian government had no basis for a claim to the Bronze.³³ A

²⁷ *Id.*

²⁸ Court of Appeals of Rome No. 2089, November 18, 1970, 6 (It.).

²⁹ David L. Shirey, *Greek Bronze on Sale for 3.5-Million*, N.Y. TIMES, Mar. 10, 1973, at 1, 37.

³⁰ *Id.*

³¹ See, e.g., 2010 Ordinanza, *supra* note 1, at 9–10 (referencing an offer of the Bronze to the Metropolitan Museum).

³² For a journalistic account of the evolution of the Getty Museum, see Suzanne Muchnic, *A Getty Chronicle: The Malibu Years*, L.A. TIMES (July 6, 1997), <http://articles.latimes.com/1997/jul/06/entertainment/ca-9998/> [<http://perma.cc/Y5HP-V9YY>].

³³ 2010 Ordinanza, *supra* note 1, at 9. There was an opinion dated October 4, 1972, by well-reputed lawyers Gianni Manca and Vittorio Grimaldi from the law firm Studio Graziadei. The opinion assured that the prior final judgment and Herzer’s subsequent purchase of the object lawfully, in good faith, would assure that Mr. Getty could obtain good title. *Id.* at 12.

front page article in the New York Times reported, “the fisherman were completely absolved of the crime. The court decided that the bronze had been found in extraterritorial waters. . . . The sculpture was legally exported from Italy in 1970 with a clear title.”³⁴

Mr. Getty’s negotiations for the Bronze, however, foundered on price. Aside from being breathtakingly expensive in its own right, the price of the Bronze fluctuated because, among other reasons, the German economy was booming while America slipped into recession and struggled with unemployment and high inflation following the Arab oil embargo. As a result, the value of the dollar faded quickly against the Deutsche Mark, losing half its value during the 1970s.³⁵

Notably, in August of 1973, Herzer concluded a letter to Dr. Jiri Frel, the Getty curator with whom he had been negotiating, that despite the faltering negotiations, and “whether or not the deal comes off,” “even the Italian government admits that we do have clear title to the bronze.”³⁶

Price, it seemed, was the only issue to be resolved, but as was clear by the end of 1973, Getty would not budge.

B. The Trustees Purchase the Bronze in 1977

Mr. Getty died in 1976. With his death, the Getty Museum found itself the beneficiary of his vast estate, which was converted into a \$700 million (\$2 billion in 2016 dollars) endowment.³⁷ From Mr. Getty’s relatively frugal oversight, the Museum found itself in a new reality.

Negotiations resumed for the Bronze and the Trustees engaged in due diligence to reexamine the propriety of the acquisition.³⁸ As the evidence before the Pesaro court shows, in

³⁴ Shirey, *supra* note 29, at 1.

³⁵ See Lawrence H. Officer, *Exchange Rates Between the United States Dollar and Forty-one Currencies*, MEASURING WORTH (2016), <http://www.measuringworth.com/exchangeglobal> (permitting a website visitor to calculate historical exchange rates). One dollar in 1970 was worth 3.6460 Deutsche Marks (“DM”). By 1975, this had slid to 2.2550 DM. In 1977, when the Trustees purchased the Bronze, it was 2.3210 DM. In 1980, it was 1.8180 DM. As noted by the Pesaro Court, by August 1973, Herzer refused Mr. Getty’s offer of \$3.5 million, which had only the year before seemed acceptable, and raised the price to \$4 million because of the devaluation of the dollar. 2010 Ordinanza, *supra* note 1, at 10.

³⁶ 2010 Ordinanza, *supra* note 1, at 13.

³⁷ Muchnic, *supra* note 32; FELCH & FRAMMOLINO, *supra* note 1, at 25.

³⁸ In 2006, the Los Angeles Times reported that, according to Thomas Hoving, Mr. Getty had put certain legal conditions on the sale of the Bronze that were not met. FELCH & FRAMMOLINO, *supra* note 1. This has led subsequent scholars to speculate that the

July of 1977, Herzer sent the Getty “the complete documentation with regard to the legal aspects” concerning the Bronze.³⁹ The three enclosed files contained over one hundred pages of documentation, including details about two investigations by German authorities at the Italian government’s request, both of which were quickly closed with the result that, as the Pesaro court cited, “[Herzer] could freely dispose of the object.”⁴⁰ The investigations were prompted by an Italian court in Gubbio; in 1974, an action was entered at the Magistrate’s Court of Gubbio for illegal export of the Bronze against unidentified persons, regarding which the court had unsuccessfully requested international judicial assistance.⁴¹

That court also unsuccessfully requested assistance from Interpol in 1977, and from the State Department in 1978. United States Customs officials interviewed the registrar for the Getty Museum about the Bronze on March 21, 1978, and took no further action.⁴² The State Department declined to assist the Italian authorities further on June 21, 1978.⁴³ In November 1978, the Gubbio proceedings ended with a nonsuit as the alleged defendants were not identified within the statutory period.⁴⁴ Eventually, in 1984, Interpol informed Italy that it would conduct no further investigation without evidence demonstrating Italian ownership of the Bronze. Italy never supplied such evidence.

At the end of July of 1977, the Getty Trustees agreed to buy the statue for \$3.95 million.⁴⁵ In tribute to Mr. Getty, the Bronze was christened the “Getty Bronze.” After this tempestuous

Trustees simply declined to consider the question of legal title of the Bronze when they voted to purchase it. See Derek Fincham, *Transnational Purchase of the Getty Bronze*, 32 CARDOZO ARTS & ENT. L.J. 471, 480 (2014). This is not true, as even the Pesaro court acknowledged (although that court found the Trustees’ efforts inadequate). See generally 2009 Ordinanza, *infra* note 54; 2010 Ordinanza, *supra* note 1. Notably, Mr. Hoving himself was quite dismissive of the Trustees of the Getty and may not be the most trustworthy source. After his dismissal from the Met in 1977 for “ever-increasing publicity stunts” and disregard of Museum procedures, Mr. Hoving turned on the institutions he once built up, pursuing personal vendettas against art museums, particularly the Getty, in various media outlets. Lee Sorensen, *Hoving, Thomas*, DICTIONARY OF ART HISTORIANS, <https://dictionaryofarthistorians.org/hovingt.htm> [http://perma.cc/HD99-BXBB]. He joined ABC’s 20/20 as an art correspondent and produced a sensationalistic piece on the Bronze in 1979. He also wrote various “tell-all” books about the Met described as “one-sided and at times fictitious accounts . . . of the art world by a genuine insider.” *Id.*

³⁹ 2010 Ordinanza, *supra* note 1, at 14.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 15.

⁴² *Id.* at 8.

⁴³ *Id.* at 9.

⁴⁴ *Id.*

⁴⁵ *Id.* at 8.

journey, the Bronze would rest, undisturbed, for the next three decades at its home in Malibu overlooking the Pacific Ocean.⁴⁶

III. PESARO

In the mid-1990s, Interpol conducted a raid on a warehouse in Geneva belonging to Italian art dealer Giacomo Medici. Among the evidence discovered were polaroids of Italian antiquities in an unrestored state—apparently having been illegally looted. The photos included recognizable antiquities from the collections of numerous museums and individuals worldwide. Medici was arrested in 1997 and sentenced in 2004.⁴⁷ In 2005, the Italian government indicted Robert Hecht, an American antiquities dealer, and Marion True, the Getty Museum’s former curator of antiquities, for conspiracy to traffic in illegal antiquities.⁴⁸ The charges were eventually dismissed on limitations grounds in 2012 (Hecht) and 2010 (True). But the investigation shone a harsh light on the Getty’s collections and, by association, the Bronze, which saw renewed attention of the press.⁴⁹ In January 2006, the Italian authorities demanded the return of fifty-two artifacts, including the Bronze. The Getty eventually agreed to the return of forty objects in August 2008.⁵⁰

But not the Bronze. The Bronze, of course, was not among the items implicated in the Medici scandal—not having been looted from an Italian archeological site and, indeed, not being Italian at all. The Getty and the Italian Ministry agreed that the question of the Bronze would be set aside pending disposition of new proceedings that had begun in 2007, in Pesaro, just north of Fano. Fanned by the media coverage, local fervor in Fano about the Bronze had become inflamed.

A. The Pesaro Court Dismisses the Action As a Pretext

In 2007, a local activist group, “Le Cento Città,” filed a petition with the Public Prosecutor’s Office to seek “return” of the

⁴⁶ Rather, almost three decades; in 1989, the Director General of the Ministry of Cultural Heritage and Activities sent a letter to the Director of the Getty requesting the Bronze be “returned” to Italy, which the Getty declined, as the statue is Greek. Felch, *The Amazing Catch*, *supra* note 1.

⁴⁷ See, e.g., David Itzkoff, *Conviction for Dealer of Stolen Antiquities is Upheld*, N.Y. TIMES: ARTSBEAT (July 16, 2009, 11:01 AM), <http://artsbeat.blogs.nytimes.com/2009/07/16/conviction-for-dealer-of-stolen-antiquities-is-upheld/> [<http://perma.cc/WF2B-W8FJJ>].

⁴⁸ *Id.*

⁴⁹ Among the many contemporaneous news articles appearing in the L.A. Times was Felch, *The Amazing Catch*, *supra* note 1.

⁵⁰ Jason Felch & Ari B. Bloomekatz, *Getty’s Accord Removes Shadow*, L.A. TIMES (Aug. 3, 2007), <http://articles.latimes.com/2007/aug/03/local/me-getty3> [<http://perma.cc/85VF-TYV4>].

Bronze to Fano. In response, the public prosecutor brought a criminal proceeding against the fishermen who raised the Bronze and the Barbettis, again—at least some of whom were by this time deceased. The prosecutor then immediately requested dismissal of the criminal charges because they were “extinguished as they have become statute-barred and because of the death of some of the investigated persons.”⁵¹ But simultaneously, the prosecutor requested a judgment forfeiting the Getty Bronze to Italy as an accessory object in a criminal proceeding. In November of 2007, the judge recognized the criminal proceedings as a pretense on the part of “Le Cento Città” to obtain a confiscation order for the Bronze, and dismissed both the criminal and forfeiture proceedings, noting that:

[I]t is unquestionable that the criminal offenses envisaged and that can be envisaged have long become statute-barred as the events date back to the sixties and the seventies. What evidently led the Chairman of the “Le Cento Città” association to file a petition is the possibility of obtaining a confiscation order for the afore-mentioned statue.⁵²

The judge further found, on the merits, that the Getty Museum was a good faith purchaser of the Bronze, rendering forfeiture unavailable under the Italian Constitution.⁵³

B. A Second Judge Reverses, Recounts Long-ago “Facts” of the Bronze’s Discovery and Acquisition, and Orders Forfeiture

The prosecutor filed an opposition to the order and, following a hearing at which the Getty appeared as a third party in interest and objected on various procedural and substantive grounds, a second judge, Judge Mussoni, reversed the first in a series of decisions in 2009 and 2010.⁵⁴

Although the judge acknowledged the statue was “probably found in international waters,”⁵⁵ she ruled that Italy nevertheless owned the statue *ab initio* under Italian patrimony laws—a premise considered by the Italian courts in the 1960s and rejected. But the new theory of Italian ownership focused on the fishing trawler itself: namely, the court reasoned, under Article 4 of the Italian Navigation Code, the trawler (said to be

⁵¹ 2007 “Dismissal Order,” Office of the Judge In charge of the Preliminary Investigations, No. 2042/07, 3357/07.

⁵² *Id.*

⁵³ *Id.* (citing Art. 27 Costituzione [Cost.] (It.)).

⁵⁴ Trib. Ordinario di Pesaro, Ufficio del Giudice per le indagini preliminary in funzione di Giudice dell’esecuzione, Ordinanza del 12 può 2009, n.2042/07 R.G.N.R. 3357/07 R.G.I.P. (It.) [hereinafter 2009 Ordinanza].

⁵⁵ *Id.*

an Italian-flagged ship) should be considered part of the territory of Italy. And as part of the territory of Italy, when the Bronze became entangled in the trawlers' nets, it was equally ensnared by the Italian patrimony law that any "found" object of historical or artistic value belongs to the State. Following the precedent of a single case from 1963 (before the Bronze cases in 1966–70), the judge reasoned that "as soon as a movable object lying on the sea floor is caught up in the nets it is to be deemed that it has entered Italian territory and is therefore subject to Italian law."⁵⁶ This principle "affirms the existence of the immediate ownership [of the Bronze] by the Italian State[.]"⁵⁷

The court further accepted in the alternative that either the importation of the Bronze into Fano without the appropriate declarations, or its export without authorization in violation of the patrimony law, would also result in the "nationalization" of the Bronze through an "acquisition of a right of ownership . . . by the State . . . deriv[ing] from the restrictive regulations that govern all objects of artistic, archeological, and/or historical value."⁵⁸

The judge concluded by ordering the forfeiture of the Bronze, "wherever it may be."⁵⁹ Since that order, the case has continued to be the subject of numerous proceedings and appeals through the present day.

IV. WHY RESTITUTION?

It merits at this point taking a step back from the legal arguments and assessing the question: why should Italy own the Bronze, a Greek statue found by chance in international waters that has now spent decades longer in Malibu than it ever did in Fano?

Restitution is a legal remedy that "implies return of the object to the legal owner in accordance with what the law prescribes."⁶⁰ In the case of cultural property, however, the meaning of restitution now extends to the "overcoming of legal obstacles *standing in the way of* return"⁶¹—that is, restitution *in*

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* (*aff'd* in 2010 *Ordinanza*, *supra* note 1).

⁵⁸ *Id.*

⁵⁹ 2010 *Ordinanza*, *supra* note 1, at 35.

⁶⁰ Christa Roodt, *Restitution of Art and Cultural Objects and its Limits*, XLVI COMP. INT'L L. J. S. AFR. 300 (2013).

⁶¹ *Id.* at 301 (citing THE POST-WAR RESTITUTION OF PROPERTY RIGHTS IN EUROPE (Veraart & Winkel, eds., 2011)) (emphasis added).

spite of what the law prescribes—and instead to further certain policy goals based on ethical or moral grounds.

As recognized by Dr. Christa Roodt, in such a regime of restitution in spite of the law rather than pursuant to it, so-called:

Technical defences [*sic*] based on jurisdiction, choice of law, conceptual devices in choice of law, *legal title* or de-accessioning provisions, and even the good faith defence [*sic*], may be applied less strictly in the light of the historic background and special circumstances of a case. The demand for restitution may also be strong enough to suspend statutory limitations in the light of the extreme injustice of the past.⁶²

Recognizing this unique, multivalent meaning of restitution in the cultural property context, Section IV.A will briefly recount the different traditional philosophical underpinnings of restitution. Section IV.B will then discuss the concept of what the authors term “acquisitive patrimony” in the case of Italy’s claim for restitution of the Bronze.

A. Traditional Justifications for Restitution

This section sketches out a spectrum of categories in which restitution may be considered a common remedy. This spectrum begins with cases whose justifications for restitution are the strongest, and moves through cases with more complexity or nuanced issues.

Actual Prior Ownership. The classic paradigm for restitution is to make a wronged person whole. When a person has deprived another, restitution is appropriate to “restore” the wronged party “to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.”⁶³ In these cases, actual ownership is previously documented by a legally cognizable title—for example, a painting owned by a national museum or a statue owned by a private collector. In cases of deprivation of the physical object (theft, conversion, damage, or otherwise), the owner is entitled to restitution by operation of law. In a case of clear prior title, the overlay of additional cultural heritage protections or ethical considerations (such as patrimony laws or suspension of traditional defenses) is not needed—and in fact, traditional defenses would likely apply.⁶⁴

⁶² *Id.* (emphasis added).

⁶³ RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. (a) (June 2016).

⁶⁴ These would include for example unclean hands, laches, and statutes of limitations. See generally *id.* at §§ 139–49 for general principles of defenses.

Extreme Injustice of the Past. Dr. Christa Roodt's useful dichotomy of restitution quoted above notes the difference between restitution as the law prescribes and restitution *in spite of* what the law prescribes in cases of "extreme injustice of the past."⁶⁵ We adopt this rubric to refer to State or individual acts illegal under international law, or acts of aggression and art appropriation in service of aggressive colonialism or cultural destruction that are considered repugnant to modern society.

Nazi-looted art. The paradigmatic cases of "extreme injustice of the past" involve a State action or program that deliberately deprive individuals or subjugate nations of cultural property and/or heritage. The restitution of Nazi-looted or "Holocaust" art falls squarely here. The Nazis' systematic seizure of art before and during World War II began with the wholesale appropriation and destruction of so-called "degenerate" or "depraved" art within Germany, but quickly expanded to the indiscriminate seizure of art and cultural artifacts—either to enrich individual Nazis or the Nazi German state, or to achieve the annihilation of so-called "lesser" cultures.⁶⁶ This program violated an explicit international law prohibition on the confiscation of private property by aggressive occupying powers under Article 46 of the 1907 Hague Convention.⁶⁷ Alfred Rosenberg, the Nazi official who directed the German *Einsatzstab Rosenberg* that was responsible for the vast majority of art looting, was tried at Nuremberg for war crimes, crimes against peace, and crimes against humanity, and was hanged.⁶⁸ Hermann Goering, in addition to being the high-ranking Nazi *Reichsmarschall*, was a noted looter of property and artwork from the Holocaust's Jewish victims and was convicted and

⁶⁵ Roodt, *supra* note 60, at 301.

⁶⁶ Lynn H. Nichols, *World War II and the Displacement of Art and Cultural Property*, in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 39 (Elizabeth Simpson ed., 1997); JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, *LAW, ETHICS, AND THE VISUAL ARTS* 16–17 (5th ed. 2007).

⁶⁷ John Henry Merryman, *Introduction*, in *IMPERIALISM, ART AND RESTITUTION* 1, 7–9 (John Henry Merryman ed., 2006) [hereinafter Merryman, *Introduction*]; George Winfield Scott, *Hague Convention Restricting the Use of Force to Recover on Contract Claims*, 2 AM. J. INT'L L. 78, 90 (1908).

⁶⁸ *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946*, in 22 INT'L MILITARY TRIBUNAL 539–41 (BLUE SERIES, 1948), http://loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf [<http://perma.cc/3ULZ-LUBK>]. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 125 (1994).

sentenced to death at Nuremberg, although he committed suicide before the sentence could be carried out.⁶⁹

International Colonialism. Other campaigns of aggressive colonialist art appropriation also fall in this category. Acts of national plunder, such as the triumphalist plunder of Europe by Napoleon in the eighteenth century, plunder of Chinese artifacts after the Boxer rebellion, or the British Punitive Expedition against Benin in 1897 can constitute aggressive colonialist appropriation even though not specifically in violation of international law norms at the time, and were contemporaneously recognized as such and hotly debated among intellectuals.⁷⁰

Another example of this is Mussolini's brutal World War II campaign in Ethiopia, which resulted in the looting of numerous objects by Italian forces. Styling himself as following the Romans' ancient tradition of looting cultural treasures to add to the capitol's landscape, in 1937 Mussolini hauled away Ethiopia's most ancient archeological artifacts to commemorate his "new Roman empire."⁷¹ One of these treasures was the Axum Obelisk, dating from fourth century A.D., which Mussolini carted off and erected in front of Rome's new colonial office, the Ministry for Italian Africa.⁷² Three times over the last sixty years Italy promised to return the Obelisk, and each time it reneged on its word. Interestingly, as late as 2002, the Italian undersecretary of the Ministry of Culture held the view that the Obelisk had become integral to the Roman landscape, and further questioned whether Ethiopians were "cultured" enough to appreciate its restitution, saying in an interview:

Are we really supposed to believe that there is an Ethiopian out there—a cultured Ethiopian—who attaches a symbolic political or ethical significance to the restitution of that stone? . . . The Ethiopian people . . . should consider themselves fortunate to have a window on the Eternal City of the rich Western world.⁷³

Italy finally returned the Obelisk under intense political pressure in 2005, sixty-eight years after the fact, although numerous other objects remain in Italian storerooms.⁷⁴

69 NICHOLAS, *supra* note 68, at 23, 36, 38–39, 342–43.

70 Merryman, *Introduction*, *supra* note 67, at 5–6.

71 See, e.g., Richard Parkhurst, "Old Stones" – *The Loot of Ethiopian Antiquities during the Italian Invasion of 1935–6*, DIALOGUE, Mar. 1970, at 31–44.

72 *Id.*; Tom Hundley, "Ethiopia Again Demands Return of Obelisk," CHICAGO TRIBUNE (Mar. 10, 2002), http://articles.chicagotribune.com/2002-03-10/news/0203100403_1_obelisk-ethiopian-people-ethiopian-embassy [<http://perma.cc/RDX4-MFEW>].

73 Hundley, *supra* note 72.

74 *Obelisk returned to Ethiopia after 68 years*, THE GUARDIAN (Apr. 20, 2005), <https://www.theguardian.com/world/2005/apr/20/italy.ethiopia> [<http://perma.cc/23QQ-5DK8>].

Trophy art. An interesting variation on this is the widespread state appropriation of artworks after World War II by Soviet “trophy brigades,” which were set up to exact “equivalent” artwork from Germany as reparations for Nazi looting and destruction.⁷⁵ Nazi art looting on the Eastern front was particularly brutal; Slavic culture, deemed inferior, was to be eliminated completely. Hundreds of museums and over two thousand churches and synagogues were simply destroyed.⁷⁶ Western powers collected Nazi art after World War II’s end with the eventual goal of returning it to the nations from which it had been taken, but Soviet trophy brigades considered such art “compensatory restitution” for the U.S.S.R.’s losses.⁷⁷ While some of the art taken by the U.S.S.R. had belonged to private collections or museums in Germany prior to World War II, many items had been plundered or coercively acquired by the Nazi looting machine. Setting aside the legal proscriptions on the destruction and taking of art, morally, Russia views this art as appropriate and equivalent compensation for its enormous World War II losses. But many of those who initially owned such works dispute Russia’s claim and consider them plundered anew. In 2000, Russia passed a Federal Law on Displaced Cultural Valuables justifying the retention of this art under a theory of compensatory restitution, and nationalizing art and cultural property within Russia that formerly belonged to Germany or its World War II allies.⁷⁸ These works continue to exist in legal limbo, as litigation and diplomacy have yielded little results.⁷⁹

These justifications in cases of “extreme injustice” are not purely ownership based in terms of involving a recognizable legal title which can be given straightforward effect under the law. In many of these cases, there is no cognizable legal remedy, and thus, restitution “in spite of” what the law prescribes can be appropriate.

Protection of Archeological and Cultural Context. Along the spectrum of justifications for restitution, this category recognizes that restitution can also be appropriate as a deterrent to discourage the pillage or looting of archeological sites, or to

⁷⁵ Amelia Borrego Sargent, *New Jurisdictional Tools for Displaced Cultural Property in Russia: From “Twice Saved” to “Twice Taken,”* 10 Y.B. CULTURAL PROP. L. 167, 170–71 (2010).

⁷⁶ *Id.* at 169.

⁷⁷ *Id.* at 170–72.

⁷⁸ *See id.* at 189–91.

⁷⁹ *See, e.g.,* the outcome in *Agudas Chasidei Chabad of United States v. Russian Federation, et al.*, 128 F. Supp. 3d 242 (D.D.C. 2015), in which the court has awarded sanctions in the amount of \$50,000 per day against Russia for its refusal to comply with an order for the return of sacred texts to the Jewish organization Agudas Chasidei Chabad.

preserve and respect a cultural context. These types of goals were articulated in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 1970 (“1970 UNESCO”).⁸⁰

Pillage or individual acts of looting. Restitution can deter archeological destruction of cultural sites, buildings, burials, and monuments by looters. Destruction of the archeological record results in a loss for all.⁸¹

Intercultural reparations under NAGPRA. The Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in the United States in 1990, requires federal agencies and public and private institutions that receive federal funding to return Native American cultural items to lineal descendants or prior owners, and establishes procedures for new discoveries of Native American cultural items on federal or tribal lands.⁸² John Henry Merryman has described NAGPRA as “what may be the greatest art restitution project in history.”⁸³ NAGPRA’s premise is what some scholars have termed “intercultural reparations,” “grounded in recognition that alienation of human remains and items of cultural patrimony violated Native religious traditions and common-law rights to protect the dead.”⁸⁴ The justification for NAGPRA could easily be contextualized within the history of American continental expansion; it is set apart from the examples above, in part because it does not implicate international law norms, but involves restitution between a government and a living culture within a single political boundary.

Constructive Ownership. At the far end of the spectrum, private purchase and ownership of cultural objects itself is suspect under a strict interpretation of the 1970 UNESCO Convention and subsequent treaties, which encourage the national retention of cultural objects and discourage any private trade ostensibly to discourage clandestine excavation and export.⁸⁵ Beyond remedying actual title, extreme injustice, or

⁸⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property 1970, art. 13, 15, *adopted on* Nov. 14, 1970, 823 U.N.T.S. 232, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> [<http://perma.cc/46PH-PD7J>].

⁸¹ *See, e.g.*, Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197 (2001).

⁸² *Id.* at 231 n.149.

⁸³ Merryman, *Introduction*, *supra* note 67, at 1, 10.

⁸⁴ Michael F. Brown & Margaret M. Bruchac, *NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences*, in IMPERIALISM, ART AND RESTITUTION 193, 194 (John Henry Merryman ed., 2006).

⁸⁵ John Henry Merryman, *Art Systems and Cultural Policy* 24–30 (Stanford Pub.

present looting, what we term “constructive ownership” is an argument deployed by a nation to demand restitution of cultural objects based on a particular set of principles or enactments that it is the object’s rightful “country of origin” rather than actual prior possession or title.

As Dr. Roodt recognized, the term “country of origin” can have quite a few meanings, and it is not always, or not even primarily, the country consisting of the culture in which an object was created. Rather, in the current cultural heritage regime, “[t]he ‘country of origin’ refers to the country that designates the object as part of its cultural heritage, or that classifies it as national treasure, or includes it in a record on an ad hoc basis.”⁸⁶ That is, the modern designation creates the “origin” country for the purposes of cultural nationalization.

A “country of origin” argument arises when an object that “originated” in a particular country is legally outside of that country (and not through an act of aggression, as discussed above), but a nation nevertheless calls for its return. The Elgin Marbles are a prime example: John Henry Merryman examined the legal basis for ownership and concluded the acquisition was legal and “by the standards applicable in that time and place, ethical.”⁸⁷ As Merryman later noted, Greece has since made the argument that “whatever one might think about whether the Elgin Marbles belong to Greece, they belong in Greece.”⁸⁸ As another scholar articulates, “[c]ertain objects are of signal importance to national identity: the Crown of St. Stephen to Hungary, the Declaration of Independence to the United States, the Stone of Scone to Scotland, and the Imperial regalia to Japan.”⁸⁹ These are cases where an item is said to “belong’ to a people, essentially or inherently connected to them in some inalienable way.”⁹⁰

Other examples of a “country of origin” argument arise in cases of acquisition of works through *partage*, an arrangement

Law Working Paper, No. 1489612, 2010), <http://ssrn.com/abstract=1489612>.

⁸⁶ Roodt, *supra* note 60, at 290–91 (advocating for a comprehensive *lex culturis*, a body of law that would be applied to cultural property disputes other than the *lex situs* or *lex originis*).

⁸⁷ John Henry Merryman, *Whither the Elgin Marbles?*, in IMPERIALISM, ART AND RESTITUTION 98, 99 (John Henry Merryman ed., 2006). Merryman’s original article is John Henry Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

⁸⁸ Merryman, *Whither the Elgin Marbles?*, *supra* note 87, at 98, 100.

⁸⁹ Stephen K. Urice, *The Beautiful One Has Come – to Stay*, in IMPERIALISM, ART AND RESTITUTION 135, 152 (John Henry Merryman ed., 2006).

⁹⁰ Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT’L L. & POL’Y 95, 96 (1998).

common in the early twentieth century whereby a foreign-funded archeological team and a source nation would equally divide objects found during excavations.⁹¹ A portrait bust of Nefertiti, currently in Berlin, was acquired by *partage* from Egypt in 1912 in accordance with all applicable laws at the time.⁹² Nevertheless, Egypt has called for its return because it is “Egyptian.”⁹³ This concept is more complicated than Egypt suggests; the cultural connection between Nefertiti’s Egypt (1350–1333 B.C.E.) and contemporary Egypt is, as one scholar noted, far more nuanced.⁹⁴ Separating the two are conquest by Alexander the Great, numerous Islamic caliphates, Ottoman, and then British rule. Instead, the modern state considers the territory encompassed by its current political boundary to define its cultural boundaries.

Finally, this category invariably involves individual nations’ patrimony laws, which to varying degrees provide for nationalization of objects of artistic, ethnographic, or archeological value found within a country’s territory (deemed the “country of origin”) and limit the export and circulation of such material.⁹⁵

The concept of territory is key here, because national patrimony laws equate current national political borders with a past cultural identity based on territory—eliding the historical nuances that bring cultural property to the present day. The patrimony law regime generally forbids privatization and free circulation of such objects in the present, but ratifies whatever circulation—through commerce, war, or otherwise—may have brought the object to the territory in the first place. So, for example, under Italy’s patrimony law, ancient Egyptian artifacts found in Etruscan tombs in the current political nation of Italy belong to Italy, not Egypt, despite the fact that no one doubts a golden scarab’s true “country of origin.”⁹⁶ Of even greater moral

⁹¹ Merryman, *Introduction*, *supra* note 67, at 1, 9.

⁹² Urice, *supra* note 89, at 143.

⁹³ *Id.*; *German Foundation Refuses to Return Nefertiti Bust*, REUTERS (Jan. 24, 2011), <http://www.reuters.com/article/us-germany-egypt-nefertiti-idUSTRE70N6N220110124> [<http://perma.cc/3YTW-NYUE>].

⁹⁴ Urice, *supra* note 89, at 153.

⁹⁵ A thorough database of such laws can be found at the UNESCO DATABASE FOR NATIONAL CULTURAL HERITAGE LAWS, <http://www.unesco.org/culture/natlaws/> [<http://perma.cc/92Z7-SGK4>].

⁹⁶ Italy’s current Patrimony Law is Law No. 42/2004, D.Lgs. 22 gennaio 2004, n.42, in G.U. Feb. 2, 2004, n.28 (It.), *translated in* CODE OF CULTURAL AND LANDSCAPE HERITAGE (U.N. Educ., Scientific & Cultural Org. et al. eds., 2016). For an example of such a find, see *Rich Tomb of an Etruscan Princess Discovered in Italy*, ANCIENT ORIGINS (Mar. 9, 2016, 9:43 PM), <http://www.ancient-origins.net/news-history-archaeology/rich-tomb-etruscan-princess-discovered-italy-005499> [<http://perma.cc/Q8TR-YCBA>]; *Tomb Excavations Uncover Treasures of an Etruscan Princess*, ANSA (Mar. 11, 2016, 2:52 PM), <http://www.ansa.it>

complexity are objects seized from other cultures—whether by Imperial Rome or by Mussolini’s Nuova Roma—since under Italian patrimony law, such objects purport to belong to Italy.

This can be problematic. First, the current patrimony law regime pits cultural nationalists against cultural internationalists, and causes harm to those both within the nation and abroad. Seeking to maximize State authority over its territorial treasures, States frequently designate *all* cultural objects, not just those of major importance, as “national treasures,” a problem oft-recognized by Merryman.⁹⁷ Cultural objects can be restricted from being seen, displayed, and understood by any cultures other than the “national” one, because their ability to travel internationally or be sold in commerce is restricted. This in turn results in a dangerous parochialism that denies the multiethnic diversity that creates and influences an ever-changing culture. When cultural property laws claim antiquities to be “the manifestation of the ‘collective genius of nationals of the State,’” eliding the contours of history and culture in favor of modern political boundaries, it implies “some collective genius that distinguishes [citizens of that state] from everyone else in the world.”⁹⁸ This attitude is easily co-opted from cultural into political spheres, feeding political nationalist narratives.

Second, and particularly relevant with respect to the Bronze, is that the idea of single “country of origin” is a far too simplistic one, and can lead to conflicting results for objects of particular significance or with a complex history.

[A]n object of indisputable significance may not be so designated [as having one “country of origin”]; there may also be overlapping claims by more than one state; and a genuine cultural link could exist between country and object, independent of any formal designation. Such a link may also be forged with an “adoptive” state or a community that attributes value to the object.⁹⁹

The difficult cases with restitution arise particularly where an object’s “country of origin” is not a simple answer.¹⁰⁰

english/news/2016/03/08/tomb-excavations-uncover-treasures-of-an-etruscan-princess_a3ac25e9-3168-4c59-9bbc-8024716011e2.html [http://perma.cc/UM8Y-2ENT].

⁹⁷ Merryman, *supra* note 85 (manuscript at 26).

⁹⁸ See JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 145 (2010).

⁹⁹ Roodt, *supra* note 60, at 290–91.

¹⁰⁰ For example, the ownership of the Sevso treasure, a hoard of fourth century Roman silver, has been contested by several countries: Hungary, Croatia, and Lebanon have all claimed that the treasure was illegally excavated from their countries. While Hungary recently purchased some of the pieces, the remaining continue to reside in a

These two problems are only compounded when countries use patrimony laws as a sword rather than a shield—to acquire new objects into the national patrimony rather than protect existing but undiscovered objects within the territory.

B. Acquisitive Patrimony and the Getty Bronze

We return to the question: why should Italy own the Bronze, a Greek statue found by chance in international waters that has now spent decades longer in Malibu than it ever did in Fano, Italy?

The Italian government argues that it owns the Bronze and that it belongs in Fano.¹⁰¹ This is an argument that Italy constructively owns the Bronze, not based on prior possession or actual title, but through operation of Italy's patrimony laws. Italy has no preexisting title to the Bronze under an "actual ownership" regime. The Bronze was not owned or exhibited in a state museum from which it was stolen or taken. Nor would restitution of the Bronze to Italy, from whence it historically never originated, right some "extreme injustice of the past." No state or individual action appropriated the Bronze in a way that somehow damaged Italy's cultural heritage. Further, the Bronze was not deliberately looted from an archeological site that was irreparably damaged.¹⁰² Indeed, in ancient times the Bronze had already been removed from its original context somewhere in Greece by—in all likelihood—Roman looters, and was being taken by boat to Italy. The Bronze's "country of origin," as discussed in the above taxonomy, is not Italy at all; the Bronze is Greek, and has no historical connection to Italian soil. It was not discovered in Italian territory, and it never made it there in antiquity, and so was never incorporated into that country's historical cultural landscape.¹⁰³

private collection in the U.K. Dalya Alberge, *Sevso treasure items repatriated by Hungarian government after UK sale*, THE GUARDIAN (Mar. 27, 2014, 1:51 PM), <https://www.theguardian.com/world/2014/mar/27/sevso-treasure-items-repatriated-hungarian-government-roman-silver> [http://perma.cc/Z4PK-EK73]; Neil Brodie, *Sevso Treasure*, TRAFFICKING CULTURE (Mar. 28, 2014), <http://traffickingculture.org/encyclopedia/case-studies/sevso-treasure/> [http://perma.cc/2YKS-9JBF].

¹⁰¹ See, e.g., 2009 *Ordinanza supra* note 54; 2010 *Ordinanza supra* note 1.

¹⁰² See, e.g., Gerstenblith, *supra* note 81, at 201; see also Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 277, 301 (1982).

¹⁰³ Despite this, the mayor of Fano has articulated the city's claim to the Bronze in precisely these terms, stating in an interview that "[t]he statue and its discovery has become part of our culture and folklore . . . It's clear we have a claim to it." Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES (Jan. 15, 2010), <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html>. But why? The Bronze's fleeting passage through Fano underscores the plain factual and historical differences between it and an artifact like the Elgin Marbles—a difference not just in degree but in kind.

In such cases, the seeming justification behind territorial patrimony laws breaks down. Indeed, this is not a “country of origin” argument but rather acquisitive patrimony, an expansionist use of its patrimony law as a sword to obtain cultural property beyond that originally “found” in Italian territory. Thus, the Pesaro Court held that under Italian law, any Italian vessel, including flagged boats and aircraft, are Italian “territory” for the purposes of applying its Patrimony Law.¹⁰⁴ The Bronze, which was located in international waters, supposedly entered Italian territory when it was first entangled in the fishing trawlers’ nets before it was “discovered”; it was therefore discovered in Italian territory.¹⁰⁵

Consider the implications if the law were so. Would a painting shipped on an Alitalia flight between London and Munich need to comply with Italian Patrimony Law’s export and import provisions, or be forfeit to the Italian state? Could Italy simply nationalize such a transiting object and designate it part of its patrimony? What if an Italian-flagged ship pulled up some pre-Columbian artifact off the Pacific Coast of South America?¹⁰⁶ Would that be part of the Italian patrimony? Acquisitive patrimony reflects a disconnect of territorial patrimony laws from a State’s actual *territory*—that is, ancient artifacts found within a State’s soil—and expands it instead to art and artifacts that transit a nation’s political borders. This is a novel and potentially disruptive expansion of nationalized, political control over cultural heritage.

Further, although acquisitive patrimony does not seem to comport with the ethical and moral reasons ordinarily invoked when arguing for restitution in cases of, for example, “extreme injustice of the past,”¹⁰⁷ the rhetoric of traditional restitution is

¹⁰⁴ 2009 Ordinanza, *supra* note 54.

¹⁰⁵ 2010 Ordinanza, *supra* note 1.

¹⁰⁶ Among other things, Italy’s claim of title to such an object today would violate the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage* (“CPUCH”). See U.N. Educ., Sci. and Cultural Org., *Text of the 2001 Convention, UNDERWATER CULTURAL HERITAGE*, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/> [<http://perma.cc/M6HU-BE6T>]. The Convention generally requires Italy to “preserve underwater cultural heritage for the benefit of humanity.” *Id.* art. 2. To the extent Italy purported to “seiz[e]” any non-Italian work under the Convention, it would be required to notify “any other State with a verifiable link, especially of a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure . . . that it has made under this Convention” *Id.* art. 18. It would need to “ensure that its disposition be for the public benefit,” specifically “taking into account the . . . interests of any State with a verifiable link, especially a cultural, historical or archaeological link.” *Id.*

¹⁰⁷ Roodt, *supra* note 60, at 301.

still used to dismantle or disregard the “technical defenses” provided under ordinary legal procedure that would otherwise be available, including choice of law, jurisdiction, good faith, and the principle that newly enacted laws do not operate retroactively—i.e. procedural due process.¹⁰⁸ That is, in the case of the Bronze, Italy seeks restitution “in spite of” the law, but lacking the ethical and moral grounds ordinarily attendant under traditional restitutionary categories. This tactic is deliberate; according to one Italian scholar, Judge Mussoni’s arguments to justify the application of substantive Italian law to the Bronze, and thereby obtain ownership, “demonstrate[] the seriousness of Italy’s commitment to retaining *by any possible means* what it considers to be its national heritage.”¹⁰⁹

Acquisitive patrimony is not unique to the Bronze. Consider, too, the Peggy Guggenheim Collection located in Venice, Italy. Peggy Guggenheim, an American art patron and collector, lived part of her life in Italy and had a collection there of numerous American Abstract Expressionists, including Jackson Pollock and Mark Rothko.¹¹⁰ Beginning in 1951, Guggenheim opened her Venice palazzo and her collection to the public in the summer months.¹¹¹ She left her collection to the Guggenheim Foundation. The Peggy Guggenheim Collection—including American art made by Americans—was subsequently designated part of the *Italian* patrimony and strict limitations were placed on its export.¹¹²

As the reach of the Italian patrimony law extends to contemporary artists, the consequences of acquisitive patrimony are becoming more acute. The Italian patrimony law requires an export license for any work over fifty years old made by an artist who has died, even if it has only been in Italy for a short time.¹¹³ The bureaucratic backlog threatens to stifle the circulation of

¹⁰⁸ See Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze”*, in CULTURAL HERITAGE, CULTURAL DIVERSITY: NEW DEV. IN INT’L L. 301, 303–26 (Silvia Borelli & Federico Lenzerini eds., 2012).

¹⁰⁹ *Id.* at 303 (emphasis added).

¹¹⁰ See *Peggy Guggenheim, Biography*, PEGGY GUGGENHEIM COLLECTION, <http://www.guggenheim-venice.it/inglese/museum/peggy.html> [<http://perma.cc/ZJM5-AMVX>].

¹¹¹ *Id.*

¹¹² See Roderick Conway Morris, *Italy Tightens Rules on Lending of Art*, N.Y. TIMES (Oct. 24, 1998), <http://www.nytimes.com/1998/10/24/news/italy-tightens-rules-on-lending-of-art.html>.

¹¹³ Julia Halperin & Ermanno Rivetti, *Time for Italy to Reverse its Art Export Laws?*, THE ART NEWSPAPER (Oct. 2014), <http://www.cbmlaw.it/media/News-Arte-Povera.pdf> [<http://perma.cc/VD9Z-74JL>]; Ermanno Rivetti, *Are Italy’s Export Laws About to Change?*, THE ART NEWSPAPER (Sept. 25, 2015), <http://theartnewspaper.com/market/are-italy-s-export-laws-about-to-change/> [<http://perma.cc/U2ZD-REN7>].

Italian post-war art, affecting the market as well as research, conservation, and museum lending.¹¹⁴

Thus, while national patrimony laws embody a way of thinking of cultural property as part of a national heritage, giving “nations a special interest, impl[ying] the attribution of national character to objects, independently of their location or ownership, and legitimiz[ing] national export controls and demands for the ‘repatriation’ of cultural property,”¹¹⁵ they also go further. In cases such as the Peggy Guggenheim collection, or any art incidentally transiting Italy that has the misfortune of being more than fifty years old made by an artist who has died, through acquisitive patrimony, the patrimony law achieves the expansion of the national patrimony to items not related to the nation by culture, origination, or national character, but by mere presence on Italian territory.

In a way, aggressive acquisition of artworks has come full circle, and with the same unbridled nationalist fervor. Following the early twentieth century’s cultural looting by conquest, such as Mussolini’s invasion of Ethiopia in 1937, and Nazi looting of art and artifacts before and during World War II, the expansion of national cultural patrimony through physical conquest (or the destruction of others’) was explicitly prohibited by the 1954 Convention on the Protection of Cultural Property in Wartime.¹¹⁶ Thus prohibited from expanding their national patrimony through conquest, countries aggressively use and interpret their patrimony laws to accomplish the same objective—even when an artwork or artifact has only a tenuous, but physical, connection with the claimant State.¹¹⁷

¹¹⁴ Halperin & Rivetti, *Are Italy’s Export Laws About to Change?*, *supra* note 113.

¹¹⁵ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986).

¹¹⁶ See U.N. Educ., Sci. and Cultural Org., *Text of the Convention and its 1st Protocol, THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT*, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-hague-convention/text-of-the-convention-and-its-1st-protocol/#c284179> [<http://perma.cc/UT65-A3T7>]. Italy’s repatriation or restitution of looted works from conquest within its own borders lags somewhat behind its prosecution of its own patrimony. Graham Bowley, *Nations Called Lax in Returning Art Looted From Jews*, N.Y. TIMES (Sept. 10, 2014), http://www.nytimes.com/2014/09/11/arts/design/lax-efforts-on-wartime-looted-art-criticized-in-new-report.html?_r=0; see also Sarah Cascone, *Italy Dragging Its Feet on Nazi Loot Restitution*, ARTNET NEWS (Sept. 10, 2014), <https://news.artnet.com/art-world/italy-dragging-its-feet-on-nazi-loot-restitution-98169> [<http://perma.cc/U8CX-3GTK>]. Indeed, it took 68 years for Italy to return the famed Axum Obelisk to Ethiopia. *Obelisk returned to Ethiopia after 68 years*, *supra* note 74.

¹¹⁷ Italy is not the only nation to use its Patrimony Laws in this way. Spain recently nationalized a Picasso that had been privately owned by an art collector who purchased

This should be troubling. Now, the Authors do not take the position that every item should stay wherever it is today, particularly if it were taken by force. However, the Bronze case as an outer limit exposes how the far end of the restitution spectrum has been extended and co-opted into politically motivated territory.

Importantly, by contrast, countervailing considerations of, in Merryman's phrase, "cultural internationalism" resonate in favor of the Bronze remaining in California.¹¹⁸ The regime of patrimony laws lays claim to artworks and antiquities as the property and patrimony of particular nations on the basis of political lines—and often for political gain or legitimacy.¹¹⁹ Comparatively, universalism or cultural internationalism looks to the language of the Preamble of the Hague Convention of 1954, which holds that cultural heritage "is of great importance for *all* peoples of the world" and that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."¹²⁰

This latter ideal is borne out in the so-called "universal" or "encyclopedic" museum: museums whose collections draw from a wide variety of cultures and time periods. Universal or encyclopedic museums embody the principle of the universality of cultural heritage by displaying "collections meant to represent the world's diversity, and they organize that and classify that diversity for ready, public access."¹²¹ Adhering to the principle that art and antiquities belong to the cultural heritage of "all peoples of the world," encyclopedic museums present collections to broaden that understanding of a common yet diverse cultural heritage. As one former director of the British Museum stated, "the [British] Museum acted as though it were an encyclopaedia, or a dictionary based on historical principles, with sequences of rooms, their layout, and the juxtaposition of objects within them providing a means of understanding relationships within the three-dimensional world of objects and specimens."¹²² One must

the painting in London in 1977. See Doreen Carvajal, *Private Property or Patrimony? The Fight Over a Picasso*, N.Y. TIMES (Oct. 9, 2015), <http://www.nytimes.com/2015/10/10/arts/design/private-property-or-patrimony-the-fight-over-a-picasso.html>.

¹¹⁸ Merryman, *supra* note 115, at 831.

¹¹⁹ See generally CUNO, *supra* note 98.

¹²⁰ Merryman, *supra* note 115, at 836–37 (emphasis added) (citing the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, 249 UNTS 240).

¹²¹ CUNO, *supra* note 98, at 140.

¹²² *Id.*

acknowledge the value of such museums, including the Getty, in balancing the considerations of whether the Bronze should return to Italy.

The stated purpose of the J. Paul Getty Trust is the “diffusion of artistic and general knowledge.”¹²³ The Bronze is an integral cornerstone of the collection at the Getty Villa, part of the Getty Museum operated by the Trust. The Getty Villa, modeled after the Herculaneum’s Villa dei Papiri, is the only place in the United States dedicated solely to the study and display of ancient art.¹²⁴ The Villa brings Greek, Roman, and Etruscan art, displayed in an evocative context, to an audience of over 300,000 visitors per year.¹²⁵ The Bronze is part of the Getty Villa’s history—indeed, the acquisition of the *Getty Bronze* began a new chapter in the Museum’s legacy after the death of Mr. Getty. The Bronze has a strong “forged link” with the Villa and its home for four decades, the United States. This too has value that deserves recognition, and perhaps more so because of the role the Bronze has played in the origin of the Getty. As the L.A. Times remarked in an editorial, “The bronze spent the vast majority of its first 2000 years deep in the ocean. Its longest home since then has been the Getty. That is where it should stay.”¹²⁶

One might also consider Paul Bator’s first and primary value of “the preservation of works of art and the associated values of integrity and visibility.”¹²⁷ In Bator’s formulation, this value involves not only the literal preservation of artworks, but the value of “making art known, visible, and accessible”—and not just to the widest audience, but to the appropriate audience, “now or in the future.”¹²⁸ Italy, by comparison to California, has no shortage of opportunities for the visitor to engage in ancient

¹²³ *Indenture*, THE GETTY, <http://getty.edu/about/governance/indenture.html> (last visited Jan. 14, 2017) [<http://perma.cc/AF88-GCKE>].

¹²⁴ *Architecture: A Roman Villa Recreated – Early 1970s*, GETTY, <http://www.getty.edu/visit/villa/architecture.html> [<http://perma.cc/WXW8-X49J>]; Press Release, The Getty, Ten Years of Collecting at the J. Paul Getty Museum (Sept. 24, 2007), http://www.getty.edu/news/press/center/ten_years_of_collecting.html [<http://perma.cc/HN36-TNVS>].

¹²⁵ VISITORS FIGURES 2014, THE ART NEWSPAPER 15 (2014), http://www.museus.gov.br/wp-content/uploads/2015/04/TheArtNewspaper_Ranking2014.pdf [<http://perma.cc/6M7L-SNZB>].

¹²⁶ The Times Editorial Board, *Sorry, Italy, the ‘Getty Bronze’ belongs in L.A.*, L.A. TIMES (June 2, 2014, 6:42 PM), <http://www.latimes.com/opinion/editorials/la-ed-getty-bronze-20140603-story.html>.

¹²⁷ See generally Bator, *supra* note 102. Although Bator’s framework analyzes the international trade in art, it also applies to cultural property disputes where “no enforceable legal claim exists but ethical, moral, or practical considerations might nevertheless call for return of a disputed object to its country of origin.” Urice *supra* note 89, at 145.

¹²⁸ Bator, *supra* note 102, at 299–301.

art of the Mediterranean.¹²⁹ As one part of Italy's vast national patrimony, the Bronze would lose part of its universal character in becoming yet another trophy—this time in service to nationalistic politics. Surely the shared human artistic heritage deserves better.

V. CONCLUSION

As the above considerations show, the case for restitution of the Bronze is at best a dramatic expansion of the traditional justification for the return of cultural property—one that relies on “acquisitive patrimony” or the incidental transit through territory rather than “extreme injustice” or cultural identification of a “country of origin.”

As a boundary case that tests the applicability of expansionist interpretations of cultural property law, the specifics of the case of the Getty Bronze demonstrate and make clear that there must be logical limits to the reach of cultural patrimony laws. The case of the Bronze should instead fall squarely within the existing and known legal framework—where *res judicata*, statutes of limitations, choice of law, and good faith all operate to provide certainty and due process when analyzing long-ago transactions. While cultural patrimony laws are valuable protective tools under many circumstances, their reach is not infinite, and when used as a sword rather than a shield, the justification for nationalization breaks down. Here, a Greek bronze recovered by chance in international waters, purchased with due diligence through a standard process, and long the centerpiece of a notable American museum, the Italian patrimony law cannot—should not—reach.

¹²⁹ Similarly, at least one scholar has argued that, should the Bronze be “returned” anywhere, it should be to Greece—the Bronze’s true country of origin—but that Greece’s prolific collections of Greek artifacts counsel the Bronze to remain at the Getty. See Alexander MacKintosh Ritchie, *Victorious Youth Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RES. L.J. 325, 375 (2009).

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The Temple of American Justice: The United States Supreme Court Building

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The Temple of American Justice: The United States Supreme Court Building

*Lucille A. Roussin**

The United States Supreme Court building, constructed of glittering white marble, rises above a spacious marble plaza facing west toward the United States Capitol (Figure 1). It has been said that no other building in Washington, D.C. conveys an air of such simple majesty.¹ The edifice is so much a part of the physical landscape of the nation's capital, and the decisions of the Supreme Court are so much a part of issues that touch American society, that it is taken for granted by most Americans that it forms an integral part of the original plan of Washington, D.C. laid out by the architect Pierre L'Enfant, appointed by President Washington to plan the city in 1791.² But the history of the Supreme Court building begins with the appointment of William Howard Taft as Chief Justice of the Supreme Court in 1921; it was only through his "intelligent persistence"³ that Congress passed the legislation necessary for the purchase of the land and the construction of the building. It is the thesis of this article that a unique confluence of circumstances—Taft's own view of the position of the Supreme Court in American Society, his long-term friendship with Cass Gilbert, and the post-World War I growth of the federal government—not only made the construction of the building possible, but also found an expression in the style of the architecture and the iconography of the sculptural program.

* I would like to thank Professors Malvina Halberstam and Suzanne Stone of Benjamin N. Cardozo School of Law for their advice in writing this article and their ongoing friendship. I would also like thank Professor Richard Brilliant, my mentor in the study of Art History and Archaeology and for his continuing friendship.

¹ Haynes Johnson, *The Temple on the Hill*, THE WASHINGTON POST (Oct. 5, 1977), https://www.washingtonpost.com/archive/politics/1977/10/05/the-temple-on-the-hill/447e34a7-cfe2-4d7b-87d4-68dd7a087d93/?utm_term=.dc10f9a5f81d [<http://perma.cc/W5SZ-RPX5>]; Cass Gilbert, Jr., *The United States Supreme Court Building*, 72 ARCHITECTURE 301 (1935); Ingrid A. Steffensen, *St. Louis: Public Architecture, Civic Ideals*, in CASS GILBERT, LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN 239–44 (Barbara S. Christen & Steven Flanders eds., 2001).

² JOHN W. REPS, MONUMENTAL WASHINGTON: THE PLANNING AND DEVELOPMENT OF THE CAPITAL CENTER 15–20 (Princeton Univ. Press, 1967).

³ *Corner Stone of the New United States Supreme Court Building Laid: Address of Chief Justice Hughes*, 18 A.B.A. J. 723, 728 (1932) [hereinafter *Cornerstone*].

THE PEREGRINATIONS OF THE SUPREME COURT: A BRIEF HISTORY

Exactly why L'Enfant neglected to provide for a building for the judicial branch of government is not known. He did mention a site for the "Judiciary Court" in a preliminary report to the president dated August 19, 1791, but this is the only mention of a building for the Court.⁴ It has been conjectured that the reason L'Enfant did not provide for a building for the judiciary was because no comparable institution existed in Europe, and L'Enfant thought that the Supreme Court would never achieve the prominence of the executive and legislative branches of the government.⁵

L'Enfant's plan for the city was never completed. In 1900, the centennial of the city, the American Institute of Architects called a national conference to discuss the future planning of Washington, D.C. As a result of this conference, the Senate passed a resolution sponsored by Senator James McMillan creating a Senate Park Commission composed of some of the most renowned architects of the time.⁶ The Commission's plan for the city, known as the McMillan Plan, recommended that a building for the Supreme Court be built to the north of the Library of Congress.⁷ The building was never built and the Supreme Court remained without a permanent home until it moved into its present building on October 7, 1935.⁸

The first session of the Supreme Court met on February 2, 1790, in the Exchange Building in New York City, on the second floor above the busy market place at the intersection of Broad and Market Streets.⁹ When the capitol of the United States moved to Philadelphia, the Court moved there as well. The second and third homes of the Court were in Philadelphia, first in Independence Hall, and then in the Old City Hall.¹⁰

When the capitol was moved to Washington, D.C. in 1800 the Supreme Court was allocated a room in the unfinished Capitol building, described by a contemporary source as "a half finished committee room meanly furnished and very inconvenient."¹¹ It was in this room that John Marshall presided as Chief Justice, and

⁴ REPS, *supra* note 2, at 136.

⁵ *Id.*

⁶ *Id.* at 84–93, 115, 136. It is interesting to note that Cass Gilbert, future architect of the Supreme Court building, presented a proposal for the development of federal buildings around the Mall at the AIA conference.

⁷ *Id.* at 136.

⁸ Thomas E. Waggman, *The Supreme Court: Its Homes Past and Present*, 27 A.B.A. J. 283, 288 (1941).

⁹ REPS, *supra* note 2, at 136.

¹⁰ Waggman, *supra* note 8, at 283, 288.

¹¹ *Id.*

where *Marbury v. Madison* was decided, thus setting the stage for the increasing role of the Court in the federal government.¹²

From 1809 until 1817 the Court moved in and out of the Capitol building; in 1809, to Long's Tavern because the Library in the Capitol, where the Court was to convene, was "so inconvenient and so cold."¹³ In 1814, to Bell Tavern due to a fire set by the British during the War of 1812;¹⁴ and then back to an undetermined space in the Capitol building. In 1819, the Court finally moved to the room it was to occupy until 1860, when it made its final move within the Capitol to the former Senate Chamber, located on the east side of the main corridor between the Rotunda and the new Senate Chamber.¹⁵

CHIEF JUSTICE TAFT AND THE TEMPLE OF JUSTICE

William Howard Taft was the only man to have served both as President of the United States (1909–13) and Chief Justice of the Supreme Court (1921–30). It is as Chief Justice of the Supreme Court that he flourished: "[t]he Chief Justiceship was to him the ultimate compensation for the unhappiness of his years in the White House."¹⁶ Even while he was the president, however, Taft "devoted more attention to the choice of Justices than any other President," and admitted freely that there was no other position he would rather have than that of Chief Justice of the Supreme Court.¹⁷ In fact, Taft conceived the idea of constructing a new building for the Supreme Court while he was President, but opposition from Chief Justice White stayed his hand.¹⁸

Taft's attitude toward the symbolism of the judiciary is evident in a speech given in 1908:

It is well . . . that judges should be clothed in robes, not only that those who witness the administration of justice should be properly advised that the function performed is one different from, and higher, than that which a man discharges as a citizen in the ordinary walks of life; but also, in order to impress the judge himself with the constant consciousness that he is a high-priest in the temple of justice and is surrounded with obligations of a sacred character that he cannot escape and that require his utmost care, attention and self-suppression.¹⁹

¹² See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

¹³ Wagman, *supra* note 8, at 289.

¹⁴ *Id.*

¹⁵ *Id.* at 289; see also *When the Supreme Court was in the Capitol*, 61 A.B.A. J. 949 (1975).

¹⁶ BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 213 (Oxford Univ. Press 1993).

¹⁷ *Id.* at 204, 213; see also HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 7 (1964); Alexander M. Bickel, *Mr. Taft Rehabilitates the Court*, 79 *YALE L.J.* 1, 19 (1969).

¹⁸ SCHWARTZ, *supra* note 16, at 207.

¹⁹ WILLIAM H. TAFT, *PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED*

The old Chamber in which the Court continued to convene hardly fits the description of a “temple of justice,” and Taft’s pique with the inadequacy of the Court’s facilities was exacerbated when the Senate’s response to the Court’s request for more space for the Clerk’s office was to assign the Court a small windowless room.²⁰ Taft wrote to Senator Charles Curtis of Kansas:

I hope you are not going to deny us in the Supreme Court, the space which we need for the Clerk’s Office. With the very large Senate Office Building you ought to be willing to let the Supreme Court have at least breathing space. We need a room where we can have a clerk. The room which you propose to give us is an inside one. It really is not fair.

You have taken back all the rooms but three that were assigned to us for the use of the judges. In our conference room the shelves have to be made so high that it takes an aeroplane (*sic*) to reach them. But two of the justices have rooms in the Capitol. We don’t object to this though it would be more convenient if each one had an office here. But we do think for the important requirements of the Clerk and the indispensable library accommodations, you might be willing to keep your Senate Committees within space which is reasonable in view of the real needs of the judicial branch of the government.²¹

After an exchange of letters concerning the allocation of space, Senator Curtis wrote to Chief Justice Taft on March 1, 1923:

I know how much the Supreme Court needs additional space and I tried to get them two rooms . . . The Chairman of the Subcommittee and myself worked together in this matter and did everything possible. Personally, I am in favor of erecting a new building for the Supreme Court so that they will have all the room the Court needs, not only for the Court, but for all of its officers.²²

Although this statement by Senator Curtis may seem to have opened the door, it was not until late in 1925 that Chief Justice Taft was able to pursue the plan to construct a home for the Supreme Court. His opportunity came when the Senate approved the Public Buildings Act of 1926, authorizing \$50 million for the construction of new buildings for the expanding federal government.²³ Taft had written to Senator Reed Smoot of the

ON VARIOUS OCCASIONS (1908), *reprinted in* ALPEHUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 58 (1964).

²⁰ See Catherine Hetos Skefos, *The Supreme Court Gets A Home*, in YEARBOOK 25, 26–27 (The Supreme Court Historical Soc’y, 1975).

²¹ Letter from William Howard Taft, Chief Justice of the U.S. Supreme Court, to Charles Curtis, Senator of Kansas (Feb. 26, 1923) (on file with author). I would like to thank Gail Galloway, Curator of the Supreme Court, and Franz Jantzen, Photographer of the Supreme Court for giving me permission to use the Archives and for their assistance with the archival material.

²² Letter from Charles Curtis, Senator of Kansas, to William Howard Taft, Chief Justice of the U.S. Supreme Court (Mar. 2, 1923) (on file with author).

²³ H.R. 6559, 69th Cong. (1925); *see also* NAT’L PLANNING COMM’N, WORTHY OF THE

Senate Committee on Public Lands and Surveys urging the inclusion of a provision in this bill for the purchase of the land for the erection of a building for the Supreme Court, but his request was received without enthusiasm and the proposal was defeated largely due to the opposition of Senator Smoot.²⁴ However, because there was a conflict between the House and the Senate versions of the bill, it went to conference, giving Taft time to negotiate with the members of the House Committee. His efforts were rewarded—the conference report called for the acquisition of a site for the Supreme Court, and President Coolidge signed the bill into law the following week.²⁵ As Mason has said, “[t]he most striking example of Taft’s effectiveness as a lobbyist was the campaign he waged for a new Supreme Court building”—but the campaign had only just begun.²⁶

CHIEF JUSTICE TAFT AND CASS GILBERT

Although final approval for the construction of the Supreme Court building was yet to come, by 1926 Taft had already engaged in extensive discussions concerning the architectural plan of the building with his friend Cass Gilbert.²⁷ Gilbert had already achieved fame as the architect of the Minnesota and West Virginia State Capitol Buildings, the Customs House and the Woolworth Building in New York, and the Treasury Annex and the United States Chamber of Commerce in Washington, D.C.²⁸ His friendship with Taft was of long standing; President Taft appointed him to the National Commission of Fine Arts, the body charged with the duty of reviewing and approving plans for Washington buildings and monuments.²⁹

The correspondence between Taft and Gilbert documents the progress of their plans for the new Supreme Court and Taft’s

NATION: THE HISTORY OF PLANNING FOR THE NAT’L CAPITAL 172 (1977). Although the Public Buildings Act was designed primarily for the construction of the area known today as the Federal Triangle, the 1926 drawings include a building for the Supreme Court flanking the Library of Congress and facing the Capitol; see S. DOC. NO. 69-240, at 1 (1927).

²⁴ MASON, *supra* note 19, at 133; see also Skefos, *supra* note 20, at 29.

²⁵ An Act to provide for the construction of certain public buildings, and for other purposes. Pub. L. No. 69-281, 44 Stat. 630 (1926).

²⁶ MASON, *supra* note 19, at 133.

²⁷ Letter from Cass Gilbert, Architect, to William Howard Taft, Chief Justice of the U.S. Supreme Court (Dec. 12, 1926) (on file with author). The letter includes preliminary sketches for the building. A number of Gilbert’s preliminary sketches, along with photographs of the complete building are reproduced in Cass Gilbert, Jr., *The United States Supreme Court Building*, ARCHITECTURE, Dec. 1935, at 301. See generally Alan Greenberg & Stephen Kieran, *The United States Supreme Court Building*, Washington, D.C., MAG. ANTIQUES, Oct. 1985, at 760.

²⁸ Guy Kirkham, *Cass Gilbert, Master of Style*, in PENCIL POINTS 541, 547 (1934). I would like to thank Franz Jantzen for bringing this article to my attention.

²⁹ Skefos, *supra* note 20, at 32.

continuing campaign with the Congress. In a letter dated July 18, 1927, Gilbert, travelling in Europe, wrote to Taft:

I understand perfectly that circumstances surrounding the matter do not permit of any definite committal concerning it at the present time. I perhaps need not tell you that I am keenly desirous of being appointed architect of the Supreme Court building. It ought to be the most dignified and beautiful building in Washington.³⁰

The next hurdle that Taft faced with the Congress was the composition of the Supreme Court Building Commission. Taft wanted control of the Commission to ensure that he and Gilbert would have a free hand in the design of the building.³¹ On April 24, 1928, Taft sent Gilbert the text of the original bill,³² drafted by David Lynn, architect of the Capitol, along with his suggested emendations. Gilbert immediately cabled Taft, pointing out that the original bill would effectively make David Lynn the architect and give him the authority to appoint consulting architects and others; Gilbert cautioned that “[i]t would be highly undesirable to make the employment of consulting architects either implied or mandatory for it invites division of authority just where authority should be most concentrated.”³³

The hearings on both the original bill and Taft’s revised bill were held on May 26, 1928, with both Chief Justice Tate and Justine Van Devanter in attendance.³⁴ It was only through Taft’s diplomatic handling of the issues that Capitol architect David Lynn was mollified and accepted a position as an executive officer of the Commission.³⁵ The bill providing for the submission to Congress of preliminary plans and cost estimates did not pass until December 21, 1928.³⁶ Yet, even at this late date there was debate on the Senate floor, with Senator Heflin of Alabama objecting strenuously to having the Court moved out of the “old temple of justice” in the Capitol.³⁷ On this occasion it was Senator Reed Smoot, who had attempted to block the legislation for the appropriation of land for the new building, who came to

³⁰ Letter from Cass Gilbert, Architect, to William Howard Taft, Chief Justice of the U.S. Supreme Court (July 18, 1927) (on file with author).

³¹ *Id.*

³² H.R. 13242, 70th Cong. (1928).

³³ Letter from Cass Gilbert, Architect, to William Howard Taft, Chief Justice of the U.S. Supreme Court (April 25, 1928) (on file with author). The text of the telegram was also conveyed to Taft on April 25, 1928 by telephone message from Cass Gilbert, Jr.

³⁴ H.R. 13242, 70th Cong. (1928); H.R. 13665, 70th Cong. (1928) (enacted).

³⁵ H.R. 13242, 70th Cong. (1928); H.R. 13665, 70th Cong. (1928) (enacted); *see also* Skefos, *supra* note 20, at 32.

³⁶ H.R. 13665, 70th Cong. (1928); Act of Dec. 21, 1928, Pub. L. No. 70-644, 44 Stat. 1066 (providing for the submission to Congress of the preliminary plans and estimates of cost for the construction of a building for the Supreme Court of the United States).

³⁷ 70 CONG. REC. 930 (1928) (the statement of Sen. Heflin).

the defense of the bill, stating that: “every American’s heart will be filled with pride to know that the United States Supreme Court—the greatest body in the world for the administration of law—is housed in a building that will do honor to any country in the world.”³⁸

The models for the building were approved by the Commission in May of 1939, and Congress gave final approval of the \$9,740,000 in cost estimates on December 20, 1929.³⁹ Chief Justice Taft fell ill in January of 1930 and died two months later. In February of 1927, Taft had written to his son Charles, “[m]y prayer is that I may stay long enough on the Court to see that building constructed. If I do, then I shall have the right to claim that it was my work, for without me it certainly would not have been taken up at this time.”⁴⁰ Although he did not live to see the building constructed, Chief Justice Taft certainly had every right to claim the building as his work. Cass Gilbert expressed the same sentiments in his last letter to Taft: “I shall always think of you as the real author of the project and the one to whose vision we shall owe a suitable housing for the Supreme Court of the United States. It will, in fact, be a monument to your honored name.”⁴¹

THE ARCHITECTURE: STYLE AND SYMBOLISM

Cass Gilbert was one of the leading exponents of the style known as the American Renaissance, which flourished from 1887 until 1917 and enjoyed a late period of popularity until 1938.⁴² The emphasis of the training was not only on formal courses on

³⁸ *Id.* at 932; see also Kirkham *supra* note 28 and accompanying text.

³⁹ Act of Dec. 20, 1929, Pub. L. No. 71-26, 46 Stat. 51 (providing for the construction of a building for the Supreme Court of the United States); H.R. 3864, 71st Cong. (1929).

⁴⁰ Letter from William Howard Taft, Chief Justice of the Supreme Court, to Charles Phelps Taft II, Son of the Chief Justice (Feb. 27, 1927), *quoted in* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 136 (1965).

⁴¹ Letter from Cass Gilbert, Architect, to William Howard Taft, Chief Justice of the U.S. Supreme Court (Feb. 4, 1930) (on file with author). Letter from Cass Gilbert, Architect, to William Howard Taft, Chief Justice of the U.S. Supreme Court (July 18, 1927) (on file with author). Cass Gilbert did not live to see the building completed; he died in May 1934, several months before the building was finished.

⁴² Cass Gilbert, like many American architects at the turn of the century, had limited formal training; he spent a short time with an architect in St. Paul, Minnesota, then went on to a year of study at the Massachusetts Institute of Technology, followed by a trip abroad, and then two years at the renowned firm of McKim, Mead and White, considered the best training office in the nation. See Richard Guy Wilson, *Architecture and the Reinterpretation of the Past in the American Renaissance*, 18 WINTERTHUR PORTFOLIO 69, 71 (1983) [hereinafter Wilson, *Reinterpretation of the Past*]. It was Charles Follen McKim who established the American Academy in Rome in 1885, so that American architects and artists could enjoy the benefits of the study of ancient monuments of Rome, as did their French counterparts at the École Française des Beaux Arts, who were required to spend at least a year at the École Française de Rome. See CHARLES MOORE, *THE LIFE AND TIMES OF CHARLES FOLLEN MCKIM* 167–68 (1929).

history, construction, and physics, but on detailed studies of building and ornament—“[i]nforming the present were brilliantly rendered interpretations of antiquity.”⁴³ Although many styles of architecture were taught, it was the classical style of ancient architecture that dominated.⁴⁴ One of the basic approaches of architects who worked in the American Renaissance style was the reliance on prototypes—the use of motifs of ancient architecture—although combined and set in new arrangements.⁴⁵ In order to facilitate the study of ancient architecture for Americans who were unable to travel extensively in Europe, two important books were published in the United States in the 1920s. *The American Vitruvius: An Architects' Handbook of Civic Art* offered advice based on studies of European architecture from Greek and Roman precedents through the Renaissance and Baroque periods, and arranged by topics such as “Plaza and Court Design in Europe.”⁴⁶ The publication of a volume of drawings of ancient architectural elements drawn by students of the École de Beaux Arts exerted a strong influence on the architects of the late American Renaissance style, who became known for their fidelity to classical models.⁴⁷

Gilbert was steeped in the philosophy of the American Renaissance, which grew out of the nineteenth century marriage of historiography and nationalism with its focus on the identification of the symbols that expressed national, political, and cultural ideals. In architecture, stylistic forms were considered to be the purest expression of a nation’s morality and historical significance.⁴⁸ Gilbert expressed his philosophy toward the function of the architecture and decoration of public buildings in an article published in 1929:

The poor man cannot fill his home with works of art. The State can, however, satisfy his natural craving for such things in the enjoyment of which all may freely share, by properly embellishing its public buildings and particularly its state capitol. There the rich and poor

⁴³ Richard Guy Wilson, *Architecture, Landscape and City Planning*, in THE AMERICAN RENAISSANCE 1876–1917 75, 92 (1979) (showing an exhibition at the Brooklyn Museum, Oct. 13–Dec. 30, 1979) [hereinafter Wilson, *Architecture*].

⁴⁴ *Id.*

⁴⁵ Wilson, *Reinterpretation of the Past*, *supra* note 42, at 85.

⁴⁶ See WERNER HEGEMAN & ELBERT PEETS, THE AMERICAN VITRUVIUS: AN ARCHITECTS' HANDBOOK OF CIVIC ART (1922). The final chapter, entitled “The Plan of Washington,” ends with an admonition to those who would adhere to L’Enfant’s original plan with “a belief that the principal value of that plan is a mystical parallelism with the federal constitution, which it is unpatriotic to question.” *Id.* at 293.

⁴⁷ HECTOR D’ESPOUY, ONE HUNDRED SELECT PLATES FROM FRAGMENTS D’ARCHITECTURE ANTIQUE (Pencil Points Press 1923), *reprinted as* FRAGMENTS FROM GREEK AND ROMAN ARCHITECTURE: THE CLASSICAL AMERICAN EDITION OF HECTOR D’ESPOUY’S PLATES (Norton 1981) [hereinafter FRAGMENTS].

⁴⁸ Wilson, *Reinterpretation of the Past*, *supra* note 42, at 75.

alike may find the history of the state and the ideals of its government set forth in an orderly and appropriate way in noble inscriptions, beautiful mural paintings and sculpture and in the fine proportions and good taste of the whole design.

It is an inspiration to patriotism and good citizenship, it encourages just pride in the state and is an education to oncoming generations to see these things, imponderable elements of life and character, set before the people for their enjoyment and betterment. The educational value alone is worth to the state far more than its cost – it supplements the education furnished by the public school and the university – it is a symbol of the civilization, culture and ideals of our country.⁴⁹

The architecture of Washington, D.C. is perhaps the best preserved urban example of the American Renaissance style, and indeed, it has been referred to as the national style of “Imperial America.”⁵⁰ As one scholar has noted “[t]he orderliness and stateliness of classical architecture—and its association, from time immemorial, with stable principles of law and government—made this style the most appropriate one at a time when America achieved a new world prominence.”⁵¹ This sentiment had, in fact, been expressed in an article in the *New York Times* in 1929:

The real pressure behind the new Washington is the new America. We have heard a good deal during the past few years of the United States as a great world power, perhaps the greatest. . . . The capital, says Mr. Hoover, is “the symbol of the nation;” its reconstruction coincides . . . with the dawning consciousness that this capital is an equivalent of the Rome of Augustus, of the Paris of the Grand Monarque.⁵²

The reference to the Rome of Augustus is more appropriate than the author of the article may have realized. For, like the Temples of Rome, the Supreme Court building embodies an American civil religion that was eloquently expressed at the ceremony marking the laying of the cornerstone of the building in 1931. Guy A. Thompson, President of the American Bar Association, said:

It will be a monument expressing by its own stability the firm confidence and trust, the unwavering reverence and devotion in which the people hold the Court whose home it is to be. Its towering pillars, its age-defying walls, against which the winds and storms of Heaven will beat in vain, shall be symbols of the majesty and power of that Tribunal and of its proof against the tempests of passion and ill will. It will be a monument to Justice This will be her Temple. Here

⁴⁹ Cass Gilbert, *The Greatest Element of Monumental Architecture*, 36 AM. ARCHITECT 140, 141 (1929).

⁵⁰ Michael T. Klare, *The Architecture of Imperial America*, 33 SCI. & SOC'Y 257, 272 (1979).

⁵¹ *Id.*

⁵² Anne O'Hare McCormick, *Building the Greater Capital: A New Washington Rises As the Symbol of America's New Status*, N.Y. TIMES, May 26, 1929.

her shrine will be. Here she shall abide. . . . [T]he Lord has built this house and His justice reigns therein.⁵³

Chief Justice Charles Evans Hughes similarly expressed his thoughts in quasi-religious tones:

[T]his temple of noble proportions . . . finds its chief distinction as a national symbol. . . . This building is the symbol of the distinctive character of the Republic. . . . Hence, we look upon this gleaming marble, in classic lines, not as being erected simply for judges or lawyers or litigants. . . . The Republic endures and this is the symbol of its faith.⁵⁴

THE ARCHITECTURE: ANCIENT SOURCES AND PROTOTYPES

Although the classical origins of the buildings have always been recognized, it has often erroneously been compared to the Parthenon on the Acropolis in Athens.⁵⁵ The *WPA Guide to Washington* is more correct than the authors probably realized when they described the façade of the building as suggesting a “Roman temple, its form of worship announced by the inscription below the pediment ‘Equal Justice Under Law.’”⁵⁶

The Supreme Court building is set back on a wide plaza reached by a short flight of steps, a pair of identical flag poles with sculptured bronze bases mark the outer perimeter of the plaza, and a pair of candelabra on carved marble bases flank the staircases at the entrance to the plaza (Figure 1). The building is set back on the plaza and is reached by another wide staircase, framed by projecting blocks that support monumental statues. The East, or rear façade of the building is a deep dipteral octastyle porch, surmounted by a carved entablature and a pedimented roof. The wide horizontal wings of the building are set back, so that the characteristic classical temple façade is dominant.

On the West, or front, façade is a pair of carved urns that flank the staircase that leads to a narrow plaza and the façade is set on a platform clearly meant to raise it to match the height of the east façade (Figure 1). The raised façade is ornamented with engaged columns and pilasters with Corinthian capitals that “support” an entablature bearing the inscription “Equal Justice Under the Law,” which is surmounted by a pedimental roof.

⁵³ Guy A. Thompson, *Corner Stone of the New Home of the Supreme Court of the United States is Laid*, 18 A.B.A. J. 723, 723–24 (1932).

⁵⁴ *Cornerstone*, *supra* note 3, at 728–29.

⁵⁵ See, e.g., Margaret P. Lord, *Supreme Courthouse*, CONNOISSEUR, July 1984, at 61.

⁵⁶ FEDERAL WRITERS PROJECT, *WPA GUIDE TO WASHINGTON*, D.C. 161 (1935); see also PAMELA SCOTT & ANTOINETTE J. LEE, *BUILDINGS OF THE DISTRICT OF COLUMBIA* 138 (1993).

The porch of the main façade finds its closest parallel to the deep octastyle porch of the Pantheon in Rome, as illustrated in the American edition of D’Espouy.⁵⁷ The similarities between the architectural drawing and the façade go beyond the plan of the deep porch. The way in which the center columns frame the wide doorway of the Supreme Court building is strikingly similar to the drawing of the Pantheon doorway, as is the openwork bronze grill doors of both buildings. Other details illustrated in the American edition of D’Espouy from the Pantheon and other Roman buildings can be observed in the architectural decorations of the Supreme Court building.⁵⁸ The heavy garlands that adorn the entablature are virtually identical to those of the relief panels flanking the door of the Pantheon as illustrated in D’Espouy.⁵⁹ The relief panels that extend around the entire length of both wings of the Supreme Court building, just below the cornice, bear the image of lush garlands flanked by eagles with outspread wings, and may represent a conflation of the imagery of the relief panels of the Pantheon and those from the Forum of Trajan, as illustrated in D’Espouy.⁶⁰

The resemblance between the Corinthian capitals of the Supreme Court building and the illustration of the Corinthian capital said to be from the Portico of Octavia in Rome is especially striking—both have the unusual feature of an eagle set atop the central acanthus leaf of the capital. The deeply carved square coffers of the porch ceiling of the Supreme Court building find parallels among many Roman carved ceiling panels illustrated in D’Espouy, e.g., that of the Temple of Mars the Avenger.⁶¹

The flagpole bases and candelabra were designed by Cass Gilbert and, like the sculptural reliefs, reveal a taste for Roman Imperial ornamentation. The laurel wreath atop the octagonal base is a replica of the base of the Column of Trajan, and the pattern of alternating shells and dolphins can be seen in the drawing of a sculptural fragment found in a Pantheon⁶² (Figure 2). The candelabra, actually lampposts, also modeled on Cass Gilbert designs, bear such a strong resemblance to the Barberini

⁵⁷ FRAGMENTS, *supra* note 47, at 58. The Pantheon was built between 125 and 128 A.D. See WILLIAM L. MACDONALD, *THE ARCHITECTURE OF THE ROMAN EMPIRE*, 95–121, figs. 96–125 (2d ed. 1982) [hereinafter MACDONALD]. I want to stress that I am using the D’Espouy drawings for their value as illustrations known to American architects, not as archaeologically accurate fragments from the building they are said to be copied from.

⁵⁸ The architectural drawings, based on drawings by Cass Gilbert, were executed by John Donnelly Jr., the son of the general supervisor of all the stone carvers. Archival material courtesy of the U.S. Supreme Court (on file with the author).

⁵⁹ FRAGMENTS, *supra* note 47, at 62.

⁶⁰ *Id.* at 63.

⁶¹ *Id.* at 56.

⁶² *Id.* at 65.

candelabra from Hadrian's Villa at Tivoli in the Vatican Museum that it is impossible to deny the influence. Both rest on lion paw feet, have slightly trapezoidal panels decorated with a single figure carved in low relief, animal heads projecting from the upper corners of the base, and elaborate acanthus leaves on the shafts.⁶³

Perhaps the most startling resemblance to the entire configuration of the façade of the Supreme Court building is a model of the Pantheon that used to be displayed in the Metropolitan Museum of Art. This compositional resemblance reveals more than a possible visual source; it is an example of the attitude toward classical architecture "that resulted from the study of plates [drawn by] archaeologists and architects who saw Roman buildings through the lens of romantic classicism."⁶⁴

THE SCULPTURAL PROGRAM: ICONOGRAPHY AND SOURCES

As was customary, Cass Gilbert determined where the sculptural decoration was to be placed on the building and then commissioned the sculptor (or sculptors) he wanted to execute the work. Since the Supreme Court building was constructed at the same time as the buildings of the Federal Triangle, the sequence of procedures was probably the same: the selection of the sculptor; the execution of a preliminary, intermediate, and final scale model; and a detail of the stone carving.⁶⁵ It may seem odd to us today, but the sculptor was usually involved in the creation of the small models and the fine points of the final carving. All other work was subcontracted, usually to younger artists.⁶⁶

⁶³ The figures represented in low relief on the panels of the candelabra are a justice blindfolded with sword and scale and the "daughters," who are depicted weaving and spinning, a theme particularly popular in Greek vase painting. See generally Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987). I would like to thank Professor Suzanne Stone of Cardozo School of Law for bringing this reference to my attention. For the imagery of women weaving, John Donnelly executed the bronze bases of the flagpoles and the candelabra; he is also responsible for the monumental bronze doors. See Dyfri Williams, *Women on Athenian Vases: Problems of Interpretation*, in IMAGES OF WOMEN IN ANTIQUITY 92 (Averil Cameron & Amélie Kuhrt eds., 1983). The iconography of the bronze doors is a major topic in itself and will hopefully be treated in a separate study. For a summary of the iconography of the doors, see David Mason, *The Supreme Court's Bronze Doors*, 63 A.B.A. J. 1395 (1977).

⁶⁴ MACDONALD, *supra* note 57, at 114, fig. 121. It should also be noted that the marble paving of the spacious plaza of the Supreme Court is an exact replica of the marble floor of the Pantheon.

⁶⁵ GEORGE GURNEY, *SCULPTURE AND THE FEDERAL TRIANGLE* 69 (1985).

⁶⁶ *Id.* at 72. In the creation of large compositions like pediments, the translation of the figural composition into increasingly larger figures and into the final monumental scale was accomplished by means of a device called a pointing machine. *Id.* at 73. The pointing machine was actually invented by Roman sculptors, who regularly replicated large Greek statues into miniatures. See generally ELIZABETH BARTMAN, *ROMAN MINIATURE COPIES OF CLASSICAL GREEK SCULPTURE* (1986).

The sculptors chosen by Cass Gilbert were all well-known artists who worked in the Beaux Arts tradition and who had worked, or were currently working on other monumental buildings in Washington, D.C. and New York. Although Gilbert had the final authority, each sculptor had the freedom to choose the subject matter of the commission. Indeed, Gilbert seems not to have been all that concerned with the iconographic content. In a letter to the sculptor of the west pediment (on the front of the building), Gilbert said:

I don't care very much what the figures mean, I assume of course that they may mean something or convey certain symbolism—but what I care about is the composition, the design, the arrangement, the balance . . . and the sculpture as sculpture. Who cares a hang whether the figure represents virtue, courage, vice or wisdom so long as it fits its place in the design?⁶⁷

It is perhaps because of Gilbert's attitude that there is, in fact, no coherent iconographic program. Although each figure or composition is given a "title" that invokes a general theme of law, the identification of figures is derived solely from the descriptions furnished by each sculptor. Thus, while invoking the vocabulary of classical art, the coherence of the iconography that is characteristic of Greek and Roman architectural and sculptural programs is forsaken.

We will consider here only those figures that add to an understanding of the building as a "temple of justice," where either the composition as a whole, or the individual figures or motifs, can be shown to derive from ancient monuments of a religious or imperial nature, and add to our understanding of the architecture and decoration of the Supreme Court building as an example of the architecture of "Imperial America."

THE FIGURES OF CONTEMPLATION AND AUTHORITY

The monumental seated figures that flank the staircase are the work of James Earle Fraser, although their placement and monumental scale was dictated by Cass Gilbert. The male figure on the right is identified by the sculptor as the "Authority of Law," who holds in his left hand a tablet of laws, backed by a sheathed sword, which is symbolic of enforcement through law (Figure 3). The female figure, entitled "Contemplation of Justice," holds a small model of "Justice" in her right hand, while her left arm rests on a book of laws. The small model of Justice in her right hand is certainly inspired by the famous colossal

⁶⁷ Letter from Cass Gilbert, Architect, to Robert Aitken, Sculptor (July 19, 1932) (on file with author).

chryselephantine statue of Athena sculpted by Phidias, which stood within the Parthenon on the acropolis in Athens—she held a small figure of Nike (Victory) in her right hand (Figure 4).

The real importance of these figures, however, is more compositional than iconographic. Monumental flanking figures such as these can have no source other than the model of the Pantheon mentioned above, as they bear out Gilbert's reliance on the model of the Pantheon in the Metropolitan Museum as a primary source. The presence of these monumental statues was thus dictated by the architecture, an American restatement of one of the most significant monuments of Roman Imperial architecture.

THE PEDIMENTS

Both pedimental compositions bear a certain resemblance to those on the model of the Pantheon—each features a central seated figure that dominates an essentially static, symmetrically disposed grouping of figures. This is in contrast to the most famous, and most often imitated, pedimental composition, that of the Parthenon on the Acropolis in Athens, where the central figures are not only standing, they are depicted as though in motion.⁶⁸

The theme of the east pediment, sculpted by Hermon A. MacNeil, is Ancient Lawgivers of the East. Moses is the central figure (and bears a slight resemblance to Michelangelo's Moses), flanked by Confucius and Solon (Figure 5). The figures that flank this central group are purely allegorical and identified by the sculptor as symbolizing: The Enforcement of the Law (left); Justice Tempered by Mercy (right); the Settlement of Disputes Through Enlightened Judgment (left); "Maritime," and other large functions of the Supreme Court in the protection of the United States (right); then "Study and Pondering of Justice" (left); and "a tribute to the fundamental and supreme character of this Court."⁶⁹ In the corners are the tortoise and the hare from Aesop's fables, meant to symbolize the slow, deliberate nature of law. Neither the iconography nor the position of the figures seems to have any relationship to the meanings attributed to them by the sculptor. The most interesting feature of the east pediment is the inscription "Justice the Guardian of Liberty." It is reported that the text was chosen by Chief Justice Hughes in a note passed to Justice Van Devanter while they were on the

⁶⁸ RICHARD BRILLIANT, *ARTS OF THE ANCIENT GREEKS* 199–200 (1973).

⁶⁹ SUMMARY: BUILDING ARTISANS—SUPREME COURT BUILDING (documents from the Archives of the Supreme Court on file with the author).

bench. The other suggested text was “Equal Justice is the Foundation of Liberty.”⁷⁰

It is the west, or front pediment, that commands attention. The iconography of the pediment as given by the sculptor, Robert Aitken, is “Liberty Enthroned” looking confidently into the future, across her lap the Scales of Justice. She is surrounded in the composition by two Guardian figures. On her right is “Order,” and on her left is “Authority.” Then to the right and left, two figures, each represent “Council.” Then to their right and left, two figures represent “Research Past and Present”⁷¹ (Figure 6).

While virtually all pedimental compositions follow the archetype of the Parthenon pediments, the disposition of the figures on the west pediment correspond more directly to that of the figures on the Pantheon model: a central seated figure in a rigidly frontal pose and flanking figures made smaller by their positioning, either seated (Pantheon model) or crouching, both of which turn their heads toward the central figure. Other figures are shown in conversation, or as reclining figures facing the corners of the pediment. The central figure of Liberty Enthroned is clearly modelled after the colossal statue of Athena from the Parthenon: she wears a Greek peplos with an aegis (breastplate) and on her head is a spiked crown. The figures of Order and Authority are executed in the Roman idiom—clothed as Roman soldiers holding *fascēs*, the insignia of the highest Roman magistrates, consisting of rods of birch or elm tied together with straps.

When the pediment was revealed to the public it caused a sensation because Aitken had created several of these classically draped and modelled figures of the men whose lives were inextricably tied to the history of the Supreme Court and the construction of the edifice.⁷² The reclining figure at the left representing “Research Present” is a portrait of Chief Justice Taft portrayed as a student at Yale. His counterpart, reclining on the right side of the pediment is an image of George Marshall, Chief Justice of the Supreme Court from 1801 to 1835, who reads from an ancient scroll symbolizing “Research Past.” The pair in conversation on the left represent the architect, Cass Gilbert, and former Senator, Elihu Root, who introduced President Taft’s bill to create Washington’s Fine Arts Commission. The pair on the right represents Chief Justice Charles Evans Hughes, who

⁷⁰ *Cornerstone*, *supra* note 3.

⁷¹ *Id.*

⁷² See *Living Notables Used as Models for Supreme Court Sculpture*, N.Y. TIMES, Dec. 8, 1934, at 1; see also Skefos, *supra* note 20, at 34–35.

succeeded Taft as Chairman of the Supreme Court Building Commission, in conversation with the sculptor of the pediment, Robert Aitken.⁷³ The sculptor's self-portrait among the nation's leading most eminent legal minds of America must have caused some controversy. He defends himself in a letter to Cass Gilbert Jr. by citing a list of famous artists who had portrayed themselves in major public works of art; he first names Phidias, sculptor of the Parthenon, who carved his likeness on the shield of the colossal Athena.⁷⁴

THE SUPREME COURT CHAMBER

One enters through the monumental bronze doors into the Great Hall; the route to the Court chamber is one of almost processional rhythm. As has been noted by one commentator, "the extended experience of approaching and entering the Supreme Court continues inside the building as one moves along the central axis toward the court chamber."⁷⁵ The Great Hall is a long, rectangular colonnaded space constructed of white marble. One passes through this into the rectangular colonnaded entrance vestibule, which terminates in a semi-circular apse with massive doors that open into the chamber.

The court chamber is unique within the building, distinguished in proportion, color, and decoration from all the preceding spaces. In proportion, the room is nearly square in plan; the walls are sheathed in ivory marble from Spain and the columns are made from a yellow and ivory veined marble from Siena.⁷⁶ Ionic capitals are used for the columns that set off the interior space. The use of Ionic capitals, as distinct from the Corinthian capitals of the porch and the plain Doric capitals of the Great Hall, again indicates Gilbert's knowledge of ancient architecture and the canonical application of the three orders of architectural column capitals in antiquity. The classical statement of the three orders and their proper use is found in Vitruvius' *De Architectura*, where the Ionic order is described as a "balance between the severe manner of the Doric and the softness of the Corinthian," and its use prescribed for "intermediate decoration."⁷⁷

⁷³ SUMMARY: BUILDING ARTISANS—SUPREME COURT BUILDING (on file with author).

⁷⁴ Letter from Robert Aitken, Pediment Sculptor, to Cass Gilbert, Jr., Architect (Sept. 6, 1934) (on file with author).

⁷⁵ PAMELA SCOTT & ANTOINETTE J. LEE, BUILDINGS OF THE DISTRICT OF COLUMBIA 139 (1993).

⁷⁶ The first marble columns from Siena were rejected by Cass Gilbert, who then wrote an admiring letter to Mussolini requesting his personal help in assuring that only the finest marble from the Siennese quarry be selected. See Geoffrey Blodgett, *Cass Gilbert, Architect: Conservative at Bay*, 72 J. AM. HIST. 615, 633 (1985).

⁷⁷ JOHN ONIANS, BEARERS OF MEANING: THE CLASSICAL ORDERS IN ANTIQUITY, THE

Above the simple entablature in the attic story is the most elaborate sculptural program of the building, a series of four friezes carved in low relief and designed by well-known New York Sculptor, Adolph Alexander Weinman, who trained under Augustus Saint-Gaudens.⁷⁸ His design for the Courtroom friezes reflects his training, which emphasized a correlation between the sculptural subject and the function of the building. Faithful to classical sources, he designed for the Courtroom friezes a procession of great lawgivers of history from many civilizations to portray the development of secular law. The procession of lawgivers begins on the south wall frieze and continues on the north wall. In the words of Weinman himself,⁷⁹ the east and west wall sculptural groups are representations of the Majesty of Law and Justice.⁸⁰

A. East Wall Frieze

The dominant motif in this frieze shows two powerful seated male figures of heroic proportions, representing the “Majesty of the Law” and the “Power of Government.” Flanking this group at either side are the genii of Wisdom and Justice.

To the right of this central motif is a group symbolic of the “Safeguard of the Liberties of the Rights of the People in Their Pursuit of Happiness,” and to the left, “The Defense of Human Rights and Protection of Innocence”⁸¹ (Figure 7).

B. West Wall Frieze

The dominant motif in this frieze shows a central group of “Justice” resting upon her sheathed sword with the winged figure of “Divine Inspiration” balancing the scales, the two flanked at either side by the seated figures of “Truth” and of “Wisdom.” At the right of this central group are “The Powers of Evil,” as shown in the two figures struggling in the coils of a serpent, and the figures of “Corruption and Slander, Deception and Despotism.”

MIDDLE AGES AND THE RENAISSANCE, 36–37 (1988). Even if Gilbert was not familiar with the original text he would have known the applications of the orders from *The American Vitruvius*. HEGEMAN & PEETS, *supra*, note 46.

⁷⁸ Charles H. Dorr, *A Sculptor of Monumental Architecture: Notes on the Work of Adolph Alexander Weinman*, 33 ARCHITECTURAL REC. 518, 526–27 (1913).

⁷⁹ I am grateful to Alexander Weinman’s son, Charles Weinman, for sending me a carbon copy of the architectural and iconographic plan in Weinman’s own words.

⁸⁰ Alexander Weinman, Courtroom Friezes (documents from the Archives of the Supreme Court on file with the author).

⁸¹ The individual figures are left to right: The Defense of Human Rights and the Protection of Innocence; Wisdom and Majesty of Law; Tablet with the Ten Commandments; the Power of Government and Justice; and Safeguard of the Liberties and Rights of the People in their Pursuit of Happiness.

At the left of the central groups are “The Powers of Good,” as shown in the “Defense of Virtue” and “Charity, Peace, Harmony and Security” (Figure 8).

Both the north and south wall friezes of the Supreme Courtroom are composed as a procession of the Great Lawgivers of History, the procession terminating at both ends of each frieze in an allegorical group.

C. South Wall Frieze

The South Wall Frieze has representations of Menes, Uniter, and Ruler of Upper and Lower Egypt, about 4000 B.C.; Hammurabi, King of Babylon, about 2500 B.C.; Moses; Solomon; Lycurgus; Solon; Draco; Confucius; and Octavian. The movement of these figures is toward the East Wall. The allegorical groups at either end of this frieze represent “History” and “Fame.” The standing winged figures at the left, with fasces, symbolizes “Authority.” The standing winged figure at right, with lamp, is guarding the “Light of Wisdom” (Figure 9).

D. North Wall Frieze

The north wall frieze has representations of Justinian, Mohammed, Charlemagne, King John, St. Louis, Hugo Grotius, Blackstone, Marshall, and Napoleon.

The movement of these figures is also toward the east wall. The allegorical groups at either side of this frieze represent “Philosophy” and “Liberty and Peace.” The standing winged figure at left, with disc of the flaming sun, symbolizes “The Rights of Man.” The standing Winged figure at right, with scales, is symbolic of “Equity” (Figure 10).

THE DECISIONS OF THE COURT EVOLVE BEYOND THE IDEALISM OF THE ICONOGRAPHY

As the building neared completion in the spring of 1935, the Court, in its final session at the Capitol, made its first frontal attack on Franklin D. Roosevelt’s New Deal. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court found the National Industrial Act unconstitutional in a unanimous decision in late May.⁸² That autumn the Court opened its first session in the new building. Awaiting its judgment were the Agricultural Adjustment Act, the Public Works Administration, the Tennessee Authority, the Social Security Act, the National Labor Relations Act, the Guffey-Snyder Act, the Frazier Lemke Farm Mortgage

⁸² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

Moratorium Act and the Railroad Employees Act. In January 1936 came the six-three decision in *U.S. v. Butler*, killing the Agricultural Adjustment Act.⁸³ “The great Court fight was joined—the old men in their new temple against that man down the street. Gilbert’s last citadel promptly replaced the Capitol and the White House as the political storm center of the nation.”⁸⁴

The resolution of the Court fight in 1937 transformed the Supreme Court’s relationship to Congress and to the president, radically altered the uses of judicial review, and launched the Court on a new career of creative governmental activism whose experimental spirit belied the staid symbols decorating its home. Justices lost their godlike aura in the public eye and emerged as purposeful judicial politicians.⁸⁵

Modern scholars have criticized the notion that the 1937 battle destroyed the Court. The critical assault on judicial review that culminated in the Battle of 1937 did not destroy the Court, but it did impair many of the ancient myths which had long served as justifications for the Court’s activities. Thereafter it was no longer possible for the judges and their supporters to take refuge from reasoned criticism behind the old incantations—the idea that the Court was merely a passive mouthpiece of an unambiguous constitution; the idea that the nature and range of the Court’s power to intervene was settled once and for all by the Constitution itself or by unmistakable inferences from the Constitution. There had grown up a generation of jurists and scholars convinced that the Court’s judges were conscious molders of policy and that the Constitution had left open many questions about its own meaning, including the question of the Court’s proper role.⁸⁶

CONCLUSION

Most accounts of the evolution of the United States Supreme Court focus on the history of the Court as seen through the lens of the decisions of the justices in a historical framework, from the first court in 1790 through the decision of the current court.⁸⁷ That is not the purpose of this article, which begins with a detailed survey of the architecture and iconography of the Supreme Court building to understand what, if any, influence it had and has on the decisions of the Court that shape our social views.

⁸³ *U.S. v. Butler et al.*, 297 U.S. 1, 68 (1936).

⁸⁴ Blodgett, *supra* note 76, at 635.

⁸⁵ *Id.* at 635.

⁸⁶ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 259 (5th ed. 2010).

⁸⁷ *See, e.g.*, SCHWARTZ, *supra* note 16, at 378–79.

The successive shifts of focus in American economic reality have done much to determine the large sweep of American constitutional law. They have done so in a threefold way: by setting the characteristic problems that have appeared for decision before the Supreme Court, by creating the conflicts and clashes of interests that have made those problems important to the community, and by fashioning the ideologies that have to a large extent influenced its decisions. For each Court, one can trace a “career”—the trajectory of a shifting community of justice as they ponder cases, maneuver for position, and choose between alternative ways of interpreting the Constitution.⁸⁸

But is there no connection between the legal history of the United States Supreme Court building with its extensive iconographical program stressing civil and religious history that led to the construction of this “Temple of American Justice”?

These eras when creedal politics supplant interest-group politics are relatively rare, but the system does contain an ongoing institution that is at the heart of the civil religion—the United States Supreme Court. The Court is the priestly interpreter of holy writ, the one agency in government that has the assigned duty to respond to the claims of individuals that the rights they have been promised have not been realized. With the Constitution as a sacred text of the American civil religion in place, we can now turn to the establishment of the agency that, in time, would become not only the priestly interpreter of that text but a continuing force in promoting national unity and in securing and expanding the ambit of the protection of individual rights. More than any other single institution, the Supreme Court of the United States has been responsible for making the Constitution a vital document that continues to command the allegiance and faith of the American people.⁸⁹

⁸⁸ MAX LERNER, *NINE SCORPIONS IN A BOTTLE: GREAT JUDGES AND CASES OF THE SUPREME COURT* 13, 179 (1994).

⁸⁹ JOHN E. SEMONCHE, *KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT* 10, 37 (1998). In the spring of 1996 I had the privilege of speaking with Justice Ruth Bader Ginsburg in her office. I specifically asked about the sculptural program of the Courtroom and whether she thought that it had any influence at all on the solemnity of the court, even if it had no influence on decisions of the court. After a short pause considering my query, she answered in the affirmative.

ILLUSTRATIONS



Figure 1: Full View: Supreme Court Building.
Photograph courtesy of the Architect of the Capitol.



Figure 2: Franz Jantzen. South Flagpole Base on West Plaza of the Court.
Collection of the Supreme Court of the United States.

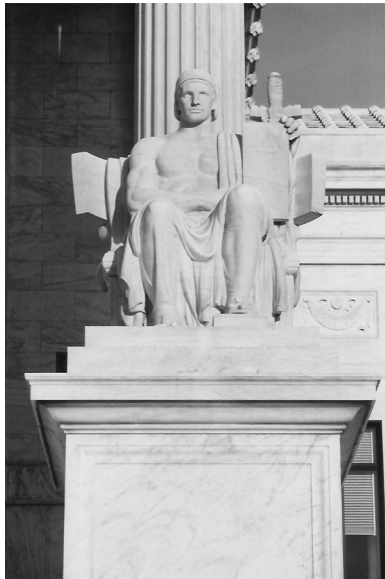


Figure 3: Sculpture "Authority of Law."
Collection of the Supreme Court of the United States.



Figure 4: Josh Mathes. "Contemplation of Justice."
Collection of the Supreme Court of the United States.

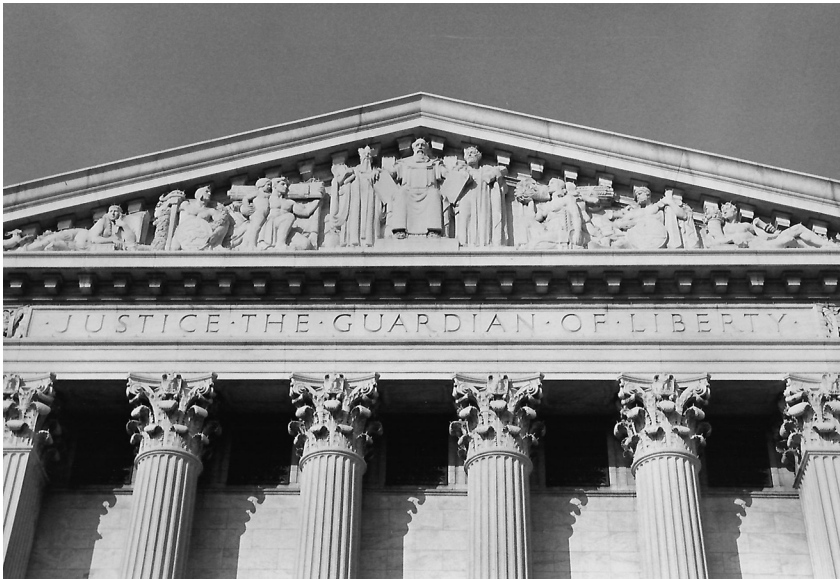


Figure 5: Josh Mathes. East Pediment of the Supreme Court Building.
Collection of the Supreme Court of the United States.

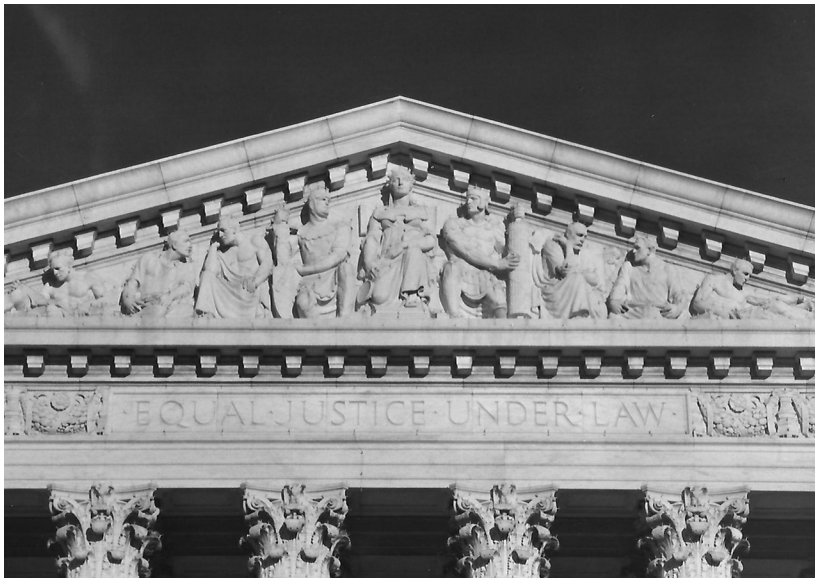


Figure 6: Josh Mathes. West Pediment of the Supreme Court Building.
Collection of the Supreme Court of the United States.

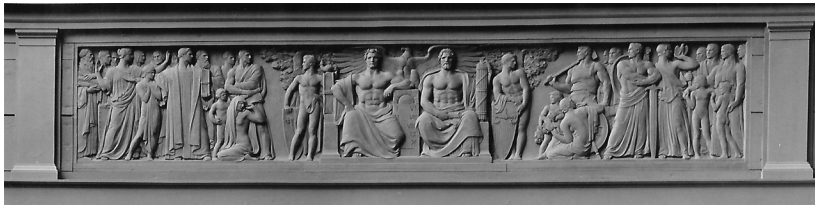


Figure 7: Court Chamber: East Wall Frieze.
Collection of the Supreme Court of the United States.



Figure 8: Court Chamber: West Wall Frieze.
Collection of the Supreme Court of the United States.



Figure 9: Court Chamber: South Wall Frieze.
Collection of the Supreme Court of the United States.



Figure 10: Court Chamber: North Wall Frieze.
Collection of the Supreme Court of the United States.

2017

The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)

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The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)

Rajika L. Shah*

In 2015, the Western Prelacy of the Armenian Apostolic Church of America reached an historic, amicable settlement with the J. Paul Getty Museum regarding ownership and possession of eight valuable illuminated manuscript pages that had been secretly cut out of a medieval Armenian Gospel book during the Armenian genocide in 1915–1923. The pages resurfaced decades later in the Getty museum's collection in Southern California. The Church's suit was brought under a novel California statute, Code of Civil Procedure section 338(c)(3), that extended the statute of limitations for certain claims to fine art stolen or unlawfully taken. This statute of neutral applicability was the product of many years of attempts by the California legislature to provide a forum for certain categories of plaintiff victim residents, most notably Holocaust and Armenian genocide survivors and their heirs. After federal courts struck down a series of special statutes on foreign affairs preemption grounds, section 338(c)(3) was finally deemed to pass constitutional muster. It has now served as the template for Congressional legislation in the 2016 Holocaust Expropriated Art Recovery Act, a statute explicitly designed to further U.S. policy with respect to Nazi-looted art. This article explores the long road to section 338(c)(3) and how it may point the way forward for future action.

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I. INTRODUCTION

In September 2015, the Western Prelacy of the Armenian Apostolic Church of America reached an historic, amicable settlement with the J. Paul Getty Museum, in which the Getty acknowledged the church's ownership of eight thirteenth century illustrated manuscript pages (called Canon Tables) from the Zeyt'un Gospels, by Toros Roslin (Armenian, active 1256–1268), which were allegedly stolen in the early twentieth century during the Armenian genocide and have been in the Getty's collection since the mid-1990s.¹ Separately, in recognition of the Getty's decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church donated the pages to the Getty Museum in order to ensure their preservation and widespread exhibition.² This remarkable settlement, in the first successful Armenian genocide-related art recovery case, followed years of legal battle between the parties.

One of the most interesting features of the Getty case is that it was litigated under California Code of Civil Procedure section 338(c)(3), a 2010 statute that extends the limitations period on claims for the recovery of stolen or unlawfully taken art. Under the statute, the limitations period on such claims does not begin to run until the date of *actual discovery* of (i) the identity and whereabouts of the artwork, and (ii) facts sufficient to establish that the claimant has a claim for a possessory interest in the artwork.³

The Getty case illustrates well how section 338(c)(3), although neutral in its applicability, empowers in particular human rights plaintiffs, who often need years of research in order to establish the facts required to start the limitations clock ticking on their recovery claims. It also puts museums, art dealers, and auction houses on notice that they may face valid claims for the recovery of stolen art long after their initial acquisition.

That section 338(c)(3) can be used to recover art taken during mass atrocities, such as genocide, is no coincidence. In fact, it follows a long line of attempts by the California legislature to provide redress and a forum for its citizens and residents to bring claims for the recovery of property taken

¹ See Press Release, J. Paul Getty Museum, J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case (Sept. 21, 2015), http://news.getty.edu/images/9036/manuscript2015_release.pdf [hereinafter Getty Press Release] [<http://perma.cc/BJ2A-42G5>].

² See *id.*

³ See CAL. CIV. PROC. CODE § 338(c)(3) (West 2010).

during mass atrocities, by passing a variety of state statutes designed to assist particular victim groups whose claims would otherwise have been time-barred. Those statutes were consistently struck down by federal courts on various constitutional grounds. Section 338(c)(3) is the first one that passed constitutional muster, and is thus both a milestone and a blueprint for future statutes.

This article will examine the long road to section 338(c)(3) and the Getty case in light of other, less successful, Holocaust and mass atrocities cases and statutes. Section II will discuss the context in which the Getty case and section 338(c)(3) arose, including the Holocaust restitution movement and how it gave birth to Armenian genocide restitution litigation. Section III will explore the back-and-forth conversation between the California legislature and the judiciary regarding the constitutional limits of state action as it played out in Holocaust art recovery and Armenian genocide litigation. Section IV will focus on the Getty case and section 338(c)(3) in detail, while section V will explore possibilities for future art recovery litigation, including the newly enacted federal Holocaust Expropriated Art Recovery Act (“HEAR Act”).

II. THE RISE OF MODERN HOLOCAUST AND MASS ATROCITIES RESTITUTION EFFORTS

A. Why Property Restitution Matters

Victims of genocide and other mass atrocities indisputably have individual claims under both international law and domestic law for their own personal injuries and for the loss of the lives of their loved ones. However, they also have claims for the property losses that typically accompany the atrocities.

These property losses can run from the mundane, such as household items, to valuable assets including insurance policies, bank accounts, or safe deposit boxes. Real estate losses can also be devastating, and may be the most difficult on which to recover if there are subsequent inhabitants or the state has taken over the property. Whatever they consist of, such property losses deprive the victims of not only their physical assets, but also an essential sense of identity and self.⁴

There are strong arguments that even the destruction of a group’s culture—for example, the suppression of a minority

⁴ See MICHAEL J. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 153–55 (2016) [hereinafter HOLOCAUST, GENOCIDE, AND THE LAW].

group's language, religion, and social habits—constitutes a form of genocide.⁵ For example, a plausible argument can be made that a cultural genocide occurred in the case of China's decades-long suppression of Tibetan culture and religion; Turkey's suppression of Kurdish culture, including a ban on the use of the Kurdish language; and the forced assimilation of Aboriginal indigenous people in Australia and Native Americans in North America.⁶

Art, and other cultural or religious property that can be viewed as art, sits at the intersection of these two ideas. Objects that are explicitly created as artworks (such as paintings), and those that can be seen as an artistic expression of religious, philosophical, historical, or other significance (such as objects found at places of worship) are valuable not only because of the high prices they can command, but because they help to define the character of a people and their traditions. It is no surprise, then, that many of the recent lawsuits brought by victims of mass atrocities seek compensation for the loss of stolen art. The most famous of these cases is *Altmann v. Republic of Austria*,⁷ a case that went all the way to the United States Supreme Court and was dramatized in the 2015 feature film, "Woman in Gold," but there have been several others.⁸

In 2016, the U.S. Court of Appeals for the District of Columbia recognized the centrality of property takings in the commission of genocide when it explicitly held that property takings themselves—apart from any murders—constitute a form of genocide.⁹ In *Simon v. Hungary*, fourteen elderly Holocaust survivors originally from Hungary sued the Republic of Hungary and its state-owned Hungarian railway for having collaborated with the German Nazis in 1944–45, during the waning months of World War II, to perpetuate the deportation and extermination of nearly half a million Hungarian Jews.¹⁰

Because the plaintiffs sued Hungary and a Hungarian state agency, jurisdiction over the defendants was governed exclusively

⁵ *See id.* at 47–48.

⁶ *See id.* at 48.

⁷ *Altmann v. Republic of Austria*, 541 U.S. 677 (2004).

⁸ *See, e.g.*, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010); *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d (2d Cir. 2012); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006).

⁹ *Simon v. Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016).

¹⁰ *Id.* at 134. The *Simon* plaintiffs brought causes of action for property loss, including conversion and unjust enrichment, as well as personal injury and international law claims.

by the Foreign Sovereign Immunities Act (“FSIA”).¹¹ Unless one of the enumerated exceptions was met, the general rule applied and the foreign sovereign and the state railway would be immune from suit in U.S. courts.¹² The relevant exception in *Simon*, commonly known as the “takings” or “expropriation exception,” holds that a foreign sovereign and its related entities are not immune from suit in U.S. courts if “[1] rights in property [2] taken in violation of international law are in issue and [3] that property or any property exchanged for such property is present in the United States” in connection with a specified commercial activity with a U.S. nexus.¹³

The *Simon* plaintiffs’ property-related claims for conversion and unjust enrichment satisfied the first element of the exception, and the state-owned railway did not dispute that it engaged in the requisite U.S.-based commercial activity.¹⁴ Thus, the key issue in *Simon* was whether plaintiffs’ property had been “taken in violation of international law.” Because there was no dispute that genocide itself violated international law, the court began its analysis by determining whether the alleged property takings “[bore] a sufficient connection to genocide that they amount to takings in violation of international law.”¹⁵

The *Simon* plaintiffs alleged a three-step governmental policy designed to inflict maximum destruction, carried out in the space of just three months. First, Hungarian Jews were targeted in a persecution campaign that included travel and certain clothing bans, bans from eating in restaurants or using public pools, and the requirement that every Jew wear the yellow Star of David.¹⁶ Second, Jews were forced into cramped, unsanitary ghettos, and had their clothing removed. All of their property was systematically inventoried and confiscated by Hungarian officials going door to door.¹⁷ Third and finally, Jews were rounded up and marched to the railways, all their remaining belongings confiscated, and they were transported to Nazi death camps (primarily Auschwitz-Birkenau in German-occupied Poland) under the direction of Nazi mastermind Adolf Eichmann, where they were virtually all murdered upon arrival.¹⁸ As this

¹¹ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (stating that the FSIA is “the sole basis for obtaining jurisdiction over a foreign state in our courts”).

¹² See 28 U.S.C. § 1604 (2012).

¹³ 28 U.S.C. § 1605(a)(3) (2012).

¹⁴ *Simon*, 812 F.3d at 142, 147.

¹⁵ *Id.* at 142–43.

¹⁶ *Id.* at 133.

¹⁷ *Id.*

¹⁸ *Id.* at 133–34.

description makes clear, widespread property confiscation was not merely incidental to the extermination of Hungarian Jews, it was part and parcel of an integrated plan to destroy the group, its way of life, and its culture.¹⁹

As the D.C. Circuit saw it, “the pivotal acts constituting genocide” that occurred in *Simon* “are those set out in subsection (c) of the definition” of genocide as found in the Convention for the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), adopted by the United Nations in 1948 and entered into force in 1951.²⁰ In other words, the property takings alleged by plaintiffs were intended to “deliberately inflict [] on the group conditions of life calculated to bring about its physical destruction in whole or in part,” which was the very reason such language was included in the definition of genocide.²¹

The court’s view on this point was unambiguous: the property taken from Hungary’s Jews did more than “finance Hungary’s war effort” and was not merely incident to the ghettoization of the Hungarian Jews.²² Rather, the “systematic, wholesale plunder of Jewish property” by Hungarian and German authorities was intended to deprive Jews of the resources they needed to survive as a people; the property was taken for the very purpose of ensuring the destruction of Hungary’s Jews.²³ As a result, the international law violation required to establish the court’s jurisdiction under the FSIA’s takings exception was not the uncompensated expropriations themselves, but rather genocide.²⁴

In agreeing with the plaintiffs, the *Simon* court confirmed and further articulated the conclusion reached by the Seventh Circuit Court of Appeals four years earlier in another case

¹⁹ *Id.* at 134.

²⁰ *Id.* at 143. The Genocide Convention set forth for the first time a legal definition of genocide and criminalized genocidal activity, whether committed in peacetime or during war. Article II of the Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, C.P.P.C.G. No. 1021, 78 U.N.T.S. 277.

²¹ *Simon*, 812 F.3d at 143.

²² *Id.*

²³ *Id.* (some internal formatting omitted).

²⁴ *Id.* at 145.

involving the theft of property of Hungarian Jews during the Second World War.²⁵ In *Abelesz v. Magyar Nemzeti Bank*, the federal appellate court explained that acts of thievery such as “the freezing of bank accounts, the [establishment of] straw-man control of corporations, the looting of safe deposit boxes and suitcases brought . . . to the train stations, and even charging third-class train fares to victims being sent to death camps” is both a “ghoulishly efficient” means of financing the rounding up and deportation or incarceration of the targeted group, and an “integral part” of the genocide itself.²⁶

These conclusions comport with victims’ sense of why property takings are at the core of genocidal activity, and place property claims at the heart of any effort to restore victims to wholeness.

B. U.S. Courts as the Modern Forum for Victims’ Property Restitution Litigation

Victims of mass atrocities are often unable, for a variety of reasons, to make claims for stolen property until long after the events occurred. They typically suffer from extreme psychological distress, displacement, loss of multiple family members, and loss of supporting documentation. They may not wish to think or talk about the stolen property because it reminds them of the horrors they witnessed, and they may not be aware of a forum in which to assert their claims. When all of these factors combine, it may be decades or generations later before they and their heirs realize a claim may be made.

In addition, a variety of defendants may be liable for property losses, depending on what was taken and the circumstances. The claims may be directed at both state and non-state actors, including: (1) those who directly perpetrated the genocide or mass atrocity; (2) those who aided and abetted, or facilitated the

²⁵ See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).

²⁶ *Id.* at 675. As fully stated by the court:

Genocide, the complaints here clearly imply, can be an expensive proposition. Expropriating property from the targets of genocide has the ghoulishly efficient result of both paying for the costs associated with a systematic attempt to murder an entire people and leaving destitute any who manage to survive. The expropriations alleged by plaintiffs in these cases -- the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases brought by Jews to the train stations, and even charging third-class train fares to victims being sent to death camps -- should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews. The expropriations thus effectuated genocide in two ways. They funded the transport and murder of Hungarian Jews, and they impoverished those who survived, depriving them of the financial means to reconstitute their lives and former communities.

Id.

genocide or atrocity in some way; and (3) those who took no direct or indirect participation in the genocide or atrocity, but nevertheless benefited from it by virtue of having received, purchased, or come into possession of property taken during the genocide or atrocity.²⁷

Beginning in the 1990s, momentum built for a wave of litigation in U.S. courts in order to tackle the “unfinished business” of the Holocaust by seeking to hold accountable private actors and state agencies for the benefits they received as a result of Nazi persecution.²⁸ This included suits seeking restitution of unreturned bank deposits, unpaid insurance policies taken out by Holocaust victims, and looted art,²⁹ as well as suits seeking compensation from banks that had traded in looted assets and industrial companies that had benefited from Nazi victim slave labor.³⁰

Several factors made United States courts the most attractive forum for these suits, including the ability of U.S. courts to recognize jurisdiction over defendants that do business in the United States, even over claims that occurred abroad; the ability of lawyers to take cases on a contingency basis, thereby giving Holocaust claimants top-notch legal representation when filing suits against European and American corporate giants; and a legal culture in which lawyers are willing to take high-risk cases with a low probability of success in order to test the limits of the law.³¹ Equally important to the positive outcome of the modern push for Holocaust restitution were the commitment and willingness of American public officials to shine a spotlight on the mass theft of Jewish property and broker settlement agreements, the effective advocacy of U.S.-based Jewish community organizations, and American media interest in Nazi reparations.³²

²⁷ See themes discussed in Michael J. Bazyler, *From “Lamentation and Liturgy to Litigation”: The Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits, in American Courts*, 95 MARQ. L. REV. 245 (2011) [hereinafter *Lamentation and Liturgy*].

²⁸ See HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 161. This has been called the “third period” of Holocaust restitution efforts. *Id.* at 155. In the first period, immediately following the Second World War, the Allied countries focused on recovering and returning assets stolen by the Nazis throughout Europe, including but not limited to Jewish property. *Id.* at 155–57. These efforts were only partly successful, and were complicated by the later communist property takings in countries of the Soviet eastern bloc. *Id.* The second period was marked by a 1952 agreement between Germany and Israel in which Germany agreed to make payments to the new state of Israel over the following decade, and to individual Holocaust survivors for the duration of their lives. *Id.* at 158–61.

²⁹ See *supra* note 8 and accompanying text.

³⁰ See HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4 at 161.

³¹ *Id.* at 161–62.

³² *Id.* at 162; see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 403–06 (2003)

These remarkable efforts led to compensation totaling more than \$8 billion in individual and community-based payments, with significant European and American government cooperation.³³ Many suits ended in outright dismissal on technical grounds including statute of limitations, political question, lack of subject matter jurisdiction, and *forum non conveniens*. No case ever went to trial. And yet, Germany and its corporations realized that, even if they succeeded in getting a particular lawsuit (most filed as class actions) dismissed, they would still face a political and public relations problem that would not go away. Victims' advocates were able to exert settlement pressure on them by reminding the American public "that the German products they were buying—whether cars, computers, aspirin, or insurance—were from the same companies that were implicated in some of the most horrific crimes committed in human history."³⁴

Moreover, the lawsuits spurred many companies—both European and American—to review their archives and official histories in light of allegations of Nazi complicity, and in some cases even issue apologies.³⁵

The success of the modern Holocaust restitution movement led other victim groups to follow a similar model. For example, suits were filed against Germany and German companies for their role in the Herero genocide in southwestern Africa (sometimes called the "first" genocide of the twentieth century); against Japan and Japanese industry arising out of the Second World War for slave labor; against multinationals arising out of their business activities in apartheid South Africa; and by African-Americans for reparations against the U.S. government and American companies involved in slavery arising from the American slave era.³⁶

The Getty case, which sought the return of valuable Canon Tables that had been removed from an early medieval Armenian illuminated book of gospels during the Armenian genocide, was another such suit.

(discussing the history of Holocaust reparations efforts, and of U.S. government involvement in brokering settlements).

³³ *America's Role in Addressing Outstanding Holocaust Issues: Hearing Before the Subcomm. on Europe of the Comm. on Foreign Affairs*, 110th Cong. 8 (2007) (statement of J. Christian Kennedy, Special Envoy for Holocaust Issues, Bureau of European and Eurasian Affairs, U.S. Department of Justice); see also HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 163.

³⁴ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 163.

³⁵ *Id.* at 164.

³⁶ For a more thorough discussion of the cases, their background, and success or lack thereof, see *id.* at 169–77.

Events that occurred in Ottoman Turkey targeting ethnic Armenians between 1915 and approximately 1923 are often referred to as the “Armenian genocide.” During this period, between 1 million and 1.5 million Armenians were rounded up with little to no notice and forcibly deported, primarily into the eastern deserts now in the territories of Syria, Iraq, and Kuwait.³⁷ According to one account, “the great bulk of the Armenian population was forcibly removed from Armenia and Anatolia to Syria, where the vast majority was sent into the desert to die of thirst and hunger. Large numbers of Armenians were methodically massacred throughout the Ottoman Empire. Women and children were abducted and horribly abused. The entire wealth of the Armenian people was expropriated.”³⁸

Turkey has long refused to recognize the massacres of the Armenians as a genocide.³⁹ At most, Turkey offers a grudging recognition, with Turkish Prime Minister Ahmet Davutoğlu stating in 2015, the hundred-year anniversary of the start of the Armenian genocide, that “[w]e once again respectfully remember Ottoman Armenians who lost their lives during the deportation of 1915 and share the pain of their children and grandchildren.”⁴⁰ According to Turkey, the forced dislocation was “a war-related dislocation and security measure” with unfortunate consequences.⁴¹ As Turkey sees it, Armenian nationalists agitating for independence presented a “security risk.”⁴² Because Armenians took up arms against the Ottoman government, their relocation was constructed to be a result of their political goals, not their

³⁷ For a thorough discussion of whether the *actus reus* and *mens rea* of the legal definition of genocide are met with respect to the Armenians, see *id.* at 61–63; see also Complaint at 13, *Bakalian v. Republic of Turkey*, No. CV10-09596, 2010 WL 5390152 (C.D. Cal. Dec. 15, 2010) (describing the circumstances leading up to the genocide, and the genocide itself).

³⁸ *Frequently Asked Questions About the Armenian Genocide*, ARM. NAT'L INST., <http://www.armenian-genocide.org/genocidfaq.html> [<http://perma/H28G-MGMX>].

³⁹ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63; see also Carol J. Williams, *As Centenary of Armenian Massacre Nears, 'Genocide' Dispute Sharpens*, L.A. TIMES (Apr. 20, 2015, 7:16 PM), <http://www.latimes.com/world/europe/la-fg-armenia-genocide-anniversary-20150420-story.html> (quoting Turkish Prime Minister Ahmet Davutoğlu as stating that “to reduce everything to a single word, to load all of the responsibility on the Turkish nation . . . and to combine this with a discourse of hatred is legally and morally problematic”) [<http://perma.cc/4BT7-2QNC>].

⁴⁰ Williams, *supra* note 39.

⁴¹ According to Turkey's Ministry of Foreign Affairs website, the Armenian deaths were due to the effects of “inter-communal conflict” and a world war when 2.5 million Muslims also perished. See *The Armenian Allegation of Genocide: The Issue and the Facts*, REP. OF TURK. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa> [<http://perma.cc/Z2V4-8B7X>].

⁴² See Complaint, *supra* note 37, at 13 (noting that Armenians were one of the most prosperous groups living in the Ottoman Empire in the late nineteenth and early twentieth centuries); HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63.

ethnicity or religion.⁴³ However, British historian Donald Bloxham has written that “nowhere else during the First World War was the separatist nationalism of the few answered with the total destruction of the wider ethnic community from which the nationalists hailed.”⁴⁴

Turkey’s resistance to recognition means that no political or diplomatic solution has yet been found for the question of compensation to Armenians for their injuries incurred during the genocide, including property restitution. Thus, beginning in the early 2000s, Armenian genocide victims, led by attorney Vartkes Yeghiayan, himself a child of survivors of the Armenian genocide, also began filing suits in U.S. courts seeking restitution for the property takings that occurred during the Armenian genocide.⁴⁵ As Yeghiayan explained in an article in the *Los Angeles Times*: “For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from picketing and going to church every April 24 [the Armenian Day of Remembrance] and mourning to taking legal action. . . . Holocaust victims’ heirs showed me the way.”⁴⁶

III. CALIFORNIA’S ATTEMPTS TO PROVIDE A FORUM FOR VICTIMS

When property is taken in the context of mass human rights abuses, violence, or genocide, courts often approach cases with caution out of concern they are intruding into political and/or foreign affairs realms, whether such concerns are warranted or not. A number of doctrines provide ammunition to defendants to put the case out of reach of the courts.

Motivated by these concerns, and by the large numbers of potential plaintiff claimants living in California, the California legislature began in the late 1990s to enact special statutes designed to aid particular classes of victim groups in bringing their claims in court. Thus began a years-long conversation between the California legislature and the federal judiciary regarding the

⁴³ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63.

⁴⁴ DONALD BLOXHAM, THE GREAT GAME OF GENOCIDE 92 (2007); *see also* RONALD GRIGOR SUNY, “THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE”: A HISTORY OF THE ARMENIAN GENOCIDE (2015); ARA SARAFIAN, TALAAT PASHA’S REPORT ON THE ARMENIAN GENOCIDE 5–8 (Ara Sarafian ed., Gomidas Inst. 2011).

⁴⁵ For a description of the early years of Armenian restitution litigation efforts, *see Lamentation and Liturgy*, *supra* note 27. The outcome of those early cases, as well as later-filed cases, is discussed more thoroughly in Michael J. Bazylar & Rajika L. Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, 23 SW. J. INT’L L. 101 (2017).

⁴⁶ Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. TIMES (Apr. 27, 2001), <http://articles.latimes.com/2001/apr/27/news/cl-56190> (quoting Armenian-American attorney Vartkes Yeghiayan, who represented plaintiffs in Armenian genocide-era restitution suits) (internal quotation marks omitted) [<http://perma.cc/L6MZ-JCK4>].

scope of valid state action in light of the Constitution's allocation of the foreign affairs power to the federal government.

A. *Garamendi* and the Contours of Foreign Affairs Preemption

The first of these cases involved unpaid insurance policies issued to Holocaust victims. In 1998, California enacted amendments to its Insurance Code, requiring insurance companies doing business in the state to publish lists of any insurance policies issued to Europeans that were in effect between 1920 and 1945.⁴⁷ The disclosure requirements were codified as the Holocaust Victim Insurance Relief Act ("HVIRA"). The statute applied only to "Holocaust victims," and, according to the legislative history, was designed to "ensure the rapid resolution" of unpaid insurance claims, "eliminating the further victimization of these policyholders and their families."⁴⁸ It was also explicitly passed as a tool to promote "the development of a resolution to these issues."⁴⁹

The question of the constitutionality of the state statute eventually made its way to the Supreme Court. In a 5–4 split decision issued on June 23, 2003, Justice David Souter authored what has become the definitive case describing the modern doctrine of foreign affairs preemption, *American Insurance Association v. Garamendi*.⁵⁰

In *Garamendi*, the Court laid out the analytical framework for conducting foreign affairs preemption analysis. Clarifying its prior decision in *Zschernig v. Miller*⁵¹—the only prior precedent that invalidated a state law under the foreign affairs doctrine—the *Garamendi* Court explained that *Zschernig* embodied two "contrasting theories of field and conflict preemption."⁵² As *Garamendi* explained, the *Zschernig* majority employed the doctrine of field preemption to invalidate a state law whose implementation impermissibly "intru[ded] into the field of foreign affairs."⁵³ By contrast, Justice Harlan, who concurred in the result, declined to embrace the notion of field preemption in

⁴⁷ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 408–09 (2003) (describing CAL. INS. CODE § 13800 *et seq.* (West 1999)). California also amended its Code of Civil Procedure to extend the statute of limitations on any such claims until December 31, 2010, see CAL. CIV. PROC. CODE § 354.5 (West 2006), but the district court's ruling dismissing the challenge to that statute for lack of standing was not on appeal. *Garamendi*, 539 U.S. at 409 n.4.

⁴⁸ *Garamendi*, 539 U.S. at 410 (quoting a California Senate Committee on Insurance report).

⁴⁹ *Id.* at 410–11 (quoting CAL. INS. CODE § 13801(f) (West 1999)).

⁵⁰ See generally *id.*

⁵¹ See generally *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁵² *Garamendi*, 539 U.S. at 419.

⁵³ *Id.* at 417 (quoting *Zschernig*, 389 U.S. at 432).

foreign affairs, but agreed that the state law could be preempted on a narrower rationale, due to “conflicting federal policy.”⁵⁴ As the *Garamendi* Court emphasized, this narrower reading of the foreign affairs preemption doctrine stemmed from a desire to avoid conflict with precedent “suggesting that in the absence of positive federal action ‘the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.’”⁵⁵

The *Garamendi* Court noted that there was “a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions.”⁵⁶ *Garamendi*, however, “require[d] no answer” to that question, for the state statute before the Court—California’s HVIRA—involved “a sufficiently clear conflict to require finding preemption” even on the narrower view of foreign affairs preemption espoused by Justice Harlan in *Zschernig*.⁵⁷ Having found that HVIRA conflicted with federal policy to settle Holocaust insurance claims exclusively through the German Foundation “Remembrance, Responsibility and the Future” negotiated by President Bill Clinton and funded by the German government,⁵⁸ the Court found no need to consider whether, in the absence of either an express federal preemption or a conflict with federal foreign policy, a state law such as HVIRA could be held invalid because it intruded into the “field” of foreign policy occupied by the federal government.⁵⁹

In dicta, the *Garamendi* Court indicated that the foreign affairs doctrine retained the concept of implied field preemption, which could be deployed in a narrow set of circumstances:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict . . . Where, however, a State has acted within what Justice Harlan called its “traditional competence,” but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity and substantiality that would vary with the strength or the traditional importance of the state concern asserted.⁶⁰

⁵⁴ *Id.* at 418–19 (Harlan, J., concurring in the result) (quoting *Zschernig*, 389 U.S. at 458–59).

⁵⁵ *Id.* at 418 (Harlan, J., concurring in the result) (quoting *Zschernig*, 389 U.S. at 459).

⁵⁶ *Id.* at 419 (footnote omitted).

⁵⁷ *Id.* at 419–20.

⁵⁸ *Id.* at 405.

⁵⁹ *Id.* at 419–20.

⁶⁰ *Id.* at 419 n.11 (citations omitted).

Moreover, “congressional occupation of the field is not to be presumed ‘in a field which the States have traditionally occupied.’”⁶¹

Thus, *Garamendi* struck down HVIRA as being in conflict with the federal policy establishing a forum and mechanism to resolve unpaid Holocaust insurance claims, and set the stage for successive litigation.⁶²

B. The Wartime Claims Statute

Also in 1999, California passed a statute extending the limitations period for certain claims arising out of World War II. Section 354.6 of the California Code of Civil Procedure provided a right of action in state courts for Second World War “slave labor” and “forced labor” victims or their heirs, and established that such claims would be timely if brought prior to December 31, 2010.⁶³ The statute defined “slave labor victims” as those taken from a concentration camp or ghetto between 1929 and 1945 by the Nazis or their allies or business enterprises in Nazi-controlled territories, to perform unpaid labor, while “forced labor victims” were civilians and prisoners of war who labored under the same conditions.⁶⁴ The value of the compensation that the statute entitled them to seek was to be calculated without regard to any wartime or post-war currency devaluations⁶⁵—a significant requirement given that many eastern bloc communist countries devalued their currencies one or more times in the post-war period.

Plaintiffs filed twenty-nine suits in California for compensation from German and Japanese companies who benefitted from their labor during the war. The cases were consolidated and removed to federal court. The named plaintiff in the individual lead case, *Deutsch v. Turner*, was a Hungarian Jew sent to Auschwitz with his brothers, where they were forced to work fourteen-hour days, seven days a week, for a German construction company.⁶⁶ The other cases involved claims against Japanese companies.

⁶¹ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁶² Ironically, the U.S. Court of Appeals for the Ninth Circuit had not found HVIRA to be unconstitutional for precisely the opposite reasons, holding that it did not violate the dormant commerce clause and was unlikely to intrude on the federal foreign affairs power because Congress acquiesced in its passage. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 745–48 (9th Cir. 2001).

⁶³ *See Deutsch v. Turner Corp.*, 324 F.3d 692, 706–07 (9th Cir. 2003) (discussing CAL. CIV. PROC. CODE § 354.6 (1999)).

⁶⁴ *Id.* at 706 (quoting CIV. PROC. § 354.6(a)(1),(2)).

⁶⁵ *Id.* at 706–07 (quoting CIV. PROC. § 354.6(a)(3)).

⁶⁶ *Id.* at 704.

Although *Deutsch* predated *Garamendi* by a few months, it was resolved on the same basis—foreign affairs preemption. The Ninth Circuit Court of Appeals, with Judge Stephen Reinhardt writing the opinion, first declined to find that section 354.6 was merely procedural, as urged by California, because it explicitly created a cause of action for the defined victim groups.⁶⁷ This mattered because “the California legislature created—or at least resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies’ protection.”⁶⁸ More importantly, the statute implicated the federal government’s foreign affairs power to “make and resolve war, including the power to establish the procedure for resolving war claims.”⁶⁹ According to the court, this was part of the “inner core” of the otherwise somewhat vaguely defined foreign affairs power, and was thus reserved exclusively to the federal government.⁷⁰

Relying on *Zschernig*, the court struck down section 354.6 as unconstitutional.⁷¹ Plaintiffs’ claims were thus subject to California’s existing statutes of limitation of general applicability, under which they were all time-barred.⁷²

C. The Holocaust Art Statute

In 2002, before the opinions in either *Deutsch* or *Garamendi* had been issued, California acted again. This time the legislature amended the Code of Civil Procedure to add section 354.3, which allowed “any owner, or heir or beneficiary of an owner, of Holocaust-era artwork” to bring an action in California courts against “any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance,” and extended the statute of limitations until December 31, 2010.⁷³

Marei von Saher was the surviving heir of a prominent Jewish art dealer living in the Netherlands before World War II.⁷⁴ The family fled when war broke out and left all their assets behind, including art dealer Jacques Goudstikker’s collection of over 1000 artworks, which was looted by the Nazis.⁷⁵ However,

⁶⁷ *Id.* at 707.

⁶⁸ *Id.* at 708.

⁶⁹ *Id.* at 711.

⁷⁰ *Id.*

⁷¹ *Id.* at 716.

⁷² *Id.* at 716–17.

⁷³ See *Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher I)*, 592 F.3d 954, 958–59 (9th Cir. 2010) (amended opinion) (discussing CAL. CIV. PROC. CODE § 354.3).

⁷⁴ *Id.* at 959.

⁷⁵ *Id.*

Jacques did bring his notebook containing a list of each of the paintings; it noted that Goudstikker's collection included the "Adam and Eve" diptych by Cranach the Elder.⁷⁶

Shortly after the war ended, the United States adopted a policy of "external restitution," whereby Nazi-looted artworks found by U.S. forces would be returned to the country of origin so that each country could establish its own means of restituting artworks to the original owners.⁷⁷ Thus, after Allied forces discovered the Cranachs at Hermann Göring's country estate outside Berlin, they returned the paintings to the Netherlands.⁷⁸ The Netherlands awarded the Cranachs to another claimant, who traced the paintings to his family from takings effected by the Soviet Union prior to the war, and who sold them to the Norton Simon Museum in Pasadena, California, in the 1970s.⁷⁹

After the passage of section 354.3, in 2007, von Saher brought suit against the Norton Simon to recover the Cranachs. By the time the case reached the Ninth Circuit on the question of the constitutionality of section 354.3, the court had the benefit of the opinions in both *Garamendi* and *Deutsch*. The court did not fail to notice that this was another instance of California taking action to assist Holocaust-era claimants.⁸⁰

In an opinion authored by Judge Thompson and joined by Judge Nelson, to which Judge Pregerson dissented, the court reviewed the principles set forth in *Garamendi* regarding foreign affairs conflict and field preemption ("*Von Saher I*"). The court held that section 354.3 did not conflict with any existing federal policy; moreover, the 1943 London Declaration (in which the Allies reserved the right to invalidate any wartime transfers of property) did not expressly address restitution or reparations, and a policy statement issued by President Truman immediately following the war (setting forth the operating procedures under which the policy of "external restitution" would take place) ceased to have effect in 1948, when the U.S. stopped accepting external restitution claims.⁸¹

The court went on to find, however, that section 354.3 was invalid under the doctrine of field preemption. Although regulation of property was traditionally an area of state responsibility, section 354.3 "[could not] be fairly categorized as a

⁷⁶ *Id.*

⁷⁷ *Id.* at 957–58.

⁷⁸ *Id.* at 959.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 961–63.

garden variety property regulation” because it singled out a particular group of victims and claims (art recovery claims of Holocaust victims and their heirs).⁸² Thus, the statute’s real purpose was to benefit this particular group.⁸³ Moreover, although California had a legitimate interest in regulating museums and galleries operating within the state, section 354.3 applied to “any” museum or gallery, whether located in California or not—an expression of dissatisfaction with the federal government’s resolution of World War II that belied any “serious claim” that it addressed an area of traditional state responsibility.⁸⁴ Further, as in *Deutsch*, the statute impermissibly established a remedy for wartime injuries, as particularly evidenced by the statute’s repeated references to the “Nazi regime,” “Nazi persecution,” and “atrocities” committed by the Nazis.⁸⁵ The statute would have more than an incidental effect on foreign affairs because it would require courts to review the restitution policies and decisions made by foreign countries following the war, i.e. the Netherlands’ internal policies concerning restitution of stolen artworks recovered by the Allies for distribution to the rightful claimants.⁸⁶

Thus, section 354.3 was struck down in its entirety. As in *Deutsch*, von Saher’s claims did not meet California’s general statute of limitations applicable to claims for property theft—the existing version of Code of Civil Procedure section 338—and thus the claims were time-barred.⁸⁷

However, as further discussed *infra*, the California legislature was not ready to give up on its attempts to provide redress and a friendly forum for claimants. Six weeks after the Ninth Circuit issued its 2010 decision in *Von Saher I*, the California legislature amended section 338 to add new section 338(c)(3).⁸⁸ Section 338(c)(3) was made explicitly retroactive so that it could apply to von Saher’s claims.⁸⁹

⁸² *Id.* at 964.

⁸³ *Id.*

⁸⁴ *Id.* at 965 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)).

⁸⁵ *Id.* at 966.

⁸⁶ *Id.* at 967.

⁸⁷ *Id.* at 968–69.

⁸⁸ See *Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher II)*, 754 F.3d 712, 718 (9th Cir. 2014).

⁸⁹ *Id.* at 719. Thus, Marie von Saher’s quest to recover the Cranachs continued for several more years, and still continues today—ten years after the case was first brought. By 2014, the question of whether von Saher’s specific claims and remedies, rather than amended section 338(c)(3), conflicted with the federal government’s “external restitution” policy and were therefore preempted was before the Ninth Circuit for the first time. *Id.* The panel (consisting of Judges Nelson, Pregerson, and Wardlaw, Judge Thompson having since passed away) again rejected the museum’s conflict preemption argument, this time “because the Cranachs were never subject to postwar internal restitution

The constitutionality of section 338(c)(3) under foreign affairs field preemption was eventually addressed in another case, *Cassirer v. Thyssen-Bornemisza Foundation Collection*,⁹⁰ as discussed *infra*. In the meantime, California faced continued judicial scrutiny regarding a series of Armenian genocide-related recovery statutes.

D. The Armenian Genocide Insurance Statute

Taking direct inspiration from suits brought by Holocaust survivors and heirs against European insurance companies that failed to pay out on life insurance and other policies purchased by European Jews prior to the Second World War, Armenian claimants brought several suits in federal court in Los Angeles against American and European insurance companies that failed to pay on policies purchased seventy or more years earlier by Armenians in Ottoman Turkey prior to the Armenian genocide.

A specific statute passed by the California legislature in 2000, and codified at California Code of Civil Procedure section 354.4, established California as a forum for “any Armenian Genocide victim” or an heir or beneficiary residing in the state to bring claims “arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923,” despite any forum-selection clause in the contracts, and extended the limitations period for filing the cases.⁹¹ An “Armenian Genocide victim” was defined as “any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.”⁹² Section 354.4 was explicitly modeled after the California statutes at issue in *Garamendi* and *Deutsch*.⁹³

The first two lawsuits, against New York Life Insurance Company and French insurer AXA, closely followed the

proceedings in the Netherlands”: Jacques Goudstikker’s immediate heirs had never made postwar restitution claims for the Cranachs to the Dutch government, because the Netherlands had determined (remarkably, in the court’s view) that Göring had obtained them without duress. *Id.* at 721–22. The museum eventually obtained summary judgment on all of plaintiff’s claims on August 9, 2016, on the basis that the Norton Simon acquired good title to the Cranachs through the Dutch state. Order Granting Defendant’s Motion for Summary Judgment at 10, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866 (C.D. Cal. Aug. 9, 2016). Von Saher appealed the judgment to the Ninth Circuit, with written briefing scheduled for spring 2017. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 16-56308 (9th Cir. 2016).

⁹⁰ *Cassirer v. Thyssen–Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013).

⁹¹ See CAL. CIV. PROC. CODE § 354.4(b), (c) (West 2006).

⁹² See CAL. CIV. PROC. CODE § 354.4(a) (West 2006).

⁹³ *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052, 1054 (9th Cir. 2009).

Holocaust restitution litigation model. In 2004, New York Life settled for \$20 million.⁹⁴ In 2005, AXA likewise settled for \$17 million.⁹⁵ Settlement funds were established in both cases, administered by a three-person settlement board with authority to review and decide on claims, under the supervision of the federal judges hearing the cases, to pay out the valid insurance claims. The remainder of the funds was to be distributed in *cy pres* funds to various American and French Armenian non-profit groups.⁹⁶

In the third insurance case, *Mousesian v. Victoria Versicherung AG*, the Armenian claimants made similar claims against German insurers.⁹⁷ However, that case followed a different and most unusual trajectory. In addition to the technical arguments made in the other suits such as statute of limitations, *forum non conveniens* and the like, the German defendants in *Mousesian* argued that section 354.4 was unconstitutional. As in *Deutsch*, defendants argued that the California statute impermissibly intruded on the federal government's conduct of foreign affairs, and was therefore preempted.⁹⁸ In particular, they argued that the statute was intended to benefit a particular class of victims—"Armenian Genocide victims"—and objected to the statute's definition of "Armenian Genocide victim."⁹⁹ The district court rejected the argument, and defendants appealed to the Ninth Circuit.

The appellate court issued a split 2–1 decision in 2009 reversing the district court and holding for the defendants. In an opinion authored by Judge Thompson and joined by Judge Nelson, from which Judge Pregerson dissented—i.e. the same panel and the same configuration that held section 354.3 to be field preempted in *Von Saher I*—the court held that section 354.4 conflicted with an express federal policy to avoid recognizing an "Armenian Genocide."¹⁰⁰ Although the House of Representatives regularly introduced measures to formally recognize the events targeting Armenians and other ethnic and religious minorities in

⁹⁴ See *Armenian Heirs Settle AXA Class Action Lawsuit*, BUSINESS WIRE (Oct. 12, 2005, 11:00 AM), <http://www.businesswire.com/news/home/20051012005262/en/Armenian-Heirs-Settle-AXA-Class-Action-Lawsuit> [<http://perma.cc/7YYPG-GMZV>].

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See *Mousesian I*, 578 F.3d at 1055. In addition to Victoria Versicherung AG, plaintiffs also named as defendants Victoria's parent owner, Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG ("Munich Re"), and another Munich Re subsidiary, Ergo Versicherungsgruppe AG ("Ergo"). All three defendants are referred to collectively as "Victoria Insurance."

⁹⁸ See *id.* at 1055.

⁹⁹ See *id.* at 1054–55.

¹⁰⁰ *Id.* at 1057.

Ottoman Turkey as a genocide, the court pointed to executive efforts to prevent the measures from coming to a House vote, and letters to Congress from the State Department that such resolutions would “complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation,” as evidence of clear executive policy.¹⁰¹ The court noted that “the heart” of the conflict lay in the two-word phrase “Armenian Genocide”: “The symbolic effect of the words . . . is precisely the problem. The federal government has made a conscious decision not to apply the politically charged label of ‘genocide’ to the deaths of these Armenians during World War I.”¹⁰² The court also found that California’s interest in passing section 354.4 was not, as plaintiffs claimed, in carrying out its traditional role of regulating insurers, but rather the “real desiderata” was to provide a forum for Armenian genocide victims to obtain justice.¹⁰³ Because the federal policy had preemptive force and section 354.4 was in conflict with the policy, the court struck down the statute.¹⁰⁴

Due to the importance of the issues at stake, Plaintiffs sought panel rehearing and rehearing en banc. After more than a year, the same three-judge panel issued a new decision in 2010 granting the petition for rehearing, withdrawing the original 2009 decision, and filing a new opinion and dissent.¹⁰⁵ This time, Judge Pregerson wrote the majority opinion joined by Judge Nelson, and Judge Thompson was in the dissent. Evidently, Judge Pregerson had persuaded Judge Nelson that, in fact, there was no express federal policy against use of the term “Armenian Genocide,” and therefore section 354.4 should be allowed to stand.¹⁰⁶

In the second *Movesian* decision, the court held that “informal presidential communications” to Congress suggesting that the House decline to formally recognize the Armenian genocide were not sufficient to establish a federal policy against recognition, particularly in light of other executive and legislative statements favoring such recognition.¹⁰⁷ The court pointed to regular congressional remembrance day celebrations in honor of genocide victims, including Armenians; executive statements

¹⁰¹ *Id.* at 1057–59; see also *Lamentation and Liturgy*, *supra* note 27, at 260–61.

¹⁰² *Id.* at 1060–61.

¹⁰³ *Id.* at 1062.

¹⁰⁴ *Id.* at 1062 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 425 (2003)).

¹⁰⁵ See *Movesian v. Victoria Versicherung AG (Movesian II)*, 629 F.3d 901 (9th Cir. 2010).

¹⁰⁶ *Id.* at 903.

¹⁰⁷ *Id.* at 906.

regarding the events using language “virtually indistinguishable” from “Armenian Genocide”; and statements by then-presidential candidate Barack Obama urging recognition of an Armenian genocide.¹⁰⁸ Nor had the federal government previously expressed any opposition to the large number of states that individually recognized the Armenian genocide.¹⁰⁹ In the absence of a clear federal policy, section 354.4 presented no conflict and was therefore not preempted on that basis.¹¹⁰

The court further held that section 354.4 did not conflict with either the German-American claims agreement signed in 1922 to settle all claims of U.S. nationals against Germany or German nationals arising out of World War I, or the 1928 Settlement of War Claims Act providing for payment of awards made under the claims agreement, because section 354.4 covered private insurance claims and was not an invalid exercise of the federal government’s power to wage and end war.¹¹¹

Moreover, the doctrine of field preemption did not apply, because California was validly acting within its traditional state interest in regulating the insurance field and was not, as the original panel decision had held, simply using the statute as a means of impermissibly taking a position on foreign affairs.¹¹² For these reasons, the court now found that section 354.4 was a valid exercise of state power and was not preempted.¹¹³

The legal saga in *Movsesian*, however, did not end there. In December 2011, the Ninth Circuit reheard the case en banc. In February 2012, the en banc panel, in a decision issued by Judge Susan Graber, found that section 354.4 was preempted because it “intrude[d] on the field of foreign affairs without addressing a traditional state responsibility.”¹¹⁴ In other words, the en banc panel held that the doctrine of field preemption, which it also termed “dormant foreign affairs preemption,” applied to make section 354.4 unconstitutional.¹¹⁵ This was a new direction for the court in *Movsesian*, which in its previous two decisions had focused almost exclusively on conflict preemption and the existence, or not, of an express federal policy with which section 354.4 conflicted.

¹⁰⁸ *Id.* at 906–07.

¹⁰⁹ *Id.* at 907.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 908.

¹¹² *Id.* at 907–08.

¹¹³ *Id.* at 909.

¹¹⁴ *Movsesian v. Victoria Versicherung AG (Movsesian III)*, 670 F.3d 1067, 1072 (9th Cir. 2012).

¹¹⁵ *Id.* at 1072 (quoting *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 n.6 (9th Cir. 2003)).

Field preemption is a powerful doctrine, because it may apply regardless of whether the federal government has taken any action at all; or, if it has, regardless of whether the state action at issue was in any conflict.¹¹⁶ Its purpose is to ensure that the states do not engage in foreign affairs policy, even if the federal government has not acted.¹¹⁷

The en banc court relied on *Zschernig* to illustrate its point. *Zschernig* struck down an Oregon probate statute providing that nonresident aliens could not inherit property in Oregon (it would escheat to the state) unless they could prove that the country in which they resided granted reciprocal rights to U.S. citizens.¹¹⁸ Although the statute purported to be a traditional exercise of state power over property and inheritance rights, the Supreme Court determined that it would require Oregon state courts to engage in a detailed inquiry into foreign political systems and the nature of foreign property rights, including whether such rights were granted on an equal basis or based on governmental caprice and whether state confiscation of property was an important feature.¹¹⁹ This being the height of the Cold War, the Supreme Court concluded that the real purpose of the statute was to take a particular foreign policy position and make value judgments regarding certain countries' approaches to property distribution in order to "keep United States money out of the grasp of communist or authoritarian nations."¹²⁰ Thus, even though the federal government had not established any policy that conflicted with Oregon's statute, the statute was nevertheless preempted because it would necessarily require judges to make determinations that would intrude into the field of foreign affairs.¹²¹ The en banc court also examined *Von Saher I*, its most recent field preemption case, decided two years earlier.¹²²

With these precedents in hand, the *Movsesian* en banc court turned to section 354.4. According to the court, the real concern with the California statute was that it did the same thing as the unconstitutional statutes in *Zschernig* and *Von Saher*: it provided a particular remedy for a particular class of people for the purpose of righting what California had determined was a historical wrong, namely, the persecution of Armenians at the hands of the Ottoman Turks.¹²³ Such a goal fell outside the scope

¹¹⁶ *Garamendi*, 539 U.S. at 419 n.11.

¹¹⁷ *Movsesian III*, 670 F.3d at 1072.

¹¹⁸ See *Zschernig v. Miller*, 389 U.S. 429, 430–31 (1968); *Movsesian III*, 670 F.3d at 1072.

¹¹⁹ *Zschernig*, 389 U.S. at 433–34; *Movsesian III*, 670 F.3d at 1072–73.

¹²⁰ *Zschernig*, 389 U.S. at 437–38 n.8; *Movsesian III*, 670 F.3d at 1073.

¹²¹ *Zschernig*, 389 U.S. at 440; *Movsesian III*, 670 F.3d at 1073.

¹²² *Movsesian III*, 670 F.3d at 1071.

¹²³ *Id.* at 1075–76.

of traditional state responsibility.¹²⁴ The statute, according to the en banc panel, also had more than an incidental effect on foreign affairs, because it “expresse[d] a distinct political point of view on a specific matter of foreign policy” by labeling the events at issue a “genocide” and displayed sympathy for “Armenian Genocide victims.”¹²⁵ Finally, the court was concerned that, in order to determine whether a particular claimant qualified as an “Armenian Genocide victim” according to the statute’s definition, a judge would have to make a politicized inquiry into the sensitive question of whether the policyholder had “escaped to avoid persecution” by the Ottoman Turks.¹²⁶ For these reasons, the court held section 354.4 to be unconstitutional under the doctrine of field preemption.¹²⁷

Given the sweeping nature of the court’s decision that any state action promoting use of the term “Armenian genocide” was preempted, the *Mousesian* plaintiffs sought review by the Supreme Court and filed a petition for writ of certiorari. In light of the federal government interests at stake, the Supreme Court invited the Solicitor General to submit the views of the United States government. The government was unequivocal: section 354.4 impermissibly intruded on federal foreign affairs powers, the en banc panel had reached the correct decision, and there

¹²⁴ *Id.* at 1076.

¹²⁵ *Id.* It did not escape the court’s notice that, only a few days after the en banc oral argument was held, France and Turkey became embroiled in a diplomatic row after the French National Assembly passed a bill criminalizing denial of the Armenian genocide, much as Holocaust denial is also a crime in France. Turkey recalled its ambassador, canceled bilateral visits, and refused cooperation in certain areas. *Id.* at 1077 (citing a BBC news article from December 22, 2011, detailing the developments, see *Turkey retaliates over French ‘genocide’ bill*, BBC NEWS (Dec. 22, 2011), <http://www.bbc.com/news/world-europe-16306376> [<http://perma.cc/LX67-JBDN>]). Turkey took similar actions when the German Bundestag voted in June 2016 to declare the killings of Armenians in Ottoman Turkey a genocide. See *German MPs recognise Armenian ‘genocide’ amid Turkish fury*, BBC NEWS (June 2, 2016), <http://www.bbc.com/news/world-europe-36433114> [<http://perma.cc/RQ6N-9TS9>]. Perhaps even more concerning for the court was the fear of angering Turkey, an important NATO ally, at a time of increasing tension in the Middle East. *Mousesian III*, 670 F.3d at 1077 (citing a New York Times article describing President Obama’s reluctance to use the term “Armenian Genocide” during a remembrance day celebration due to Turkey’s fierce opposition, see Peter Baker, *Obama Marks the Genocide Without Saying the Word* (Apr. 24, 2010), <http://www.nytimes.com/2010/04/25/world/europe/25prexy.html>). The “Arab Spring” had already begun by the time of the en banc oral argument, with demonstrations and protests in Tunisia that spread to several surrounding countries and eventually led to the downfall of multiple regimes. One of NATO’s most important strategic airbases is located in Incirlik, Turkey, and continues to play a pivotal role in combating terrorism, providing support to Syrian rebels, and fighting the spread of the Islamic State (“ISIS”). These events lend support to the court’s conclusion that the question of whether a genocide occurred in Ottoman Turkey “continues to be a hotly contested matter of foreign policy” and that “Turkey expresses great concern over the issue.” *Id.*

¹²⁶ *Mousesian III*, 670 F.3d at 1076–77.

¹²⁷ *Id.* at 1077.

was no need for further review by the Supreme Court.¹²⁸ The government also suggested that, while there was no express conflict between section 354.4 and certain treaties and settlement agreements concluded between the United States and Turkey after World War I to settle claims of U.S. nationals, the existence of such documents demonstrated that the U.S. adopted a particular approach to the settlement of wartime claims—an approach with which California expressed dissatisfaction in the passage of section 354.4.¹²⁹ Indeed, the government indicated that its consistent policy response when faced with questions such as those presented by the *Movsesian* plaintiffs' claims was to encourage Turkey and Armenia together to reach a mutually agreeable solution.¹³⁰

The petition for certiorari was denied, and thus the en banc decision stands as the final word on the *Movsesian* plaintiffs' claims.¹³¹

E. The Armenian Genocide Bank Deposit Statute

In 2006, Armenian claimants filed a new suit against two German banks, Deutsche Bank and Dresdner Bank, seeking to recover money and property allegedly withheld by these defendants during the Armenian genocide from their Armenian depositors.¹³² The German banks were accused of trading in assets stolen from the Armenian victims by the Ottoman Turkish state perpetrators.¹³³ The complaint in the action recited the historical facts of the murder and deportation of the Armenian

¹²⁸ Brief for the United States as Amicus Curiae at 5–6, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S.Ct. 2795 (2013) [hereinafter Solicitor General's Brief]. The case name changed on petition for writ of certiorari as only certain plaintiffs elected to proceed with claims against certain defendants.

¹²⁹ *Id.* at 15.

¹³⁰ *Id.* at 17.

¹³¹ It appears that *Movsesian III* is likely to remain limited to clarifying the circumstances in which a state steps too far over the line reserving foreign affairs powers to the federal government. See *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. Aug. 4, 2016) (declining to extend *Movsesian III*'s preemption holding to action by the city of Glendale in erecting a monument to Korean "comfort women" who served as sexual partners to Japanese soldiers during World War II). Unlike *Movsesian*, in *Gingery* the local government had appropriately addressed its views "through expressive displays or events, rather than through remedies or regulations." *Id.* at 1229. The court confirmed that "Glendale's establishment of a public monument to advocate against 'violations of human rights' is well within the traditional responsibilities of state and local governments." *Id.* Further, even if the city was acting outside an area of traditional state responsibility, its action of erecting a monument memorializing victims and expressing the hope that others would not experience similar harms would not have more than an incidental or indirect effect on foreign affairs, and thus was not preempted. *Id.* at 1231.

¹³² See *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian I)*, No. 06-cv-00774 MMM (CWx), 2006 U.S. Dist. Lexis 96772 at *2 (C.D. Cal. Sept. 25, 2006).

¹³³ See *id.* at *2–3. *Deirmenjian v. Deutsche Bank (Deirmenjian III)*, A.G., No. 06-cv-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957, at *2, *21–23 (C.D. Cal. July 30, 2010).

population of Ottoman Turkey, including the death of 1.5 million to 2 million Armenians between 1915 and 1923, and sought recovery for the theft of the victims' property.¹³⁴

Deirmenjian involved two plaintiff subclasses. Class A consisted of those whose ancestors had deposited assets directly with the defendant banks.¹³⁵ The complaint alleged that the Armenian minority in Ottoman Turkey relied on the stability of the European banks and, therefore, deposited assets in such banks for their protection.¹³⁶ The two German banks, operating in Ottoman Turkey under the name of Deutsche Orient Bank, allegedly had over a dozen branches throughout the Ottoman Empire and targeted affluent Armenians as their customers.¹³⁷ Class B consisted of those victims whose assets were looted pursuant to Turkish government action and later deposited with the defendant banks.¹³⁸ With the onset of the killings and deportations of Armenians, the German banks allegedly accepted gold deposits from the Ottoman Turkish government with full knowledge that such deposits were taken from the Armenian victims.¹³⁹ Moreover, the German banks allegedly transferred to their own books assets belonging to their deceased Armenian customers rather than returning those assets to the customers' heirs, and they deliberately concealed the existence of the assets from such heirs.¹⁴⁰

The Class A plaintiffs relied on California Code of Civil Procedure section 348, a general purpose statute on the books since the late 1800s, which provides that there is no limitations period on actions to recover money or other property deposited with a bank.¹⁴¹ The Class B looted asset plaintiffs, however, could not rely on section 348, and in her initial decision issued in

¹³⁴ See *id.* at *5–11.

¹³⁵ See *id.* at *2–3 n.2.

¹³⁶ First Amended Class Action Complaint and Demand for Jury Trial at 7, *Deirmenjian v. Deutsche Bank, A.G.*, No. 06-cv-00774 MMM (CWx) (C.D. Cal. Oct. 16, 2006) [hereinafter *Deirmenjian* First Amended Complaint].

¹³⁷ *Id.* at 5. Similar allegations were made by Jews against the Swiss banks. See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 43, 52 (N.Y.U. Press, 2003).

¹³⁸ See *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *3 n.2.

¹³⁹ *Deirmenjian* First Amended Complaint, *supra* note 136, at 9–10; cf. BAZYLER, *supra* note 137, at 26 (explaining that in the Holocaust restitution litigation, both Swiss banks and German banks were accused of knowingly accepting from the Nazis gold and other assets looted from the Jews).

¹⁴⁰ *Deirmenjian* First Amended Complaint, *supra* note 136, at 10.

¹⁴¹ See *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *121, 133; see also CAL. CIV. PROC. CODE § 348 (West 2006).

September 2006, presiding Judge Margaret Morrow¹⁴² dismissed the Class B claims as time-barred, with leave to amend.¹⁴³

The California legislature acted swiftly, and on January 1, 2007, California Code of Civil Procedure section 354.45 came into effect. Section 354.45 extended the statute of limitations for claims brought by “Armenian Genocide victims” for the return of deposited assets or looted assets later deposited in a bank operating in Ottoman Turkey during the genocide—categories that reflected the two plaintiff subclasses in *Deirmenjian*.¹⁴⁴ The definition of “Armenian Genocide victim” in section 354.45 was identical to that found in section 354.4, the statute struck down in *Mousesian III*.¹⁴⁵

In a lengthy decision issued in December 2007 (prior to the *Mousesian I* and *Von Saher I* rulings, but after *Deutsch* and *Garamendi*), the district court held that section 354.45 was unconstitutional.¹⁴⁶ According to Judge Morrow, the new California law impermissibly intruded on the foreign affairs power of the federal government to settle wartime claims of American citizens against Turkey and Germany arising out of World War I.¹⁴⁷ The court analyzed the Treaty of Berlin and a subsequent executive agreement between the United States and Germany establishing a mixed claims commission to consider war reparations to be paid to U.S. nationals, and determined that section 354.45 conflicted with both.¹⁴⁸ Additionally, the court held that section 354.45 conflicted with the Ankara Agreement, a 1934 agreement between the United States and Turkey memorializing and establishing a \$1.3 million lump-sum payment for all claims of U.S. nationals against Turkey that fell within the scope of a prior agreement between the parties.¹⁴⁹

¹⁴² Judge Morrow has since retired from the federal bench.

¹⁴³ *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *121, 150.

¹⁴⁴ CAL. CIV. PROC. CODE § 354.45; *see also* S.B. 1524, 2006 Leg. (Cal. 2006) (explaining section 354.45's connection with the Armenian genocide). The statute provides as follows:

Any action, including any pending action brought by an Armenian Genocide victim, or the heir or beneficiary of an Armenian Genocide victim, who resides in this state, seeking payment for, or the return of, deposited assets, or the return of looted assets, shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is filed on or before December 31, 2016.

CAL. CIV. PROC. CODE § 354.45(c).

¹⁴⁵ *Compare* CAL. CIV. PROC. CODE § 354.45(a)(1) *with* CAL. CIV. PROC. CODE § 354.4(a)(1).

¹⁴⁶ *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian II)*, 526 F. Supp. 2d 1068, 1085 (C.D. Cal. 2007). The Class B plaintiffs thus could not rely on section 354.45 either, and their claims were finally dismissed in 2008.

¹⁴⁷ *Id.* at 1079–80.

¹⁴⁸ *Id.* at 1081–85.

¹⁴⁹ *Id.* at 1085.

The question of whether section 354.45 actually conflicts with the Ankara Agreement settlement is controversial, because there is ample evidence that the claims commission established pursuant to the Ankara Agreement did not consider claims of “naturalized” American citizens—i.e. Turkish Armenians—at Turkey’s insistence.¹⁵⁰ Ultimately, however, it did not matter, because in a 2010 decision granting defendants summary judgment over all the Class A claims, the court held that—in contrast to its initial 2006 decision finding the Class A claims timely under section 348—the ten-year Turkish statute of repose applied to bar the claims.¹⁵¹

Shortly thereafter, one of the plaintiffs, Khachik Berian (both on his own behalf and on behalf of the similarly situated class plaintiffs), filed an appeal before the Ninth Circuit Court of Appeals seeking to have the lower court’s ruling that the Turkish limitations period applied to Armenian genocide-era claims overturned and section 354.45 found valid.¹⁵² Written briefing concluded in May 2011, but oral argument was not scheduled until November 2013. During that time, two developments occurred that impacted the issues on appeal in *Deirmenjian*. First, the Ninth Circuit issued its en banc field preemption opinion in *Movsesian III* striking down section 354.4. Second, the United States filed its wide-ranging amicus brief to the Supreme Court regarding the *Movsesian* plaintiffs’ petition for certiorari and setting forth its expansive view of federal policy regarding use of the term “Armenian genocide.” In an unpublished Memorandum Opinion issued December 9, 2013, the Ninth Circuit affirmed the district court’s grant of summary judgment in *Deirmenjian* on statute of limitations grounds.¹⁵³

Thus, by the end of 2013, California’s repeated legislative attempts to provide a forum for its Jewish and Armenian residents seemed to be going nowhere, as the courts consistently deferred to the federal government and struck down every statute.

¹⁵⁰ See Opening Brief of Appellant Khachik Berian, Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359, at 33–34 and accompanying references (9th Cir. Feb. 7, 2011); see also *Lamentation and Liturgy*, *supra* note 27, at 277–79 (describing correspondence in the treaty’s *travaux préparatoires* between the United States and Turkey in which the United States acquiesced to Turkey’s request to exclude claims of Turkish Armenians).

¹⁵¹ *Deirmenjian III*, 2010 U.S. Dist. LEXIS 86957, at *77.

¹⁵² See Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359 (9th Cir. Nov. 5, 2013). No Class B plaintiff (representing the looted assets claims) filed an appeal, and Defendant Dresdner Bank was not a party on appeal.

¹⁵³ See Memorandum Opinion, Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359 (9th Cir. Dec. 9, 2013).

IV. CALIFORNIA'S LEGISLATIVE ATTEMPTS TO PROVIDE REDRESS BEAR FRUIT

A. Section 338(c)(3), the General Purpose Art Recovery Statute

Undaunted by the federal courts' consistent findings that California's special statutes were unconstitutional, and apparently determined to learn from their prior mistakes, in September 2010 California lawmakers signed into law new section 338(c)(3) of the Code of Civil Procedure, adding the provisions to the existing section 338.

Unlike the other statutes that came before it, section 338(c)(3) did not limit itself to a particular class of plaintiffs with claims that arose in particular historical circumstances. Rather, it applied generally to the recovery of fine art taken by theft.¹⁵⁴ The statute provides in relevant part that:

[A]n action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:

(i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.

(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.¹⁵⁵

According to the legislative history, the purposes of the statute were twofold. First, the legislature wanted to "clarify competing interpretations of California's statute of limitations for the specific recovery of personal property."¹⁵⁶ Second, the bill was designed to "address a vexing problem faced by theft victims": the fact that it is "in the very nature of stolen art that it circulates underground for several years before it appears in museums and galleries, and by that time the SOL has long run its course."¹⁵⁷ The legislature thus recognized, as several courts already had, that

¹⁵⁴ See CAL. CIV. PROC. CODE § 338(c)(3)(A) (West 2010).

¹⁵⁵ *Id.*

¹⁵⁶ *Statute of Limitation: Recovery of Stolen Works of Art, Hearing on A.B. 2765 Before the Assembly Committee on Judiciary*, 3 (Cal. 2010) (Assembly Bill-Bill Analysis), http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_2765&sess=0910&house=A.

¹⁵⁷ *Id.* at 3–4.

a “discovery” rule would be fairer to victims of art theft, even while acknowledging the “potential inequity” to good faith purchasers.¹⁵⁸

Although section 338(c)(3) was thus clearly passed for neutral reasons having nothing to do with the Holocaust, Armenian genocide victims, or any other select victim group, there is some evidence that California legislators remained interested in formulating a pro-victim statute that did not implicate foreign affairs. For example, the legislative history also referred to *Von Saher I*, noting that, in striking down section 354.4, the Ninth Circuit indicated that von Saher potentially could have brought her claims under the general provisions of section 338, but that the court was uncertain as to whether the discovery rule announced in unrelated California case law would apply to the circumstances of von Saher’s case.¹⁵⁹ In addition, E. Randall Schoenberg, the attorney representing Maria Altmann in her quest to recover her family’s Nazi-stolen artwork from Austria,¹⁶⁰ also wrote in support of the amendment.

As with the other statutes, the constitutionality of section 338(c)(3) would soon be tested.

B. The Western Prelacy Files Suit Against the J. Paul Getty Museum

In 2010, a few months prior to the passage of section 338(c)(3), Attorney Vartkes Yeghiayan filed another Armenian genocide-era case, this time on behalf of the Western Prelacy of the Armenian Apostolic Church of America. The lawsuit, originally filed by the Western Prelacy in June 2010 in the Los Angeles Superior Court, named as defendants the J. Paul Getty Museum and the J. Paul Getty Trust—one of the wealthiest and most prominent art institutions in the world.¹⁶¹ The complaint accused the Getty defendants of purchasing art which was stolen from the rightful owner, the Catholicosate of Cilicia, during the gravest days of the Armenian genocide, 1915–1923.¹⁶² The complaint was amended in 2011 to add plaintiff’s reliance on section 338(c)(3).¹⁶³

¹⁵⁸ *Id.* at 4–5.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ See *supra* note 7 and accompanying text.

¹⁶¹ See, e.g., Veronica Rocha, *Armenian Church Sues the Getty*, L.A. TIMES (June 3, 2010), <http://www.latimes.com/gnp-church060310-story.html> [<http://perma.cc/282P-TD6Z>].

¹⁶² See *id.*

¹⁶³ See Second Amended Complaint, *Western Prelacy of the Armenian Apostolic Church of America v. The J. Paul Getty Museum*, Superior Court for the State of California, County of Los Angeles, Case No. BC 438824 (Aug. 1, 2011) [hereinafter *Getty Complaint*].

The One Holy Universal Apostolic Orthodox Armenian Church is the official name of the Armenian Apostolic Orthodox Church (the “Armenian Church”), and is the oldest organized Christian Church in the world, having its origins in 301 A.D., when Armenia adopted Christianity as its official religion.¹⁶⁴ It remains the central religious authority for the Orthodox Armenian population all over the world.¹⁶⁵ The Catholicosate of the Holy See of the Great House of Cilicia is one of the Church’s two main regional sees.¹⁶⁶

During the Armenian genocide, the Catholicosate of Cilicia, which was located in Sis (a medieval Armenian city in modern-day Kozan, Turkey), was robbed and ruined by the Turks.¹⁶⁷ Catholicos Sahak, having been warned that Sis would be subject to the same kind of massacres experienced in other parts of the Ottoman Empire, retreated with his followers to Aleppo, Syria.¹⁶⁸ In 1929, following the exodus of hundreds of thousands of Armenians from Turkey, the Catholicosate was reestablished in Antelias, Lebanon.¹⁶⁹ This became the new home of the Great House of Cilicia in the Armenian diaspora.¹⁷⁰

Following the genocide and the growth of the Armenian diaspora in the United States, the Catholicosate of Cilicia came to be represented in the United States by independently functioning Eastern and Western Prelacies.¹⁷¹ The Western Prelacy is headquartered in southern California.¹⁷²

The facts of the Western Prelacy’s complaint tell a story that could have come right out of a Hollywood film. It begins 800 years ago with T’oros Roslin (circa 1210–1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.¹⁷³ The works of Roslin occupy the most significant place in the book painting of the Cilician state and Medieval Armenia.¹⁷⁴ His art is discussed in numerous scholarly books and articles in multiple languages, and his name is mentioned in various publications concerning both the history and culture of Armenia

¹⁶⁴ *Id.* at 1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2–3.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.*

and art history in general.¹⁷⁵ Roslin's works are preserved in manuscripts held in collections all over the world.¹⁷⁶

The Zeyt'un Gospels were copied and illustrated by Roslin in Hromkla, Cilicia, in 1256 for Catholicos Constantine I of the Holy See of the Great House of Cilicia.¹⁷⁷ Like other religious illuminated manuscripts, they constitute a highly valued national treasure of the Armenian people.¹⁷⁸ According to legend, religious manuscripts like the Zeyt'un Gospels wielded supernatural powers that would protect and save all those associated with its creation and protection.¹⁷⁹ For over six centuries, the Zeyt'un Gospels were venerated by the Armenians of Zeyt'un, Turkey, especially during times of war.¹⁸⁰ During the critical days of the Armenian genocide, the full Church hierarchy in procession paraded the Zeyt'un Gospels through every street in Zeyt'un in order to create a divine firewall of protection around the city.¹⁸¹

By the late nineteenth century, the Gospels were in joint possession of the church and the Sourenian family, a prominent Turkish Armenian family known as "Defenders of the Church."¹⁸² The Gospels were placed in an iron chest in the wall of the Church in Zeyt'un and secured by two locks.¹⁸³ The Church had the key to one of the locks and the Sourenian family had the key to the other.¹⁸⁴ The Gospels could only be "freed" by the insertion of both keys at once.¹⁸⁵

In or about 1915, at the start of the Armenian genocide, the Zeyt'un Gospels were taken from the Church in Zeyt'un and handed to Prince Asadur Agha Sourenian, who, because of his prominent family connections with the Turks, was among the last to leave Zeyt'un when all Armenians were ordered exiled.¹⁸⁶ Prince Asadur and his family were not deported until late 1915.¹⁸⁷ Prior to their deportation, the prince brought the Gospel book to the nearby town of Marash in order to save it from certain destruction, and also to be protected by its divine power.¹⁸⁸ In the spring of 1916, the Sourenian family, which was

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.* at 5–6.

179 *Id.* at 6.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

continuing to safeguard the Zeyt'un Gospels in Marash, was ordered exiled to Der Zor in the Syrian Desert.¹⁸⁹

Also in Marash with the Sourenians was their friend and doctor, Dr. H. Der Ghazarian, who was working at the time in a German hospital.¹⁹⁰ He discovered the Sourenians were going to be deported and asked to borrow the Zeyt'un Gospels the day before they were exiled.¹⁹¹ Dr. Der Ghazarian's ardent requests to borrow the Gospels ultimately saved it.¹⁹² Because of his work at the hospital, the doctor was allowed to stay in Marash longer than most other exiled Armenians.¹⁹³

With the Sourenian family exiled to the desert, the Gospel book remained temporarily with Dr. Der Ghazarian in Marash.¹⁹⁴ It is believed that Dr. Der Ghazarian and his family fled Marash in the spring of 1920 and were forced to leave behind the Gospels.¹⁹⁵ Subsequently, an unknown Turkish individual found the Zeyt'un Gospels and brought the manuscript to Melkon Atamian, an Armenian, in Marash for him to sell.¹⁹⁶ Atamian apparently cut away eight folios (sixteen pages) bearing the eight illuminated Canon Tables—some of the most beautiful pages in the Gospels—and returned the rest of the manuscript to the Turk.¹⁹⁷

The Turkish possessor subsequently took the Gospel manuscript, minus the eight folios, to Khachatur vardapet Der Ghazarian, Prelate of the Armenian Church of Marash, part of the Catholicosate of the Great House of Cilicia.¹⁹⁸ Der Ghazarian, before his own deportation, entrusted the Gospels to Reverend James K. Lyman—an American missionary in Marash.¹⁹⁹ Later, Rev. Lyman sent word from Marash to the “Zeyt'un Compatriotic Union” in Aleppo that he was in possession of the Gospel book and was prepared to transfer it to them for safekeeping.²⁰⁰ With the consent of the Patriarch of Marash, Lyman was told to pass it on to the Patriarchate of the Armenian Church in Istanbul.²⁰¹

In the late 1960s, with the consent of the Catholicosate of the Great House of Cilicia, the Armenian Patriarch of Istanbul, in an

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* at 7.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.* at 7–8.

effort to prevent the Turkish government from sequestering sacred church objects, took the Gospel book to Armenia.²⁰² The Gospel book, minus the eight folios containing the Canon Tables, was then presented to the Matenadaran—the Armenian state museum located in Yerevan, and the main repository for Armenian manuscripts—for preservation.²⁰³ The Zeyt'un Gospels remain at the Matenadaran to the present day.²⁰⁴

Unbeknownst to the Catholicosate of the Great House of Cilicia, the eight stolen folios containing the Canon Tables were maintained in the private collections of the Atamian family for a period of over ninety years, from the time of removal to the time of the Getty's purchase in 1994.²⁰⁵ During this time, the Catholicosate had no knowledge of facts to suggest that the pages had been stolen during the Armenian genocide.²⁰⁶ Armenian Church-related scholars, including those associated with the Catholicosate, who had studied both the Zeyt'un Gospels and the eight folios comprising the Canon Tables during the decades since their separation, could not definitively conclude that the Canon Table pages had been stolen from the Zeyt'un Gospels.²⁰⁷

In 1994, the Atamian family loaned the folios to the Pierpont Morgan Library in New York for an exhibition entitled, "Treasures From Heaven."²⁰⁸ The Atamian family's name remained anonymous at the time of the exhibition.²⁰⁹ The Catholicosate was never informed by the family of either their possession or the initial removal of the eight missing Canon Tables.²¹⁰ The Pierpont Morgan Library also never informed the Catholicosate of Cilicia of their temporary possession of the stolen folios.²¹¹ Sometime after the Pierpont Morgan exhibition, the Getty Museum purchased the eight stolen folios (Canon Tables) from the Atamian family.²¹²

The Catholicosate did not discover that the eight missing folios of the Zeyt'un Gospels had in fact been stolen and were being housed in the Getty Museum in Los Angeles until about July 2006.²¹³ Following this discovery, the Western Prelacy, as

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at 8–9.

213 *Id.* at 9.

the authorized representative and assignee of the Catholicosate of the Great House of Cilicia, brought suit.

C. Section 338(c)(3) Is Upheld

As with so many other lawsuits seeking compensation and restitution for injuries incurred as a result of mass atrocities, the timeliness of the Western Prelacy's claims was a heavily litigated issue from the outset.

In the Getty's 2011 demurrer²¹⁴ to the operative complaint, the Getty argued that the Church's claims were time-barred under either the general limitations period found in section 338 or the newly passed section 338(c)(3).²¹⁵ In November 2011, the court overruled the Getty's demurrer, rejecting the Getty's assertions that early dismissal was appropriate based upon statutes of limitations, including section 338(c)(3).²¹⁶ The court then ordered the parties to participate in mediation.²¹⁷

Developments in the Holocaust looted art cases soon began to have an impact on the litigation against the Getty. In October 2012, the Western Prelacy and the Getty museum asked the court to stay the case in light of the recent federal district court ruling in *Cassirer v. Thyssen-Bornemisza Collection Foundation*—a case against a Spanish state-run art museum brought by the heir to a Holocaust survivor whose valuable artwork had been stolen by the Nazis—declaring section 338(c)(3) to be unconstitutional.²¹⁸ The district court relied in part on the fact that section 338(c)(3) applied to claims to art taken after 1910, as evidence that the legislative intent was—as with the other California statutes previously struck down—to provide a forum for Holocaust-era claims in particular.²¹⁹ The district court's decision was on appeal to the Ninth Circuit, and thus the resolution of the appeal could determine the outcome of the Western Prelacy's case.

²¹⁴ A demurrer is California's procedure for challenging the sufficiency of the complaint, analogous to a 12(b)(6) motion under the Federal Rules of Civil Procedure.

²¹⁵ See Defendants the J. Paul Getty Museum and the J. Paul Getty Trust's (1) Notice of Demurrer to Second Amended Complaint; (2) General Demurrer to Second Amended Complaint; and (3) Memorandum of Points and Authorities at 5–15, Superior Court of the State of California, County of Los Angeles, Case No. BC 438824 (filed Sept. 6, 2011).

²¹⁶ The court ruled from the bench and did not issue a written opinion. For a discussion of the November 3, 2011 demurrer hearing, see Mike Boehm, *The Getty Museum is in a Legal Fight Over Armenian Bible Pages*, L.A. TIMES (Nov. 4, 2011), <http://articles.latimes.com/2011/nov/04/entertainment/la-et-armenian-bible-20111104> [<http://perma.cc/28JL-33GV>].

²¹⁷ See *id.*

²¹⁸ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013). The *Cassirer* case had originally been brought pursuant to California's section 354.3, the Holocaust art recovery statute that was later struck down in the *Von Saher I* case. *Von Saher I*, 592 F.3d 954 at 616–17.

²¹⁹ *Id.* at 619.

The Ninth Circuit issued its ruling in *Cassirer* in December 2013. In a major victory for plaintiffs' advocates, the court²²⁰ held that—unlike the state statutes at issue in *Garamendi*, *Deutsch*, *Von Saher*, *Movsesian*, and *Deirmenjian*—section 338(c)(3) was *not* preempted under the foreign affairs doctrine.²²¹ According to the Ninth Circuit, section 338(c)(3) “does not create a remedy for wartime injuries by creating a new cause of action for the recovery of artwork”; rather, it “extends the statute of limitations for preexisting claims concerning a class of artwork that is unrelated to foreign affairs on its face.”²²² The court noted that section 338(c)(3) was neutral on its face and said nothing about wartime injuries or claims.²²³ The statute did not limit the class of claimants only to “Holocaust” or “Armenian Genocide” victims, but rather any person could recover any work of fine art as long as the statute’s other requirements were met.²²⁴ The panel emphasized the facial neutrality of the statute, a result of what Judge Nelson referred to at oral argument as the desirable and intended interplay between the judicial and legislative branches as separate and co-equal branches of government.²²⁵ Indeed, the facial differences between section 338(c)(3) and its unconstitutional predecessors were signs that the California legislature had taken heed of the court’s concerns and taken steps to remedy them. In its decision, the Ninth Circuit specifically cited the Getty case as an example of a non-Holocaust-era case relying on the statute for recovery.²²⁶

Following the Ninth Circuit’s February 2014 denial of the Thyssen-Bornemisza Collection Foundation’s petition for rehearing en banc in *Cassirer*, the state court lifted the stay in the Getty case so that proceedings and discovery could recommence. Trial was scheduled to begin on November 3, 2015.

On September 21, 2015, in the year marking the hundredth anniversary of the start of the Armenian genocide, the Western Prelacy and the Getty museum announced in a joint press release that they had resolved their dispute over the ownership of the eight Canon Tables.²²⁷ In the settlement, the Getty

²²⁰ The *Cassirer* panel consisted of Judges Pregerson, Nelson, and Wardlaw. Judge Pregerson wrote the unanimous opinion. *See id.* at 614.

²²¹ *Id.*

²²² *Id.* at 618–19.

²²³ *Id.*

²²⁴ *Id.* at 619.

²²⁵ The author attended oral argument in *Cassirer* at the Ninth Circuit in Pasadena, California on August 22, 2013.

²²⁶ *Cassirer*, 737 F.3d at 619. The court also cited *Rafaelli v. Getty Images, Inc.*, No. 2:12-cv-00563 (C.D. Cal. Jan. 20, 2012) (suit regarding photographs created in the 1970s).

²²⁷ Press Release, *J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case*,

“acknowledges the Armenian Apostolic Church’s ownership of the eight thirteenth century manuscript pages. . . . Separately, in recognition of the Getty’s decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church will donate the pages to the Getty Museum in order to ensure their preservation and widespread exhibition.”²²⁸ The Canon Tables will continue to be housed at the Getty museum and will be available to museum visitors as well as scholars and researchers.²²⁹

V. THE WAY FORWARD?

As the first successful settlement of an Armenian genocide-era art case, the Western Prelacy’s suit against the Getty may point the way towards the future of Armenian genocide litigation. Dozens of other Armenian manuscripts are known to exist in museum collections across the United States, including the Huntington Library and Art Gallery in San Marino, California; the Walters Art Gallery in Baltimore, Maryland; the Museum of Fine Arts in Boston, Massachusetts; the Pierpont Morgan Library in New York; the Philadelphia Museum of Art in Pennsylvania; and the Freer Gallery of Art at the Smithsonian in Washington.²³⁰

However, whether those states have, or would pass, statutes of limitations similar to section 338(c)(3) is unknown. If they do not, Armenian and other plaintiffs seeking the return of artworks and cultural objects taken in circumstances involving mass atrocities may be more likely to find their claims time-barred outside of California. In crafting a creative and amicable settlement that offered both sides something of what they wanted, the Getty case may offer lessons for others—beneficiaries of section 338(c)(3) or not—to continue moving forward.

Victims of Holocaust-era art theft have additional reason for optimism. On December 16, 2016, President Obama signed into law the Holocaust Expropriated Art Recovery Act of 2016 (the “HEAR Act”).²³¹ In Senate hearings on the proposed bill, actress Helen Mirren—who played successful plaintiff Maria Altmann in

GETTY (Sept. 21, 2015), <http://news.getty.edu/press-materials/press-releases/canon-table-2015.print> [<http://perma.cc/M8DR-9ND9>].

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See, e.g., Melissa Conway & Lisa Fagin Davis, *Directory of Collections in the United States and Canada with Pre-1600 Manuscript Holdings*, 109 PAPERS BIBLIOGRAPHICAL SOC’Y AMERICA 273, 301, 357, 387 (2015).

²³¹ See *President Obama Signs Law to Aid Recovery of Nazi-Looted Art*, PR NEWSWIRE (Dec. 19, 2016), <http://www.prnewswire.com/news-releases/president-obama-signs-law-to-aid-recovery-of-nazi-looted-art-300381587.html> [<http://perma.cc/S6AW-3FBX>]; see also Pub. L. 114-308, 114th Cong., H.R. 6130 (Dec. 16, 2016).

the 2015 movie “Woman in Gold,” about Altmann’s quest to recover several valuable Klimt paintings taken from her Jewish family in Vienna during World War II—testified in favor of the bill, along with Ronald Lauder, the head of the World Jewish Congress and a Holocaust victim’s heir who has been fighting for twenty years to recover art belonging to his grandfather.²³² Introduced with bipartisan support in early 2016, the bill passed both the House and Senate unanimously.²³³

The HEAR Act is “the latest step” in the United States’ efforts, in place since World War II, to “help restore artwork and other cultural property lost in the Holocaust to its rightful owners.”²³⁴ As the accompanying Senate report noted, the first step in those efforts was the immediate postwar policy of “external restitution” discussed in the *Von Saher* case.²³⁵ However, that policy was not always successful in reuniting the true owners with their art.²³⁶

By the early part of the twenty-first century, the United States had taken a number of additional actions in furtherance of its overall policy of restitution, including (i) participation in the 1998 Washington Conference, at which forty-three nations declared Principles encouraging Holocaust victims and their heirs to come forward and make claims for unrestituted art; (ii) passage of the 1998 Holocaust Victims Redress Act and U.S. Holocaust Assets Commission Act of 1998, also encouraging restitution of stolen art; and (iii) signing the 2009 Terezin Declaration, urging forty-eight signatory states to ensure that their legal systems facilitate “just and fair solutions” and resolve claims regarding Nazi-confiscated and looted art in a fair and expeditious manner.²³⁷

In 1999, the Alliance of American Museums also adopted non-binding Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, which urged members to identify objects in their collections that may have been stolen by the Nazis, make provenance information accessible, and continue their provenance research efforts.²³⁸

²³² See Halimah Abdullah, *Helen Mirren, Lawmakers Push to Recover Art Stolen by Nazis*, NBC NEWS (June 7, 2016), <http://www.nbcnews.com/news/us-news/helen-mirren-lawmakers-push-recover-art-stolen-nazis-n587311> [<http://perma.cc/U6RQ-9Q99>].

²³³ See *President Obama Signs Law to Aid Recovery of Nazi-Looted Art*, *supra* note 231; see also *HEAR Act Signed Into Law*, COMMISSION FOR ART RECOVERY, <http://www.comartrecovery.org/hear-act> [<http://perma.cc/2GRG-ZWVA>].

²³⁴ S. Rep. 114-394, 114th Cong., at 2 (Dec. 6, 2016).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 3–4.

²³⁸ *Id.*; see also *Standards Regarding the Unlawful Appropriation of Objects During*

Against this background, however, Congress recognized that “many obstacles [still] face those who attempt to recover Holocaust-era art through lawsuits,’ including ‘procedural hurdles such as statutes of limitations’ that prevent the merits of claims from being adjudicated.”²³⁹ For this reason, “[a] Federal limitations period . . . is therefore needed to guarantee that the United States fulfills the promises it has made.”²⁴⁰

The purposes of the HEAR Act are twofold: “(1) To ensure that laws governing claims to Nazi-confiscated art further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration”; and “(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”²⁴¹ Congressional action in passing the HEAR Act is therefore grounded in its power to conduct foreign affairs; this of course avoids the constitutional problems inherent in so many of California’s state statutes and provides the justification for Congress’ regulation of the limitations period on claims to certain private property—action which federal courts have found is a traditional state interest.²⁴²

The main provision of the Act is modeled on the text of section 338(c)(3) and reads as follows:

a) In general.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant *to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—*

(1) the identity and location of the artwork or other property; and

*(2) a possessory interest of the claimant in the artwork or other property.*²⁴³

The italicized portions of the above text are very similar to the relevant portions of section 338(c)(3).²⁴⁴ The HEAR Act also

the Nazi Era, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> [<http://perma.cc/9SUM-QVAL>].

²³⁹ S. Rep. 114-394, 114th Cong., at 5 (Dec. 6, 2016) (quoting *Von Saher I*, 592 F.3d at 958 (some internal formatting omitted)).

²⁴⁰ *Id.*

²⁴¹ S. 2763, 114th Cong. § 3 (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴² *See, e.g., Mousesian II*, 629 F.3d at 908.

²⁴³ Pub. L. 114-308 at § 5(a) (emphasis added).

²⁴⁴ Compare Pub. L. 114-308 at § 5(a) (Apr. 4, 2016) (as amended Sept. 29, 2016) *with*

contains similar guidance as to when and how to resolve possible claims of misidentification.²⁴⁵ The Act would apply to any claims pending at the time of enactment or filed from the date of enactment through December 31, 2026.²⁴⁶

The enacted version of the HEAR Act differs in important ways from the bill as originally drafted. The enacted bill contains an expanded and more detailed definition of “artwork or other property,” which now includes not only fine art such as paintings, sculpture, drawings, and the like, but also “musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums.”²⁴⁷ Ceremonial and sacred objects are also included.²⁴⁸ However, the Act also contains an exception for claims already barred on the date of enactment if the claimant or a predecessor-in-interest already had actual knowledge of the relevant facts for at least six years from January 1, 1999 onwards and could have brought a claim.²⁴⁹

VI. CONCLUSION

The Getty case sits at the unique intersection of Armenian genocide property restitution efforts and California’s search for a constitutionally permissible way to provide a forum for its victim residents. Given the previous several years of litigation in which California statutes regarding claims of Holocaust and Armenian genocide survivors were consistently struck down on foreign affairs preemption grounds, it would not have been surprising if section 338(c)(3) had suffered the same fate.

That this did not happen is down to the core constitutional principle of separation of powers between co-equal branches of government. After years of hearing from courts that the California legislature impermissibly infringed on the federal conduct of foreign affairs, the state found a way forward by passing a statute, section 338(c)(3), that is neutral on its face and thus generally applicable to art recovery in atrocities other than the Holocaust—or even to art recovery having nothing to do with any mass abuses. This solution would not exist if California had not persisted in attempting to provide meaningful assistance to hundreds of thousands of its residents.

CAL. CIV. PROC. CODE § 338(c)(3)(A).

²⁴⁵ Compare Pub. L. 114-308 at § 5(b) (Apr. 4, 2016) (as amended Sept. 29, 2016) with CAL. CIV. PROC. CODE § 338(c)(3)(A)(i).

²⁴⁶ See Pub. L. 114-308 at § 5(d) (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴⁷ See Pub. L. 114-308 at § 4(2) (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴⁸ See *id.*

²⁴⁹ *Id.* at § 5(e).

Section 338(c)(3) strikes a careful balance between the needs of plaintiffs and the concerns of defendants. The value of an “actual discovery” rule to begin the running of the statute of limitations is amply demonstrated by the complicated and confusing history of the Zeyt’un Gospels: the Western Prelacy was not even aware of the existence of the Canon Tables, much less the location and how the pages came to be at their present location, until decades after they were stolen. Museums, galleries, and art dealers cannot acquire good title from a thief, and they have an obligation to look carefully into the provenance of any artworks they purchase and abide by ethical acquisition standards. They are also entitled to uniform application of the laws, and to expect that states will not override foreign policy decisions of the federal government.

Section 338(c)(3) also provided the template for Congress to take action. The HEAR Act is now in place, and can serve as a model for future legislation at the federal level. Though the road to this point was long, the future for human rights plaintiffs remains bright.

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Art Law: Looking Back, Looking Forward

By Christine Steiner and Bee-Seon Keum*

I. INTRODUCTION

Consider *The Thomas Crown Affair*, the Hollywood hit about a clever attempt by burglars to break into the Metropolitan Museum of Art in New York City. The movie has all the drama of *Art Law* writ large and, indeed, it seems that the art market is now pure entertainment or spectator sport. Art law has grown into a recognized area of law—taught in many law schools and practiced by a select group of visual arts lawyers who represent artists, collectors, auction houses, museums, galleries, and other players in the “art world.”

It should be noted that *Art Law* is a misnomer; it is not a field unto itself, but rather it is a multi-disciplinary practice requiring extensive knowledge of diverse substantive areas of the law—contracts, torts, real property, tax, trusts and estates, criminal law, intellectual property, commercial law, international business transactions, civil procedure, and more—combined with experience in the business practices of the arcane fine arts industry.

This young field is changing rapidly. Even late in the last century, most business was done on a handshake. The few players were known to one another in the art centers of New York, London, or Paris, the transactions were smaller, the stakes were lower, and lawsuits were relatively rare. As we discuss below, the handshake norms of these cozy circles proved outmoded as sales became global, the sophisticated collector base expanded, museums became bigger in size and number, commercial galleries proliferated, and auction houses hammered down record sales.

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The legal issues in this area can be vexing, with cross-jurisdictional, multi-party opaque transactions challenging every aspect of a practitioner's creativity and knowledge. The authors are privileged to practice in a firm which built its art law practice with Ralph Lerner and Judith Bresler, authors of *Art Law: A Guide for Collectors, Investors, Dealers and Artists*, the pioneering work in the field, first published in 1989.¹ The work, now in its fourth edition, remains the last word on all aspects of the practice of art law, including gallery sales, private sales, artist-dealer relations, auctions, authenticity, international issues, impairments of title, First Amendment, copyright, moral rights of artists, tax and estate planning for collectors and artists, museum issues, and a host of other legal considerations. The treatise also includes art-related legislation and model agreements.

This field garners great attention from the media and the public, largely because the high-profile cases are intriguing—stolen art, fakes and forgeries, wartime crimes, antitrust conspiracies, archeological riches—indeed the compelling stuff of blockbuster movies. Even yeoman legal issues such as contracts, tax, and copyright are worthy of attention because, quite simply, art matters. This Article will look back to the origins of art law, trace the legislative and regulatory developments of the evolving field, and look forward to the expected maturation of the practice.

II. ORIGINS OF ART LAW AND ITS CURRENT STATE

Much of the body of law that governs commercial transactions developed out of civil litigation involving disputes between artists, dealers, collectors, and other stakeholders in the art industry. As noted above, and as seen through case law, a wide range of preexisting disciplines, including commercial law, contract law, and tort law have provided the foundations for art law related to commercial transactions.

A. The Uniform Commercial Code

The Uniform Commercial Code (“UCC”) is the most important collection of statutes that applies to purchases and sales of art.² Article 2 of the UCC, which deals with the sale of goods, is the principal source for the rules regarding authenticity and title, two of the most important issues from both a buyer and

¹ See generally RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS* (4th ed. 2012).

² See *id.* at 87–88.

a seller's perspective. To date, forty-nine states have adopted Article 2 of the UCC.³

Title and authenticity are particular concerns in an art sale because infirmities in either can have detrimental consequences for the marketability of the artwork. The buyer must be assured that the seller is the owner of the work and has the ability to transfer good and marketable title to the work, free and clear of all claims; the buyer must have free and unencumbered right of possession and enjoyment of the work. The buyer must also be assured that the work is authentic and that it is what the seller represents—typically that it is by a particular artist and/or from a particular country of origin, period, or culture. The seller, on the other hand, will want to be very careful about the representations and warranties he or she is making regarding the work so as not to be vulnerable to a breach of warranty claim. Fortunately, Article 2 of the UCC provides the framework for the rules governing authenticity and title transfer.

1. Authenticity

Authenticity is governed by the warranty provisions of Article 2, consisting of the express warranty, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose.⁴ Express warranties arise from affirmative statements made by a seller regarding the goods. UCC Section 2-313 provides that:

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be

³ See *Uniform Commercial Code Locator*, CORNELL L. SCH., <https://www.law.cornell.edu/uniform/ucc#a2> [<http://perma.cc/7UQF-5SRT>]. The State of Louisiana has adopted several Articles of the UCC, but not Article 2. See LA. REV. STAT. ANN. §§ 10:1-101 to 10:9-710 (2016).

⁴ See LERNER & BRESLER, *supra* note 1, at 88–101.

merely the seller's opinion or commendation of the goods does not create a warranty.⁵

Thus, a seller's affirmation of fact or promise that a work is by a particular artist, or the seller's description of the work as being by a particular artist will create an express warranty if such affirmation or description by the seller becomes part of the basis of the bargain. As can be seen in *Weber v. Peck*, an express warranty by a seller's description of the work can include a seller's statements about the provenance of a work if the buyer relies on such statements.⁶

In *Weber*, the plaintiff, Francis Weber, entered into a contract with the defendant, an art dealer, to buy a Jacob van Ruisdael painting for \$388,000 plus 5% of the proceeds from the resale of the painting.⁷ In the contract, the art dealer agreed to provide original authenticating letters from Ruisdael experts. The parties also signed a bill of sale in which the art dealer warranted that "the above described painting is authentic and as described above."⁸ The applicable description of the painting included a reference to the painting's provenance. Although the art dealer did not provide the original authenticating letters at the closing, Weber proceeded with the purchase and subsequently moved forward with placing the painting for sale at an upcoming auction at Sotheby's. In the course of that auction consignment, Weber learned that Sotheby's was unable to verify the provenance of the painting and thus deleted value-enhancing references to seven previous owners and five publications. Weber sued the art dealer after the Sotheby's sale did not go well; a bid was made for \$300,000 but payment was never received and Weber retained the work. Weber's suit alleged that, having sold at auction, the painting could not be placed again in the aftermarket and could not be sold for more than \$300,000. Citing to New York's UCC 2-313(1)(b), the court ruled in favor of Weber on the breach of warranty issue, concluding that the art dealer had breached his warranty of the accuracy of the provenance.⁹

⁵ U.C.C. § 2-313 (AM. LAW INST. & UNIF. LAW COMM'N 2016).

⁶ *See id.* at 90–91; *Weber v. Peck*, No. 97 Civ. 7625(JSM), 1999 WL 493383, at *3 (S.D.N.Y. July 9, 1999). The term "provenance" derives from the French *provenire*, meaning "to originate." The provenance of a work of art "is the historical record of its ownership" and is related to but distinguishable from authenticity, which for practical purposes means that a work is by a particular artist; provenance "can bolster claims of a work's authenticity," as records of an object's presence in a particular collection or in the artist's purported workshop can provide strong evidence of a work's authenticity. *Provenance Guide*, INT'L FOUND. ART RES., https://www.ifar.org/provenance_guide.php [<http://perma.cc/NQ4A-7XUN>].

⁷ *Weber*, 1999 WL 493383, at *1.

⁸ *Id.* at *1.

⁹ *Id.* at *4.

The court did not allow Weber to rescind the entire sale because Weber knew the authenticating letters were not provided at the closing and proceeded anyway with the subsequent Sotheby's sale. However, the court noted that Weber was not precluded from seeking damages for breach of the warranty related to the provenance or the alleged breach of warranty of the authentication letters. Such damages would depend on the extent to which the loss in value was caused by the breach.

In addition to express warranties, authenticity issues can also fall within the ambit of implied warranties, which are warranties that arise from the circumstances or conduct of the sale and not from the express statement of a seller.¹⁰ The two types of implied warranties are that of merchantability and fitness for a particular purpose.¹¹ The application of implied warranties to artwork seems to be an imperfect fit, because the language of the implied warranties suggests that they are intended to cover the sale of fungible goods.¹² A buyer of a forgery may nevertheless seek to avail himself or herself of these remedies against the art merchant who sold the forgery.¹³

UCC Section 2-314(1) provides that, unless excluded or modified, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."¹⁴ The term "merchant" is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."¹⁵ In the art context, "merchant" includes commercial art galleries, auction houses, and art dealers, but does not include individual collectors who are not in the business of buying and selling art.¹⁶ The relevant provisions of UCC Section 2-314(2) provide that, to be merchantable, goods must at least "pass without objection in the trade under the contract description," be "fit for the ordinary purposes for which such goods are used," and "conform to the promises or affirmations of fact made on the container or label if any."¹⁷ Thus, arguably, a forgery sold by an art merchant would not pass muster under UCC Section 2-314(2) with regards to the

¹⁰ See LERNER & BRESLER, *supra* note 1, at 98.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016). Although the UCC allows implied warranties to be disclaimed, disclaimers are valid only under proscribed circumstances. See U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2016).

¹⁵ U.C.C. § 2-104(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

¹⁶ LERNER & BRESLER, *supra* note 1, at 99.

¹⁷ U.C.C. § 2-314(2)(a), (c), (f) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

description of the work specified in the agreement of sale or fitness for the ordinary use for such work.¹⁸

UCC Section 2-315 provides as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.¹⁹

Thus, arguably, a forgery would fail to satisfy UCC Section 2-315 if the seller knew of the buyer's purpose in buying the artwork (e.g., to purchase an authentic painting by a particular artist), the seller has knowledge that the buyer is relying on the seller's skill or judgment in furnishing the artwork (e.g., the seller is an art merchant), and the buyer actually relies to his or her detriment on the seller's skill.

2. Title

Article 2 of the UCC provides substantial protections for a buyer against the risk of bad title.²⁰ UCC Sections 2-312(1) and (2) provide as follows:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.²¹

Thus, unless specifically excluded or modified, every contract for the sale of art includes a warranty stating that the seller is transferring good title, the seller has the right to transfer title, and the works are transferred free of security interests, liens or other encumbrances of which the buyer has no knowledge.²²

Additionally, UCC Section 2-312(3) provides that if the seller is a merchant, there is an implied warranty that the seller

¹⁸ See LERNER & BRESLER, *supra* note 1, at 99.

¹⁹ U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2016).

²⁰ See *id.* at 103.

²¹ U.C.C. § 2-312(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

²² *Id.*

delivers the goods free from “the rightful claim of any third person by way of infringement.”²³

The case of *Menzel v. List* determined the appropriate amount of damages owed to a purchaser if a seller did not pass good title for the painting to the purchaser.²⁴ Erna Menzel and her husband had purchased a Chagall painting at auction in Belgium in 1932 for what was then the equivalent of \$150. In 1940, the Menzels fled Belgium ahead of the Nazis, leaving the painting in their apartment. When the Menzels returned to their apartment in 1946, they discovered that the painting was confiscated and a receipt was left in its place. The painting resurfaced in 1955 when a Parisian art gallery sold it to the noted New York dealer Klaus Perls for \$2800. A few months later, Perls resold the painting to Albert List for \$4000. In 1962, Mrs. Menzel recognized the painting in an art book mentioning List as the owner, and she sued List to recover the painting. List, in turn, impleaded Perls for breach of an implied warranty of title.²⁵ At trial, the jury directed List to return the painting or pay Mrs. Menzel for the painting’s then-fair market value of \$22,500 and found for List as against Perls in the amount of \$22,500.²⁶ The appellate court reduced the amount of damages to \$4000 plus interest, but the Court of Appeals reversed, reinstating the award of \$22,500 to List. The Court of Appeals reasoned that List was entitled to his benefit of the bargain, which was the fair market value of the painting at the time of its return to Mrs. Menzel, rather than rescission, which would have given List only his purchase price plus interest. Commentators have noted that, by putting List back in the position he would have been in had Perls not breached the implied warranty of title, the Court of Appeals placed the full burden of investigation

²³ U.C.C. § 2-312(3) (AM. LAW INST. & UNIF. LAW COMM’N 2016).

²⁴ *See id.* at 104–05; *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969).

²⁵ LERNER & BRESLER, *supra* note 1, at 104–05. At the time the case was decided, sales in New York were governed by the New York equivalent of the Uniform Sales Act instead of the Uniform Commercial Code. Section 13 of the Uniform Sales Act provided as follows:

In a contract to sell or a sale, unless contrary intention appears, there is (1) an implied warranty on the part of the seller that . . . he has a right to sell the goods . . . (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

Menzel, 246 N.E. 2d at 744.

²⁶ Although statute of limitations was not at issue in *Menzel v. List*, a buyer with a breach of warranty claim in New York must meet a four-year statute of limitations. *See Doss, Inc. v. Christie's, Inc.*, No. 08 Civ. 10577 (LAP), 2009 WL 3053713, at *2 (S.D.N.Y. Sept. 23, 2009) (noting that New York law requires commencement of a buyer’s claim for breach of warranty within four years of delivery of the goods).

of title to the painting squarely on the dealer.²⁷ The result in a breach of warranty of title claim, that a seller bears liability for the increase in value, can indeed be an expensive remedy in the hothouse environment of art valuation.²⁸

B. Tort Law

The explosive growth of the art market in recent years and the staggering sums that works of art can command have led to increased concerns about forgeries. In cases of forgery, tort law may provide recourse to the aggrieved buyer in addition to contract law's breach of warranty claims.²⁹ The injured buyer may claim that the seller committed the tort of fraud, which occurs when the seller has made an intentional or knowing misrepresentation of a material existing fact about the artwork with the intention that the misrepresentation be relied on and the buyer in fact relies on such misrepresentation to his or her detriment.³⁰ The buyer might also claim that the seller engaged in negligent misrepresentation, which, unlike fraud, does not require the seller's intent or knowledge of the misinterpretation.³¹

The torts of fraud and negligent misrepresentation are not mutually exclusive from breach of warranty claims, and buyers asserting forgery claims against an art dealer may include one or both of the tort claims as well as breach of warranty claims. A recent forgery case in which the plaintiffs asserted a number of claims, including fraud and breach of warranty, is one of several actions filed against Knoedler Gallery and its principals.³² In 2011, the venerable Knoedler Gallery, New York's then-oldest commercial art gallery, shocked the art world by abruptly closing its doors after 165 years, following allegations that it had sold approximately \$80 million worth of forged Abstract Expressionist paintings over the course of a decade, including works attributed to Rothko, de Kooning, Pollock, Motherwell, and other great artists of the mid-twentieth century. Plaintiffs, in a spate of lawsuits, alleged that Knoedler misrepresented material facts in presenting the origin and provenance of the works, that

²⁷ See, e.g., Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 525 (1988); Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 DUKE L.J. 607, 624 (2012).

²⁸ See Gerstenblith, *supra* note 27, at 525–26; DeMott, *supra* note 27, at 619.

²⁹ See LERNER & BRESLER, *supra* note 1, at 137.

³⁰ *Id.* The required elements for a claim for fraud consist of “(1) misrepresentation of a material fact; (2) the falsity of that misrepresentation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance.” *Kottler v. Deutsche Bank*, 607 F. Supp. 2d 447, 462 (S.D.N.Y. 2009).

³¹ See LERNER & BRESLER, *supra* note 1, at 138.

³² *De Sole v. Knoedler Gallery*, 137 F. Supp. 3d 387, 395 (S.D.N.Y. 2015).

Knoedler's statements regarding the origin and provenance of the works were false, that Knoedler had an intent to defraud, that plaintiffs reasonably relied on Knoedler's misrepresentations, and that plaintiffs incurred damage as a result of relying on Knoedler's misrepresentations. The cases against Knoedler ultimately settled out of court without completing trial, resolved by payment of refunds or settlements of enhanced monetary amounts.

The lessons from the Knoedler scandal should be apparent to any reasonable art professional seeking to avoid an authenticity dispute—in an unregulated industry with confidential transactions on behalf of undisclosed principals, due diligence is especially important. But how much diligence is due? At a minimum, an individual seeking to purchase, or a dealer seeking to sell, should obtain expert assurances as to authenticity and explore all “red flags.” In the Knoedler cases, these “red flags” included: a secret overseas collector with works that had never been publicly exhibited and had no known provenance; and sales transacted by intermediaries previously unknown in the art world, at prices below-market, and at times with payments in cash. Buyer beware.

C. Art-Specific Legislation

Until the 1960s, the art market remained largely unregulated by any statutory scheme directed solely at the buying and selling of fine art.³³ Artwork was merely treated as personal property, and the few issues dealing with artwork were resolved through litigation in the courts under existing bodies of law.³⁴ At the state level, the status quo changed in New York in 1965 when a series of public hearings were held to discuss issues unique to the art market, and as a result, several new laws were added in 1966 to the New York General Business Law aimed to address the rights of artists and consumers.³⁵ Since then, legislation specifically addressing art issues has experienced rapid growth in several states, including New York, California, Massachusetts, and others.³⁶ At the federal level, there are laws addressing the protection of art of specific classes (such as Native Americans),³⁷ of certain objects (such as those incorporating parts

³³ See Leslie Kaufman Akst, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 939 (1978).

³⁴ *Id.*

³⁵ See *id.* 939 nn.3 & 5.

³⁶ See LERNER & BRESLER, *supra* note 1, at 145; see, e.g., CAL. CIV. CODE §§ 1738, 1738.5–38.9 (West 2016); IOWA CODE ANN. §§ 715B.2–715B.4 (West 2016); MASS. GEN. LAWS ANN. ch. 104A, § 2 (West 2016); MICH. COMP. LAWS ANN. §§ 442.321–42.325 (West 2016); N.Y. ARTS & CULT. AFF. LAW §§ 1.01–61.13 (McKinney 2016).

³⁷ See, e.g., Native American Graves Protection and Repatriation Act (“NAGPRA”),

derived from endangered species, e.g., ivory),³⁸ or of legal systems (such as international treaties governing cultural property).³⁹ In totality, state and federal legislation relating to the art market covers a broad spectrum of issues addressing the protection of consumers, artists, the market place, and cultural property in general.

1. Consumer and Artist Protection Laws

As the largest U.S. commercial center of art activity, New York has developed the most significant regulatory body of law governing art. In 1983, the Arts and Cultural Affairs Law (“NYACAL”) was enacted, replacing most of the new articles that were added to the New York General Business Law governing the rights of artist and consumers.⁴⁰

Notably, with respect to consumer protection, the NYACAL provides a lay purchaser with stronger warranty protections than those available under Article 2 of the UCC. Section 13.01 of the NYACAL provides:

1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:

(a) Shall be presumed to be part of the basis of the bargain; and

(b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.⁴¹

Thus, if an art merchant provides a writing to a purchaser with a description that the artwork was created by a specific artist, such as an invoice, an express warranty is created.⁴² Effectively, the provision removes the distinction between objective fact and the art merchant’s mere opinion with respect to authenticity.⁴³ The intention behind this fact/opinion provision was to level the playing field for laypersons dealing with art merchants, acknowledging that dealers may be incentivized to

25 U.S.C. §§ 3001–13 (2016); Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091–95 (2016).

³⁸ See Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* (2016).

³⁹ See, e.g., UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970; UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972.

⁴⁰ The Arts and Cultural Affairs Law was enacted as new Chapter 11-C of the Consolidated Laws of New York by Arts & Cultural Affairs Law, ch. 876, 1983 II. N.Y. Laws 2462, effective Dec. 31, 1983.

⁴¹ *Id.* at § 13.01.

⁴² See LERNER & BRESLER, *supra* note 1, at 90.

⁴³ *Id.* at 146.

affix a definite attribution to a work in order to inflate the price and, in case of misattribution, to rely on the defense that the attribution was a mere opinion.⁴⁴

The NYACAL also provides strong protections for the artist in artist-dealer relationships. Section 12.01(1)(a) of the NYACAL provides that whenever an artist delivers an artwork to an art merchant for the purpose of exhibition and/or a sale, the delivery to and acceptance of such artwork creates a consignor/consignee relationship.⁴⁵ The art merchant will be deemed to be an agent of the consignor-artist with respect to the artwork, the artwork is considered trust property for the benefit of the consignor-artist, and any proceeds from the sale of such artwork are trust funds for the benefit of the consignor-artist. The trust property and trust funds shall be considered property held in statutory trust, and no such trust property or trust funds shall become the property of the consignee or be subject or subordinate to any claims, liens, or security interest of the consignee's creditors. This statute means, among other things, that the artist must be paid first and that the artist's consigned works cannot be attached in a bankruptcy action. Section 12.01(3) provides a strong enforcement mechanism by allowing attorney's fees for plaintiffs who successfully enforce their rights in court. Moreover, any waivers must be clear, conspicuous, and in writing. Notably, much of Section 12.01 was strengthened in direct response to the scandalous collapse in 2007 of the Salander O'Reilly Gallery, another seemingly reputable New York gallery that was charged with fraud for selling works to multiple parties, selling works without disclosing such sales to the consignors, and converting such sales proceeds to pay off existing gallery debts.⁴⁶

2. Object Protection Laws

Various laws protecting goods in commerce have been enacted at the federal level to address the protection of art. For instance, the Native American Graves Protection and Repatriation Act ("NAGPRA") was passed in 1990 to restore tribal ownership of Native American grave goods and human remains.⁴⁷ The statute requires federal agencies and museums receiving federal funds and holding Native American remains or objects to publish written summaries of the items and consult

⁴⁴ See *Levin v. Dalva Brothers, Inc.*, 459 F.3d 68, 77 (1st Cir. 2006).

⁴⁵ See LERNER & BRESLER, *supra* note 1, at 21.

⁴⁶ NEW YORK CITY BAR ASS'N, REPORT ON LEGISLATION BY THE ART LAW COMMITTEE 2-3 (2012), <http://www2.nycbar.org/pdf/report/uploads/20072122-ReportonA7189S4988reNewYorkArtsandCulturalAffairsLawNYACAL.pdf> [<http://perma.cc/322L-59CL>].

⁴⁷ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2016).

with the tribe affiliated with the remains or object to determine and agree on the repatriation and disposition of the remains or objects. The statute also protects Native American burial sites and the removal of Native American human remains and imposes criminal penalties for trafficking in Native American human remains.

A federal law that has recently significantly impacted the art and antiquities market is the Endangered Species Act of 1973 (“ESA”),⁴⁸ and especially the regulations governing African elephants under the ESA. First, a bit of background: in the United States, the African elephant is primarily protected and managed under the Convention on International Trade of Endangered Species of Wild Fauna and Flora (“CITES”) and the ESA.⁴⁹ CITES, which took effect on July 1, 1975, is a multilateral treaty signed by 182 parties, including the United States, for the protection of certain listed animal and plant species.⁵⁰ CITES regulates commercial and noncommercial international trade in listed species through a system of permits and certificates that must be obtained for import and export.⁵¹ With the exception of certain populations of African elephants that are deemed to be recovering populations, all other African elephants are listed in Appendix I, which lists species that are threatened with extinction and are or may be affected by trade and therefore subject to “particularly strict regulation.”⁵²

The ESA, which implements CITES in the United States, prohibits the taking, possessing, selling, offering for sale in interstate or foreign commerce, importing, exporting, delivering, carrying, transporting, or shipping in the course of a commercial activity, any ESA species listed as “endangered” or any part thereof.⁵³ While the ESA does not specify particular prohibitions

⁴⁸ 16 U.S.C. § 1531 *et seq.* (2016).

⁴⁹ See 16 U.S.C. § 1531 (2016); Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975, 27 U.S.T. 1087; 16 U.S.C. §§ 4201–22 (2016) African elephants are also protected under the African Elephant Conservation Act, which was passed in 1988 and imposes a moratorium on the import of African elephant ivory since 1989. This moratorium, still in place, makes it illegal to import raw African elephant ivory into the U.S. from any country unless certain conditions are met. *Id.*

⁵⁰ Endangered and Threatened Wildlife and Plants, 81 Fed. Reg. 36,388 (June 6, 2016) (to be codified at 50 C.F.R. pt. 17), <https://www.federalregister.gov/articles/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african#h-11> [<http://perma.cc/HZ4E-4FZU>].

⁵¹ *Id.* at 36,389.

⁵² Convention on International Trade in Endangered Species of Wild Fauna and Flora art. II, July 1, 1975, 27 U.S.T. 1087.

⁵³ Endangered and Threatened Wildlife and Plants, 81 Fed. Reg. 36,388 (June 6, 2016) (to be codified at 50 C.F.R. pt. 17), <https://www.federalregister.gov/articles/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african#h-11> [<http://perma.cc/HZ4E-4FZU>].

for ESA species listed as “threatened,” the Secretary of the Interior (“Secretary”), acting through the U.S. Fish and Wildlife Service, has the authority to issue protective regulations for species under Section 4(d) of the ESA.⁵⁴ The African elephant has been listed as a “threatened” species under the ESA since June 11, 1978, and regulations were issued by the Secretary under Section 4(d) to regulate the import and commerce of African elephant ivory with certain exceptions.⁵⁵ Notably, the ESA allows an “antiques exception” for articles that: (a) are not less than 100 years of age; (b) are composed in whole or in part of any endangered species or threatened species; (c) have not been repaired or modified on or after December 28, 1973; and (d) entered at a port designated for the import of ESA antiques.⁵⁶

On July 6, 2016, the U.S. Fish and Wildlife Service issued final regulations increasing protection for African elephants and resulting in a near-total ban on the commercial trade in African elephant ivory in the United States.⁵⁷ For commercial purposes, the import of African elephant ivory is prohibited.⁵⁸ For noncommercial purposes, the import of worked elephant ivory is allowed if it was legally acquired, removed from the wild prior to February 26, 1976, and is either part of a household move or inheritance, part of a musical instrument, or part of a traveling exhibition.⁵⁹ For commercial purposes, only the export of items meeting the ESA antiques exception is allowed. For noncommercial purposes, only the following exports are allowed: (a) items meeting the ESA antiques exception; (b) items legally acquired, removed from the wild prior to February 26, 1976, and are either part of a household move or inheritance, part of a musical instrument, or part of a traveling exhibition; (c) certain worked ivory that qualifies as pre-ESA; and (d) law enforcement and bona fide scientific specimens.⁶⁰ Interstate and foreign commerce in African elephant ivory is prohibited except for items that qualify as ESA antiques, and certain manufactured or handcrafted items that contain a small (*de minimis*) amount of ivory and meet certain criteria.⁶¹ Notably, “foreign commerce,” i.e. selling ivory outside of the United States—as distinguished from import or export—by persons subject to U.S. jurisdiction is prohibited with limited exceptions for ESA antiques and manufactured or

⁵⁴ *Id.*

⁵⁵ *Id.* at 36,390.

⁵⁶ *Id.* at 36,388.

⁵⁷ *Id.* at 36,418.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

handcrafted items that contain a *de minimis* amount of ivory.⁶² Interstate commerce, i.e. selling across state lines, is only allowed for items meeting the antiques exemption and certain manufactured or handcrafted items that contain a *de minimis* amount of ivory.⁶³ Intrastate commerce, i.e. selling within a state, is allowed for: (a) ivory lawfully imported prior to January 18, 1990, the date the African elephant was listed in CITES Appendix I, which the seller must demonstrate; or (b) ivory imported under a CITES pre-convention certificate, which the seller must demonstrate.⁶⁴ Noncommercial movement within the United States, within and across states, of legally acquired ivory is allowed. The personal possession and noncommercial use of legally acquired ivory is also allowed.

As demonstrated above, laws protecting art in commerce present challenging and complex issues due to the difficulty of balancing freedom of commerce against the need to protect threatened or endangered species or classes of art objects. Interestingly, the response by the U.S. Fish and Wildlife Service to comments received from the U.S. museum community during the comment period for the final regulation on African elephants suggests that there may be further consideration of how museums are treated under the final regulation, and further developments can be expected in this evolving area.⁶⁵

3. Moral Rights Laws

Legislative initiatives to protect artists and their works also took hold in the latter twentieth century. In 1990, Congress passed the Visual Artists' Rights Act ("VARA"),⁶⁶ giving artists new rights in their works, rights of attribution, and rights of integrity, that are related to, but distinct from, copyright. VARA protects artistic works from intentional destruction or mutilation and requires that works be properly credited to the creator. Significantly, VARA defines "a work of art" subject to protection for the first time in the definitional section of the Act, which states:

A "work of visual art" is —

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.* at 36,397.

⁶⁶ 17 U.S.C. § 106A (2016).

are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.⁶⁷

Some states had artists' rights protections in place prior to the passage of VARA—see, e.g., California (1979), New York (1983)—and in some cases these state statutes provide broader rights.⁶⁸

In addition, California recognizes a resale royalty right, and is the only state in the nation to accord a royalty to the artist when an artwork is resold.⁶⁹ The royalty right, like the rights of attribution and integrity, derive from the European model of artists' rights. The California Resale Royalty Act ("CRRA"), provides, essentially, that where a sale of fine art for at least \$1000 takes place on the secondary market in California, the artist is entitled to receive 5% of the resale price from the seller within ninety days of the sale.⁷⁰ The constitutionality of the statute was challenged in a series of lawsuits in 2012 and 2015 and its status is uncertain.⁷¹ As this Article goes to press, the Ninth Circuit is expected to rule shortly on the issue of preemption, i.e. whether the Copyright Act of 1976 preempts the state CRRA statute.

D. Intellectual Property

1. Overview

The field of copyright is an especially active one in the art world because intellectual property rights—particularly copyright and trademark—have a direct bearing on the creation and marketing of fine art. Artists create original works and, at the same time, they often use works created by others; museums own collections, sell products, and license their names for reproductions of objects and images. Those in the arts are concerned about protecting ownership rights, while at the same

⁶⁷ 17 U.S.C. § 101 (2016).

⁶⁸ See CONN. GEN. STAT. §§ 42-116s–116t (2016) (enacted in 1988); 815 ILL. COMP. STAT. 320/1–8 (2016) (enacted in 1993); LA. REV. STAT. ANN. § 51:2154–5126 (West 2016) (enacted in 1986); ME. REV. STAT. tit. 27 § 303 (2016) (enacted in 1985); MASS. GEN. LAWS ch. 231, § 85S (2016) (enacted in 1984); N.J. STAT. ANN. § 2A:24A-1–8 (West 2016) (enacted in 1986); N.M. STAT. ANN. § 13-4B-1–3 (2016) (enacted in 1978); N.Y. ARTS & CULT. AFF. LAW § 14.01–14.03 (McKinney 2016) (enacted in 1984); 73 PA. CONS. STAT. §§ 2101–10 (2016) (enacted in 1993); R.I. GEN. LAWS § 42-75.2-1–10 (2016) (enacted in 1987).

⁶⁹ CAL. CIV. CODE § 986 (West 2016).

⁷⁰ *Id.*

⁷¹ See *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015).

time concerned about protecting and preserving fair use and access to works in the public domain because creativity thrives in a vibrant and massive public domain. A working knowledge of the basic principles of intellectual property is essential in the field, and the rapid advance of communication technologies and the resulting demand for content have focused even greater attention on intellectual property issues.

Copyright and trademark are different concepts, protecting different types of property through different enforcement mechanisms. Copyright is described as a “bundle of property rights.”⁷² The law states that copyright protection subsists “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”⁷³ It grants exclusive rights to copyright owners and curbs those exclusive rights with certain limitations (most importantly, fair use) that further the public interest. A trademark is the exclusive right to use the objective symbol signifying the goods and services offered in commerce by the owner. Trademark principles raise certain procedural issues—distinctiveness, relevant market, likelihood of confusion, types of marks, prior use—that are peculiar to the commercial arena. This overview will focus on copyright, rather than trademark, because copyright is the more common (and urgent) focus of creative communities.

For a work to be protected by copyright, it must be fixed in a tangible medium of expression, so that the object can be perceived, reproduced, or expressed for more than a brief duration. It must be original and contain an expression of the author’s creativity. The amount of originality or creativity needed to pass the threshold is not high; so, for example, a change in color or medium is not enough originality or creativity to pass the threshold, but a change in angle or light might be. Copyright protects expressions, but not ideas, procedures, processes, systems, methods of operations, concepts, principles, or discoveries. Many of the interesting copyright cases are art cases, whether they involve a sculpture based on a photograph;⁷⁴ a movie poster based on a magazine cover;⁷⁵ a new photograph appropriating the underlying photograph;⁷⁶ the ownership of the copyright in a commissioned work;⁷⁷ and a host of other art-related cases.

72 *United States v. Craft*, 535 U.S. 274, 283 (2002).

73 17 U.S.C. § 102(a) (2016).

74 *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992).

75 *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 708–09 (S.D.N.Y. 1987).

76 *Cariou v. Prince*, 714 F.3d 694, 700 (2d Cir. 2013).

77 *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

2. Fair Use

Fair use, which is an equitable doctrine that balances the rights of a copyright owner with the rights of society, speaks to specific uses of protected works that are considered “fair.” The tension between an owner’s financial and security interests and society’s legitimate access to intellectual property led Congress to incorporate and codify a growing body of fair use case law when it revised the Copyright Act in 1976.⁷⁸ Fair use strives to ensure that an author’s exclusive bundle of property rights will not hinder the very creativity the law was designed to foster. The doctrine recognizes that new works draw inspiration from older works and that the productive use of older works promotes the progress of science, art, and literature. Fair use permits certain good-faith uses that, in other contexts, would be infringement. These uses include criticism, comment, new reporting, teaching, scholarship, and research.⁷⁹

The fair use statute lays out the test to determine whether a use is fair. The fair use test is a four-pronged, case-specific analysis. It examines: (1) the purpose and character of the new work’s use; (2) the nature of the original work; (3) the amount and substantiality of the portion used in relation to the original work as a whole; and (4) the economic effect on the original work’s actual and potential markets.⁸⁰ These prongs cannot be evaluated in isolation as a mathematical formulation, but rather the test is a “totality of the circumstances” analysis. The flexibility inherent in the test often leaves users unsure whether the contemplated use is a fair use. The lawyer’s classic answer, “it depends,” is particularly unhelpful to those seeking certainty in assessing these fine-line distinctions.

Art-related decisions dominate the fair use case law, and with good reason, because artists are entitled to fair use of the copyrighted work of others, and equally entitled to vigorously enforce their exclusive rights to exploit their properties by license or other means. Fair use in the context of objects and images is often in the eye of the beholder; one must determine and apply the fair use test, with all its nuances and inconsistencies. The one overriding question in the fair use assessment is whether a use is transformative or productive; does the new work encompass valuable creativity in and of itself? When a work has been transformed, there is less likelihood of market substitution and more likelihood of a fair use finding. This was illustrated in

⁷⁸ See generally The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁷⁹ 17 U.S.C. § 107 (2016).

⁸⁰ *Id.*

the 1994 case *Campbell v. Acuff-Rose Music Inc.*,⁸¹ where the alteration of the lyrics from “Pretty Woman” was held to be possible fair use because the new song, by 2 Live Crew, featured lyrics that were substantially different from the original Roy Orbison song, targeted a different audience, and posed little risk of market substitution. Likening the song to a modern-day parody that made commentary on the original, the Supreme Court found that the use was productive and offered a separate new value.

While a new work is more likely to pass the fair use test if the new work’s composition, message, and use differ from those of the copyrighted work, it can be difficult in the realm of images to assess the degree of transformation or productivity needed to satisfy the fair use test. In *Rogers v. Koons*, the court found that a Jeff Koons sculpture, which reproduced in sculptural form a copyrighted photograph by Ed Rogers, was not a fair or transformative use because it added no separate creativity and affected the market for the photograph.⁸² In *Hart v. Sampley*, the sale of items containing the copyrighted image of the Three Servicemen statue at the Vietnam Veterans Memorial was found not to be a fair use.⁸³ However, in *Wojnarowicz v. American Family Association*, the publication of fragments of a work in an anti-National Endowment for the Arts pamphlet was found to be a fair use because the portion used was insubstantial, and the free speech implications were significant (note, though, that the artist prevailed under an integrity clause of the New York moral rights statute, the Artists’ Authorship Rights Act).⁸⁴

Fair use has inherent drawbacks; it is expensive and time consuming to make individualized decisions on a case-by-case reading of the facts, and it is risky because the analysis might be incorrect. Fortunately, fair use is not an either/or proposition; rights management systems exist for situations where fair use is inapplicable or impractical, for large-scale projects, and for peace of mind.

3. Online Issues

The growth of the internet has been accompanied by a liberal interpretation of both freedom of speech and of the fair use

⁸¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589–600 (1994). Though the Court held that 2 Live Crew “departed markedly from the Orbison lyrics and produced otherwise distinctive music,” the Court did not make a determination on the issue of whether the use of the original song’s bass riff was “excessive copying”; instead, the case was remanded “to permit evaluation of the amount taken.” *Id.* at 570.

⁸² See *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

⁸³ *Hart v. Sampley*, No. 91-3068, 1992 WL 100135, at *2–3 (D.D.C. Feb. 4, 1992).

⁸⁴ See *Wojnarowicz v. Am. Family Ass’n*, 745 F. Supp. 130, 141 (S.D.N.Y. 1990).

exception. The ease and speed of downloading and manipulating images, and the mass of unrestricted images on the internet, have lulled many users into assuming implied licenses to copy, print, and distribute internet materials. Uploading an image implicates the rights of reproduction and distribution; downloading and printing an image represent two acts of reproduction; and modifying an image implicates the rights of reproduction, distribution, and adaptation. If the use is a fair use, these activities will not infringe the copyright owner's exclusive rights. But if these uses are deemed not to be fair, then each separate act is a separate (presumably compensable) infringement.⁸⁵ Interesting issues in the online environment include whether a digital image differs enough from an original image to garner its own copyright; whether a reproduction of a work in the public domain is eligible for copyright when it is digitized; how to deconstruct the separate copyright components of a multimedia project; and who is liable for third-party infringement. It can be expected that there will be many developments in this area in the future.

E. Tax

As art escalates in value, collectors increasingly treat their art collections as investments. The art collection as investment property presents unique and challenging issues from various tax perspectives, including income tax and gift and estate taxes.

1. Income Tax Treatment of Art

The rising value of art has led to the necessity of tax planning from an income tax perspective. The income tax treatment related to artwork will have different income tax results depending on whether the owner of the artwork is treated as a dealer, investor, or collector.⁸⁶ A dealer is someone who is engaged in the trade or business of selling art to customers. Although the term "trade or business" is not defined in the Internal Revenue Code ("IRC"), case law has stated that the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer's primary purpose for engaging in the activity must be for income or profit.⁸⁷ A sporadic activity, which the Internal Revenue Service ("IRS") classifies as a hobby,

⁸⁵ See 17 U.S.C. § 504(c)(1) (West 2016); see also *FAQs: Copyright and Digital Files, COPYRIGHT*, <https://www.copyright.gov/help/faq/faq-digital.html#backup> [<http://perma.cc/D9G9-C5SG>].

⁸⁶ See LERNER & BRESLER, *supra* note 1, at 1169–71.

⁸⁷ *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987).

amusement, or diversion, does not qualify.⁸⁸ Dealers are taxed on the gain from the sale of art held as inventory at ordinary income tax rates and may take income tax deductions for ordinary and necessary expenses incurred in the trade or business of being a dealer.⁸⁹ An investor is someone who buys and sells art *primarily* for investment purposes, rather than for personal use and enjoyment or as a trade or business. As distinguished from a dealer who holds art as inventory in a business, an investor holds art for the primary objective of making a profit from the appreciation in value of the art over a period of time.⁹⁰ Investors are taxed on the gain from the sale of art held for more than one year at the federal long-term capital gains rate for collectibles, which is currently 28%.⁹¹ Investors are much more restricted than dealers in their ability to take deductions for investment-related expenses, as they can only deduct expenses incurred in connection with holding property for the production of income.⁹² A collector is someone who buys and sells art primarily for personal pleasure and is not a dealer or investor. Collectors, like investors, are taxed on the gain from the sale of art held for more than one year at the current federal long-term capital gains rate for collectibles of 28%.⁹³ Collectors have even more limitations on their ability to deduct collection-related expenses than investors.⁹⁴

Distinguishing between dealers, investors, and collectors is often not an easy task because of the element of personal enjoyment inherent in any artwork and the facts and circumstances of the inquiry. Investors face a particularly difficult task in proving that they are holding artwork primarily for investment purposes and not for personal use and enjoyment. While deriving pleasure may not in and of itself preclude finding that a collection is investment property, the collector will find it a challenge to convince the IRS of his or her investor status if the activities and circumstances indicate that there is too much enjoyment of the collection without the requisite demonstrated intent to treat the collection as investment property.⁹⁵

⁸⁸ *Id.*

⁸⁹ See I.R.C. §§ 1(a)(2), 64, 162 (2016). The top ordinary income tax rate is currently 39.6%. *Id.*

⁹⁰ See *Drummond v. Comm'r*, 73 T.C.M. (CCH) 1959, at *10–11 (1997).

⁹¹ I.R.C. § 1(h)(1) (2016). Art held for one year or less is taxed at ordinary income rates. *Id.*

⁹² Examples of investment-related expenses that an art investor may choose to deduct include insurance premiums, storage fees, and subscriptions to trade publications. See *Wrightsmen v. United States*, 428 F.2d 1316, 1319 (Ct. Cl. 1970).

⁹³ I.R.C. § 1(h)(4) (2016).

⁹⁴ See I.R.C. §§ 68(a) & 183(b) (2016).

⁹⁵ See LERNER & BRESLER, *supra* note 1, at 1172–73; *Wrightsmen*, 428 F.2d. at 1320.

2. Section 1031 Like-Kind Exchanges

For art owners who do qualify as investors for income tax purposes, like-kind exchanges under IRC Section 1031 may provide a capital gains tax deferral opportunity (we refer to such exchange as a “Section 1031 like-kind exchange”).⁹⁶ IRC Section 1031 allows owners of investment properties to defer payment of capital gains taxes by reinvesting proceeds from the sale of a currently owned property into the purchase of a new like-kind property.⁹⁷ The property exchanged must be property held for productive use in a trade or investment that is exchanged solely for property of a “like kind” to be held for productive use in a trade or business or for investment.⁹⁸ The property exchanged cannot be stock in trade or other property held primarily for sale (i.e. inventory).⁹⁹ Therefore, generally with regard to artwork, taxpayers who are eligible to take advantage of Section 1031 like-kind exchanges will be investors who hold artwork primarily for investment, as opposed to collectors who collect artwork for personal enjoyment.

Section 1031 like-kind exchanges involving artwork present an interesting mix of issues because there are gray areas alongside clear-cut rules. On the one hand, the rules are highly technical. For instance, the Treasury Regulations for IRC Section 1031 provide detailed rules for certain specific timing requirements in so-called “deferred exchanges.”¹⁰⁰ On the other hand, much is unsettled, such as what constitutes like-kind property in the context of art. The Treasury Regulations provide the following interpretation of the term “like-kind”:

As used in section 1031(a), the words “like kind” have reference to the nature or character of the property and not to its grade or quality. One kind or class of property may not, under that section, be exchanged for property of a different kind or class. The fact that any real estate involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the property and not to its kind or class.¹⁰¹

How to distinguish between the “nature or character” of one kind of artwork for another is a question that remains a gray area. On the one hand, the IRS rulings on coins held for investment seem to focus on the function of the property held rather than the makeup of the property, as discussed below:

⁹⁶ See LERNER & BRESLER, *supra* note 1, at 1187–90.

⁹⁷ See I.R.C. § 1031 (2016).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Treas. Reg. § 1.1031(k)-1 (2008).

¹⁰¹ See Treas. Reg. § 1.1031(a)-1(b) (1991).

- In Revenue Ruling 76-214, the IRS ruled that the exchange of Mexican 50-peso bullion-type gold coins for Austrian 100-corona bullion-type gold coins qualified for nonrecognition of gain under IRC Section 1031.¹⁰² Since such coins were not circulating mediums of exchange in their respective countries, their nature or character were the same for purposes of IRC Section 1031 as being gold coins.
- In Revenue Ruling 82-96, the IRS ruled that gold bullion was like-kind to Canadian Maple Leaf gold coins for purposes of IRC Section 1031.¹⁰³ The Maple Leaf coins were traded for their gold content. Therefore, they were bullion-type coins whose nature and character were the same and thus of like kind with the gold bullion.
- In Revenue Ruling 79-143, despite the coins appearing similar because they both contain gold, the IRS held that United States \$20 gold coins for South African Krugerrand gold coins were not like-kind to each other.¹⁰⁴ The U.S. gold coins were numismatic-type coins, the value of which is determined by their age, number minted, history, art and aesthetics, condition, and metal content, while the South African Krugerrand gold coins were bullion-type coins, the value of which is determined solely on the basis of metal content.
- In Revenue Ruling 82-166, the IRS held that gold bullion coins and silver bullion coins were not like-kind to each other, not because one was gold and the other silver but because silver is essentially an industrial commodity and gold is primarily utilized as an investment in itself.¹⁰⁵

On the other hand, the IRS has ruled for purposes of IRC Section 1033, which governs the treatment of involuntary conversion of property, that lithographs are not “similar or related in service or use” to artwork in other media such as oil paintings, watercolors, sculptures, and other graphic forms of art.¹⁰⁶ Although we do not know whether the same rationale would apply in the context of a Section 1031 like-kind exchange, the conservative approach would be to select works of the same media for a Section 1031 like-kind exchange.¹⁰⁷

¹⁰² Rev. Rul. 76-214, 1976-1 C.B. 218.

¹⁰³ Rev. Rul. 82-96, 1982-1 C.B. 113.

¹⁰⁴ Rev. Rul. 79-143, 1979-1 C.B. 264.

¹⁰⁵ Rev. Rul. 82-166, 1982-2 C.B. 190.

¹⁰⁶ See LERNER & BRESLER, *supra* note 1, at 1188; I.R.S. Priv. Ltr. Rul. 81-27-089 (Apr. 10, 1981).

¹⁰⁷ In I.R.S. Priv. Ltr. Rul. 81-27-089 (Apr. 10, 1981), a fire damaged an art collection consisting of 3000 lithographs, some oil paintings, pencil drawings, sculptures, masks, wood carvings and block prints. The taxpayers wanted to use the insurance proceeds to

3. Valuation Issues in Tax and Estate Planning with Art

One of the key issues from a tax perspective is how to value artwork in a collection. Art is inherently unique and therefore it is difficult to find precise sale comparisons to determine value. Moreover, there are large information gaps when it comes to comparing the values of other similar artwork in the market. Only 47% of art sales worldwide are conducted through public auctions and the rest are private sales, the terms of which are often confidential and sometimes known only to the intermediaries transacting the sale.¹⁰⁸ As such, the concept of “fair market value,” defined in the estate tax regulations as “the price which a willing buyer would pay to a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts,” is somewhat of a challenge as applied to art in practice.¹⁰⁹ Nevertheless, the fair market valuation of art is necessary from all areas of tax, including income tax, gift tax, and estate tax.

The IRS has developed comprehensive rules on the valuation of art in the income and gift and estate tax regulations.¹¹⁰ As contemplated by the IRS’ rules and procedures, the practice of valuing art for tax purposes relies heavily on the opinions of appraisers who are demonstrated to be experts in the property being appraised. For instance, to claim an income tax deduction for a charitable donation of artwork with a claimed value exceeding \$5000, the taxpayer must obtain a “qualified appraisal” from a “qualified appraiser” for the property contributed.¹¹¹ To be a “qualified appraisal,” an appraisal must be prepared by a qualified appraiser containing certain specific information about the artwork being contributed, including a detailed description of the property, a detailed description of the qualified appraiser’s background and qualifications, the method of valuation used to determine the fair market value, and the fee arrangement between the donor and the appraiser.¹¹² A “qualified appraiser” is an individual who (i) has earned an appraisal

purchase replacement works consisting of 63% lithographs and 37% works in other media such as oil paintings, watercolors, sculptures, or other graphic forms of art. The IRS ruled that, for purposes of IRC Section 1033, lithographs may not be replaced with artworks in non-lithograph artistic media and nonrecognition of gain was disallowed to the extent that 36% of the insurance proceeds were reinvested in art works in other artistic media. *Id.*

¹⁰⁸ See Eileen Kinsella, *What Does TEFAP 2016 Art Market Report Tell Us About The Global Art Trade?*, ARTNET NEWS, (Mar. 9, 2016), <https://news.artnet.com/market/tefaf-2016-art-market-report-443615> [http://perma.cc/TZ78-6LWV].

¹⁰⁹ Treas. Reg. § 20.2031-6(a) (2011).

¹¹⁰ Treas. Reg. § 20.2031-6 (2011); Treas. Reg. § 25.2512-1 (1992); Treas. Reg. § 1.170A-1(c)(2) (2008).

¹¹¹ I.R.C. § 170(f)(11) (2016); Treas. Reg. § 1.170A-13(c)(2)(i)(A) (1996).

¹¹² Treas. Reg. § 1.170A-13(c) (1996).

designation from a recognized professional appraiser organization, or has otherwise met minimum education and experience requirements set forth in the regulations; (ii) regularly performs appraisals for pay; and (iii) meets any other requirements prescribed by the IRS.¹¹³ The individual will not be treated as a qualified appraiser for a specific appraisal unless he or she demonstrates verifiable education and experience in valuing the property subject to the appraisal and the individual has not been prohibited from practicing before the IRS at any time for a three-year period ending on the appraisal date.¹¹⁴ Art valuations submitted to the IRS may be reviewed by the Art Advisory Panel of the Commissioner of Internal Revenue.¹¹⁵ Created in 1968, the Art Advisory Panel is made up of art experts, including museum curators, dealers and scholars, serving without compensation.¹¹⁶ As can be seen from recent annual reports, the Art Advisory Panel's valuations often differ from those submitted by taxpayers.¹¹⁷

Interesting valuation issues can arise when art is not owned in its entirety but rather in undivided fractional interests, particularly in the estate tax context. Although courts have upheld valuation discounts for the transfer of less than a 100% interest in artwork for estate tax purposes, this remains a developing area, as seen most recently in *Estate of Elkins v. Commissioner*.¹¹⁸ In *Estate of Elkins*, James Elkins and his children owned percentage interests in sixty-four works of modern and contemporary art as a result of lifetime gifts and transfers made under Mr. Elkins's wife's will.¹¹⁹ Upon Mr. Elkins's death, the IRS denied the estate's claim of a fractional ownership discount of 44.75% to the artwork, and litigation ensued.¹²⁰ Rejecting the IRS's argument that no discount should be allowed for fractional interests in works of art, the Tax Court allowed a nominal 10% fractional ownership discount to account for various "uncertainties" a hypothetical buyer of Mr. Elkins's fractional

¹¹³ I.R.C. § 170(f)(11)(E)(ii) (2016). See Treas. Reg. § 1.170A-13(c)(5) (1996) and I.R.S. Notice 2006-96, 2006-46 I.R.B. 902 for further IRS requirements for qualified appraisers.

¹¹⁴ I.R.C. § 170(f)(11)(E)(iii) (2016).

¹¹⁵ ART ADVISORY PANEL OF THE COMM'R OF INTERNAL REVENUE, ANNUAL SUMMARY REPORT FOR THE FISCAL YEAR 2015 2 (Sept. 2015), https://www.irs.gov/pub/irs-utl/art_adv_panel_annual_summary_report_fy15.pdf [<http://perma.cc/G4FX-CJPH>].

¹¹⁶ *Id.*

¹¹⁷ For example, in 2015, the Art Advisory Panel recommended acceptance of 35% and recommended adjustments of 65% of the appraisals reviewed. *Id.* at 4.

¹¹⁸ *Estate of Elkins v. Comm'r*, 140 T.C. 86, 119 (2013), *aff'd*, 767 F.3d 443 (5th Cir. 2014); *see also*, *Stone ex rel. Stone Trust Agreement v. United States*, No. 07-17068, 2009 WL 766497, at *1 (9th Cir. Mar. 24, 2009) (denying fractional interest discount for estate's interests in paintings, but allowing discount equal to estimated costs of partitioning estate's interest).

¹¹⁹ *Elkins*, 140 T.C. at 87–89.

¹²⁰ *Id.* at 91–93.

interests in the art may face due to the children's ownership of their fractional interests in the art.¹²¹ The Court of Appeals for the Fifth Circuit went even further in ruling for the estate, holding that because the IRS offered no evidence on the discounted values and nothing in the record supported the nominal 10% discount determined by the Tax Court, the estate's expert opinions on the valuation issue must stand (including steep discounts of up to 80% on some individual pieces).¹²² Note that the Fifth Circuit accepted the estate's discounted values based on the lack of evidence presented by the IRS, a mistake the IRS is not likely to repeat.¹²³ As a final cautionary note, family entity planning with fractional interests in art may invite scrutiny from the IRS not only from an estate tax perspective but also from an income tax perspective, as seen in the recent case of *Allbritton v. Commissioner*, where the IRS asserted a \$40.7 million tax assessment on a family company that owned fractional interests in art that was rented out to the family for personal use.¹²⁴ These cases illustrate the potential challenges that taxpayers may face with the IRS in cases involving movable and enjoyable assets such as art.¹²⁵ It remains to be seen what approach the IRS will take in future cases and whether any methodologies will be proposed to provide guidance on the valuation of fractional interests in art.¹²⁶

III. CHANGING NORMS

As can be seen from the above, the attention from legislative and regulatory bodies to the many aspects of the art world have created a complex web of interrelated and unrelated laws. An art law practitioner must know and employ a deep and wide command of the law, whether representing artists, collectors, galleries, museums, or others in the art market place.

¹²¹ *Id.* at 126, 135.

¹²² *Elkins*, 767 F.3d at 445.

¹²³ See Diana Wierbicki, *Elkins v. Commissioner*, in LISI ESTATE PLANNING NEWSLETTER #2085 (Leimberg Information Services, Inc.) Apr. 1, 2013, at 8.

¹²⁴ Complaint, *Allbritton v. United States*, No. 4:15-v-00275 (S.D. Tex. 2015). As of the date of this Article's publication, the case has been stayed pending settlement.

¹²⁵ Diana Wierbicki & Bee-Seon Keum, *Whose Art Is It Anyway?*, WEALTHMANAGEMENT.COM (Apr. 20, 2015), <http://www.wealthmanagement.com/estate-planning/whose-art-it-anyway> [<http://perma.cc/5CX4-AKAH>].

¹²⁶ Proposed Regulations under IRC Section 2704 were issued on August 4, 2016 to limit valuation discounts for fractional interests in certain family-controlled entities for estate, gift, and generation-skipping transfer tax purposes. See Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, 81 Fed. Reg. 51413-25 (proposed Aug. 4, 2016). Public hearings were held on the proposed regulations on December 1, 2016.

Not only are the laws evolving, but the art world itself is evolving. The cozy circle of dealers and collectors, noted in the Introduction, has grown into a mega-industry. Many galleries have expanded globally, operating internationally as one gallery or as separate related subsidiaries. Art fairs now fill the annual calendar and galleries are expected to keep the business going at home while simultaneously setting up shop for a week in other cities, whether foreign or domestic. The time and expense, coupled with the challenges of international transport, assure that only the successful operators can participate. Moreover, collectors who enjoy these social/commercial events and welcome the opportunities to purchase at art fairs must confront a host of legal issues inherent in international purchasing—what is the situs of the sale?; what taxes are owed?; what are the remedies if things go wrong?

Apart from international purchasing in the art fair context, the global nature of the art marketplace assures that these international transactions are becoming commonplace. For example: a lawyer representing a client in one country sells to a collector in another country; a collector/investor purchases a work strictly for investment and stores it indefinitely in a “freeport” such as the Geneva Freeport or Le Freeport in Singapore. Freeports can be generally described as zones allowing the suspension of taxes, customs, and other duties on goods within such zones. Historically, freeports were used as temporary storage facilities for goods on the move, and tax suspensions in these zones were intended to promote trade and commerce by lightening regulatory burdens that may slow down transactions.¹²⁷ Today, freeports house—on an indefinite basis, if desired—some of the world’s most valuable art collections in state-of-the-art security facilities that employ art professionals and provide opportunities to transact business with the benefits of privacy and limited regulatory oversight.¹²⁸ It should be noted that the tax suspension benefits of freeports are temporary, as they only “suspend” the requirement to pay taxes until the goods reach their final destinations, and once the goods leave the freeport, transfer taxes and customs duties may apply depending on the destination country’s tax and customs laws. Although regulatory attention has focused on the wealth stored in

¹²⁷ See *Uber-Warehouses for the Ultra-Rich*, THE ECONOMIST (Nov. 23, 2015), <http://www.economist.com/news/briefing/21590353-ever-more-wealth-being-parked-fancy-storage-facilities-some-customers-they-are> [<http://perma.cc/Y4BK-C8R5>].

¹²⁸ *Id.*

freeports, it remains to be seen whether these “safe havens” will be substantially challenged.¹²⁹

As transactions have become more complex (in value, geography, or otherwise), written agreements have become more standardized. Common terms include representations and warranties, payment and delivery, responsibility for expenses and taxes, insurance, consequences of default, termination, and a host of other clauses, depending on the nature of the transaction. And, as the *Knoedler* matter teaches us, dealers and collectors will exercise more caution in commercial transactions, especially those involving unknown or remote parties.¹³⁰

Perhaps the most significant shift in market practices can be seen in the areas of antiquities and objects of cultural patrimony. The late twentieth century and early twenty-first century saw a series of lawsuits demanding repatriation of cultural objects by nations of origin. These claims asserted that the objects were stolen property because they had been taken in violation of nations’ theft laws, or were taken in violation of valid treaties. Indeed, the illicit international trade in objects of cultural property, including archeological and ethnographic objects, has largely shifted as the ethics of collecting have been examined and revised. Gone are the days of wholesale plunder of archeological sites, causing destruction of the site as well as the context and, often, the objects themselves. Galleries and collectors now largely trade in properly documented, legitimately excavated, or acquired objects. Similarly, museums have changed practices and now are bound by ethics codes that prohibit acquisition of archeological materials and ancient art without valid title, evidence of lawful export, and a full history from discovery to the present.¹³¹ These ethical codes govern not only the acquisition, but also the borrowing, displaying, and disposing of such objects. It can be expected that these claims will continue to be prosecuted, and that newly-emerging nations will press repatriation claims for indigenous cultural property or for artistic works taken improperly in times of strife.

At the same time claims were asserted for repatriation of cultural property, the latter twentieth century saw claims asserted by survivors and families of victims of the wholesale appropriation of art by the Nazis during the Holocaust-era. The

¹²⁹ *Id.*

¹³⁰ See generally *De Sole v. Knoedler Gallery*, 137 F. Supp. 3d 387, 395 (S.D.N.Y. 2015).

¹³¹ *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, ASS’N OF ART MUSEUM DIRECTORS (Jan. 29, 2013), <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf> [http://perma.cc/AZP8-GE5E].

Nazis plundered on a scale unique in modern history and the consequences of art displacement continue to be felt today. Numerous cases were decided against private collectors,¹³² museums,¹³³ and nations.¹³⁴ One matter, popularized in the 2015 movie *Woman in Gold*, follows the legal efforts of Maria Altmann to gain ownership of a collection of Gustav Klimt paintings owned by her family, looted by the Nazis in Austria during World War II, and repatriated to an Austrian museum, where they remained on display until Altmann's successful recovery.¹³⁵ Austria held the works under claim of right and Altmann successfully brought an action in U.S. courts under the Federal Sovereign Immunities Act. The parties eventually settled and the works were turned over to Altmann.¹³⁶

As Holocaust-era claims were filed against museums asserting title to works in their collections (often acquired by gift from collector donors), these museum defendants reacted swiftly to address the crisis and to right the wrongs. Museums acknowledged that holding and displaying stolen goods would be antithetical to the public trust mission of the non-profit institutions. Museums adopted guidelines for handling and resolving claims, undertook research of their collections to identify works with gaps in provenance during the "war years" (generally acknowledged to be 1933–45), resolved these gaps if possible, published such findings, and created easily-accessible online search tools to assist those with repatriation claims.¹³⁷

On the tax side, the value of art continues to climb, and it is not surprising that taxing authorities are increasingly turning their attention to art transactions. With mounting pressures each year to bring in revenue, state revenue departments are being particularly aggressive about enforcing state and local tax laws, and art is not an exception, especially in New York State, home to some of the world's most powerful and prestigious collectors and galleries. In 2016, headlines were made by New York Attorney General Eric T. Schneiderman's announcement

¹³² See, e.g., *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969).

¹³³ See, e.g., *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010); *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1064 (9th Cir. 2009).

¹³⁴ See, e.g., *Altmann v. Republic of Austria*, 317 F.3d 954, 974 (9th Cir. 2002).

¹³⁵ *WOMAN IN GOLD* (BBC Films, 2015).

¹³⁶ See generally *Arbitral Award, Altmann, et al. v. Republic of Austria (U.S. v. Austria)* (Jan. 15, 2006), https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/arbitral-award-5-klimt-paintings-maria-v-altmann-and-others-v-republic-of-austria-15-january-2004/at_download/file [<http://perma.cc/G6A2-5K2F>].

¹³⁷ *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1945)*, ASS'N OF ART MUSEUM DIRECTORS (June 4, 1998), <https://aamd.org/document/report-of-the-aamd-task-force-on-the-spoliation-of-art-during-the-nazi/world-war-ii-era>.

of three high-profile tax settlements with a leading gallery, a prominent collector, and an art sales executive.¹³⁸ The settlements surprised many in the art world due to the high-profile nature of the targets and the focus on common industry practices such as the use of fine art shippers. All three settlements are significant as a warning that New York State is watching art transactions closely and is interpreting and enforcing its tax laws in an aggressive manner.¹³⁹

Another area to watch is Section 1031 like-kind exchanges involving artwork, which has remained largely unregulated. In 2016, President Obama presented a budget proposal that would exclude art and collectibles as assets eligible for Section 1031 like-kind exchanges.¹⁴⁰ Although the proposed changes to Section 1031 did not take place, the budget proposal shows that the use of tax deferral transactions involving artwork is on the government's radar. It remains to be seen what direction the next administrations will take, if any, with respect to Section 1031 like-kind exchanges involving art.

IV. WHERE WE ARE GOING

Changing norms foreshadow many of the changes we can expect to see in the future of art law. A dominant theme in this

¹³⁸ See Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces \$4.28 Million Settlement With International Art Dealer Gagosian Gallery for Failure to Collect and Remit New York Sales Tax (July 19, 2016), <http://ag.ny.gov/press-release/ag-schneiderman-announces-428-million-settlement-international-art-dealer-gagosian> [<http://perma.cc/V49Y-7HGU>]; Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces Agreement with Art Sales Executive for Repayment of Taxes on Artwork Acquisitions (May 3, 2016), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-art-sales-executive-re-payment-taxes-artwork> (referring in the press release which announces a \$4.28 million settlement with Gagosian Gallery) [<http://perma.cc/PG48-ZZWM>]; Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces \$7 Million Settlement with Art Collector Aby J. Rosen for Failing to Pay Sales and Use Taxes on Art Acquisitions (May 3, 2016), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-7-million-settlement-art-collector-aby-j-rosen-failing-pay> [hereinafter "Press Release, \$7 Million Settlement"] [<http://perma.cc/VP8Y-WCRN>]; Jennifer Smith, *Aby Rosen Settles Tax-Evasion Inquiry for \$7 Million*, WALL ST. J. (May 3, 2016), <http://www.wsj.com/articles/aby-rosen-settles-tax-evasion-case-for-7-million-1462299474>; Kelly Crow, *Art Dealer Larry Gagosian Settles Over Sales Taxes for \$4.3 Million*, WALL ST. J. (July 19, 2016), <http://www.wsj.com/articles/art-dealer-larry-gagosian-settles-over-sales-taxes-for-4-3-million-1468976952>; see also GAGOSIAN, <http://www.gagosian.com/contact> [<http://perma.cc/BB3M-TCNF>].

¹³⁹ The tax investigations of the gallery and the collector were made under the New York False Claims Act ("FCA"), a law that was amended in 2010 to specifically include tax liability. It appears that the FCA, which has a ten-year statute of limitations, was used by the Attorney General to impose liability on alleged instances of violation of the New York tax laws on the basis of "knowingly" making a "false statement" or "knowingly" filing a "false record" on tax returns. See Press Release, \$7 Million Settlement, *supra* note 138.

¹⁴⁰ OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE U.S. GOVERNMENT 129 (2015).

narrative is that the art industry is increasingly becoming a global industry. As of 2015, the art market was a \$63.8 billion global business.¹⁴¹ Sotheby's and Christie's, the world's leading fine art auction houses and long-time competitors, have grown into multinational art businesses with salerooms in major art centers, offices, employees, and representatives in six continents.¹⁴² The presence and influence of China is increasingly felt in the art market. As of 2015, it occupied a close third place, following the United Kingdom in its share of the global art market by value, and many of its collectors are setting record prices for contemporary art at auctions and establishing themselves as market players with connections to high-profile galleries, museums, and foundations.¹⁴³ For collectors, dealers, institutions, and industry professionals, there are opportunities to transact business worldwide and year-round at global art fairs such as Art Basel in Switzerland, Miami Beach, and Hong Kong, the Armory Show in New York, and the Foire Internationale d'Art Contemporain in Paris.¹⁴⁴ The top galleries have been aggressively expanding their worldwide presence.¹⁴⁵ Museums continue to join forces with other international museums in traveling exhibitions, and are expanding by establishing international locations, most notably the Guggenheim, with museums in New York, Venice, Bilbao, Abu Dhabi, and Berlin.

The increasing globalization of art mirrors the global expansion of private wealth. Newly wealthy individuals from Asia, Russia, Latin America, and the Middle East are interested in collecting top contemporary art, living in multiple homes around the globe, and exerting influence in the art world, as demonstrated by the recent growth in private museums. More globalization of private wealth means that planning from a multi-jurisdictional perspective is essential for the globally-inclined private collector, artist, art gallery, or museum. The benefits of cross-border tax and wealth planning are clearly

¹⁴¹ See Kinsella, *supra* note 108.

¹⁴² See *Locations*, SOTHEBY'S, <http://www.sothebys.com/content/sothebys/en/inside/locations-worldwide.html/> [<http://perma.cc/GKR9-ALP4>]; *Salerooms & Offices*, CHRISTIE'S, <http://www.christies.com/locations> [<http://perma.cc/VB4K-3F6P>].

¹⁴³ See Kinsella, *supra* note 108.

¹⁴⁴ *Which International Art Fairs Have the Highest Attendance?*, ARTNEWS (Feb. 28, 2015, 9:00 AM), <http://www.artnews.com/2015/02/28/which-international-art-fairs-have-the-largest-attendance/> [<http://perma.cc/6H56-VBE6>].

¹⁴⁵ For example, at the time this Article was published, Gagosian Gallery had sixteen locations, see GAGOSIAN, <https://www.gagosian.com> [<http://perma.cc/DE2C-P3CU>], Pace Gallery had ten locations, see PACE, <http://www.pacegallery.com> [<http://perma.cc/P7MD-49SH>], David Zwirner Gallery had three locations, see DAVID ZWIRNER, www.davidzwirner.com [<http://perma.cc/Z8LF-ED4E>], and Hauser & Wirth had six locations worldwide, see HAUSERWIRTH, <http://www.hauserwirth.com/contact/> [<http://perma.cc/8TU2-RUE7>].

evident for high net-worth private collectors having potential exposure to multiple taxing regimes and wishing to preserve their wealth for future generations. These benefits also extend to art galleries with international outposts that must contend with tax issues that arise from doing business and deriving income internationally, artists who create internationally and maintain studios in multiple locations, as well as museums planning survival and expansion by cultivating international donors. The movement of players in global locations will also continue to necessitate sophisticated legal advice in legal disciplines other than tax, including immigration, cross-border commercial and contract law, import-export law, employment law, and other fields as well.

The art industry is also becoming more of an online industry. Like internet start-ups in other industries, online art auction businesses are fiercely competing for the attention of a younger generation of potential collectors who are social media savvy, appreciate efficient and convenient user-experiences, and may even prefer the anonymity of an internet transaction in some cases.

As art continues to increase in value, art transactions will increase in sophistication and complexity, with more intermediaries in the chain and more art transported across multiple jurisdictions. We may see an increase in transactions among market players joining forces in transacting together and co-investing in artwork. The increasing complexity and dollar amounts of transactions will lead to further regulatory responses and pave the way for additional developments in the law, whether through administrative channels, legislative changes, or litigation.

A fascinating aspect of the growth of the art industry is how the players' behaviors are evolving in response to market and regulatory forces. On one hand, the art industry has been strongly self-regulated. Appraisal organizations such as The Appraisal Foundation have established and are implementing the standards of professional appraisal practice, such as the Uniform Standards of Professional Appraisal Practice.¹⁴⁶ Codes of ethics have been established for the art trade, and are applicable to members of the Association of Professional Art Advisors and the Art Dealers Association of America.¹⁴⁷ Museums are regulated by codes of ethics of the International Council of Museums ("ICOM"), the Association of Art Museum Directors

¹⁴⁶ See THE APPRAISAL FOUND., 2016–2017 UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 6, 8 (2016).

¹⁴⁷ See THE ASS'N OF PROF. ART ADVISORS, <http://www.artadvisors.org/> [<http://perma.cc/6VQB-E2NG>].

(“AAMD”), and the American Alliance of Museums (“AAM”).¹⁴⁸ The Art Loss Register maintains the world’s largest database of stolen art, allowing potential buyers to perform due diligence and protect themselves against the risk of bad title.¹⁴⁹ On the other hand, industry players are increasingly wearing multiple hats and these interrelated roles can raise questions. For example, ventures such as art dealers putting on museum-quality exhibitions, collectors and art dealers co-partnering on investments, artists and auction platforms collaborating on sales, and museums collaborating with commercial sponsors can confuse the traditional roles of these discrete art fields. Navigating legal and ethical waters in these various roles will continue to present new and interesting challenges.

The field of art-specific education will continue to see growth. There are now advanced university degrees and diplomas from commercial arts institutes such as the Sotheby’s Institute of Art being offered in art business management.¹⁵⁰ Coursework includes art law, marketing and strategy, finance and accounting, valuation, collection management, art criticism, and curating. It can be expected that this professionalization of the field will yield standards and best practices in the future.

Growth will continue. It is undisputed that the internet and cheap transportation have aided the globalization of art production and engagement with art. In addition, increased political awareness could fuel numerous claims for repatriation of cultural property against museums, collectors, and market nations. This globalization of market players—creators, purchasers, suppliers, and advisors—will grow in scale and complexity. In addition to the international commercial law aspects of these market transactions, these activities will touch on international intellectual property, immigration, and other international areas of practice.

It is fitting to end this Section with “the art” itself, and it is fair to say that the nature of art is changing. Apart from the market, i.e. the trade in art, the production of art presents new dimensions and new challenges, especially with the growth of technological innovation. The twentieth century blurred the distinction between high art and popular culture, and it is likely that the art of the twenty-first century will combine, recombine,

¹⁴⁸ See *Codes of Ethics*, ASS’N OF ART MUSEUM DIRECTORS, <https://www.aamd.org/about/code-of-ethics> [<http://perma.cc/3A9S-CJA9>]; AM. ALLIANCE OF MUSEUMS, www.aam-us.org [<http://perma.cc/4GWD-WJ25>].

¹⁴⁹ See THE ART LOSS REG., <http://www.artloss.com/en> [<http://perma.cc/JC8B-B6SN>].

¹⁵⁰ See *Master’s Programs in London, New York, and Los Angeles*, SOTHEBY’S INST. OF ART, <http://www.sothebysinstitute.com/masters-programs/> [<http://perma.cc/U7LM-BEJL>].

and interconnect in new and unexpected ways. Driven by social media, art is coming to be participative, interactive, multi-disciplinary, and accretive. Engaging and entertaining large scale (and often temporary) works such as 3D illusions and light installations, or computer-generated works employing virtual reality or artificial intelligence, raise a host of legal questions—who is the author of these immersive multi-creator works?; how are these works credited?; how are they registered for copyright protection?; how are they recorded and archived?; can these works be restored and recreated? In addition, the marketplace will ask how this art can be owned, appraised, and valued.

V. CONCLUSION

Looking back, art law has made remarkable strides in providing a foundation and structure for the governing rules and norms in this fast-paced industry, one which has evolved into a multi-billion dollar global business. Still a young field, art law is changing rapidly in response to the increased scope, depth, and complexity of a global, interconnected art world. Such trends as the astronomical rise in the value of artwork, mega-galleries, increasing numbers of new entrants to the market, new technologies, and new ways of interacting with art, all point to the future of art law.

Looking forward, art law is certain to continue developing as a dynamic and exciting field that demands deep and wide expertise from its practitioners. With higher values comes more risk to financial investments in valuable art. Risk is not limited solely to financial aspects; collectors, dealers, advisors, appraisers, artists, and museums all operate in an environment which is ripe for increased regulation, new commercial disputes, and changing ethical norms. The well-rounded art lawyer will enjoy a role in the business of art and will be rewarded by helping to shape and navigate the anticipated responses to these changes.

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Legal and Ethical Considerations for Digital Recreations of Cultural Heritage

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Legal and Ethical Considerations for Digital Recreations of Cultural Heritage

*Erin L. Thompson**

When William Wright,¹ the British traveler and missionary, visited the ruins of the ancient city of Palmyra in 1874,² he brought ropes and grappling hooks³ “to enable [him] to reach those lofty resting-places of the dead, which all [his] predecessors had sighed in vain to ransack.”⁴ Nearly 150 surviving limestone tower tombs dot the site. They are elaborate constructions with slots to house up to 300 burials of family members and associates, many sealed with slabs sculpted with portraits.⁵ The most evocative represent women with almond eyes from the second and third centuries, weighed down with jewelry, and drawing aside their veils to stare straight ahead into the future.⁶

The acrobatic Wright found to his disappointment that “the highest recesses had been ransacked before [he] scaled them, and that nothing remained but a few mutilated mummies”; he consoled himself by taking a number of skulls, “choosing those that seemed most unlike each other.”⁷ A fantastically rich city, Palmyra was an oasis in what is now Syria and what was then a crucial stopping place on the caravan routes that brought silk, jade, spices, slaves, and other luxury goods from China and India through the Middle East and on to Rome.⁸ Wright was hardly the

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1 *Wright, William (1837-1899) (DNB00)*, WIKISOURCE (Sept. 18, 2011, 5:28 PM), [http://en.wikisource.org/wiki/Wright,_William_\(1837-1899\)_DNB00](http://en.wikisource.org/wiki/Wright,_William_(1837-1899)_DNB00) [<http://perma.cc/64X8-NS38>].

2 WILLIAM WRIGHT, AN ACCOUNT OF PALMYRA AND ZENOBIA WITH TRAVELS AND ADVENTURES IN BASHAN AND THE DESERT 3–4 (Thomas Nelson & Sons 2007) (1895).

3 *Id.* at 74.

4 *Id.* at 77.

5 Malcom A.R. Colledge & Pascale Linant de Bellefonds, *Palmyra*, OXFORD ART ONLINE (Feb. 23, 2011), <http://www.oxfordartonline.com/subscriber/article/grove/art/T064951> [<http://perma.cc/JXH4-DD7N>].

6 *Funerary Relief of Abuna, Daughter of Nabuna*, YALE UNIV. ART GALLERY, <http://artgallery.yale.edu/collections/objects/4535> [<http://perma.cc/BA5G-75XF>].

7 WRIGHT, *supra* note 2, at 82.

8 Cynthia Finlayson, *The Women of Palmyra—Textile Workshops and the Influence of the Silk Trade in Roman Syria*, SILK ROADS, OTHER ROADS: TEXTILE SOCIETY OF AM. 8TH BIENNIAL SYMP. 70 (2002).

first to loot the art that Palmyra's merchant class left behind, but in 2015, the site faced an even greater threat: the Islamic State ("IS").

IS gained control of the archeological site Palmyra as a result of its conquest of the neighboring modern city of Tadmur and its strategic gas fields.⁹ Previously, IS had released videos showing its fighters attacking antiquities and archeological sites with sledgehammers, earthmovers, and explosives at other major archeological sites: Nimrud, Mosul, and Hatra.¹⁰ The voiceovers of the videos claim that the destruction is motivated by piety—by a wish to “remove the symbols of polytheism and spread monotheism.”¹¹

In March 2016, Syrian governmental forces re-took Tadmur and Palmyra, but not before IS had publically executed Palmyra's retired chief of antiquities, Khaled al-Asaad, and detonated explosives in the site's Temples of Baalshamin and Baal. Built in the first and second centuries CE, respectively, the temples were some of the best-preserved structures from Roman antiquity existing anywhere in the world.¹²

IS's destruction of archeological materials was widely covered in the Western media, and was met with a flurry of projects with the goal of combatting the destruction through the use of digital technologies. Among these, the leading technological use is 3D modeling and printing, which involves using computer software to develop a mathematical representation of a three-dimensional surface of an object and then mechanically adding or subtracting layers of a substance using specialized extrusion or carving tools directed by this mathematical model.¹³ These technologies have been hailed in the press as a savior and the remedy to this destruction. It is claimed that we can use these technologies to preserve threatened sites, reconstruct destroyed ones, and

⁹ Kareem Shaheen, *Palmyra: Historic Syrian City Falls Under Control of Isis*, GUARDIAN (May 21, 2015, 2:34 PM), <http://www.theguardian.com/world/2015/may/20/syrian-city-of-palmyra-falls-under-control-of-isis> [http://perma.cc/53N8-WCL8].

¹⁰ See Kristin Romey, *Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace*, NAT'L GEOGRAPHIC (Apr. 14, 2015), <http://news.nationalgeographic.com/2015/04/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isil-archaeology/> [http://perma.cc/3LZJ-3TYX]; Graham Bowley & Robert Mackey, *Destruction of Antiquities by ISIS Militants is Denounced*, N.Y. TIMES (Feb. 27, 2015), <http://www.nytimes.com/2015/02/28/world/middleeast/destruction-of-antiquities-by-militants-is-denounced.html>.

¹¹ Romey, *supra* note 10.

¹² Hwaida Saad & Kareen Fahim, *Syrian Troops Said to Recapture Historic Palmyra From ISIS*, N.Y. TIMES (Mar. 27, 2016), http://www.nytimes.com/2016/03/28/world/middleeast/syria-palmyra.html?rref=collection%2Ftimestopic%2FSyria&action=click&contentCollection=world®ion=stream&module=stream_unit&version=latest∓contentPlacement=6&pgtype=collection.

¹³ Kate Nodjimbadem, *The Heroic Effort to Digitally Reconstruct Lost Monuments*, SMITHSONIAN MAG. (Mar. 2016), <http://www.smithsonianmag.com/history/heroic-effort-digitally-reconstruct-lost-monuments-180958098/?no-ist> [http://perma.cc/9LBD-QLV2].

disseminate knowledge of the past cheaply and easily all over the globe.¹⁴ But is it really so simple?

As Cees Hamelink, writing on the ethics of technology, has argued throughout history, “[t]he prevailing trend is to think that all possible problems can be fixed by technological means that do not require ethical reflection.”¹⁵ Through all of the outbursts of enthusiasm about the possibilities of technological solutions, only a few scholars, artists, and activists have paused to consider the potential downsides to digital reconstructions of threatened cultural heritage.¹⁶ For example, as detailed by Emma Cunliffe, these technologies involve concerns about the authenticity of the reconstructions and the prioritization of time and funding to reconstruction versus initiatives to aid more directly refugees and other conflict victims.¹⁷

This article addresses some ethical and legal aspects of another area of concern: control. So far, most of the founders and prime movers of the digital projects that focus on archeological sites in Syria and Iraq destroyed by or under threat from IS are from America or Western Europe. They have not uniformly sought input on the creation, control, or interpretation of images from local residents of the sites. As William Wright demonstrates with his casual looting of Palmyra, Western attention has not always proven beneficial for either the historical or modern residents of Middle Eastern sites. Accordingly, this article investigates the status of copyright and other intellectual property law considerations of these projects within a larger meditation on potential “digital colonialism” concerns.

Part I describes IS’s motivations for attacking cultural heritage sites. Part II covers some exemplary digital reconstruction models of cultural heritage sites destroyed by IS. Parts III and IV examine, respectively, the ethical and legal aspects of creating these digital

¹⁴ See, e.g., Katie Nodjimbadem, *The Heroic Effort to Digitally Reconstruct Lost Monuments*, SMITHSONIAN (Mar. 2006), <http://www.smithsonianmag.com/history/heroic-effort-digitally-reconstruct-lost-monuments-180958098/?no-ist> [<http://perma.cc/2RGD-CK2Y>]; Mary Karmelek, *The New Monument Men Outsmart ISIS*, NEWSWEEK (Nov. 11, 2015, 7:21 AM), <http://www.newsweek.com/2015/11/20/institute-digital-archaeology-preserves-cultural-heritage-middle-east-392732.html> [<http://perma.cc/L4EN-YWBK>].

¹⁵ CEES J. HAMELINK, *THE ETHICS OF CYBERSPACE* 6 (2000).

¹⁶ *Tangible Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/> (defining “Cultural Heritage” as “the legacy of physical artifacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations”) [<http://perma.cc/Q56A-6RNW>].

¹⁷ Emma Cunliffe, *Should We 3D Print a New Palmyra?*, CONVERSATION (Mar. 31, 2016, 8:07 AM), <https://theconversation.com/should-we-3d-print-a-new-palmyra-57014> [<http://perma.cc/SBN6-PMUU>].

models. I conclude by offering some best practices for creators of digital models who wish to avoid potential ethical pitfalls.

I. THE ISLAMIC STATE'S MOTIVATIONS FOR DESTROYING CULTURAL HERITAGE

Destruction of cultural heritage is not IS' only goal. Reports from inside IS-controlled territory are fragmentary, but archeologists analyzing satellite photographs are seeing pits dug by looters spread across the thousands of archeological sites in Iraq and Syria.¹⁸ IS is not the first to loot, but it has sped the pace of the looting by encouraging professional looters with heavy machinery and archeological knowledge to dig archeological sites in return for payment to IS of a 20% "tax" on the value of what they find.¹⁹

According to Amr Al-Azm, a professor of anthropology and Middle Eastern history at Shawnee State University, who has been collecting reports from inside Syria, IS even has jihadist bureaucrats charged with issuing official-looking permits allotting sites to approved looters, appraising their finds, and connecting sellers to foreign dealers who take possession of the artifacts at the Turkish border.²⁰ From there, the material goes underground. Turkish and Lebanese authorities have announced the seizure of a few hundred objects, but we can only guess where the rest are going.²¹

The potential rewards for those dealing in antiquities are high: in 2007, an ancient Near Eastern statuette of a lioness, barely three inches high, sold for \$57.2 million (although part of this price was due to the work's documented provenance).²² Usually, the looters at the beginning of the chain that brings an antiquity from the ground to a place of pride in a collection earn

¹⁸ See *Imagery of Archaeological Site Looting*, BUREAU OF EDUC. & CULT. AFF., <http://eca.state.gov/cultural-heritage-center/syria-cultural-heritage-initiative/imageryarchaeological-site-looting> [<http://perma.cc/3FNS-3XP2>].

¹⁹ *Dangerous "Uphill Battle" to Save Syria's History*, CBS NEWS (Mar. 20, 2015, 7:01 AM), <http://www.cbsnews.com/news/syria-antiquities-looted-destroyed-war-isis-modern-monuments-men/> [hereinafter *Uphill Battle*] [<http://perma.cc/4888-BJYS>]; Amr Al-Azm, Salam Al-Kuntar & Brian I. Daniels, *ISIS' Antiquities Sideline*, N.Y. TIMES (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?_r=0.

²⁰ *Uphill Battle*, *supra* note 19; Al-Azm, Al-Kuntar & Daniels, *supra* note 19.

²¹ See Samar Kadi, *Narrowing Markets for Illicit Trade of Syrian Antiquities*, DAILY STAR (Mar. 14, 2015, 12:20 AM), <http://www.dailystar.com.lb/News/Lebanon-News/2015/Mar-14/290754-narrowing-markets-for-illicit-trade-of-syrian-antiquities.ashx> (seizures in Lebanon); Franklin Lamb, *Looting is the Greatest Threat to Our Cultural Heritage*, FOREIGN POL'Y J. (Dec. 29, 2014), <http://www.foreignpolicyjournal.com/2014/12/29/looting-is-the-greatest-threat-to-our-cultural-heritage-in-syria/> (discussing seizures in Turkey) [<http://perma.cc/F5RN-E83W>].

²² *The Guennol Lioness Sells for \$57.2 Million*, ARTDAILY.ORG, <http://artdaily.com/news/22531/The-Guennol-Lioness-Sells-For--57-2-Million#.VVYfdfViko> [<http://perma.cc/L3ME-LPUR>].

only one or two percent of the final sales price of the object; the chain of middlemen who smuggle the work from country to country collect increasingly high prices, since the expertise necessary to clear customs is higher than that needed to wield a shovel.²³ IS, by contrast, can collect its 20% because it has created a monopoly in looting. Like the Mafia, IS profits by collecting revenues from other criminals; these criminals pay up because the larger organization efficiently divides up the territory where each smaller player can operate, limiting costly competition so as to maximize the surplus that is available to be skimmed.²⁴

One of the most problematic aspects of the trade in looted antiquities is that we can never be sure what was taken. A looting pit might mean that the looters emptied a well-stocked ancient tomb, or it might mean that they went home empty-handed after a long day in the sun.

IS profits from looting, but its destruction of cultural property is a key piece of its overall strategy. IS has demolished far more Islamic than ancient heritage: only 4% of the known destroyed sites are ancient, while more than half are Shia mosques and shrines.²⁵ IS enacts this destruction with a macabre sense of the theatrical. For example, in June 2014, IS fighters drove through the streets of two adjacent farming villages of Guba and Shireekhan, outside of Mosul, ordering all of the 950 Shia families to leave.²⁶ They then kidnapped about forty Shia men, but it was not until the fighters raised IS's black flag above a Shia shrine and three Shia mosques in the villages, filling them with explosives and demolishing them, that all of the remaining Shia residents fled.²⁷

Destroying Islamic cultural property serves IS's purposes by causing Shia residents to flee, but why is demolishing

²³ *Iraq/Syria: ISIL/ISI Fundraising by Antiquities Trafficking*, CONFLICT ANTIQUITIES (June 16, 2014, 7:00 PM), <https://conflictantiquities.wordpress.com/2014/06/16/iraq-syria-isil-isis-antiquities-trafficking-fundraising/> [<http://perma.cc/E2EH-6Y7E>]; NEIL BRODIE, JENNY DOOLE, & PETER WATSON, *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 13 (The McDonald Inst. For Archaeology Res. 2000), http://www2.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf [<http://perma.cc/9E2E-QDJS>]; Neil Brodie, *Pity the Poor Middleman*, 3 THE ILLICIT ANTIQUITIES RES. CENTRE 7, 8 (1998), <http://traffickingculture.org/wp-content/uploads/2012/07/CWC-3.pdf> [<http://perma.cc/87P7-5DE4>].

²⁴ I am indebted to Philip J. Cook (Duke University) for these economic insights.

²⁵ Christopher Jones, *Heritage in Peril: Iraq and Syria* (Metropolitan Museum of Art, September 22), GATES OF NINEVEH (Sept. 23, 2014), <https://gatesofnineveh.wordpress.com/2014/09/23/heritage-in-peril-iraq-and-syria-metropolitan-museum-of-art-september-22/> [<http://perma.cc/A6AW-95F3>].

²⁶ *Iraq: ISIS Kidnaps Shia Turkmen, Destroys Shrines*, HUM. RTS. WATCH (June 27, 2014, 11:45 PM), <http://www.hrw.org/news/2014/06/27/iraq-isis-kidnaps-shia-turkmen-destroys-shrines> [<http://perma.cc/7JV2-DQTK>].

²⁷ *Id.*

archeological sites? In part, it is because IS is destroying what it cannot sell. The sculptures pulverized in the videos are too large to transport easily and too recognizable to find a willing buyer.²⁸ But the destruction also operates as another reminder to Shia, Yazidi, Christian, and other populations that IS considers heretical—that no alternatives to IS's views, even those long dead, will be permitted. Ancient Palmyrans worshipped many deities from many traditions, including Greek, Roman, Persian, and pre-Islamic.²⁹ It was a city composed of many ethnicities and religions whose citizens were tolerant of diversity. IS seeks to sweep away such tolerance in favor of its dark and singular vision of the world.

II. THE DIGITAL INITIATIVES AIMED AT COMBATTING THE ISLAMIC STATE'S DESTRUCTION

The projects that currently seek to apply digital technologies to threatened cultural heritage fall into several different types.³⁰ Some focus on enabling the collection and storage of new images of threatened sites, for example by distributing digital cameras equipped with the ability to automatically upload high-quality images to archival servers, while other initiatives work with existing 2D images, combining them in order to

²⁸ Paul D. Skinkman, *ISIS' Destruction of Antiques at Mosul, Nimrud Hides Sinister Moneymaking Scheme*, U.S. NEWS & WORLD REP. (Mar. 9, 2015, 2:29 PM), <http://www.usnews.com/news/articles/2015/03/09/isis-destruction-of-antiques-at-mosul-nimrud-hides-sinister-moneymaking-scheme> [http://perma.cc/XGF3-BMHX].

²⁹ *Palmyra*, OXFORD ART ONLINE, http://www.oxfordartonline.com/subscriber/article/grove/art/T064951?q=palmyra&search=quick&pos=1&_start=1#firsthit [http://perma.cc/6JSQ-WYTL].

³⁰ For background on the role of digital technology within the study of cultural heritage sites, see DIGITAL HERITAGE: APPLYING DIGITAL IMAGING TO CULTURAL HERITAGE 549–74 (Lindsay MacDonald ed., 2008). See generally DIGITAL ARCHAEOLOGY: BRIDGING METHOD AND THEORY (Thomas L. Evans & Patrick Daly eds., 2005); Mark Gillings, *The Real, the Virtually Real, and the Hyperreal: The Role of VR in Archaeology*, in ENVISIONING THE PAST: ARCHAEOLOGY AND THE IMAGE (Sam Smiles & Stephanie Moser eds., 2008); Colleen L. Morgan, *(Re)Building Catalhöyük: Changing Virtual Reality in Archaeology*, 5 ARCHAEOLOGIES 468; Donald H. Sanders, *The Present and Future of Virtual Heritage*, in HOW DO WE WANT THE PAST TO BE? ON METHODS AND INSTRUMENTS OF VISUALIZING THE ANCIENT REALITY (M.G. Micale & D. Nadali, eds., 2007); Juan Antonio Barcelo, *Automatic Archaeology: Bridging the Gap Between Virtual Reality, Artificial Intelligence and Archaeology*, in THEORIZING DIGITAL CULTURAL HERITAGE: A CRITICAL DISCOURSE (Fiona Cameron & Sarah Kenderdine eds., 2007). For further thoughts on the intersection of ethics and digital cultural heritage in other spheres, see Deidre Brown, *Te Ahu Hiko: Digital Cultural Heritage and Indigenous Objects, People and Environments*, in THEORIZING DIGITAL CULTURAL HERITAGE: A CRITICAL DISCOURSE (Fiona Cameron & Sarah Kenderdine eds., 2007); Sarah Colley, *Ethics and Digital Heritage*, in THE ETHICS OF CULTURAL HERITAGE (Tracy Ireland & John Schofield eds., 2015); Kathy Bowry & Jane Anderson, *The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?*, 18 SOC. & LEGAL STUD. 479 (2009).

create digital models whose detail and quality surpass the individual existing images.³¹

Whether the initiatives work with existing or new images, and regardless of whether they are concerned with threatened or already-destroyed artifacts, they so far have in common the fact that their main “products” are 3D digital models. These models can exist more or less in isolation, as files which allow viewers to examine an object or site virtually, or can be embedded within elaborate presentations that also include supplemental information in the form of text, audio, and reconstructions of vanished elements such as pigmentation, wooden elements, and occupants. These models can even be combined with 3D printing technology to allow the creation of physical recreations, from scale models to life-sized replicas “printed” in concrete.

Three different projects will, in this article, serve as examples for the rest: Rekrei, the Million Image Database, and the “Material Speculation: ISIS” project of the artist Morehshin Allahyari.

Rekrei describes itself as “a crowdsourced project to collect photographs of monuments, museums, and artefacts damaged by natural disasters or human intervention, and to use those data to create 3D representations and help to preserve our global, shared, human heritage.”³² The project, which uses photogrammetric techniques to create 3D digital models, was founded by Matthew Vincent and Chance Coughenour, two Europe-based researchers, as a way of focusing the efforts of those who wanted to volunteer to use their technical skills to do something in the wake of IS destruction. Essentially, the project collects 3D digital models created by users in the Sketchfab platform, which are then displayed at Rekrei.org. These models usually capture a single artifact or element of a site by digitally “stitching” together 2D images.

While Rekrei brings together users with their own interests, the Million Image Database is a project with a much more centralized direction. The Database is the product of the Institute of Digital Archaeology, itself a joint project of Oxford, Harvard,

³¹ Besides the projects discussed below, see e.g., CYARK, <http://www.cyark.org/> [<http://perma.cc/8UMA-E275>]; TREASURE CARETAKER TRAINING, <http://treasurecaretaker.com/> (coordinating the Digital Monastery Project) [<http://perma.cc/8E5S-WGYW>]; #NEWPALMYRA, <http://www.newpalmyra.org/> (focusing on digital archaeology, cultural development, and open data) [<http://perma.cc/JC9D-AUN2>]; ACT, <http://act.mit.edu/projects-and-events/events/projects/memory-matrix/> (working on the Memory Matrix Project) [<http://perma.cc/MB5C-8QGB>]; Palmyra 3D Model (@Palmyra3Dmodel), FACEBOOK, <https://www.facebook.com/Palmyra3Dmodel/> (last visited Dec. 20, 2016).

³² *Rekrei: A Summary*, REKREI, <https://rekrei.org/about> [<http://perma.cc/7XAS-PU44>].

and the Museum of the Future in Dubai.³³ This project has designed and is distributing low-cost, easy-to-use 3D cameras—nearly 1000 already, with plans to reach a total of 5000 in 2016—to volunteer activists in conflict zones in Syria, Iraq, Yemen, Afghanistan, Turkey, Jordan, and Egypt. These cameras can record stereoscopic images, capturing detail measured in centimeters. The camera then automatically uploads the images to the project’s website. All the technology and software is open-source, to allow others to replicate the project. The Institute says that these images “will be used for research, heritage appreciation, educational programs and 3D replication—including full-scale 3D replication using proprietary cement-based 3D printing techniques.”³⁴ Their goal in doing so is to “ensur[e] that the visual reminders that keep that history alive remain a part of the human experience.”³⁵

The first full-scale replication already occurred; the Institute created a 3D digital model of an ancient Roman triumphal arch destroyed by IS in Palmyra, working from photographs taken by archaeologists and tourists before the occupation. A scale replica (twenty feet tall instead of fifty feet) of the arch as it existed shortly before its destruction was then carved in marble by robots working from the digital model, and the arch was installed in Trafalgar Square, London in April 2016, with plans to travel to other locations.³⁶

The artist Morehshin Allahyari is one of the most vocal critics of digital replication projects that produce physical objects. She has said that the arch in London is a simplistic gesture since “[t]his is about histories, [and] about institutional relationships. We have to talk about power structures—how it’s different when westerners or tech companies save cultural things compared to someone else who actually comes from the culture.”³⁷ Allahyari’s own project, “Material Speculation: ISIS,” also digitally fabricates and produces 3D printing models of selected archeological artifacts destroyed by IS in 2015, in order to inspect

³³ *Imaging Projects*, INST. FOR DIGITAL TECH., <http://digitalarchaeology.org.uk/projects/> [<http://perma.cc/AR2D-SNSN>].

³⁴ *Id.*

³⁵ *Id.*

³⁶ Christopher D. Shea, *Palmyra Arch Replica Is Unveiled in Trafalgar Square in London*, N.Y. TIMES (Apr. 19, 2016), <http://www.nytimes.com/2016/04/20/arts/international/replica-of-palmyra-arch-is-unveiled-in-trafalgar-square.html>; Claire Voon, *What’s the Value of Recreating the Palmyra Arch with Digital Technology*, HYPERALLERGIC (Apr. 19, 2016), <http://hyperallergic.com/292006/whats-the-value-of-recreating-the-palmyra-arch-with-digital-technology/> [<http://perma.cc/7DZS-HX9A>].

³⁷ Voon, *supra* note 36.

“Petropolitical and poetic relationships between 3D [p]rinting, [p]lastic, [o]il, [t]echnocapitalism and [j]ihad.”³⁸

Allahyari’s multi-step project first created digital models of the artifacts. This modeling was not a matter of automatically combining 2D photographs since most of the objects, like the sculpture of King Uthal, excavated in the city of Hatra and housed in the Mosul Museum when destroyed by IS, were not the subject of repeated photography from multiple angles.³⁹ Instead, Allahyari, working from relatively few and low quality images, created digital models with elements of reconstruction where details were not available. Then, Allahyari printed 3D objects from her digital models. However, these printed objects, made in a clear resin and at a much-reduced scale, are clearly different than the destroyed originals. The physical objects also include a flash drive and a memory card inserted within them, holding information in the form of images, maps, PDF files, and videos gathered by Allahyari from multiple sources in multiple languages, including English, Farsi, and Arabic. Allahyari contacted staff from the Mosul Museum itself as well as other archeologists and historians in Iraq, Iran, and America.

The final step of Allahyari’s project is to disseminate the files for her reconstructions. In February 2016, she made available free downloads of the files allowing anyone to 3D print her King Uthal object, along with the associated research, and she plans to do the same for all objects in the project in the future.⁴⁰

III. ETHICAL CONSIDERATIONS FOR DIGITAL RECONSTRUCTIONS OF CULTURAL HERITAGE

There are a range of ethical questions associated with the use of digital technology in the cultural heritage sphere, including the political uses of representation and interpretation of cultural heritage; the accessibility or lack thereof of digital representations; the violence to the “authentic” or “real” that the virtual might inflict; the correct approach to data transparency

³⁸ Morehshin Allahyari, *Material Speculation: ISIS (2015–2016)*, MOREHSHIN ALLAHYARI, <http://www.morehshin.com/material-speculation-isis/> [<http://perma.cc/W6P8-XZZG>]; see also Alexis Anais Avedisian & Anna Khachiyani, *On Material Speculation*, http://www.morehshin.com/wp-content/uploads/2016/03/morehshin_allahyari-material_speculation_isis_brochure-1.pdf [<http://perma.cc/SQV8-TKEC>].

³⁹ Christopher Jones, *Assessing the Damage at the Mosul Museum, Part 2: The Sculptures from Hatra*, GATES OF NINEVEH (Mar. 3, 2015), <https://gatesofnineveh.wordpress.com/2015/03/03/assessing-the-damage-at-the-mosul-museum-part-2-the-sculptures-from-hatra/> [<http://perma.cc/T9WJ-DFJY>].

⁴⁰ Paul Soulellis, *The Distributed Monument: New Work from Morehshin Allahyari’s ‘Material Speculation’ Series*, RHIZOME BLOG (Feb. 16, 2016), <http://rhizome.org/editorial/2016/feb/16/morehshin-allahyari/> [<http://perma.cc/6PLB-NE7Y>].

and sharing; and the ease both of manipulation and surreptitious capture of digital images.⁴¹ These inquiries also address ethical questions first formatted about traditional photography, such as the responsibility the maker of and the audience for the image bears to its subject, especially when this subject is shown suffering harm.

A. Embedded Assumptions and Arguments in Past Images of Cultural Sites

Even what would seem to be a simple act—that of merely creating images of cultural heritage sites, such as those made by Rekrei, the Million Image Database, and Allahyari—can be ethically problematic, due to a long history of the use of images by those seeking to create or advance political claims on the pictured territory. Here, I would like to examine at some length one sample image of Palmyra in order to demonstrate how closely and deeply ethical concerns can be integrated into what seem, at first glance, like simple images: Gavin Hamilton’s 1758 painting “James Dawkins and Robert Wood Discovering the Ruins of Palmyra.”⁴²

At first, the observer is uncertain where the man in the center of this painting is pointing. His hand has drifted up out of the heavy folds of an awkward toga, which seems to threaten to fall off at any moment, and could be gesturing towards the foreshortened rear of a horse, which fills the foreground to the left. But then one finally sees, in the far background, the object of his attention: an avenue of ancient columns leading toward an arch, through which shines the setting sun. The man’s companion, also smothered in a sagging toga, looks at the ruins and raises his hand in a gesture of surprise and approbation, at the same time raising the heel of his boot, eager to reach the end of his journey.

This is how Gavin Hamilton represented Dawkins and Wood “Discovering the Ruins of Palmyra,” painting them seven years after their expedition to the ancient city in what is now Syria and a year after Dawkins’s death.⁴³ His brother commissioned the painting in commemoration.⁴⁴ Dawkins was the Oxford-educated son of a wealthy English family who had made its fortune as

⁴¹ For a survey of these and other concerns, see *THEORIZING DIGITAL CULTURAL HERITAGE: A CRITICAL DISCOURSE* 437–55 (Fiona Cameron & Sarah Kenderdine eds., 2007).

⁴² See generally Claire Pace, *Gavin Hamilton’s Wood & Dawkins Discovering Palmyra: The Dilettante as Hero*, 4 *ART HIST.* 271 (1981) (discussing the impact of Gavin Hamilton’s work on neoclassicism).

⁴³ *Id.*

⁴⁴ *Id.*

planters in the West Indies.⁴⁵ He financed the trip to Palmyra, Baalbek, and other classical sites along the Mediterranean and in the Middle East, and hired an Italian draughtsman to accompany him and make drawings of the sites.⁴⁶ Wood eventually published an account of the journey, *The Ruins of Palmyra* (1753), which became very popular in England, less for its short text than for its fifty-seven large, skillful illustrations, ranging from details of carvings to panoramic views of the site, which were the first influential images of Palmyra to reach Europe.⁴⁷

The painter, Hamilton, had never visited Palmyra; at the time of the commission, he was an Englishman resident in Rome, where he made a living less from painting than from excavating and selling Roman antiquities to visiting Grand Tourists.⁴⁸ He probably based his depiction of Palmyra on plate no. 20 from the *Ruins of Palmyra*, meaning that the painting shows Dawkins and Woods “discovering” an image that they themselves had been responsible for creating.

It is important to analyze what the painting leaves out. For one, we do not see modern Western clothing. Dawkins and Wood, 18th century Englishmen, are clothed in Roman togas and boots, with Roman hairstyles, as if they were aristocratic inhabitants of the very city whose ruins they are encountering at the peak of its prosperity, in the second century C.E. Hamilton further underscores their claim to an identity with ancient culture by having them make gestures based on those seen in ancient Roman art and showing them in strict profile view, as was the rule for aristocratic figures in ancient Roman friezes and coins.⁴⁹

Besides Dawkins and Wood, there are five other figures in the painting. Four have their attention turned away from the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The ensuing popularity of Palmyra means that long before the Million Image Database project resulting in the Palmyrene arch in Trafalgar Square, Palmyra travelled to London. A view of Palmyra, based on *The Ruins of Palmyra*, was included among the decorations at the popular pleasure grounds at Vauxhall: “[T]riumphal arches leading to a large and fine painting of Palmyra which has deceived many strangers and induced them at first sight to imagine they see a real pile of ruins at some distance,” as described by one visitor in 1762. See EDWARD CROFT-MURRAY, *Decorative Painting in England, 1537–1837: The Eighteenth and Early Nineteenth Centuries v.2* (1971); see also Pace, *supra* note 42. For more on the way that current virtual reality presentations of cultural heritage connects to a long history of panoramic viewing technologies, from the Lascaux Caves on, see Sarah Kenderdine, *Speaking in Rama: Panoramic Vision in Cultural Heritage Visualization*, in *THEORIZING DIGITAL CULTURAL HERITAGE: A CRITICAL DISCOURSE* (Fiona Cameron & Sarah Kenderdine eds., 2007).

⁴⁸ Pace, *supra* note 42.

⁴⁹ See Richard Brilliant, *GESTURE AND RANK IN ROMAN ART: THE USE OF GESTURES TO DENOTE STATUS IN ROMAN SCULPTURE AND COINAGE* (New Haven: Connecticut Academy, 1963).

ruins: a guard glowers down at the explorers, a guide consults a scrap of paper, and one man pulls on the bridle of a horse to tug it out of the way of an oncoming camel, whose rider is absorbed in controlling his beast. Only the rider of the horse on the left might be looking at Palmyra, but his back is to us and his body twisted into a Michelangelo-like posture that might also leave him looking away from the ruins, in the direction his horse's head points.⁵⁰

Presumably these figures are intended to represent local residents of the area, hired to guide Dawkins and Wood to Palmyra, and yet Hamilton shows them as completely disinterested in the site, almost purposefully ignoring it in the moment it first appears. By contrast to Dawkins and Wood's classical appearance, the other figures are almost aggressively non-ancient, with their modern clothing emphasized through Hamilton's choice of rich and insistent blues, greens, and reds. The figures have a range of skin tones and physiognomies, with Hamilton attempting to portray the different racial identities of groups living in the area, but all five wear turbans, signaling their Islamic faith. Nothing about Dawkins or Wood comparably signals their religion.

The view of Palmyra that Hamilton chose to include also leaves out important information about the site. In the painting, Palmyra looks miraculously intact. The travellers have paused in the shade of a substantial, seemingly flawless structure—one of the tower tombs that once lined the road into the city. The columns and arches the explorers point to in the distance also seem unbroken, with just a few toppled columns to assure the viewer that, after all, this is an ancient town. In reality, then as now, the vast majority of the city was reduced to true ruins, with chunks of anonymous stone scattered over a landscape in which just a few columns and buildings still stood, in heavily damaged states.

Also importantly, the painting gives no hint that the site, far from being one that required any sort of discovery, was inhabited when Dawkins and Wood arrived, and indeed had been continuously inhabited since at least the Bronze Age.⁵¹ The oasis settlement had been known as Tadmur before the Romans conquered it and renamed it Palmyra, after the site's characteristic trees (palm trees feature prominently in Hamilton's painting, to give the educated viewer a hint as to what site they were looking

⁵⁰ On the "figura serpentinata" of Michelangelo and the Mannerists, see generally John Shearman, *MANNERISM (STYLE AND CIVILIZATION)* (Penguin Books, 1991).

⁵¹ See generally IAIN BROWNING, *PALMYRA* (1979); JEAN STARCKY & MICHEL GAWLIKOWSKI, *PALMYRE* (1985).

at). Palmyra's wealth diminished after the third century C.E., after a rebellion against the Romans, led by the famed Queen Zenobia, and then with the general decline of the luxury trade on which it depended that accompanied the fall of the Roman empire.⁵² But scattered reports through the centuries always show it as a settlement still. In 1691, an English traveller—the first European visitor in the modern age—described Palmyra's population as a “poor miserable dirty people” living in “little huts made of dirt” within the enclosure walls of the sanctuary of Bel, saying that never before had he seen such a mixture of “the greatest state and magnificence together with the extremity of filth & poverty.”⁵³

The villagers, a handful of families, continued to live in the shadow of the Temple of Bel until 1929, when a French archeological expedition cleared the ruins of Palmyra and moved its inhabitants to a new, adjoining town, named Tadmur after the ancient settlement, meaning that the parents of some living Syrians were born within the temple IS destroyed.⁵⁴

Despite the fact that Dawkins and Wood travelled thousands of miles to reach Palmyra and spent only fifteen days there, Hamilton's painting claims that they are more a part of its culture than the local inhabitants of the region. The logic of the image makes a claim that these locals may spend more time in Palmyra's proximity, but that they are separated from its truth by their religion, their modernity, and, above all, by their indifference to its splendors.

B. Embedded Assumptions and Arguments in Digital Models of Cultural Sites

It is easier to see how assumptions about knowledge, identity, and culture impact representations of historical sites in images like Hamilton's painting, where these assumptions are writ so large as to become caricatures of themselves—two Englishmen trundling around in togas, “discovering” an inhabited city by following a guide who already knows where it is. But this eighteenth century painting is easy to analyze precisely

⁵² See generally WARWICK BALL, *ROME IN THE EAST: THE TRANSFORMATION OF AN EMPIRE* (Psychology Press, 2001); Javier Teixidor, “Palmyra in the Third Century,” in *A JOURNEY TO PALMYRA: COLLECTED ESSAYS TO REMEMBER DELBERT R. HILLERS* (Brill, 2005).

⁵³ William Halifax, *A Relation of a Voyage from Aleppo to Palmyra in Syria*, 19 *PHIL. TRANS. OF THE ROYAL SOC'Y IN LONDON* 83, 86 (1695), <http://rstl.royalsocietypublishing.org/content/19/215-235/83.full.pdf+html> [<http://perma.cc/M4EN-JGRZ>].

⁵⁴ See STARCKY & GAWLIKOWSKI, *supra* note 51; see also Kanishk Tharoor & Maryam Maruf, *Museum of Lost Objects: The Temple of Bell* (Mar. 1, 2016), *BBC NEWS*, <http://www.bbc.com/news/magazine-35688943> [<http://perma.cc/R9AR-SMQB>].

because it is so removed from us. It is much more difficult to see the assumptions that underpin our own representations of the past.

One reason that it is so difficult for us to analyze the images we create of Palmyra and other such sites now is our widespread belief that photography is less susceptible to manipulation than are older techniques of image-capture like drawing or painting. But photographs, even if not internally manipulated through what is now a myriad of technologies, can give a false impression as well, simply because of what the photographer includes or leaves out of the frame. If you are acquainted with the Pyramids only through photography, for example, you might think that they rise in isolated splendor in uninhabited deserts. This, at least, is the impression that most photographers seek to include by choosing angles that do not also capture the shops and houses of the surrounding city of Giza, which squeeze as tightly as permitted into the non-heritage space.

So, what do the current spate of digital models of Middle Eastern sites leave out? And what assumptions about sites, visitors, and locals do they embed? I will examine four categories of absence in these models: human figures, alternate interpretations, time, and certain sites.

1. Absence of Human Figures in Digital Models

All three of the exemplary reconstruction projects described in this article are images of artifacts that do not include representations of people, whether ancient or contemporary. This humanless status is characteristic of many digital models of cultural heritage. One exception, a digital video that takes the viewer through a virtually reconstructed Northwest Palace of King Ashurnasirpal II at Nimrud (near modern Mosul in northern Iraq) as it would have appeared during his reign in the ninth century B.C., displayed in the “Assyria to Iberia at the Dawn of the Classical Age” exhibit at the Metropolitan Museum (September 22, 2014–January 4, 2015), helps explain why this is so.⁵⁵

This video begins with the “camera” swooping in from an aerial view that encompasses the whole city of Nimrud—but its streets are deserted, giving the impression that the city is already deserted. Gradually, we reach the palace itself, and here there are occupants. We see twenty-five figures in various courtyards and rooms: guards, attendants, and even Ashurnasirpal himself. But they are curiously indistinct and generalized. They

⁵⁵ *Digital Reconstruction of the Northwest Palace, Nimrud, Assyria*, THE MET (Sept. 18, 2014), <http://www.metmuseum.org/metmedia/video/collections/ancient-near-eastern-art/northwest-palace-nimrud> [<http://perma.cc/PJY4-NEN8>].

wear identical clothing, move with identical motions, and would seem to have identical faces, except the viewer never gets close enough to inspect them. And they are all men in the prime of life—none of the women or children or the aged who would have also inhabited the palace.

Why this restricted range of appearance? For the same reason that most digital reconstructions are simply unpeopled: expense.⁵⁶ We have the technology to create detailed, realistic digital worlds filled with individualized characters, as is shown in numerous contemporary video games and films. But the costs of the technology and labor to design and animate this type of motion are staggering—a company might employ hundreds of artists and spend millions of dollars to bring a major video game, such as the *Grand Theft Auto* series, to market.⁵⁷

Heritage projects are unlikely to ever spend more than a fraction of this type of budget. Until technological development proves vastly more efficient in automating animation of the human figure (something which, thanks to the sophistication of the brain in perceiving cues about what is human and what is not, is extremely difficult without falling into the uncanny valley),⁵⁸ we will generally see deserted reconstructions, or those with only a few figures, leaving us to imagine the rest.

The problem here is that we are not very good at imagining people we do not see. The empty spaces of digital reconstructions can appear ready for conquest in the same way, for example, that early European settlers imagined the landscape of America to be empty. Paintings, drawings, and later photographs showed vast stretches of land without any evidence of human inhabitants. The artists aiming their attention away from Native Americans and their settlements helped elide their existence and claims to the land. Similarly, the emptiness of digital reconstructions leave the viewer free to claim those spaces for his or her own interpretation and identification.

2. Absence of Alternate Interpretations in Digital Models

Another way in which expense factors into ethical concerns about digital recreations is in the choice of information included

⁵⁶ For suggestions on how to use game-based technologies to increase user engagement in virtual heritage spaces and decrease their feeling of dehumanization, see Bernadette Flynn, *The Morphology of Space in Virtual Heritage*, in *THEORIZING DIGITAL CULTURAL HERITAGE: A CRITICAL DISCOURSE* (Fiona Cameron & Sarah Kenderdine eds., 2007).

⁵⁷ T.C., *Why Video Games Are So Expensive to Develop*, *THE ECONOMIST* (Sept. 24, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/09/economist-explains-15> [<http://perma.cc/Y3K9-5C3Z>].

⁵⁸ Marcus Cheetham, Pascal Suter, & Lutz Jancke, *The Human Likeness Dimension of the "Uncanny Valley Hypothesis": Behavioral and Functional MRI Findings*. 5 *FRONT HUM. NEUROSCI.* 126 (2011).

in the recreation. In the Northwest Palace reconstruction video, for example, viewers have no choice about what they see—they must follow the pre-determined path of the “camera” through the landscape.

Technology does offer other, more user-directed alternatives. The same company that created the Northwest Palace video, Learning Sites, Inc., is also working on a larger project to recreate the same site in a virtual reality presentation, where viewers don headsets that simulate three-dimensional vision and allow them to choose which areas to focus on by moving their heads. But the expense of building a virtual world means that the user’s choices are still limited—the experience is still heavily determined by the designer’s vision of this world. It is more that the user can chose to ignore some content, but cannot so easily envision an alternative interpretation.

Ideally, as some have argued, “[t]he past should be fully viewable and up to the viewer and the viewer alone to choose which pieces of it they [wish] to interpret as they encounter an augmented cultural heritage site in the field or the museum.”⁵⁹ But this ideal state is impossible to reach (a digital recreation of the “full” past would have to include the entire world, which would be beyond the capacity for a user to experience) or even, really, to approach, given the budget constraints for heritage projects.

3. Absence of Time in Digital Models

Most of the current digital recreations have another type of absence: that of time. While it is possible to allow the viewer to access different images of the same site or monument at different moments in its history, most current digital projects display, at most, the artifact as it exists now and the artifact as the creator of the digital model imagines that it existed when it was first created. This selective choice of time—again, in part, a product of the expense of creating more views of the object through time—leaves out information about the way the object has passed through time and the meanings accreted onto it.

This prioritization of a favored moment is nothing new, of course. Both archeology and the physical restoration of cultural heritage sites frequently involve the actual destruction of the evidence of certain time periods in the process of discovering or preserving other time periods of greater interest to the excavator or restorer. For example, the Athenian Acropolis has been

⁵⁹ Falko Kuester et al., *Digital Archaeological Landscapes & Replicated Artifacts: Questions of Analytical & Phenomenological Authenticity & Ethical Policies in CyberArchaeology*, in DIGITAL HERITAGE INT’L CONG. (2013).

cleared of all physical signs of its post-Antique occupation, including the remains of the Christian church and Islamic mosque which once, in turn, stood within the ruins of the Parthenon.

4. Absence of Certain Sites in Digital Models

In one of the few articles to examine at length the ethical issues raised when a wealthy country offers to digitize cultural materials (here, the contents of an archive) from a poorer country, Peter Johan Lor & J.J. Britz ask:

[W]hen materials for developing countries are digitized, are the interests of the holding institution and country taken into account, or is the wealthier party “cherry-picking”. . . Who selects the material? Is it primarily material that holds a special interest for the library in the developing country? Does it reflect a European or an American world-view?⁶⁰

These questions must also be asked about the current race to digitize cultural monuments in Syria and Iraq. These projects overwhelmingly focus on pre-Islamic heritage: sites like Palmyra or Nimrud that were created by Romans or the empires of the Ancient Near East. In reality, only a small percentage of the cultural sites destroyed by IS are this ancient. Most of the sites they target are shrines, mosques, churches, cemeteries, and other sacred sites important to Christian, Yazidi, and branches of Islam that IS finds heretical. Unsurprisingly, projects by Syrians and Iraqis to commemorate destroyed heritage include not only ancient sites, but also these more recent monuments, important to living faiths.

Given economic constraints and the many other pressing worries of those who remain in the conflict areas and those who have left, it is not surprising that there are few such initiatives. Those that do exist are inspiring. For example, a number of Syrian artists in the Za’atari refugee camp in Jordan are recreating damaged, destroyed, or unreachable cultural sites using the few materials available to them, which could have included wood, clay, or rocks.⁶¹ One of the most careful of the resulting scale models is that of the Umayyad Mosque of Damascus, considered to be one of the holiest sites of Islam and heavily damaged during the current conflict.⁶² But the Za’atari

⁶⁰ Peter Johan Lor & J.J. Britz, *An Ethical Perspective on Political-Economic Issues in the Long-Term Preservation of Digital Heritage*, 63 J. AM. SOC’Y FOR INFO. SCI. AND TECH. 2153–64 (2012).

⁶¹ See Christopher Herwig, *Syria’s Landmarks Restored in Miniature*, UNHCR (Aug. 24, 2016, 12:56 PM), <http://tracks.unhcr.org/2016/01/syrias-landmarks-restored-in-miniature/> [<http://perma.cc/DL89-YWBD>].

⁶² *Id.*

artists are ecumenical: an art teacher and painter named Mahmoud Hariri has built a model of Palmyra from clay and wooden kebab skewers, explaining that his goal is for Za'atari residents to connected with their country and culture: "This is a way for them not to forget."⁶³

So far, Western digital preservation projects have not been so broad-ranging. One way of thinking of the appropriate "price" to pay for the right to digitize the Roman site of Palmyra might be the obligation to include other sites, representative of other cultures, in the drive to preserve. Rekrei includes digital models of both pre-Islamic and Islamic objects, but the ratio is still lopsided; as of August 2016, their "3D Gallery" included digital models of thirty-five pre-Islamic objects from Syria and Iraq and only five Islamic objects.⁶⁴

C. Effects of Absences in Digital Models

There have been a number of discussions by those worried that the digital might "replace" the real—that we will begin to neglect or even discard archeological objects and sites once we have achieved satisfactory simulacra. I believe that such worries are overstated, if only because the technology that would guarantee the satisfaction of our urges to see and touch the real is so far from being developed, especially for three-dimensional objects.⁶⁵ Similarly, one could worry that tourists might forgo visiting a cultural site if they can instead access a digital reconstruction, thus causing a loss of tourist revenue for the local community. However, at least in the case of still-existing cultural sites, it is likely that the number of those who decide that they are satisfied by seeing a digital version of the site, and thus do not travel to it, will probably be overbalanced by the number of tourists who decide to visit the site after seeing a digital version.⁶⁶

Rather than worrying about the aura of cultural artifacts, I am worried about their interpretation. Even seemingly simple digital models transmit convincing, unified interpretations of objects, leaving no room for alternate interpretations or even any

⁶³ *Id.*

⁶⁴ See *Sketchfab Gallery*, REKREI, <https://rekrei.org/gallery> (last visited Jan. 2, 2017).

⁶⁵ The digitization of pure data, as well as two-dimensional objects such as book pages, present different risks. Accordingly, some thinkers have warned that "the 'fattening' of Western repositories" with digitized material from archives in, for example, Africa, could lead to an increase in the isolation and underfunding of these archives, as Western scholars chose to consult the digitized material instead of visiting the archives. PETER LIMB, *DIGITAL DILEMMAS AND SOLUTIONS* 15 (Chandos Publishing, 2004).

⁶⁶ Indeed, I would imagine that the opposite problem is more likely: that sites publicized by high-quality digital reconstructions will see such increased visitorship that their numbers might prove harmful to the preservation of the site.

signal that these alternate interpretations might exist. Compare the experience of visiting the same sites. Visitors to physical heritage sites encounter plenty of evidence of alternate interpretations and uses. They read guidebooks and hear their tour guides and overhear those of others (often offering conflicting information). They read official signage along with the unauthorized graffiti. They get a sense of local attitudes toward the site—is it one that inspires national pride, with hordes of schoolchildren trooping through, or is it one that is little known, with, say, taxi drivers greeting a request to go there with a puzzled expression? Visitors see how sites are really used. Are they protected, gated-off sources of tourist revenue, or are they casually marked by a few faded signposts pointing to a field where shepherds herd their sheep through ancient tombs?

Digital reconstructions can avoid this welter of conflicting attitudes and interpretations. They generally present clean, seamless views of the past—unless the creator makes an effort to change this tendency. Allahyari’s “Material Speculation: ISIS” project is an example of a project that attempts to embed alternate viewpoints and interpretations, by including along with the reproduced images of artifacts information and interviews with a wide range of concerned stakeholders.⁶⁷ But most digital modeling projects do not go to such lengths.

It could be objected that many digital models, like those made by the *Rekrei* community, are purely visual, without any associated information at all. But this absence does not prompt the viewer to think about the variety of meanings an object can have. The reverse is true. Absence sends a powerful message: that nothing stands in the way of the viewer’s own interpretations of the site.

This interpretive room can be valuable. Who has not increased their empathetic communication with the past by imagining themselves into it, thinking about what their life would have been like had they been born a thousand years ago? But some interpretations have much more sinister effects. Nazi-sponsored archeologists, for example, “discovered” traces of “Aryan” heritage in Poland and other territories, justifying German territorial expansion. Recent decades have seen similar arguments used to amplify territorial claims in Palestine.

⁶⁷ See discussion, *supra*, at Part II.

IV. LEGAL CONSIDERATIONS FOR DIGITAL MODELS OF CULTURAL HERITAGE

What legal rights are held by those who own (whether individually or under state control) cultural heritage artifacts and those who create digital models of these artifacts? The answers vary slightly from state to state, and there is still some ambiguity in the law where technology has outpaced court decisions, but in general, it seems that the law offers little recourse to those seeking to protest the digitalization of cultural heritage sites, and many protections for those who have done the digitalization.

The cultural heritage objects in question are not protectable by copyright; at thousands of years old, they are in the public domain many times over. An owner could seek to prevent digitalization by restricting access to an artifact, for example, by prohibiting photography by visitors, as many museums do.⁶⁸ But this is a moot point once sufficient photographs have been taken to permit 3D modeling, as is true for the Middle Eastern sites and objects examined in this article.

On the other hand, the creators of digital models of these non-copyrightable cultural heritage artifacts most probably do have copyright protection.⁶⁹ This does not seem to have been tested in court so far, but is strongly implied by the way courts have read copyright laws and past cases.⁷⁰

In the United States, the two key cases are *Meshwerks v. Toyota* and *Osment Models, Inc. v. Mike's Train House, Inc.* In *Meshwerks v. Toyota*,⁷¹ the plaintiff, which had been commissioned by Toyota's advertising agency to create digital 3D models of several Toyota automobiles for use in an advertising campaign, sued when Toyota used these models in more than the single anticipated ad. Meshworks claimed that this unauthorized use violated the copyright they claimed to hold in the digital models.

⁶⁸ See Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 796, 797–98 (2012).

⁶⁹ By contrast, the owner of the copyright in an object such as a Barbie Doll is the only one who can authorize 3D models and 3D-printed replicas of the copyrighted objects, since these models and replicas are considered derivative works and copies under American copyright law. 17 U.S.C. §§ 101, 106 (2012); see Charles Cronin, *3D Printing: Cultural Property As Intellectual Property*, 39 COLUM. J.L. & ARTS 1, 31 (2015).

⁷⁰ For an overview of the issue of the copyrightability of digital models of cultural property in the United States. See Cronin, *supra* note 69; see generally Thomas Margoni, *The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs*, UNIV. OF GLASGOW SCH. OF L. (2014) (dealing with a similar overview for the EU).

⁷¹ *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

The Tenth Circuit determined that Meshwerks's scans were not copyrightable expression and upheld the district court's grant of summary judgment in favor of Toyota.⁷² "Originality," not "sweat of the brow," is required for a work to merit copyright protection in the United States.⁷³ Thus, the fact that Meshwerks employees spent hundreds of hours and drew on high levels of technical skills while rendering a digital wire-frame so that it would exactly copy the automobiles' appearances, worked against Meshwerks's claim to copyright protection. All of the sweat of Meshwerks's brow was dedicated to replicating the originality of another creator. The sole protectable originality in the resulting models was that of Toyota, whose designers created the modeled objects.

However, the Tenth Circuit emphasized that, while Meshwerks's models were not copyrightable, this did not mean that no digital models could ever attain copyright protection: "A Luddite might make the mistake of suggesting that digital modeling, as was once said of photography, allows for nothing more than 'mechanical reproduction' . . . and involves no originality of thought. . . . Clearly, this is not so."⁷⁴

Thus, it is not surprising that, two years after the *Meshwerks* decision, a federal district court in Missouri found that digital 3D models and prints could, in fact, warrant copyright protection.⁷⁵ In *Osment Models*, the plaintiff was reproducing railway and filling stations; like cultural heritage artifacts, these were non-copyrightable. Importantly, Osment, unlike the Meshwerks employees, was not striving to create exact replicas for his scale models. Instead, he manipulated some of the digital information he worked with, for example by changing some colors and design details, and also added a number of features, such as signage. The court determined that these additions met copyright's requirement for a "spark" of original expression, and thus held that Osment could prevent the unauthorized copying of his models by the defendant, another model railroad producer.⁷⁶

⁷² *Id.* at 1261, 1270.

⁷³ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359–60 (1991); *see also* 17 U.S.C. § 101 *et seq.*; Copyright Act of 1909, § 1 *et seq.*, 35 Stat. 1075; U.S. CONST. art. 1, § 8, cl. 8.

⁷⁴ *Meshwerks, Inc.*, 528 F.3d at 1269 (quoting *Burrow-Giles Lithograph Co. v. Sarony*, 111 U.S. 53, 59 (1884)).

⁷⁵ *Osment Models, Inc. v. Mike's Train House, Inc.*, No. 2:09-CV-04189-NKL, 2010 WL 5423740 at *1 (W. Dist. Mo. Dec. 27, 2010).

⁷⁶ *Id.* at *7.

Exact photographic reproductions of public domain works of art are not copyrightable.⁷⁷ There has been some attempt to argue that at least some digital capture of cultural property is also non-copyrightable because it is merely factual, offering none of the originality that is required for a work to merit copyright protection in the United States and similarly in most other countries.⁷⁸ Thus, Brian Wassom, who argued the *Meshwerks* case, believes that the efforts of Rekrei and others to create digital 3D models of cultural heritage are “awesome, impressive, incredibly labor-intensive, highly detailed, and skillful. One thing they are not, however, is copyrightable.”⁷⁹ That is, they are not copyrightable if these models strive to be exact reproductions without any input from the digital modelers.

But, as Wassom also points out, there are multiple strategies the creators of digital models of cultural heritage can use “for protecting their content, such as making sure to weave fictional imagery into their real-world recreations.”⁸⁰ Applying the logic of *Osment Models* means that the creator of a digital model of a cultural heritage artifact needs only add a spark of creativity in order to gain copyright protection.

And it is the rare digital model that will not call for this spark. Most digital models involve many decisions about what data to include and what state of the object to recreate, and a project that attempts to restore or recreate an artifact’s original appearance will of course require a great deal of creativity. For example, the credits on the Northwest Palace reconstruction video list the names of six people and two institutions for their contributions of “archeological data and interpretation”; one “lead visual artist” and one company for “modeling, rendering, and animation”; and another six people for “additional modeling and texturing.”⁸¹ Such a project combines sweat of the brow with originality. Unsurprisingly, the creators of digital models of cultural

77 *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998), on recons., 36 F. Supp. 2d 191 (S.D.N.Y. 1999). However, many U.S. cultural institutions ignore this holding by asserting copyright over their digital photographs of public domain artworks in their collection. Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 32 (2006).

78 For the argument that digital captures are non-copyrightable, see generally Anne Marie Sullivan, *Cultural Heritage & New Media: A Future for the Past*, 15 J. MARSHALL REV. INTELL. PROP. L. 604, 630 (2016).

79 Brian Wassom, *VR Modeling Has a Lot of Benefits, But Copyright Isn't One of Them*, WASSOM (Aug. 21, 2015), <http://www.wassom.com/vr-modeling-has-a-lot-of-benefits-but-copyright-isnt-one-of-them.html> [<http://perma.cc/95MW-26SH>].

80 *Id.*

81 See *Digital Reconstruction of the Northwest Palace, Nimrud, Assyria* (Sept. 18, 2014), <http://www.metmuseum.org/metmedia/video/collections/ancient-near-eastern-art/northwest-palace-nimrud> [<http://perma.cc/FL5X-X7LN>].

heritage do claim copyright protection, if only in disclaiming it, as when, for example, Rekrei participants contribute their digital models to the project by granting Creative Commons licensing.⁸²

V. CONCLUSION: BEST PRACTICES FOR DIGITAL MODELS OF CULTURAL SITES

The creators of digital models of cultural heritage sites and objects face certain ethical responsibilities, especially given the rights imbalance, whereby the creators have copyright protection for their vision of the past, while the owners of physical cultural heritage do not.

These ethical responsibilities should weigh even more heavily on the creators of digital models of the artifacts destroyed by IS, since this destruction is paired with a refugee crisis. To those forced to flee their homes, the cultural sites that form part of their personal and national identities become yet more precious, and their destruction more painful. And disconnected, dispossessed refugees have little power to contribute to digital reconstruction projects to attempt to shape their interpretations. Digitalization is generally regarded as a solution to problems of access since, for example, someone without the funds to travel to a library can now access digitalized information. But the playing field is not yet entirely level. Not everyone has the connectivity, devices, or language skills required to either access or make a contribution to a digital reconstruction.

One strategy may be to follow Allahyari's example by creating digital models that clearly mark themselves as the product of a modeler rather than attempt to convince the viewer that they are neutral representations of the past. Allahyari's models and prints reproduce stone sculptures in clear resin at a much reduced scale, meaning the viewer cannot mistake them for the originals. Allahyari thus reduces her own authority—she is

⁸² “Creative Commons licensing provides free copyright licenses which allow the copyright owner to dedicate works to the public, or to license certain uses of their works, while retaining and reserving other rights from the proverbial ‘copyright bundle of rights,’ for themselves or their respective affiliated institutions. *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008).” Sullivan, *supra* note 78, at 642 n.204. Rekrei users create models and upload them through the website Sketchfab, and then tag them to make them part of the Rekrei community. When a user uploads through Sketchfab, she is presented with a number of options; if she chooses to allow other users to download her model, she is prompted to create a Creative Commons license, and cannot allow downloads unless she does so. See *Help Center*, SKETCHFAB (last updated August 20, 2015), <https://help.sketchfab.com/hc/en-us/articles/203020988-Report-Violation> [<http://perma.cc/688C-ERCU>]. The Sketchfab Terms of Use also state that the user remains “the owner of your User Content at all times, and Sketchfab does not claim any ownership rights in your User Content.” *Id.*

offering only a version of an original—and the viewer must work to come to his or her own understanding of the object.

Another practice of Allahyari's that should be emulated is her inclusion of information from many sources to accompany her visual models. This could be done even more seamlessly. For example, it is possible to build digital presentation frameworks that allow users to add annotations and comments.⁸³ This would mean both that scholars specializing in that object or site could update the digitalization to keep pace with new research, but also that others—tourists, locals, anyone—could add their thoughts. The viewer of this type of presentation might be, at times, overwhelmed with debate about particularly controversial aspects of the past, but would always have the sense that he or she is not viewing the past in isolation—that multiple other viewers and interpretations exist.

These interpretations are the true value offered by cultural heritage. Compared to other resources that laws are designed to protect—oil, precious metals, livestock—heritage sites have little inherent value. They offer empty, uninhabitable buildings, graves, and heaps of battered stones. They have value only in relation to how we see them. The past lives only in our imaginations. We must be all the more careful, then, to treat these sites in a manner that does not destroy the value they have for others. We must all work to keep open the many lines of sight on the past.

⁸³ See Kuester, *supra* note 59.

2017

Casting the First Stone: The Future of Music Copyright Infringement Law After Blurred Lines, Stay with Me, and Uptown Funk

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Casting the First Stone: The Future of Music Copyright Infringement Law After *Blurred Lines*, *Stay with Me*, and *Uptown Funk*

*Regina Zernay**

Abstract

Music copyright infringement has traditionally been considered very difficult to prove in court. The outcomes of three recent controversies, however, suggest that the way infringement cases are brought and resolved may have undergone a significant change. The first case was the highly publicized *Blurred Lines* lawsuit in 2013, whose songwriters were accused of infringing Marvin Gaye's *Got to Give It Up*. The second case alleged that Sam Smith's 2014 Grammy-award winning song *Stay with Me* infringed the chorus of Tom Petty's *I Won't Back Down*. The third case involved the huge hit song *Uptown Funk* and the 1970s hit *Oops Upside Your Head*.

Despite the courts' historical propensity toward favoring alleged infringers, the Marvin Gaye estate won in court, and the *Stay with Me* and *Uptown Funk* infringement claims were amicably settled before lawsuits could be filed. Each case represents a departure from the traditional methods of resolving copyright infringement claims.

This Comment analyzes whether a significant change has occurred in the way music copyright infringement suits are resolved. The ultimate goals of this Comment are to provide readers with a better understanding of the current state of music copyright law and offer information that may help avoid or minimize the impact of infringement claims.

* J.D. candidate, Chapman University Dale E. Fowler School of Law, anticipated May 2017. I would like to thank Dean Donald J. Kochan for his tremendous help and guidance. I would also like to thank Professor Tom W. Bell for his valuable advice in revising the initial version of this Comment. Sincere thanks to Professor Mary Lee Ryan for her "Advanced Seminar: U.S. Copyright Law" course. Most importantly, I would like to thank Francisca Zernay and Darren Roberts for their constant love, patience, and support.

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INTRODUCTION

Until recently, if a songwriter brought a copyright infringement claim, the odds of winning were low because the hurdles to proving the claim were high. Changes, though, have appeared on the horizon, and as David Bowie once warned, “look out you rock ’n’ rollers.”¹ The new movement in copyright law is shifting to recognize broader similarities like style and genre as legitimate bases for infringement claims, creating entirely new litigation opportunities, coupled with corresponding risks for artists.

For a number of reasons, it was traditionally considered quite difficult to succeed at winning a music copyright infringement claim in court, and settlement was rare.² In the past, infringement may have been found when a song incorporated a melody nearly identical to a widely distributed song,³ or when sound recordings were sampled⁴ without permission.⁵ Rarely were cases won for simply emulating a style or genre.⁶

¹ DAVID BOWIE, *Changes*, on HUNKY DORY (RCA Records 1971).

² See, e.g., Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 229 (1990) (representing the historical view that considered “[m]usical copyright protection . . . a misnomer,” and under the traditional regime, “[a] plaintiff seeking to protect his property interest finds little sympathy from the judiciary.”); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 741–42 (2010) (criticizing the existing standard for demonstrating copyright infringement in 2010, stating “[o]ur rules for proving copyright infringement make little sense”); Michelle V. Francis, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter—A More Comprehensive Use of Expert Testimony and the Implementation of an “Actual Audience” Test*, 17 PEPP. L. REV. 493, 494 (1990) (citing A. SHAFER, *MUSICAL COPYRIGHT* 146 (2d ed. 1932)) (reflecting the traditional belief that “[t]he determination of [copyright] infringement is one of the most difficult of all legal questions”); William R. Coulson, *They’re Playing Our Song! The Promise and the Perils of Music Copyright Litigation*, 13 J. MARSHALL REV. INTELL. PROP. L. 555, 575 (2014) (“So, do composers ever ‘borrow’ from each other? Of course, it happens. Examples abound. Even if it amounts to larceny, is it easy to prove? Decidedly not.”); Telephone Interview with Robert M. Barta, Attorney at Law, Rosoff, Schiffres & Barta (Aug. 15, 2016) (entertainment attorney who represented several songwriters in successful copyright infringement claims during the 1990s) [hereinafter Barta Interview] (“[In the 1990s,] cases were fought and very few settled. . . . It was difficult to pursue the claim. Many artists did not have the money or resources to challenge established record companies. It was difficult, expensive, and [the labels and their insurers] fought at every avenue possible.”); *infra*, Part II.C. (providing descriptions of several cases demonstrating the difficulty of proving music copyright infringement under the traditional regime).

³ See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983) (citing *Warner Bros. v. American Broad. Companies*, 654 F.2d 204, 207 (2d Cir. 1981)) (affirming the district court’s holding that George Harrison’s *My Sweet Lord* infringed on *He’s So Fine*); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (affirming the district court’s holding that Michael Bolton’s *Love is a Wonderful Thing* infringed on the Isley Brothers song of the same name).

⁴ “Sampling” is defined as “the act of using a small part of a recording (such as a song) as part of another recording.” *Sampling*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sampling> (last visited Mar. 26, 2016) [<http://perma.cc/MWL2-FXUS>]. The sampling described in this Comment will generally refer to instances where a portion of a sound recording has been copied, as recorded, and inserted into a new

Despite the same legal climate, at least three recent cases exhibited vastly different responses to music copyright infringement claims. Each signals that the copyright landscape may be undergoing significant and remarkable changes.

The first was the widely publicized *Blurred Lines* case, currently under appeal.⁷ In 2013, representatives for the estate of legendary singer/songwriter Marvin Gaye contacted the writers of the hit song *Blurred Lines* to address concerns that *Blurred Lines* copied elements of Gaye's 1977 song *Got to Give It Up*.⁸ Instead of settling out of court, the *Blurred Lines* songwriters' representatives sued the Gaye estate, seeking a declaratory judgment from the court stating that no infringement had occurred.⁹ The Gaye estate responded with a counterclaim accusing the *Blurred Lines* songwriters of copyright infringement.¹⁰ In 2015, the jury unexpectedly held in favor of the Gaye estate, awarding damages of more than \$7 million.¹¹

The second controversy involved Sam Smith's Grammy-award winning song *Stay with Me*. In 2014, publishers in charge of Tom Petty's 1989 hit song *I Won't Back Down* contacted Smith's representatives to discuss the strong melodic similarities

composition, with or without alteration.

⁵ See, e.g., *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (ordering a temporary injunction against Biz Markie's album *I Need A Haircut* for sampling music without permission from the copyright owner).

⁶ See, e.g., Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303, 303 (2014). Merely one year before the 2015 *Blurred Lines* decision, "sound-alike" recordings were considered legal. As Demers explains, "[i]n the wake of lawsuits against unauthorized sampling, the new sound-alike has assumed a prominent position among today's pop musicians. Instead of stealing musical objects from the past, artists create semblances of the past, and these semblances are perfectly legal." *Id.* See also Todd Davidovits & Graham Day, *Recent Developments in Copyright: Blurred Reasoning and I Won't Back Down Until You Stay with Me*, JD SUPRA (Mar. 26, 2015), <http://www.jdsupra.com/legalnews/recent-developments-in-copyright-blurre-53935/> ("In the absence of an actual sample, merely emulating the production elements or atmosphere of an earlier recording has typically not provided a strong basis for finding infringement of a sound recording copyright.") [<http://perma.cc/ZS8Q-FBS5>].

⁷ Tim Kenneally & Pamela Chelin, *Robin Thicke, Pharrell Williams Appeal 'Blurred Lines' Copyright Infringement Lawsuit*, THE WRAP (Dec. 8, 2015, 12:59 PM), <http://www.thewrap.com/robin-thicke-pharrell-williams-appeal-blurred-lines-copyright-infringement-lawsuit/> [<http://perma.cc/MVD8-KNX3>].

⁸ See Complaint for Declaratory Relief at 4, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752 [hereinafter *Williams Complaint*].

⁹ *Id.* at 5.

¹⁰ Defendants' Frankie Christian Gaye and Nona Marvisa Gaye First Amended Counterclaims at 12, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx) (C.D. Cal. Oct. 30, 2013), 2013 WL 6079472 [hereinafter *Frankie & Nona Gaye First Amended Counterclaim*]; Defendant Marvin Gaye III's Counterclaim & Demand for Trial of Causes by Jury at 11, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK-AGR (C.D. Cal. Nov. 19, 2013), 2013 WL 6831871 [hereinafter *Marvin Gaye III's Counterclaim*].

¹¹ *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx), 2015 WL 1036137, at *3 (C.D. Cal. Mar. 10, 2015) [hereinafter *Blurred Lines Special Verdict*].

between the two songs.¹² Rather than employing the preemptive strike tactic utilized by the *Blurred Lines* legal team, Smith's representatives settled, giving the writers of *I Won't Back Down* songwriting credit and a percentage of royalties for *Stay with Me*.¹³ The matter was put to rest before a lawsuit was filed.¹⁴

The third incident surfaced in 2015, when concerns were raised that a vocal rhythmic pattern in the monster-hit *Uptown Funk* sounded similar to a pattern featured in the 1970s hit *Oops Upside Your Head*.¹⁵ Instead of contacting *Uptown Funk* representatives directly, the publishers of *Oops Upside Your Head* filed a copyright infringement claim with online video distributor YouTube.¹⁶ As a result, all payments for *Uptown Funk*'s YouTube plays were frozen until the issue was resolved.¹⁷ *Uptown Funk* representatives settled quickly, giving the writers of *Oops Upside Your Head* songwriting credit and royalties.¹⁸

Some may argue that these cases suggest stronger protections for songwriters have emerged. In many ways, though, this new setting may provide fertile ground for unwarranted accusations of copyright infringement.

As noted scholar Tim Wu observed, “[t]here is no question that Pharrell was inspired by Gaye and borrowed from him; he has freely admitted as much. But, by that standard, every composer would be a lawbreaker.”¹⁹ In light of what appears to be a lower threshold for proving copyright infringement, while it may be easier for a songwriter to demonstrate infringement, it also may be easier for a songwriter to be found guilty of it. The scenario brings to mind the old adage, “let he that is without sin cast the first stone.”²⁰ Like villagers armed with stones,

¹² Brian Mansfield, *Sam Smith to Pay Tom Petty Royalties on 'Stay with Me,'* USA TODAY (Jan. 26, 2015, 11:38 AM), <http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051/> [<http://perma.cc/H7JU-SP28>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Daniel Welsh, *'Uptown Funk' Gets Five New Co-Writers Following Claim By 'Oops Upside Your Head' Singers, Gap Band,* HUFFINGTON POST (May 1, 2015, 10:32 AM), http://www.huffingtonpost.co.uk/2015/05/01/uptown-funk-oops-upside-your-head-co-writers_n_7187434.html [<http://perma.cc/P9D9-YXKQ>].

¹⁶ Ed Christman, *'Uptown Funk!' Gains More Writers After Gap Band's Legal Claim,* BILLBOARD (May 1, 2015), <http://www.billboard.com/articles/news/6553522/uptown-funk-gains-more-writers-after-gap-bands-legal-claim> [<http://perma.cc/7W8Q-M5UL>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out,* THE NEW YORKER (Mar. 12, 2015), <http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out> [<http://perma.cc/BS44-74NP>].

²⁰ *John* 8:1–11 (King James). An adulterous woman was brought to Jesus, who was told that the law's punishment for adultery was death by stoning. The villagers asked Jesus what they should do. Jesus responded by saying “he that is without sin among you,

songwriters have been given a more effective weapon to defend their copyrights. However, this weapon may easily be turned against the songwriters it is supposed to protect.

The outcomes of music copyright infringement cases are more uncertain than before, and neither the average songwriter nor the general legal practitioner has enough information about the current music copyright landscape and how to maneuver around its various pitfalls. Even as of this writing, reports of high-profile copyright infringement claims continue to surface in the media, with at least two new accusations of infringement against the writers of *Uptown Funk*²¹ and, most notably, the highly publicized copyright infringement suit against Led Zeppelin for their classic song *Stairway to Heaven*, originally released more than forty years ago.²² Though the jury found that *Stairway to Heaven* did not infringe the 1968 Spirit song *Taurus*, the decision is now being appealed.²³ Whether or not they realize it, songwriters may be facing an increased danger of committing copyright infringement, and without knowing more, they are risking much greater liability.

This Comment aims to fill that informational gap. It analyzes whether a significant and permanent change has occurred in the way that music copyright infringement suits are brought, examines the legal predicates contributing to that development, and evaluates how new cases wrestling with these emerging copyright complexities will ultimately be resolved. Part I gives a brief history of the copyright laws and describes how courts have traditionally evaluated infringement claims. Part II takes a closer look at the *Blurred Lines* case and compares it with recent cases, including *Stay with Me* and *Uptown Funk*. Finally, Part III examines how much the risk of infringement has increased in the aftermath of *Blurred Lines* and considers whether protective measures, such as more widely available and

let him first cast a stone at her." The villagers walked away without throwing a single stone. *Id.*

²¹ See TMZ Staff, *Girl Group Claims YOU STOLE 'UPTOWN FUNK' FROM US!!!*, TMZ (Feb. 23, 2016, 12:40 AM), <http://www.tMZ.com/2016/02/23/bruno-mars-uptown-funk-the-sequence-funk-you-up-cease-and-desist/> [<http://perma.cc/7CAF-P2VH>]; Hanna Flint, *This '80s Serbian Pop Song Sounds A LOT Like Mark Ronson and Bruno Mars' Uptown Funk*, METRO UK (Aug. 11, 2015, 10:07 AM), <http://metro.co.uk/2015/08/11/this-80s-serbian-pop-song-sounds-a-lot-like-mark-ronson-and-bruno-mars-uptown-funk-5337031/> [<http://perma.cc/N5K5-6TSN>].

²² Libby Hill, *Led Zeppelin's 'Stairway to Heaven' Heading to Copyright Trial*, L.A. TIMES (Apr. 12, 2016, 12:30 PM), <http://www.latimes.com/entertainment/music/la-et-ms-led-zeppelin-stairway-to-heaven-copyright-trial-20160412-story.html> [<http://perma.cc/F2TY-DCV8>].

²³ Assoc. Press, *Appeal Filed in Copyright Case of Led Zeppelin's "Stairway,"* YAHOO! MUSIC (July 27, 2016), <https://www.yahoo.com/music/appeal-filed-copyright-case-led-zeppelins-stairway-194436584.html> [<http://perma.cc/4B2F-S6KF>].

affordable songwriter insurance, will emerge. The goals of this Comment are to give the reader a better understanding of the current state of music copyright law, and offer information that may help avoid or minimize the impact of infringement claims.

I. THE COPYRIGHT CLAUSE AND TRADITIONAL FINDINGS OF MUSIC COPYRIGHT INFRINGEMENT

Congress passed the first copyright laws in 1790,²⁴ and since then, U.S. copyright laws have undergone a great number of changes, expanding both the protections that copyright laws provide and the categories of works that are eligible for copyright protection.²⁵ Discussing the details of over 200 years of copyright evolution extends far beyond the scope of this Comment.²⁶ However, there are several important points that must be explained in order to understand the information contained herein.

Section A of Part I will briefly explain the original purpose of the Copyright Clause and how the resulting laws evolved to protect musical compositions and sound recordings. Section B provides a general explanation of what constitutes copyright infringement. Section C describes the traditional approach used by courts to evaluate claims of music copyright infringement.

By the end of Part I, the reader should have a general understanding of the primary goal of the Copyright Clause, some familiarity with the requirements for copyright protection, and an awareness of the high level of proof required to show music copyright infringement under the courts' traditional standard of evaluation.

A. Copyrights in General

The ability to copyright creative works has long, deep roots that lead back to the Constitution. The Copyright Clause is found in the U.S. Constitution, Article I, Section 8, Clause 8,²⁷ and it granted Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁸ It has been said that *promoting the*

²⁴ MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1–OV (Matthew Bender, rev. ed. 2015).

²⁵ ALEXANDER LINDEY & MICHAEL LANDAU, 1 LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:1 (3d ed. 2016).

²⁶ For a detailed explanation of the evolution of U.S. Copyright law, please consult NIMMER & NIMMER, *supra* note 24, considered one of the leading treatises on U.S. copyright law.

²⁷ LINDEY & LANDAU, *supra* note 25, § 1:1.

²⁸ U.S. CONST. art. I, § 8, cl. 8.

progress of science and useful arts is the primary goal of the copyright provision.²⁹

Granting Congress the power to pass laws that provide copyright protection was only the first step in creating the current copyright laws in the United States. The next crucial step was Congress's passage of the Copyright Act of 1790.³⁰ Under this first Act, copyright protection was provided for books, maps, and charts, and limited to an initial term of fourteen years plus an additional fourteen-year renewal.³¹

The "Copyright Act" is a term used generally to refer to what is codified in Title 17 of the U.S. Code.³² Since Congress enacted the Copyright Act of 1790, U.S. copyright laws have been amended several times.³³ In addition to the current version of the Act, many aspects of the previous versions of copyright laws are still present and, depending on the circumstances, still applicable.³⁴ One significant result is that the copyright date of a work usually determines which version of the Act applies to a cause of action.³⁵ This date issue is pertinent here because the 1977 copyright date of *Got to Give It Up* excluded it from protection under the Copyright Act of 1976, which did not take effect until January 1, 1978 and offered more protection for songwriters.³⁶

Though the text of the Copyright Act of 1790 only provided copyright protection for books, maps, and charts,³⁷ songwriters received copyright protection for musical compositions by registering them as books under the 1790 Act.³⁸ Over time, other creative works were added to the list of subject matter eligible for copyright protection, and two of these additions constitute the creative works that songwriters may currently copyright in order to protect their music. The first of these additions was musical

²⁹ NIMMER & NIMMER, *supra* note 24, § 1.03 (emphasis added). For an interesting discussion that examines the parameters of the Copyright Clause, see TOM W. BELL, *INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD* 15–20 (2014).

³⁰ See LINDEY & LANDAU, *supra* note 25, § 1:1.

³¹ *Id.*

³² See JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 3 (4th ed. 2015).

³³ *Id.* at 4.

³⁴ NIMMER & NIMMER, *supra* note 24, § 1–OV.

³⁵ *Id.*

³⁶ *Williams v. Bridgeport Music, Inc.*, No. LACV13-06004 JAK (AGR_x), 2015 WL 7877773, at *9–10 (C.D. Cal. Oct. 30, 2014) [hereinafter *Order Regarding Summary Judgment*].

³⁷ LINDEY & LANDAU, *supra* note 25, § 1:1.

³⁸ William F. Patry, *Copyright Law and Practice, Chapter 1 – Introduction: The First Copyright Act*, DIGITAL LAW ONLINE, <http://digital-law-online.info/patry/patry5.html> (last visited Aug. 25, 2016) ("Although musical compositions did not receive express statutory protection until 1831, they too were registered under the 1790 Act as books.") [<http://perma.cc/73GA-2H4Q>].

compositions, enacted in 1831.³⁹ The second was protection for sound recordings, granted in 1972.⁴⁰ The duration of copyright protection was also expanded to cover the life of the author plus seventy years.⁴¹

A musical composition and a sound recording are two different things and receive separate copyrights.⁴² A musical composition “consists of music, including any accompanying words . . . [and] may be in the form of a notated copy (for example, sheet music) or in the form of a phonorecord (for example, cassette tape, LP, or CD).”⁴³ A sound recording “results from the fixation of a series of musical, spoken, or other sounds.”⁴⁴ Put differently, the musical composition is the sequence of musical notes and words that make up a song, combined in a specified manner. Though this musical composition can be recorded many different ways, the specific combination of its words and music is the fixed expression being copyrighted, and can be identified with as little as sheet music.⁴⁵ A sound recording is a particular recorded version of the musical composition, fixed in an audio recording.⁴⁶ While the sound recording is a representation of the underlying musical composition, the copyright of the sound recording only covers the particular audio performance that has been recorded, not the underlying musical composition.⁴⁷

The complete list of creative works eligible for copyright protection is provided in § 102 of the Copyright Act as codified today.⁴⁸ In addition, § 102 excludes “any idea, procedure, process, system, method of operation, concept, principle, or discovery” from copyright protection.⁴⁹ Knowing which creative works are excluded could be considered as important as knowing which works are eligible, for if it can be shown that a work falls within one of the excluded categories, an infringement claim can be

³⁹ LINDEY & LANDAU, *supra* note 25, § 1:1.

⁴⁰ *Id.*

⁴¹ *Id.* Note, however, that the 70-year term refers to single authors. For joint authors and works for hire, see 17 U.S.C.A. § 302 (West 2016) of the Copyright Act.

⁴² LINDEY & LANDAU, *supra* note 25, § 9.4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 17 U.S.C.A. § 102 (West 2016) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . musical works, including any accompanying words . . . [and] sound recordings.”).

⁴⁹ 17 U.S.C.A. § 102(b) (West 2016).

defeated since the work was never eligible for copyright protection in the first place.⁵⁰

Breaking down § 102, we see there are three requirements for subject matter to be considered copyrightable⁵¹: (1) “fixation” in a tangible medium of expression;⁵² (2) “originality,” requiring that the work be an original work of authorship;⁵³ and (3) the work must not fall within one of the categories excluded for copyright protection by § 102(b).⁵⁴ If a defendant in a copyright infringement claim can show the plaintiff’s allegedly infringed work fails to satisfy any of the § 102 requirements, the plaintiff’s work may be denied eligibility for copyright protection and, accordingly, the plaintiff’s infringement claim will fail.

Otherwise, if a creation satisfies all three of the requirements in § 102, the subject matter may be copyrighted. The benefit of a copyright is that it provides the copyright owner a set of exclusive and enforceable rights, all of which are described in § 106 of the Copyright Act (subject to certain limitations, outlined in §§ 107 through 122 of the Act).⁵⁵

Having provided a general background about the primary goal of the Constitution’s copyright provision and a description of the how the Copyright Act evolved to protect musical compositions and sound recordings, we will now discuss situations where third parties violate the exclusive rights of copyright owners, also known as copyright infringement.

B. What Constitutes Copyright Infringement⁵⁶

On the surface, copyright infringement may seem easy to define. Simply put, copyright infringement occurs when any of the exclusive rights granted to the copyright owner under the Copyright Act have been violated.⁵⁷ Once an infringement has occurred, the owner may sue the alleged infringer to enforce the rights that have been violated.⁵⁸ Additionally, as in *Blurred Lines*, to prevent a potential infringement suit, a new work’s

⁵⁰ See COHEN ET AL., *supra* note 32, at 90–109; *infra* Part I.B.

⁵¹ See COHEN ET AL., *supra* note 32, at 51.

⁵² *Id.* at 51–52.

⁵³ *Id.* at 51, 62.

⁵⁴ *Id.*

⁵⁵ 17 U.S.C.A. § 106 (West 2016).

⁵⁶ Given the rich history of U.S. Copyright Law and its mutable nature, the question of what constitutes copyright infringement cannot be fully answered within a few short paragraphs. For those interested in a more detailed discussion, see NIMMER & NIMMER, *supra* note 24.

⁵⁷ Catherine Palo, *Copyright Infringement Litigation*, in 77 AM. JUR. TRIALS 449 § 23 (updated Feb. 2016).

⁵⁸ *Id.*

authors may sometimes seek a declaratory judgment from the court stating their work has not infringed an earlier creation.

Delving a little deeper reveals that proving infringement is rather complex. There are two basic prerequisites for demonstrating copyright infringement: (1) ownership of a valid copyright by the plaintiff, and (2) copying by the defendant.⁵⁹ The difficulty lies in successfully establishing the presence of both requirements.

The first prerequisite, ownership, consists of:

(1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the work . . . ;⁶⁰ (4) compliance with applicable statutory formalities;⁶¹ and (5) (if the plaintiff is not the author) a transfer of rights or other relationship between the author and the plaintiff. . . .⁶²

While showing all five ownership requirements may seem daunting, registration with the U.S. Copyright Office “constitutes *prima facie* evidence in favor of the plaintiff” for the first four requirements.⁶³ If the copyright owner is also the author of the work, the fifth ownership requirement does not apply.⁶⁴

When responding to an allegation of copyright infringement, a defendant may challenge the plaintiff’s copyright ownership as a defense and “will prevail in an infringement action [if] the plaintiff has failed to establish by a preponderance of the evidence the required element[] of ownership”⁶⁵ Part II’s discussion of *Blurred Lines* observes that the *Blurred Lines* legal team questioned the ownership of *Got to Give It Up* as a defense.⁶⁶

The second prerequisite required for proving infringement, “copying by the defendant,” consists of two separate elements: “copying in fact,” and “copying as a legal proposition.”⁶⁷ To show the first element, copying in fact, the plaintiff must demonstrate that the defendant “used the plaintiff’s material as a model,

⁵⁹ NIMMER & NIMMER, *supra* note 24, § 13.01.

⁶⁰ *Id.* § 5.05 (explaining that, under § 104 of the Copyright Act as currently codified, not all foreign nationals are eligible for copyright protection in the United States, however, a foreign national may be able to receive copyright protection through “four ‘points of attachment,’” based on the “nationality of the author, place of first publication of the work, place of fixation of the sounds embodied in a sound recording, and the situs of a constructed architectural work.”).

⁶¹ *Id.* § 13.01 n.9 (“[T]he formal requirements for copyright subsistence (and hence, ownership) have lessened over time, and are basically inapplicable to works created during the Berne era [referring to the Copyright Act as amended by The Berne Convention Implementation Act of 1988, discussed *supra* Part I.A.]”).

⁶² *Id.* § 13.01.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* § 13.01.

⁶⁶ *Infra* Part II.A.

⁶⁷ NIMMER & NIMMER, *supra* note 24, § 13.01.

template, or even inspiration.”⁶⁸ If copying in fact can be shown, then the plaintiff must also demonstrate the presence of the second element, copying as a legal proposition, by showing that “the defendant’s work is substantially similar to plaintiff’s work such that liability may attach.”⁶⁹ Thus, a plaintiff must first prove that the defendant has, in fact, copied the plaintiff’s work. Once copying has been shown, the plaintiff must then prove that what has been copied is legally protected, because, as previously discussed, not everything is copyright-eligible.⁷⁰

Element one, copying in fact, means that the plaintiff has proven in a “factual sense,” that the defendant copied the plaintiff’s material.⁷¹ One way of proving copying in fact is through direct evidence, such as presenting a party who witnessed the copying, or a showing of identical copies.⁷² Direct evidence is often unobtainable though, and when direct evidence cannot be produced, courts will consider indirect evidence.⁷³ Copying in fact can be proven with indirect evidence if the copyright owner can produce the two components of (1) “proof of *access*,”⁷⁴ plus (2) “*substantial similarity*”⁷⁵ (also known as “probative similarity” and not to be confused with “copying as a legal proposition,” which courts also call “substantial similarity”).⁷⁶ Thus, an owner may indirectly prove copying occurred by showing the alleged infringer had somehow been exposed to the first work, and the resulting creation is very much like the first work.⁷⁷

Next, consider the second element to show copying by the defendant: “copying as a legal proposition,” also known as “substantial similarity.”⁷⁸ The essence of this element is that

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See 17 U.S.C.A. § 102(b) (West 2016); *supra* Part I.A.

⁷¹ NIMMER & NIMMER, *supra* note 24, § 13.01.

⁷² See, e.g., Feist Publ’n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 343–44, 361 (1991) (demonstrating direct proof of copying when the plaintiff, a phone book company, showed the defendant’s competing phone book included over a thousand entries identical to those listed in the plaintiff’s phone book, including four fake entries planted in the plaintiff’s phone book for the purpose of detecting future copying by others).

⁷³ NIMMER & NIMMER, *supra* note 24, § 13.01.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.* (emphasis added).

⁷⁶ One must be warned of the confusing dual usage of the term “substantial similarity.” As mentioned, element one, “copying in fact,” can be demonstrated through a combined showing of “access” plus “substantial similarity.” Confusingly, element two of copying by a defendant, “copying as a legal proposition,” is also often referred to as a “substantial similarity” test. This duplicate naming problem has led Nimmer to suggest that the “substantial similarity” prong of the indirect evidence test for element one, copying in fact, instead be referred to as a “probative similarity” test. NIMMER & NIMMER, *supra* note 24, § 13.01.

⁷⁷ *Id.*

⁷⁸ *Id.*

even if copying has occurred, a plaintiff must show what was copied is actually protected by copyright law, otherwise no infringement can be found.⁷⁹ If the portions copied were not copyrightable for any reason (e.g., the material is excluded from copyright protection by 17 U.S.C. § 102(b);⁸⁰ the copying constituted fair use;⁸¹ the material was in the public domain and freely available for use; the portion copied was so small that it is *de minimis*, or too minute to be actionable; the elements copied were *scenes a faire*, or scenes or elements that are virtually essential in order to portray a topic or convey a tone or setting),⁸² infringement is unlikely to be found.⁸³

It is useful to keep the defenses against copying as a legal proposition in mind, as we will see that additional defenses utilized by the *Blurred Lines* legal team included claims that the similarities were uncopyrightable, excluded from copyright protection, or *de minimis*.⁸⁴

In addition to the general components described above, the circuits employ different tests to evaluate “copying as a legal proposition” or substantial similarity.⁸⁵ The primary case discussed in this Comment, *Blurred Lines*, took place in the Ninth Circuit. The Section that follows will focus on the Ninth Circuit test and examine the traditional outcome of music copyright infringement.

C. How Substantial Similarity was Traditionally Determined

The source of the Ninth Circuit’s two-prong substantial similarity test is *Sid & Marty Krofft Television Products, Inc. v. McDonald’s Corp.*⁸⁶ Prong one of the Ninth Circuit’s substantial similarity test, the extrinsic test, is an objective analysis conducted by the trier of fact that is limited to examining only

⁷⁹ *Id.*; see, e.g., *Feist*, 499 U.S. at 363–64 (holding that while copying as a factual matter was shown, copying as a legal proposition had not been established because the copied information was merely raw data that did not “owe its origin” to Rural and had not been “selected, coordinated, or arranged” in at least a minimally creative way, thus no copyright infringement occurred).

⁸⁰ See 17 U.S.C.A. § 102(b) (West 2016); *supra* Part I.A.

⁸¹ “Fair Use” is a complex defense that merits a discussion of its own and extends far beyond the parameters of this Comment. For a discussion of the fair use doctrine, see ALAN LATMAN, S. JUDICIARY COMM., COPYRIGHT LAW REVISION STUDY 14: FAIR USE OF COPYRIGHTED WORKS, in NIMMER AND NIMMER, *supra* note 24.

⁸² This does not represent an exhaustive list of potential defenses against claims of copying as a legal proposition (substantial similarity). For a more in-depth look at these and other potential defenses, see NIMMER & NIMMER, *supra* note 24, § 13.03(B).

⁸³ *Id.*

⁸⁴ See *supra* Part II.

⁸⁵ NIMMER & NIMMER, *supra* note 24, § 13.03(E)(3).

⁸⁶ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163–64 (9th Cir. 1977).

“specific criteria which can be listed and analyzed.”⁸⁷ Because it is meant to be objective, the trier of fact’s personal responses are not relevant, however “analytic dissection and expert testimony” may be considered during the trier of fact’s analysis.⁸⁸

Prong two is an intrinsic test designed to determine “whether there is substantial similarity in expressions.”⁸⁹ The intrinsic test “depend[s] on the response of the ordinary reasonable person. . . . [and] is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test.”⁹⁰ Additionally, “[b]ecause this is an intrinsic test, analytic dissection and expert testimony are not appropriate.”⁹¹

As the primary focus of this Comment is how the *Blurred Lines* court applied the Ninth Circuit test, it seems most effective to utilize the district court’s description of the Ninth Circuit test when it evaluated the *Blurred Lines* legal team’s motion for summary judgment.⁹² The court first explained under what circumstances a motion for summary judgment would be denied in a copyright infringement suit:

A motion for summary judgment in a copyright infringement suit necessarily fails when there is “a genuine issue regarding whether the ideas and expressive elements of the works are substantially similar. . . . A ‘genuine issue’ exists when the plaintiff provides indicia of ‘a sufficient disagreement’ concerning the substantial similarity of two works ‘to require submission to a jury.’” . . . “For the purposes of summary judgment, only the extrinsic test is important because the subjective question whether works are intrinsically similar must be left to the jury.” . . . If there is not sufficient evidence to permit a trier of fact reasonably to find that extrinsic similarity exists, summary judgment of non-infringement must be granted⁹³

Thus, in the Ninth Circuit, if a court finds enough of a disagreement between parties about whether a substantial similarity exists between two works, it must deny summary judgment. The court determines whether the disagreement is sufficient based solely on its objective extrinsic analysis of the evidence because the intrinsic analysis “must be left to the jury.”⁹⁴

The court then explained that “in applying the extrinsic test, a court considers expert testimony in order to perform [an]

⁸⁷ *Id.* at 1164.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Order Regarding Summary Judgment, *supra* note 36, at *6.

⁹³ *Id.* (citations omitted).

⁹⁴ *Id.*

‘analytical dissection of a work.’⁹⁵ This analysis requires the trier of fact to break down the creative works being compared into their individual elements, and identify which of those elements are (and are not) protected by copyright.⁹⁶

Unprotected elements may still factor into the extrinsic evaluation. The court cited *Brown Bag v. Symantec*,⁹⁷ which the court explained made clear that “[a]lthough copyright protection is not afforded to certain elements of a work . . . copyright may inhere, under appropriate circumstances, in the selection and arrangement of unprotected components.”⁹⁸

In sum, the Ninth Circuit extrinsic test requires the trier of fact to: (1) break down each creative work into its individual elements; (2) distinguish between which elements are and are not protected by copyright; (3) compare the *protected* elements between each work to determine if substantial similarity exists; and (4) compare the *body of unprotected elements* of each work to determine if substantial similarity exists between each work’s collection of unprotected elements. If substantial similarity is found between the protected elements of each work or the collected body of unprotected elements in each work, the plaintiff will succeed at showing substantial similarity for the purposes of the extrinsic test and the plaintiff’s claim will survive summary judgment. The case is then placed in the hands of the jury, who is responsible for prong two of the Ninth Circuit’s substantial similarity test, a subjective intrinsic analysis.

Prior to *Blurred Lines*, it was considered very challenging to succeed in proving copyright infringement.⁹⁹ One notable example is *Selle v. Gibb*.¹⁰⁰ Though not a Ninth Circuit case, *Selle v. Gibb* illustrates how difficult it could be to survive a court’s scrutiny of a music copyright infringement claim. Plaintiff Ronald Selle sued the Bee Gees over the band’s hit song *How Deep Is Your Love*, alleging the song infringed Selle’s song *Let It End*.¹⁰¹ The trial court “denied defendants’ motion for a directed verdict and submitted the issue to the jury.”¹⁰² During the trial, a member of the Bee Gees mistook *Let It End* for *How Deep Is Your*

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004), *as amended on denial of reh’g* (Aug. 24, 2004) (citations omitted)).

⁹⁷ *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1776 n.4 (9th Cir. 1992).

⁹⁸ Order Regarding Summary Judgment, *supra* note 36, at *6 (citing *Symantec*, 960 F.2d at 1476).

⁹⁹ See Brent, *supra* note 2; Lemley, *supra* note 2; Francis, *supra* note 2; Coulson, *supra* note 2; see also *supra* Part II.

¹⁰⁰ *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984).

¹⁰¹ See *id.* at 898.

¹⁰² See *id.* at 900.

Love when a “musical skeleton” of *Let It End* was played in court.¹⁰³ The jury “returned a verdict in plaintiff’s favor on the issue of liability”¹⁰⁴ However, the trial court “granted the defendants’ motion for judgment notwithstanding the verdict and, in the alternative, for a new trial,” which Selle appealed.¹⁰⁵

The court of appeals affirmed the trial court’s holding which rejected the jury’s decision in favor of the plaintiff and granted the defendants’ motion for judgment notwithstanding the verdict.¹⁰⁶ Despite the presence of over thirty identical notes and more than forty identical rhythmic patterns, testimony by an expert witness who said such a level of similarity could not have occurred independently, a jury decision in favor of the plaintiff, and a defendant mixing up the two songs in court during the trial, the court still refused to support a finding of access or infringement.¹⁰⁷

In the 2003 Ninth Circuit case *Newton v. Diamond*, an exact copy of six seconds of Newton’s sound recording was sampled and looped to repeat more than forty times in a Beastie Boys song.¹⁰⁸ Though the sound recording had been properly licensed, no license had been secured for the use of the musical composition. Despite this identical copying, the court found the use of the sample was *de minimis* and therefore not infringing, because the copyrighted portion only consisted of three identical notes.¹⁰⁹ In a case where repeated copying was absolutely proven, three identical protected notes were not enough to find infringement of a musical composition.

Another illustrative Ninth Circuit case is *Three Boys Music Corp. v. Bolton*.¹¹⁰ In *Three Boys Music*, while infringement was found based on a combination of five unprotectable elements, the elements shared between the songs were so similar that even the defendant’s expert witness acknowledged their similarities.¹¹¹ The musicologist for the defendant “conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the [plaintiffs’] song” in

¹⁰³ See *Selle*, 741 F.2d at 903; *Selle v. Gibb*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <http://mcir.usc.edu/cases/1980-1989/Pages/sellegibb.html> (“The plaintiff made much of the fact that Maurice Gibb identified plaintiff’s song as his own ‘How Deep is Your Love’ when it was played for him at trial.”) [<http://perma.cc/4BK8-EJS5>].

¹⁰⁴ *Selle*, 741 F.2d at 898.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 899–906.

¹⁰⁸ *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003).

¹⁰⁹ *Id.* at 1190, 1196–97.

¹¹⁰ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

¹¹¹ *Id.* at 485–86.

any songs written prior to the plaintiffs' creative work.¹¹² Though the court only evaluated a body of five unprotectable elements, the level of proof was still arguably high because both parties acknowledged their similarities in court.¹¹³

One more example is *Swirsky v. Carey*.¹¹⁴ In *Swirsky*, the district court originally granted the defendants' motion for summary judgment, in part "because it found no precedent for substantial similarity to be 'founded solely on similarities in key, harmony, tempo or genre, either alone or in combination.'"¹¹⁵ However, on appeal, the court reversed because the plaintiff's expert witness stated "the two songs' choruses shared a 'basic shape and pitch emphasis' in their melodies, which were played over 'highly similar basslines and chord changes, at very nearly the same tempo and in the same generic style.'"¹¹⁶ The songs' choruses were sung in the key of B-flat, which the plaintiff's expert called a "suspicious coincidence."¹¹⁷ The plaintiff's expert witness also testified that the choruses "shared a similar structure in that measures five through seven of each chorus were 'almost exactly' the same as the first three measures of each chorus."¹¹⁸ *Swirsky* indicates that, prior to *Blurred Lines*, even when two songs' choruses share an identical key, nearly identical structures, and very similar bass lines, chord changes, tempos, and generic styles, the application of the law, despite being reversed in the court of appeals, was sufficiently unclear that it was originally dismissed under summary judgment.

Looking broadly at how the courts determined whether music copyright infringement occurred in past cases, it seems safe to say that, prior to *Blurred Lines*, a plaintiff could not easily prove an infringement had occurred. Plus, with two layers of evaluation for similarity—one based on the objective viewpoint of the trier of fact and the other resting on the opinions of a reasonable person—many individuals would have to agree that two songs were substantially similar before infringement could be found. As several cases have suggested, this was no easy feat, and a copyright owner was more likely than not to fail in an infringement claim.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004).

¹¹⁵ *Id.* at 846.

¹¹⁶ *Id.* at 845.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The above-described music copyright landscape, with many filters and safeguards in place to limit infringement findings, is the legal environment in which the *Blurred Lines* controversy arose. The question raised was whether *Blurred Lines* infringed on Marvin Gaye's *Got to Give It Up* when there were no identical chord progressions, lyrics, or vocal melodies. Based on the courts' past behavior, the lack of identical elements likely worked against the Marvin Gaye estate. Despite the absence of traditional similarities, the Gaye estate was originally awarded more than \$7 million in damages. In Part II, this Comment will discuss *Blurred Lines* and compare it to the outcomes in *Stay with Me* and *Uptown Funk*.

II. *BLURRED LINES*, *STAY WITH ME*, AND *UPTOWN FUNK*

The precedent set by music copyright infringement cases in the pre-*Blurred Lines* world strongly suggested that a party bringing an infringement suit faced a significant risk of losing. *Blurred Lines*, however, may be said to have upset prior precedent. Critics of the *Blurred Lines* decision have suggested the case was an evaluation of whether the "feel" and "style" of the song was copied from Marvin Gaye's *Got to Give It Up*, elements not previously considered protectable under copyright law.¹¹⁹ In finding that *Blurred Lines* infringed, many have expressed concern that the holding sets a new and arguably lower standard for proving music copyright infringement.¹²⁰ The *Blurred Lines* decision, however, may have been the result of other factors independent of the music itself. There has been considerable discussion about the effect of Robin Thicke's contradictory statements and the negative impact it had on the jury, as well as the influence of the expert witnesses involved.¹²¹ Despite these speculations, the settlements in *Stay with Me* and *Uptown Funk*

¹¹⁹ See, e.g., Adam R. Bialek, *California Jury Finds "Blurred Lines" Infringed "Got To Give It Up": Society's Mixed Signals On Copying and Intellectual Property Rights*, 27 INTELL. PROP. & TECH. L.J. 14, 15 (2015) ("What is clear is that the line between copying and evoking a 'feel' regarding music has just been blurred."); Keith Murphy, *7 Reasons the 'Blurred Lines' Verdict Should Have Everyone Spooked*, BET (last visited Feb. 10, 2016), <http://www.bet.com/music/photos/2015/03/7-reasons-the-blurred-lines-verdict-should-have-everyone-spooked.html#031315-music-questlove> ("[M]ake no mistake this is FEEL not actual melody.")

¹²⁰ See, e.g., Bialek, *supra* note 119 ("Insofar as the jury's verdict may not end the legal analysis in this case, courts will need to evaluate where 'ideas' depart from 'expression' and what 'transformative' truly means in the context of fair use."); Wu, *supra* note 19 ("Consider the sheer number of creators who would be affected if such rulings were levied more widely. Everyone knows that the Rolling Stones borrowed their style from Chuck Berry and other rhythm-and-blues artists. Rush's first album sounds a lot like Led Zeppelin—who copied Robert Johnson, among others.")

¹²¹ See, e.g., Emily Miao & Nicole E. Grimm, *'Blurred Lines' Artists Lose Multimillion-Dollar Copyright Lawsuit*, 22 WESTLAW J. INTELL. PROP. 1, 4 (2015).

may suggest that other songwriters and their representatives do not want to take their chances in court.

This Part provides a more detailed description of the *Blurred Lines* case, a discussion about factors that might have influenced the *Blurred Lines* outcome, and an analysis of the out-of-court settlements in *Stay with Me* and *Uptown Funk*.

A. The *Blurred Lines* Case

When the Marvin Gaye estate contacted representatives for *Blurred Lines* songwriters Robin Thicke and Pharrell Williams in 2013 about *Blurred Lines*' possible infringement on Marvin Gaye's *Got to Give It Up*, rather than settle out of court, lawyers for Thicke and Williams forcefully struck back by suing for a declaratory judgment stating that no infringement occurred.¹²² The following examination of the *Blurred Lines* case discusses how its result differs from the holdings in traditional music copyright infringement cases.

1. The Complaint for Declaratory Relief

Blurred Lines was written by Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. (a.k.a. T.I.), and released in or around March 2013.¹²³ At the time the *Blurred Lines* songwriters filed their complaint for declaratory relief in August 2013, the song had already been viewed more than 140 million times on YouTube.¹²⁴ By the time it was awarded Billboard's Song of the Summer, one month after the complaint was filed in September 2013, *Blurred Lines* had held the number one spot on the Billboard Hot 100 chart for twelve weeks, sold 5.4 million downloads, and set the record for the highest weekly audience in the twenty-three-year history of Billboard's Radio Songs chart.¹²⁵

In the complaint filed on August 15, 2013, the *Blurred Lines* songwriters/plaintiffs launched a preemptive strike. The songwriters/plaintiffs stated they were contacted by the Marvin Gaye estate, who claimed *Blurred Lines* infringed on Marvin Gaye's song *Got to Give It Up* and that if the songwriters did not "pay a monetary settlement of the Gayes' claim," the Gayes would "initiate litigation for copyright infringement"¹²⁶ Rather than

¹²² See generally Williams Complaint, *supra* note 8.

¹²³ *Id.* at 6.

¹²⁴ *Id.*

¹²⁵ Gary Trust, *Robin Thicke's 'Blurred Lines' Is Billboard's Song of the Summer*, BILLBOARD (Sept. 5, 2013), <http://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboards-song-of-the-summer> [<http://perma.cc/HC29-J37N>].

¹²⁶ Williams Complaint, *supra* note 8, at 16.

wait to be sued, the *Blurred Lines* songwriters initiated a declaratory judgment action.

The *Blurred Lines* songwriters/plaintiffs denied any infringement, claiming “there are no similarities” between the two songs “other than commonplace musical elements.”¹²⁷ The complaint stated that “[t]he basis of the Gaye defendants’ claims is that ‘Blurred Lines’ and ‘Got To Give It Up’ ‘feel’ or ‘sound’ the same.”¹²⁸ However, the *Blurred Lines* plaintiffs defended themselves by stating: “Being reminiscent of a ‘sound’ is not copyright infringement. The intent in producing ‘Blurred Lines’ was to evoke an era. In reality, the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work”¹²⁹

The *Blurred Lines* plaintiffs requested one of two alternative declaratory judgments from the court.¹³⁰ The first was a court declaration stating “the Gayes do not have an interest in the copyright to the composition ‘Got To Give It Up’ sufficient to confer standing on them to pursue claims of infringement of that composition[.]”¹³¹ In the alternative, the *Blurred Lines* team requested a declaration that “‘Blurred Lines’ does not infringe ‘Got To Give It Up’ or otherwise violate the Gayes’ rights.”¹³² Both alternatives attempted to defeat a claim of infringement on the part of the Gaye estate before the claim could be raised.

Alternative number one attacked the Gayes’ ownership of the copyright for *Got to Give It Up*, a tactic discussed in Part I, Section B of this Comment.¹³³ Note also that if the *Blurred Lines* team received either of the declaratory judgments sought, the Gaye estate would be prevented from succeeding in a copyright infringement claim, and no settlement between the two parties would be necessary. Some may say the *Blurred Lines* team was correct in this course of action, as the courts’ history of reluctance to find infringement suggested the Gaye estate did not have a strong case. However, others may believe that reacting with a preemptive lawsuit was overconfident.

2. The Gaye Estate’s Counterclaims

In response to the *Blurred Lines*’ songwriters’ complaint for declaratory relief, the Gaye estate filed two counterclaims accusing the *Blurred Lines* songwriters of infringing *Got to Give*

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.*

¹³⁰ *Id.* at 22.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See supra* Part I.B.

It Up.¹³⁴ The first counterclaim was filed on October 20, 2013, by Marvin Gaye's son, Frankie Christian Gaye, and daughter, Nona Marvisa Gaye ("Frankie & Nona Gaye's first amended counterclaim").¹³⁵ The second was filed on November 19, 2013, by Marvin Gaye's son, Marvin Gaye, III ("Marvin Gaye, III's counterclaim").¹³⁶ Most of the allegations in Frankie & Nona Gaye's first amended counterclaim are reiterated in Marvin Gaye, III's counterclaim.¹³⁷

Frankie & Nona Gaye's first amended counterclaim stated that Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye, III were the children of Marvin Gaye, and co-owners of the musical composition of *Got to Give It Up*.¹³⁸ This statement may have served as a response to the questions regarding the Gaye estate's ownership and legal standing to bring suit.

The counterclaim then accused the *Blurred Lines* songwriters of:

[B]latant copying of a constellation of distinctive and significant compositional elements of Marvin Gaye's classic #1 song, "Got to Give it Up" [as well as] the duplicitous actions by defendant Thicke of first publicly admitting "Got to Give it Up" was used in creating "Blurred Lines," in order to take advantage of the legend and utmost credibility of Marvin Gaye, and to drive sales, but then joining with his collaborators to file a lawsuit against Marvin Gaye's children when they rightfully raised concerns about his unlawful copying.¹³⁹

In support of the Gaye estate's accusations against Thicke, the counterclaim cited both a *GQ* magazine interview of Robin Thicke dated May 7, 2013, and a *Billboard* magazine interview of Thicke dated July 9, 2013, where Thicke said he told Pharrell Williams during the *Blurred Lines* writing sessions that *Got to Give It Up* was one of his "favorite songs of all time," and they should write something with a similar "groove" or "feel."¹⁴⁰ Thicke was accused of changing his story after filing the complaint for declaratory relief, citing an interview with "celebrity gossip website, *TMZ*," where Thicke denied having Marvin Gaye in mind when he wrote *Blurred Lines*.¹⁴¹

¹³⁴ See generally Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10; Marvin Gaye III's Counterclaim, *supra* note 10.

¹³⁵ See Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 11–12.

¹³⁶ Marvin Gaye III's Counterclaim, *supra* note 10, at 22.

¹³⁷ See generally Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10; Marvin Gaye III's Counterclaim, *supra* note 10.

¹³⁸ See Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 11–13.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 6.

By describing Thicke's contradictory media statements, the Gaye estate's legal team accomplished two things. First, it undermined Thicke's credibility. As we will see later in this Section, Thicke's character may have played an important role in the large settlement awarded by the jury. Second, the Gaye estate's legal team presented evidence that Thicke admitted to having access to *Got to Give It Up*, which is the first element required to demonstrate "copying in fact" using indirect evidence.¹⁴²

The counterclaim also alleged that an "ordinary observer would recognize this appropriation," followed by a list of supporting comments from *New York Times* writer Rob Hoerburger, music critic Paul Cantor, Marvin Gaye biographer David Ritz, and *Bloomberg Business Week's* Paul Barrett.¹⁴³ The counterclaim reinforced this allegation by stating that "ordinary observers all over the world have remarked that the two songs sound the same, which they do."¹⁴⁴ In making these statements, the Gaye estate's lawyers laid the groundwork for establishing that an "ordinary lay observer" could detect the similarities between the two songs, which, if true, would satisfy prong two of the Ninth Circuit's substantial similarity test, the intrinsic analysis.¹⁴⁵

The counterclaim then described the elements the Gaye estate believed were substantially similar between the two songs:

The substantial similarities found in "Got to Give it Up" and "Blurred Lines" are the result of many of the same deliberate creative choices made by their respective composers, far surpassing the similarities that might result from attempts to evoke an "era" of music or a shared genre, as the Blurred Writers wrongly asserted in this action. . . . Many of the main vocal and instrumental themes of "Blurred Lines" are rooted in "Got to Give it Up"; namely, the signature phrase, vocal hook, backup vocal hook, their variations, and the keyboard and bass lines. Those important and distinctive compositional elements are substantially similar in "Blurred Lines" and "Got to Give it Up." Moreover, the shared departures from convention, such as the unusual cowbell instrumentation, omission of guitar, and use of male falsetto, all contribute further to the finding of substantial similarity here.¹⁴⁶

Note that what is missing is any evidence that the two songs have any identical or nearly identical vocal melodies, chord progressions, or lyrics—elements traditionally considered required for a finding of infringement.¹⁴⁷ Rather, the Gaye

¹⁴² See *supra* Part I.B.

¹⁴³ Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 7.

¹⁴⁴ *Id.* at 34.

¹⁴⁵ See *supra* Part I.C.

¹⁴⁶ Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 37, 38.

¹⁴⁷ See *supra* Part I.C.

estate's counterclaim describes what appear to be similarities indirectly related to each other, such as themes that are "rooted" in *Got to Give It Up*, or similar musical choices such as "unusual" or omitted instrumentation and a falsetto vocal technique.¹⁴⁸ One could argue that such an indirect relationship was not commonly viewed by courts as sufficient for a finding of infringement. If so, it may be said that the Gaye estate presented a new theory of infringement for the court to consider.

Finally, and importantly, Frankie & Nona Gaye's first amended counterclaim included a preliminary musicology report comparing the recorded versions of the two songs, written by musicologist Judith Finell.¹⁴⁹ The report stated there was a "constellation"¹⁵⁰ of at least eight substantially similar compositional features between the two works, observing that "[t]heir substantially similar elements in both their vocal melodies and instrumental accompaniments occur simultaneously in each work, coinciding to form a similar 'constellation' of features."¹⁵¹ Ms. Finell expressed her belief that "[t]he two songs' substantial similarities surpass the realm of generic coincidence, reaching to the very essence of each work."¹⁵² She also opined that "the ordinary 'lay' listener would likely recognize the substantial similarities" between the two songs, and preliminarily concluded that *Blurred Lines* was not created independently of *Got to Give It Up*.¹⁵³ By providing a written report from an expert musicologist, the Gaye estate's legal team formed the basis for an argument that their infringement claim should survive the extrinsic analysis, prong one of the Ninth Circuit's substantial similarity test.¹⁵⁴

In summary, the Gaye estate's counterclaims addressed the question of their ownership of the *Got to Give It Up* copyright. The counterclaims then provided evidence showing a strong

¹⁴⁸ Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 37, 38.

¹⁴⁹ JUDITH FINELL, PRELIMINARY REPORT: COMPARISON OF "GOT TO GIVE IT UP" AND "BLURRED LINES" (2013), <http://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/musicologyblurred.pdf> [<http://perma.cc/QU2D-3YM9>].

¹⁵⁰ The repeated use of the term "constellation" does not appear to be defined in Frankie & Nona Gaye's First Amended Counterclaim or Judith Finell's musicology report. Merriam-Webster dictionary defines "constellation" as "a group of stars that forms a particular shape in the sky and has been given a name; [a] group of people or things that are similar in some way." *Constellation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/constellation> [<http://perma.cc/MH4H-N24D>]. Based on the plain language definition and the context in which "constellation" is used throughout the *Blurred Lines* court documents, it may be acceptable to infer that "constellation" in this context refers to the group of elements that are considered similar between the two songs, forming a particular or identifiable body of sound.

¹⁵¹ FINELL, *supra* note 149, at 6.

¹⁵² *Id.* at 7.

¹⁵³ *Id.* at 8, 47.

¹⁵⁴ See *supra* Part I.C.

likelihood of Robin Thicke's access to *Got to Give It Up* and placed Thicke's character into question due to his inconsistent statements to the media. Finally, the Gaye estate appeared to provide the factual foundation necessary to set up a claim that its allegations would meet both prongs of the Ninth Circuit substantial similarity test.

3. The Plaintiffs'/Counterdefendants' Motion for Summary Judgment

On July 22, 2014, attorneys for the *Blurred Lines* songwriters filed a Motion for Summary Judgment.¹⁵⁵ First, the *Blurred Lines* legal team argued that the Gaye estate did not own copyrights for the musical elements allegedly shared by the two songs.¹⁵⁶ The attorneys pointed out the fact that the Gaye estate only owned the copyright for the musical composition, not the sound recording, of *Got to Give It Up*, noting that the copyrights are not the same.¹⁵⁷ The *Blurred Lines* attorneys then stated that many of the alleged "similarities" cited by the Gaye estate were based on "commonplace elements" only found in the sound recording of *Got to Give It Up*¹⁵⁸ and absent from the sheet music submitted to the Copyright Office when the musical composition was registered in 1977.¹⁵⁹ The attorneys argued that since the musical elements in question were not part of the sheet music submitted, the musical elements were "not part of [Marvin Gaye's] copyrighted composition that Defendants claim to own."¹⁶⁰ This argument urged the court to limit the Gaye estate's copyright-protected materials to what was noted in the sheet music, excluding the Gaye estate from claiming ownership of any musical elements found only in the sound recording.

Attorneys for the *Blurred Lines* songwriters also attacked the allegation of substantial similarity, stating "[t]here is no substantial similarity in the melody, harmony, rhythm, structure, or lyrics" between the two songs.¹⁶¹ The attorneys highlighted the fact that Judith Finell's musicology report "[did] not contain *two consecutive notes* with the same pitch and duration and placement in the measure (*i.e.*, rhythm) in both songs,"

¹⁵⁵ Plaintiffs and Counter-Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alt., Partial Summary Judgment; Memorandum of Points and Authorities, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx) (C.D. Cal. July 22, 2014), 2014 WL 5026250 [hereinafter *Williams Motion for Summary Judgment*].

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.* at 2, 6.

¹⁵⁸ *Id.* at 1–2.

¹⁵⁹ *Id.* at 1.

¹⁶⁰ *Id.* (emphasis in original).

¹⁶¹ *Id.* at 8.

emphasizing that “[t]his is highly unusual in an infringement claim.”¹⁶² The motion identified several missing similarities:

The melodies of the two songs are different. There is no melodic phrase in BLURRED that also appears in GIVE. The harmonies are not similar. There is no sequence of two chords played in the same order and for the same number of measures (duration) in GIVE and BLURRED. GIVE and BLURRED do *not* contain *three* chords in common. . . . The rhythms are different. . . . The structures also are very different. . . . The lyrics are entirely different. There are no lyrical phrases in common. There is no substantial similarity between the two works.¹⁶³

In short, the *Blurred Lines* team argued that the long list of significant differences between the works negated a claim of “substantial similarity.”

The legal team devoted an entire section to its contention that the musicologist’s preliminary report failed to identify any substantial similarity between *Blurred Lines* and *Got to Give It Up*.¹⁶⁴ As previously mentioned, a claim will not survive summary judgment in the Ninth Circuit if the party alleging infringement cannot demonstrate a genuine issue of material fact regarding the substantial similarity between the two works.¹⁶⁵

The motion claimed that the eight similarities identified in the musicology report were “unprotectable *ideas* that are the basic building blocks of composition available to all composers,” and as *ideas* (which are not copyrightable), they were not eligible for copyright protection.¹⁶⁶ The motion also challenged the contention that the constellation of unprotectable elements created a combination sufficiently original to qualify for copyright protection.¹⁶⁷ The *Blurred Lines* legal team strongly asserted that “[i]t would turn copyright law on its head to allow the Gayes to claim a copyright in the ‘combination’ of musical building blocks . . . when the actual similarity in notes is virtually non-existent.”¹⁶⁸

The *Blurred Lines* lawyers engaged in a detailed discussion claiming only three of the eight alleged similarities were “reflected in the [*Got to Give It Up*] Copyright Deposit,” and since the remaining five similarities were excluded from the copyright deposit (as discussed above), they were not protected by

¹⁶² *Id.* at 2.

¹⁶³ *Id.* at 8–9 (citations omitted).

¹⁶⁴ *Id.* at 9–23.

¹⁶⁵ See *supra* Part I.B–C.

¹⁶⁶ Williams Motion for Summary Judgment, *supra* note 155, at 10.

¹⁶⁷ *Id.* at 10–11.

¹⁶⁸ *Id.* at 12.

copyright.¹⁶⁹ The *Blurred Lines* team then attempted to have the court dismiss the three remaining alleged similarities as both non-original and therefore uncopyrightable elements, as well as so insignificant that they were *de minimis*.

Summarizing, the *Blurred Lines* legal team argued that most of the elements in question were solely featured in the sound recording of *Got to Give It Up*, which the Gaye estate did not own, and the remaining musical elements in question were uncopyrightable. The *Blurred Lines* legal team relied heavily on the fact that there were no identical melodic or harmonic phrases, vocal melodies, chord progressions, or lyrics between *Blurred Lines* and *Got to Give It Up*, and claimed that, as a result, no substantial similarity between the songs existed. Arguments were raised stating that the majority of similarities identified by expert musicologist Judith Finell were uncopyrightable ideas or concepts. The copyrightability of the collective body of uncopyrightable musical elements was also challenged, as the *Blurred Lines* attorneys contended that the arrangement of the musical elements was not sufficiently original to merit protection.

4. Counterclaimant's Opposition to Motion for Summary Judgment

In September 2014, the Gaye estate filed a Joint Memorandum of Points and Authorities in Opposition to Plaintiffs and Counterdefendants' Motion for Summary Judgment.¹⁷⁰

Many of the Gaye estate's arguments had already been raised in their counterclaims. However, perhaps the most novel and important new point was an argument that urged the court to consider "[t]he overall impact of a combination of elements" to determine infringement, even if the individual elements were not copyrightable, identical, or even very similar when compared alone.¹⁷¹ The Gaye estate cited both *Swirsky* and *Three Boys Music* as two cases where courts compared a combination of "unprotectable elements" yet still concluded that the similarities were sufficient to at least survive summary judgment (*Swirsky*) or uphold a jury finding of substantial similarity (*Three Boys Music*).¹⁷² Notably, unlike the *Blurred Lines* case, the common

¹⁶⁹ *Id.* at 14–23.

¹⁷⁰ Counter-Claimants' Joint Memorandum of Points and Authorities in Opposition to Plaintiffs and Counter-Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGGRx) (C.D. Cal. July 22, 2014), 2014 WL5408808 [hereinafter *Opposition to Summary Judgment*].

¹⁷¹ *Id.* at 18–22.

¹⁷² See *Swirsky v. Carey*, 376 F.3d 841, 843 (9th Cir. 2004); *Three Boys Music Corp. v.*

elements between the songs in both *Swirsky* and *Three Boys Music* were nearly identical when compared by themselves.¹⁷³ In comparing *Blurred Lines* to *Swirsky* and *Three Boys Music*, the Gaye estate arguably attempted to expand what qualifies as copyright infringement from what may be called “a grouping of similar unprotectable elements that are nearly identical” to a standard that could be described as “a grouping of similar unprotectable elements that, taken together, sound similar to a grouping of the same similar unprotectable elements *despite the absence of identical or nearly identical copying of any one of the individual elements.*”

If the court accepted the Gaye estate’s proposed theories, copyright infringement would be expanded to include not only groupings of identical or nearly identical uncopyrightable elements, but groupings or shared creative choices that result in an overall sound or feel that is considered a similar expression of an idea, even in the absence of identical or nearly identical melodies, sequences of notes, chord progressions, lyrics, or other individual elements. Though not specifically stated in the Gaye estate’s opposition to summary judgment, this was arguably the legal leap the Gaye estate asked the court to make.

5. Order Regarding the Plaintiffs’ and Counterdefendants’ Motion for Summary Judgment

On October 30, 2014, the district court issued its order regarding the *Blurred Lines* team’s motion for summary judgment.¹⁷⁴ As described in Part I, Section C, the court first explained under what circumstances a motion for summary judgment would be granted.¹⁷⁵ The court must conduct prong one of the substantial similarity test, an objective extrinsic test comparing the *protected* elements between each work as well as the *body of unprotected elements* of each work to determine if substantial similarity exists.¹⁷⁶ If the court finds “indicia of ‘a sufficient disagreement’ concerning the substantial similarity of two works,”¹⁷⁷ the infringement claim survives summary judgment and moves to the jury.¹⁷⁸ The jury then conducts prong two, the subjective intrinsic analysis.¹⁷⁹

Bolton, 212 F.3d 477, 480 (9th Cir. 1999).

¹⁷³ See *Swirsky*, 376 F.3d 841, 845–46; *Three Boys Music*, 212 F.3d 477, 485–86.

¹⁷⁴ Order Regarding Summary Judgment, *supra* note 36, at *1.

¹⁷⁵ See *supra* Part I.C.

¹⁷⁶ Order Regarding Summary Judgment, *supra* note 36, at *6.

¹⁷⁷ *Id.* (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992) (citations omitted)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *6.

Once again, note that the extrinsic test described by the district court did not state or cite any cases showing that a body of unprotected elements *that are not individually identical or nearly identical to each other* qualifies for copyright protection.

First, the court agreed that the Copyright Act of 1909 applied to the Gaye estate's copyright, and limited copyright protection to the lead sheet deposited with the Copyright Office.¹⁸⁰ Limiting protection to the lead sheet drastically reduced the list of comparable elements.¹⁸¹ The alleged infringements were whittled down to five items: "[the] 11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure and four-note vocal melody."¹⁸²

The court then evaluated each of the protected elements in question, comparing the arguments made by the Gaye estate's expert witnesses, Judith Finell and Ingrid Monson,¹⁸³ with the responses from the *Blurred Lines* team's musicologist, Sandy Wilbur.¹⁸⁴ Ultimately, the court denied summary judgment.¹⁸⁵

The first alleged similarity was the signature phrase, described by Finell as "[a] phrase . . . within a longer melody, similar to a sentence within a paragraph or a line within a poem."¹⁸⁶ Finell alleged that the signature phrases of the two songs were substantially similar because both phrases repeated their starting tone several times, contained "a similar series of scale degrees with similar rhythms," used identical rhythms for the first six tones, utilized the same device of a melodic "tail" (melisma) on their last lyric,¹⁸⁷ and featured substantially similar melodic contours.¹⁸⁸

Wilbur disagreed, "claim[ing] that the melody, harmony, and rhythm of the songs are different . . . [n]o other notes in the Signature Phrases have the same pitch and placement . . . the starting tones are different in each song, and are played over different chords"; Finell's analysis was "incomplete"; and "a complete comparison of the melodic phrases and harmonies shows that there are substantial differences."¹⁸⁹ Wilbur also

¹⁸⁰ *Id.* at *8–9.

¹⁸¹ *Id.* at *19.

¹⁸² *Id.*

¹⁸³ *Id.* at *3–4 ("Ingrid Monson is the Quincy Jones Professor of African American Music at Harvard University. Defendants retained her as an additional expert.")

¹⁸⁴ *Id.* at *12–16.

¹⁸⁵ *Id.* at *20.

¹⁸⁶ *Id.* at *12 (citation omitted).

¹⁸⁷ Finell defines a "melisma" as "a vocal melody in which one syllable or lyric is held while sung with several successive pitches, rather than a single pitch for each syllable." *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at *13.

“dismiss[ed] the identical rhythm of the first six notes of each signature phrase as a ‘common musical idea or device,’”¹⁹⁰ noting that Chuck Berry’s *Johnny B. Goode*, the Beatles’ *Hard Day’s Night*, and War’s *Low Rider* served as three examples of songs preceding *Got to Give It Up* that utilized the same rhythmic pattern.¹⁹¹ Wilbur categorized melismas at the end of melodic phrases as “common musical device[s], and that those in ‘Got to Give It Up’ and ‘Blurred Lines’ differ based on the pitches, rhythm, placement and melodic contour of the sustained lyric.”¹⁹² Wilbur also characterized the melodic contours of the signature phrases as “substantially different” and “commonplace.”¹⁹³

Regarding the second alleged similarity, claiming that “three of the four notes of the songs’ hooks are identical in scale degree,” Wilbur noted that “Finell fail[ed] to space the hooks correctly within the measure, and . . . omit[ted] the subsequent melisma to give a misleading impression of similarity.”¹⁹⁴ In other words, the hooks themselves differed because the notes were different, played in a different rhythmic pattern, and Finell omitted the ending notes of the *Blurred Lines* hook.

In terms of the third alleged similarity, the opening bass line, Finell claimed that “the bass line that begins in bars 1–4 of ‘Blurred Lines’ and is repeated throughout the song is similar to the bass line in bars 1–4 of ‘Got to Give It Up.’”¹⁹⁵ However, Wilbur argued that “the four bars of each song have only three notes in common . . . [and] the differences between the bass lines outweigh the similarities.”¹⁹⁶ The only commonality Wilbur acknowledged between the two bass lines was that “‘the bass play[s] the root of the chord,’ a ‘commonplace idea’ and ‘the most fundamental role of the bass in popular music.’”¹⁹⁷ Wilbur cited Curtis Mayfield’s *Superfly* as “prior art,” or an example of a song that preceded *Got to Give It Up* which also featured the bass playing the root of the chord.¹⁹⁸

The Gaye estate’s second expert witness, Ingrid Monson, provided the arguments for the last two elements between *Blurred Lines* and *Got to Give It Up* considered by the court. In terms of harmonic similarity, Monson claimed that “the

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at *14.

¹⁹⁵ *Id.* at *15.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

resemblance of the melodies is so strong that the chord progression on ‘Got to Give It Up’ can serve as a substitute progression for ‘Blurred Lines.’”¹⁹⁹ Though Wilbur’s analysis was completed before Monson’s declaration, the court appeared to interpret Wilbur’s prior report as an argument refuting Monson’s claim that the chord progression in one song could replace the chord progression of the other.²⁰⁰

Finally, Monson claimed that “there is a substantial similarity between a portion of the lead vocal melody of ‘Got to Give It Up’ and a melodic line in ‘Blurred Lines.’”²⁰¹ Monson identified three notes in the vocal melodies of both songs that “chromatically ascend” (or go up in pitch). Though the melodies were not identical in pitch or in the note progression in which they ascended, Monson described the three-note ascent in each song as “recognizably related.”²⁰²

In summary, despite the Gaye estate’s expert witnesses identifying aspects of the five elements in question as “substantially similar,” the *Blurred Lines* team’s expert witness provided evidence that the similarities were generally quite limited and accompanied by a far greater number of dissimilarities, arguably suggesting that the elements were more different than the same. Additionally, the *Blurred Lines* team’s expert argued that many of the features, including those that were allegedly “identical” according to the Gaye estate’s experts, were commonly used musical tools or devices utilized in songs written before the creation of *Got to Give It Up*.

The court rejected the argument that the elements which were commonplace were not eligible for protection.²⁰³ Instead, the court said “the combination and selection of these elements may be considered under the extrinsic test because ‘the over-all impact and effect indicate substantial appropriation.’”²⁰⁴

In the end, after boiling down the list of allegedly similar elements to only those components protected by the Gaye estate’s copyright, the district court was convinced that both the remaining shared elements were sufficiently similar and the expert witnesses’ opinions about these similarities were disparate enough to have presented a “genuine issue of material fact” that

199 *Id.* at *17.

200 *Id.*

201 *Id.* at *18.

202 *Id.*

203 *Id.* at *19.

204 *Id.* (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

merited a jury's evaluation. As a result, the Gaye estate's allegations survived the motion for summary judgment.²⁰⁵

The court's decision to deny summary judgment seems to suggest that under the new *Blurred Lines* standard, songs which contain elements that are not identical or nearly identical, or only possess rather distant similarities that are commonplace and unprotectable in and of themselves, may still be considered infringing if expert testimony is presented that argues substantial similarity exists. Furthermore, the absence of nearly identical melodies, lyrics, chord progressions, and note sequences will no longer suffice as a defense against an infringement allegation so long as an expert witness claims the songs are "substantially similar."

It is worth noting that, had the *Blurred Lines* legal team's motion for summary judgment succeeded, the case would never have gone to a jury.²⁰⁶ This may come as a surprise for those outside of the legal field, as many may assume that filing a lawsuit automatically guarantees a jury trial. This is not the case for copyright infringement suits, as a claim of infringement will not be heard by a jury if it does not survive a motion for summary judgment.²⁰⁷

6. The Jury Verdict

The jury was empaneled on February 24, 2015, and the trial proceeded for seven days.²⁰⁸ During this time, the lawyers for both sides presented the jurors with many of the same arguments described above.²⁰⁹ Musical interpretations of the *Got to Give It Up* sheet music originally deposited with the Copyright Office were presented to the jurors and compared with *Blurred Lines*.²¹⁰ Expert testimony was also presented,²¹¹ as it appears

²⁰⁵ *Id.* at *19–20.

²⁰⁶ *See supra* Part I.C.

²⁰⁷ *Id.*

²⁰⁸ Proceedings: (In Chambers) Order Re Plaintiffs and Counter-Defendants' Motion for Judgment as a Matter of Law, Declaratory Relief, A New Trial, or Remittitur; Defendants and Counter-Claimants' Joint Post-Trial Motion for Declaratory Relief; Defendants and Counter-Claimants' Joint Post-Trial Motion for Injunctive Relief, or in the Alternative, for Ongoing Royalties; Counter-Claimants' Joint Motion for Prejudgment Interest, Williams v. Bridgeport Music, Inc., No. LACV13-06004JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

²⁰⁹ *See* Defendant Bridgeport Music, Inc. et al.'s Opening Statement, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Feb. 24, 2015), 2015 WL 4935274 [hereinafter Gaye Estate Opening Statement]; Plaintiff Pharrell Williams et al.'s Opening Statement, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Feb. 24, 2015), 2015 WL 4935275 [hereinafter Williams Opening Statement].

²¹⁰ *See* Defendant Bridgeport Music, Inc. et al.'s Closing Statement, Williams v. Bridgeport Music, Inc., No. CV 13-06004-JAK (AGRx) (C.D. Cal. Mar. 5, 2015), 2015 WL 4935286 [hereinafter Gaye Estate Closing Statement]; Pharrell Williams et al.'s Closing

the jurors were charged with conducting both extrinsic and intrinsic tests.²¹²

The jury instructions seem to have incorporated the lower standard of proof employed by the district court.²¹³ In describing the intrinsic similarity test, the court explained that “[i]ntrinsic similarity is shown if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye parties’ work and the Thicke parties’ work are substantially similar.”²¹⁴ The *Blurred Lines* legal team would later claim in its motion for judgment as a matter of law that the breadth of this jury instruction and its failure to limit the intrinsic evaluation to protectable elements was erroneous.²¹⁵ The court rejected this argument, stating that it adequately instructed the jury elsewhere to limit its evaluation to protectable elements.²¹⁶ The court also defended a jury instruction regarding the extrinsic test, stating that a finding of substantial similarity *did not require that each individual element was substantially similar*, so long as there was “enough similarity between a work of the Gaye Parties and an allegedly infringing work of the Thicke Parties to comprise a substantial amount.”²¹⁷ Though the similarity between the district court’s evaluation and the jury instructions may be subtle, instructing jurors to evaluate the overall work without any requirement of nearly identical elements seems to mirror the broader standard utilized by the district court in its decision to deny summary judgment.

After deliberating for two days, the jury returned its verdict on March 10, 2015.²¹⁸ The jury found that copyright infringement had occurred, but only on the part of Robin Thicke and Pharrell Williams.²¹⁹ The jury awarded the Gaye estate \$4,000,000 for actual damages.²²⁰ Additionally, the jury found that, due to the infringement, Thicke profited by \$1,610,455.31 and Williams

Statement and Defendant’s Rebuttal, *Williams v. Bridgeport Music, Inc.*, No. CV 13-06004-JAK (AGRx), 2015 WL 4935287 (C.D. Cal. Mar. 5, 2015) [hereinafter *Williams Closing Statement*].

²¹¹ See Gaye Estate Closing Statement, *supra* note 210; *Williams Closing Statement*, *supra* note 210.

²¹² Jury Instructions at 69, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Mar. 10, 2015), 2015 WL 1322666 [hereinafter *Jury Instructions*].

²¹³ *Id.* at No. 3.

²¹⁴ *Id.*

²¹⁵ Order Re Plaintiffs and Counter-Defendants’ Motion for Judgment as a Matter of Law, *Williams v. Bridgeport Music, Inc.*, No. LACV1306004JAKAGRX (C.D. Cal. July 14, 2015), 2015 WL 4479500, at *18.

²¹⁶ *Id.*

²¹⁷ *Id.* at *19.

²¹⁸ *Id.* at *1.

²¹⁹ *Id.*

²²⁰ *Blurred Lines* Special Verdict, *supra* note 11.

profited by \$1,768,191.88.²²¹ In total, the Gaye estate was awarded more than \$7.3 million.²²²

Since the jury verdict, the district court has reduced the amount awarded to \$5.3 million,²²³ and the case is currently being appealed.²²⁴

The *Blurred Lines* result was quite unexpected in light of prior cases. As compared to *Selle v. Gibb*—where the court rejected the jury’s finding of infringement and ultimately decided that no infringement occurred, despite twenty-four identical notes in the first eight bars, thirty identical rhythms throughout the song, fourteen identical notes, eleven identical rhythms in the last four bars of both songs, and a member of the Bee Gees mixing up his song with Selle’s²²⁵—it seemed unlikely that *Blurred Lines* would have been viewed as infringing since the similarities between *Blurred Lines* and *Got to Give It Up* were considerably fewer than in *Selle v. Gibb*, and none were identical.

Compared to *Newton v. Diamond*, where the infringement was said to be *de minimis* when three notes were copied exactly and looped to repeat more than forty times,²²⁶ it seemed that *Blurred Lines* could have qualified for a *de minimis* defense, since there were only five elements in question, most of which were commonly used in other songs of a similar genre and not identical.

Blurred Lines did not appear to meet the high level of proof demonstrated in *Three Boys Music*, where the elements shared between the songs were so similar that even the expert witness for the alleged infringer acknowledged their similarities.²²⁷

Nor did *Blurred Lines* appear to exhibit as many similarities as found in *Swirsky*, where the district court initially granted the defendant’s motion for summary judgment even though the two songs’ choruses shared an identical key, nearly identical structures, and very similar bass lines, chord changes, tempos, and generic styles.²²⁸

²²¹ *Id.*

²²² Order Re Plaintiffs and Counter-Defendants’ Motion for Judgment as a Matter of Law, *Williams v. Bridgeport Music, Inc.*, No. LACV13-06004JAK(AGRX), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

²²³ Anthony McCartney, *Judge Trims ‘Blurred Lines’ Song Dispute Verdict to \$5.3M*, ASSOC. PRESS (July 15, 2015, 4:14 AM), <http://bigstory.ap.org/urn:publicid:ap.org:520edacfc62c4b4292b4fac3bac5dd9c> [<http://perma.cc/T652-E2RW>].

²²⁴ Kenneally & Chelin, *supra* note 7.

²²⁵ *Selle v. Gibb*, 741 F.2d 896, 899, 905–06 (7th Cir. 1984).

²²⁶ *Newton v. Diamond*, 388 F.3d 1189, 1190, 1196–97 (9th Cir. 2003).

²²⁷ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485–86 (9th Cir. 2000).

²²⁸ *Swirsky v. Carey*, 376 F.3d 841, 846 (9th Cir. 2004), *as amended on denial of reh’g* (Aug. 24, 2004).

The legal precedent suggested by these and other prior cases seems to have shifted following the *Blurred Lines* holding. Even where elements are not close enough to be considered “nearly identical” or unique enough to be protectable under copyright law, now all that appears necessary to survive summary judgment is an expert witness who will testify that there is a “substantial similarity” between two songs.

B. Factors Which May Have Contributed to the Outcome

By itself, the decision to deny the *Blurred Lines* legal team’s motion to dismiss represents an unusual holding on the part of the district court.²²⁹ The jury decision which followed has also been viewed as remarkable, and some observers have questioned whether the jury outcome was too greatly influenced by negative opinions about Robin Thicke.²³⁰ Some may wonder if *Blurred Lines* is simply an anomaly. For a fully informed discussion, it may be wise to consider some of the exogenous factors that could have contributed to the *Blurred Lines* verdict.

A major deciding factor appears to have been the Gaye estate’s use of expert musicologists. The effect of this was noted in the district court’s decision to deny summary judgment.²³¹ The jury may have also been strongly influenced by expert testimony. Some have noted that the jury “put significant weight on the expert witness for the Gaye family, musicologist Judith Finell”²³² Another commentator suggested it was the musicologists’ breaking down of the groove into “something ‘scientifically quantifiable,’ that effectively convinced the jurors that . . . ‘Blurred Lines’ was in some part derived from Gaye’s work.”²³³

The use of expert testimony, however, is not uncommon in music copyright infringement cases and considered appropriate for consideration when conducting the extrinsic analysis test.²³⁴ Thus, it is unlikely that expert testimony could be viewed as peculiar to the *Blurred Lines* case. For jurors conducting both extrinsic and intrinsic tests, it may be safe to say that the effect

²²⁹ See *supra* Part II.A.

²³⁰ See Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1231 (2015).

²³¹ Order Regarding Summary Judgment, *supra* note 36, at *3, *14.

²³² See Emily Miao & Nicole E. Grimm, *‘Blurred Lines’ Artists Lose Multimillion-Dollar Copyright Lawsuit*, 22 WESTLAW J. INTELL. PROP. 1, 4 (2015).

²³³ Matthew D. Morrison, *Gaye vs. Thicke: How blurred are the lines of copyright infringement?*, OXFORD U. PRESS BLOG (Mar. 26, 2015), <http://blog.oup.com/2015/03/blurred-lines-copyright-infringement/> [<http://perma.cc/N8JJ-43T4>].

²³⁴ See *supra* Part I.C.

of expert testimony in future cases will likely be similar to the effect it had in *Blurred Lines*.

Commentators have also suggested that Robin Thicke's contradictory statements greatly influenced the jurors. Observers have stated that "[w]hether this case could have been decided differently had Thicke not contradicted himself is debatable."²³⁵ Thicke's contradictory statements to the media regarding the influence of *Got to Give It Up* on the writing of *Blurred Lines*²³⁶ were blamed for "cast[ing] him in an unfavorable light before the jury that no doubt influenced the jury's verdict."²³⁷ It seems reasonable to speculate that Thicke's inconsistent media statements and his poorly timed denial of Marvin Gaye's influence on his songwriting (after the *Blurred Lines* suit was filed)²³⁸ may have created a perception on the part of jurors that Thicke was dishonest. Thicke's contradictory statements were also blamed for conceding access to *Got to Give It Up*, with one observer noting that "[w]ith respect to access, Robin Thicke was his own worst enemy."²³⁹

However, it is unlikely that Thicke is the first party in an infringement suit to displease a jury.²⁴⁰ Considering the nature of the accusation, plagiarism—which is, at its core, a form of theft—it seems inevitable that some infringement suits will include parties that behave in a manner frowned upon by jurors (whether it is a songwriter who is shamelessly infringing or a copyright holder who is sinister enough to falsely accuse an innocent songwriter). With this likelihood in mind, it does not seem reasonable to say an infringement case involving parties that jurors do not care for is unusual. So, while Thicke's behavior might have been a major factor in the jury's verdict, his allegedly poor character is not so uncommon that the jury's reaction would be unlikely to occur again. Quite the contrary. It seems more likely that if a disagreeable party appears before a jury, the jury will leverage a similarly severe verdict.

In evaluating the media's comments about the *Blurred Lines* outcome, it seems a word of caution is in order. The media appears to have focused its criticism of the *Blurred Lines* decision

²³⁵ Miao & Grimm, *supra* note 121, at 5.

²³⁶ See *supra* Part II.A.2.

²³⁷ Miao & Grimm, *supra* note 121, at 4.

²³⁸ See *id.*

²³⁹ LINDEY & LANDAU, *supra* note 25, § 1:115.50.

²⁴⁰ For example, Ira Arnstein, the plaintiff in the well-known music copyright case *Arnstein v. Porter*, was described as "an eccentric (some say crazy) songwriter who had filed five separate lawsuits (all unsuccessful) against various music and film entities and individuals, often alleging wild conspiracies." COHEN ET AL., *supra* note 32, at 275. See generally *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

on the jury's response to the *Blurred Lines* songwriters, saying little if anything about the district court's surprising decision to deny summary judgment before the jury heard the case. From a legal standpoint, to view the *Blurred Lines* decision solely as a failure to appease the jury is not only misleading but also a potential tactical error. Not only must legal teams defending against infringement claims be mindful of their clients' behavior in the event that a case goes to a jury, they must also remain acutely aware of the increased possibility that a jury trial will occur.

Evaluating the effect of expert testimony and Robin Thicke's character on the verdict of *Blurred Lines*, it seems sound and perhaps safest to conclude that both factors greatly influenced the district court's and the jury's decisions. However, because the presence of these factors is likely to be seen in other similar cases, rather than saying these factors set the *Blurred Lines* case apart, it seems more appropriate to anticipate that these factors will play an equally important role. The bigger lesson is that parties should be extremely mindful of the value and effect of expert testimony, and must exercise greater caution when speaking in public, communicating with the media, and appearing before juries.

Approaches to music copyright infringement cases may have already begun adapting to *Blurred Lines*. At least two other hit songs came under fire for copyright infringement as the *Blurred Lines* courtroom battle raged on, but, unlike *Blurred Lines*, the issues were quickly settled before lawsuits could be filed. The next Section discusses the different approaches taken when infringement claims were made against the writers of *Stay with Me* and *Uptown Funk*.

C. The Settlements in *Stay with Me* and *Uptown Funk*

1. *Stay with Me*

Stay with Me is the Grammy-award winning hit song written by British artist Sam Smith and British writers James Napier and William Phillips.²⁴¹ When *Billboard* magazine featured Sam Smith on its front cover in December 2014, *Stay with Me* held the number one spot on three *Billboard* charts: two weeks on *Billboard*'s Mainstream Top 40 chart, two weeks on *Billboard*'s Adult Top 40 chart, and five weeks on *Billboard*'s Adult

²⁴¹ 'Stay with Me' Wins Grammy for Best Song, SAN DIEGO UNION TRIBUNE (Feb. 8, 2015, 7:57 PM), <http://www.sandiegouniontribune.com/sdut-stay-with-me-wins-grammy-for-best-song-2015feb08-story.html> [<http://perma.cc/8CNJ-28Q7>].

Contemporary chart.²⁴² By this time, Nielsen Music reported that Smith's album *In the Lonely Hour* had scanned²⁴³ more than 900,000 copies, and *Stay with Me*, its lead single, had already sold three million copies.²⁴⁴

Earlier that same year, in July 2014, a YouTube video surfaced showing several similarities between *Stay with Me* and the hit song *I Won't Back Down*, written by Tom Petty and Jeff Lynne.²⁴⁵ *I Won't Back Down* was the first single from Tom Petty's solo record *Full Moon Fever*, released in 1989,²⁴⁶ and spent fifteen weeks on Billboard's Hot 100 chart, peaking at number twelve.²⁴⁷

Shortly after the above-mentioned *Stay with Me/I Won't Back Down* YouTube video was released, in or around July 2014, publishers for Petty and Lynne contacted Smith's publishers about the similarities between the two songs.²⁴⁸ Smith's representatives took the opposite approach chosen by *Blurred Lines* representatives.²⁴⁹ Unlike *Blurred Lines*, where the alleged infringers went on the offensive by filing suit for a declaratory judgment, Smith's representatives amicably gave Petty and Lynne a share of both songwriting credit and royalties before a suit was filed.²⁵⁰ The settlement between Smith and Petty was reached in October 2014 (the same month that the district court denied the *Blurred Lines* legal team's motion to dismiss), but

²⁴² See Chris Willman, *Billboard Cover: Sam Smith on 'Stay with Me,' 'SNL' Jitters and 'Striving to Be a Career Artist,'* BILLBOARD (Dec. 12, 2014), <http://www.billboard.com/articles/events/year-in-music-2014/6405529/sam-smith-stay-with-me-number-one-charts-2014-billboard-cover> [<http://perma.cc/3R72-M77V>].

²⁴³ Nielsen "scans" refer to Nielsen's music sales measurement system, which it describes as "the authority in tracking what music people are buying both in-store and digitally. Nielsen compiles data from more than 39,000 retail outlets globally, to help record labels, publishers, artists, artist management and performance rights organizations understand what albums, singles and music videos people are buying, and where they're buying them." *Music Sales Measurement*, NIELSEN, <http://www.nielsen.com/us/en/solutions/measurement/music-sales-measurement.html> [<http://perma.cc/V6LM-SBMG>].

²⁴⁴ Willman, *supra* note 242.

²⁴⁵ Josh Dickey, *Grammys: Sam Smith's 'Stay with Me' is Your Song of the Year*, MASHABLE (Feb. 8, 2015), <http://mashable.com/2015/02/08/grammys-sam-smiths-song-of-the-year/#lXygWoV3Uqqp> [<http://perma.cc/HY3W-E92L>].

²⁴⁶ *Id.*

²⁴⁷ Tom Petty – *Chart History*, BILLBOARD, <http://www.billboard.com/artist/430102/tom-petty/chart> [<http://perma.cc/S7BB-4LZU>].

²⁴⁸ Brian Mansfield, *Sam Smith to Pay Tom Petty Royalties on 'Stay with Me,'* USA TODAY (Jan. 26, 2015, 11:38 AM), <http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051/> [<http://perma.cc/9N2V-L49R>].

²⁴⁹ See Davidovits & Day, *supra* note 6 ("[U]nlike the 'Blurred Lines' dispute, both sides [of the Sam Smith/Tom Petty dispute] appear to have approached the situation with a cooperative attitude, and reached a mutually agreeable resolution without resorting to the courts. . . . By contrast, Thicke and Williams did not 'back down' and paid the price.").

²⁵⁰ *Id.*

media reports about the agreement began to surface in late January, only a few weeks prior to the *Blurred Lines* verdict.²⁵¹

Though the *Stay with Me/I Won't Back Down* settlement and the *Blurred Lines* decision were within weeks of each other, the outcomes of the two cases were quite different. The four-month turnaround time for the *Stay with Me/I Won't Back Down* songwriter agreement was remarkably swift, especially when compared to the nearly three years it took to decide the *Blurred Lines* case, which is still being appealed.²⁵² Though Petty arguably had a strong claim against Smith because of the glaring similarity between the chorus melody in *Stay with Me* and the verse melody in *I Won't Back Down*,²⁵³ Smith resolved the matter by agreeing to give Petty and Lynne 12.5% each of the songwriting credit and a percentage of royalties.²⁵⁴ The *Blurred Lines* songwriters, by comparison, were originally ordered to pay more than seven million dollars in damages.²⁵⁵ Though Smith might have been guilty of actions that more closely resembled traditional infringement, he may have avoided years in court and millions of dollars in damages by choosing the opposite strategy employed by the *Blurred Lines* songwriters and agreeing to settle.²⁵⁶

2. Uptown Funk

Uptown Funk is the second-longest running number one song of all time and, in just under a year, was certified nine times

²⁵¹ See, e.g., *id.*; Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen.'* ROLLING STONE (Jan. 29, 2015), <http://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129> [<http://perma.cc/6VUX-DNAU>]; Andy Halls & Natalie Edwards, *Sam Owes Petty Cash for Hit Song*, THE SUN (Jan. 24, 2015, 8:00 PM), <http://www.thesun.co.uk/sol/homepage/showbiz/bizonsunday/6294030/Sam-Smith-settles-up-royalty-dispute-with-Tom-Petty-and-Jeff-Lynne.html> [<http://perma.cc/X7EK-53G9>].

²⁵² Kenneally & Chelin, *supra* note 7.

²⁵³ Mansfield, *supra* note 248 (quoting Dr. E. Michael Harrington, the Music Business Program Faculty Chair at SAE Institute Nashville. Dr. Harrington has taught courses and conducted training courses in music licensing and intellectual property at several universities, including the Berklee College of Music, William Paterson University, and Harvard Law School. He has also served as an expert witness and consultant in music copyright issues involving the Dixie Chicks, Woody Guthrie, Deadmau5, Lady Gaga, Danger Mouse, Steven Spielberg, Samsung, HBO, Food Network, White Stripes, Black Keys, Lauryn Hill & The Fugees, Tupac Shakur, AT&T, Keith Urban, Mariah Carey, the Monkees, Ne-Yo, Avril Lavigne, Britney Spears, 2 Live Crew, Rascal Flatts, Ford, Heinz, Publix, and others. *Meet Dr. Harrington*, EMICHAELMUSIC, <http://www.emichaelmusic.com/meet-dr-harrington/> [<http://perma.cc/A3LB-VFWK>].

²⁵⁴ Halls & Edwards, *supra* note 251.

²⁵⁵ Williams Motion for Summary Judgment, *supra* note 155, at 1.

²⁵⁶ It is possible that the high level of similarities between the two songs may have also influenced Smith's decision to settle, but it is unknown whether and to what degree this is true.

platinum in the United States.²⁵⁷ The song spent fourteen consecutive weeks in the number one position of Billboard's Hot 100 chart in 2015.²⁵⁸ Six parties were originally listed as writers of the song: producer Mark Ronson, singer Bruno Mars, Jeffrey Bhasker, Phillip Lawrence, Nicholas Williams (aka Trinidad James), and Devon Gallaspy.²⁵⁹

In February 2015, just a few weeks after the settlement between Smith and Petty was reported in the media, Minder Music, publishers for the five songwriters who wrote the Gap Band's 1979 hit *Oops Upside Your Head*, contacted the content management system of online video website YouTube, claiming *Uptown Funk* infringed their copyright.²⁶⁰ Upon receiving infringement claims, YouTube "stops paying publishers and moves the proceeds into an escrow account."²⁶¹ Instead of going to court, in April 2015, just two months after the YouTube claim was filed, the five *Oops Upside Your Head* writers were added to the list of *Uptown Funk* songwriters.²⁶² This revision freed up the money in YouTube's escrow account, and the songwriters' shares were divided up to match the percentages agreed upon in the settlement agreement.²⁶³

The decision to give the *Oops Upside Your Head* songwriters writing credit was made relatively quickly.²⁶⁴ The claim was submitted sometime in February 2015 to YouTube, a secondary contact, and not directly to representatives of the *Uptown Funk* songwriters. Nonetheless, by early May 2015, the media reported that a settlement had been reached.²⁶⁵

Much like *Stay with Me/I Won't Back Down*, the *Uptown Funk/Oops Upside Your Head* songwriter agreement took approximately four months to achieve, a much speedier resolution as compared to *Blurred Lines*.²⁶⁶ Unlike the strong melodic similarities between *Stay with Me* and *I Won't Back Down*, however, the most prominent similarity cited between *Uptown Funk* and *Oops Upside Your Head* was a vocal rhythmic

²⁵⁷ Hugh McIntyre, *Taylor Swift, 'Uptown Funk!' Rule Billboard's Year-End Lists*, FORBES (Dec. 9, 2015, 6:10 PM), <http://www.forbes.com/sites/hughmcintyre/2015/12/09/taylor-swift-uptown-funk-rule-billboards-year-end-lists/#5a4cb43d126f> [http://perma.cc/GH4A-PXVH].

²⁵⁸ *Id.*

²⁵⁹ Christman, *supra* note 16.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *See, e.g., id.*

pattern, not a melody, which does not even appear until approximately two and a half minutes into *Uptown Funk*.²⁶⁷ One cannot help but wonder if a rhythmic pattern would not have been viewed as an infringement prior to the *Blurred Lines* decision. Perhaps it may have even been considered *de minimis*.²⁶⁸ After *Blurred Lines*, though, there may be reason to suspect that an identical and prominent vocal rhythmic pattern, coupled with an expert witness, may have been sufficient at least to survive summary judgment.²⁶⁹ Rather than deal with a lawsuit, *Uptown Funk*'s representatives instead chose to give up a portion of the songwriting on a huge hit song.

3. The Role of Technology

What may be most remarkable about both *Stay with Me/I Won't Back Down* and *Uptown Funk/Oops Upside Your Head* is the prominent role of technology. As previously mentioned, Tom Petty's publishers contacted Sam Smith's representatives soon after the YouTube video surfaced showing the similarities between *Stay with Me* and *I Won't Back Down*.²⁷⁰ In the *Uptown Funk/Oops Upside Your Head* controversy, Minder's tactic of filing a claim with YouTube rather than directly with *Uptown Funk*'s songwriters immediately caused YouTube to stop paying any monies earned from *Uptown Funk* video plays.²⁷¹ The abrupt cessation of payments effectively hit the publishers and songwriters of *Uptown Funk* in the pocket without ever having to sue. The strategy of contacting YouTube directly rather than filing suit may suggest that alternative approaches to music copyright infringement are developing alongside new music delivery methods like YouTube.

Entertainment lawyer Robert M. Barta observed that technology may be playing an even more important role in prompting settlements, as reflected in the fact that “[m]usic copyright infringement cases are settling more readily now.

²⁶⁷ See Daniel Welsh, 'Uptown Funk' Gets Five New Co-Writers Following Claim By 'Oops Upside Your Head' Singers, *Gap Band*, HUFFINGTON POST (May 1, 2015, 10:32 AM, last updated May 1, 2015, 10:59 AM), http://www.huffingtonpost.co.uk/2015/05/01/uptown-funk-oops-upside-your-head-co-writers_n_7187434.html [<http://perma.cc/6SPW-QW6N>]; Chris Rizik, *The Gap Band Wins Credit and Royalties for Ronson/Bruno Mars Hit "Uptown Funk"*, SOULTRACKS (May 4, 2015), <http://www.soultracks.com/story-gap-band-uptown-funk-settlement> [<http://perma.cc/3968-3GAV>]; Jeremy D. Larson, *8 Artists That Could Sue 'Uptown Funk' on the Same Grounds as 'Blurred Lines,'* RADIO (Mar. 11, 2015, 1:44 PM), <http://radio.com/2015/03/11/8-artists-that-could-sue-uptown-funk-on-the-same-grounds-as-blurred-lines> [<http://perma.cc/KZG3-GWVG>].

²⁶⁸ See *supra* Part I.C.

²⁶⁹ See *supra* Part II.A.

²⁷⁰ Dickey, *supra* note 245.

²⁷¹ Christman, *supra* note 16.

Plaintiffs are able to show consistencies and similarities in their music through the use of specialized software that previously didn't exist."²⁷²

The increased use of automated software systems designed to identify copyright infringement may also play a significant role in future cases.²⁷³ Automated systems designed to help detect infringement are already in use at sites like YouTube and Facebook.²⁷⁴

Filing online infringement claims, using specialized software to demonstrate infringement, and the employment of automated systems to detect infringement may only be the tip of the technological iceberg. While it is not possible to address all of the various ways software and technology could be used to regulate copyright infringement here, it is well worth mentioning and likely merits a Comment of its own.

Though both cases involved parties who could afford to challenge infringement claims in court, the alleged infringers chose instead to settle quickly out of court, giving up royalties and songwriting credit. The next Section examines some of the reasons why *Stay with Me* and *Uptown Funk* settled.

4. Reasons Why *Stay with Me* and *Uptown Funk* Were Settled Out of Court

There are a number of reasons why parties in a copyright infringement suit may choose to settle rather than go to court.²⁷⁵ The parties in *Stay with Me* and *Uptown Funk*, however, may have had an additional incentive to settle after observing the *Blurred Lines* court battle.

Settling copyright infringement cases, and cases in general, may offer several benefits.²⁷⁶ For example, in his article examining the operational aspects of corporate social responsibility groups, which often use the threat of lawsuits to

²⁷² See Barta Interview, *supra* note 2.

²⁷³ See, e.g., Austin M. Phillips, *Whether It Is Fair (Use) or Not, Copyright Law Needs Automated System* (May 9, 2016) (unpublished Comment, Chap. U. Dale E. Fowler School of Law) (on file with author); Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q.J. 331, 356 (2007).

²⁷⁴ See, e.g., *YouTube Taps into Audible Magic for Content Filtering*, REPRIS MEDIA (Feb. 23, 2007), <https://www.reprisemedia.com/post/youtube-taps-into-audible-magic-for-content-filtering/> [<http://perma.cc/4FVU-6R9Q>]; Ted Mann, *How to Get Around That Pesky Copyrighted-Audio Filter on YouTube and Facebook*, TURKEY MONKEY (July 19, 2009), <http://www.turkeymonkey.com/2009/07/19/how-to-get-around-that-pesky-copyrighted-audio-filter-on-youtube-and-facebook/> [<http://perma.cc/JGD2-92BF>].

²⁷⁵ See, e.g., Palo, *supra* note 57, § 124.

²⁷⁶ *Id.*

negotiate “monetary and action-based” settlements with corporations,²⁷⁷ Donald J. Kochan explained that:

When faced with a lawsuit or the threat of a viable liability claim, it is entirely possible that the judgment value is far exceeded by the external effects of the litigation on the corporation and the corporation’s own interests in preserving its brand, image, reputation, customer base, investor interest, and the like. Thus, corporations will often even settle when they could win the substantive lawsuit but do not wish to incur the incidental expense of the litigation and collateral damage along the way. Moreover, if there is an ambiguous or uncertain risk, which may very well be the case in newly developing liability regimes, then the corporation may want to be risk averse—again motivating settlement.²⁷⁸

While a songwriter may not be a corporate entity, as a public figure, a songwriter may share many of the same concerns as a corporation in terms of damage to public perception and reputation. The cost of litigation is also a concern that corporations and songwriters have in common. Finally, like the corporations described in the corporate social responsibility group scenario, songwriters are dealing with an unknown level of risk, as it is not yet clear how *Blurred Lines* will influence future infringement cases. Facing a similar set of drawbacks and risks, a songwriter may also decide that settling out of court is the more appropriate course of action.

A similar comparison can be drawn with employment claims. For employers, the unpredictable nature of litigation is a factor, as well as the risks of negative publicity or an adverse ruling.²⁷⁹ A settlement may also allow a party to negotiate an agreement that is more favorable than a courtroom verdict.²⁸⁰ Many of the factors an employer evaluates when deciding whether or not to settle—the unpredictable nature of litigation, the risk of negative publicity, and the opportunity to negotiate a mutually beneficial agreement—also merit consideration when a songwriter is contemplating settlement. After weighing these and other factors, a songwriter may decide that settlement is the better option.

In addition to the general benefits of settlement, the *Blurred Lines* verdict may have created greater incentive for settlement in music infringement controversies. At least one observer has noted that “[t]he ‘Blurred Lines’ case may have changed what constitutes

²⁷⁷ Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 449, 474 (2014).

²⁷⁸ *Id.* at 450.

²⁷⁹ Richard F. Busch, II, *Designing Effective Conflict Management System*, 27 COLO. LAW. 63, 65 (1998).

²⁸⁰ *Id.*

copyright infringement in pop music, and musicians—specifically R&B artists—are being more careful, giving their influences writing credits and royalties to avoid similar situations.”²⁸¹ *Stay with Me* and *Uptown Funk* were listed as two examples of this, along with recent charting artists like Miguel and Jidenna, who gave other songwriters (Billy Corgan from the Smashing Pumpkins and Iggy Azalea, respectively) writing credit after their songs were released.²⁸² During a radio interview, Jidenna admitted the decision to give Iggy Azalea songwriting credit was motivated by the *Blurred Lines* verdict.²⁸³ These statements suggest that concerns raised by the outcome in *Blurred Lines* have made the settlement of music copyright infringement cases a more attractive option.

In the case of *Uptown Funk*, at least one songwriter’s representative admitted that *Blurred Lines* might have been a deciding factor for settlement. “In wake of the landmark ‘Blurred Lines’ verdict, which is currently under appeal, the music industry is being ‘more cautious,’ noted Danny Zook, [*Uptown Funk* co-writer Trinidad] James’s manager.”²⁸⁴ When asked if he believed the *Blurred Lines* verdict influenced the *Uptown Funk*’s songwriters’ decision to settle, Zook observed that “[n]obody wants to be involved in a lawsuit. Once a copyright dispute goes to a trial, [if a jury is used], it is subject to be decided by public opinion—and no longer resolved based entirely on copyright law.”²⁸⁵ Zook’s observations suggest that in the aftermath of *Blurred Lines*, songwriters and their representatives may believe they now face a greater risk of liability for infringement.

It is possible that the potential expense of going to trial also served as a deterrent.²⁸⁶ Illustrating the high cost of a music copyright infringement trial, after the *Blurred Lines* verdict, the Gaye estate unsuccessfully sued for legal costs, citing over \$3

²⁸¹ Blake Brittain, *Musicians More Careful After ‘Blurred Lines’ Case*, BLOOMBERG BNA (Sept. 17, 2015), <http://www.bna.com/musicians-careful-blurred-n17179936188/> [<http://perma.cc/RWY4-URGH>].

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Latifah Muhammad, *‘Uptown Funk’ Writers to Split Royalties With the Gap Band*, BET (May 4, 2015, 6:25 PM), <http://www.bet.com/news/music/2015/05/04/uptown-funk-splits-writing-credits-with-the-gap-band.html> [<http://perma.cc/J9CW-6A7X>].

²⁸⁵ Christman, *supra* note 16.

²⁸⁶ Settlement in copyright cases is sometimes viewed as a form of risk-avoidance. For example, see Palo, *supra* note 57, § 124, advising that to avoid greater costs, “[i]f the client has limited funds, it may be expedient to take a consent decree, particularly if the client is a defendant. The cost to each party continuing with the litigation may greatly exceed the amount of damages and profits involved and, accordingly, the sum required to reach a settlement with the plaintiff.”

million in attorneys' fees and allowable expenses (nearly half of the amount awarded in the suit).²⁸⁷

Thus, while the settlements in *Stay with Me* and *Uptown Funk* may have been motivated by the general benefits of settlement, the outcome in *Blurred Lines* seems to have played an influential role. At the very least, it seems safe to say that *Blurred Lines* has increased the level of concern over infringement liability. Though it is possible that the *Blurred Lines* decision could be overturned on appeal, it seems wiser for songwriters and their representatives to assume the decision will remain in effect and act accordingly.

Although songwriters appear to be acknowledging the greater risk of infringement they may now be facing, there has been little discussion about safeguards or protections that could lower this risk. The next Part of this Comment will examine what protections are currently available for songwriters and consider whether additional safeguards will emerge.

III. THE HIGHER LIKELIHOOD OF COPYRIGHT INFRINGEMENT AND THE ROLE OF INSURANCE

One cannot help but wonder what level of infringement risk songwriters now face. It is therefore useful to examine what measures are currently in place to protect songwriters, and if the available measures are not sufficient, consider whether other options will emerge.

A. Forms of Songwriter Insurance Currently Available

An internet search for the term "insurance for songwriters" only yields a small number of pertinent results.²⁸⁸ The most affordable version of songwriter insurance appears to be group insurance offered through Nashville Songwriters Association International ("NSAI").²⁸⁹ NSAI President Steve Bogard explained

²⁸⁷ See Corrected Memorandum of Points & Authorities in Support of Motion for an Award of Attorneys' Fees & Costs at 3, 10, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004-JAK (AGR_x) (C.D. Cal. Jan. 12, 2016), 2016 WL 409534; Ashley Cullins, *Judge Denies Marvin Gaye Family's Request for Pharrell and Robin Thicke to Pay Their Legal Fees*, BILLBOARD (Apr. 12, 2016), <http://www.billboard.com/articles/business/7332999/judge-denies-marvin-gaye-family-request-pharrell-robin-thicke-legal-fees> [<http://perma.cc/7R4K-TQ4H>].

²⁸⁸ Results of a search for "insurance for songwriters" include, for example, *Music Publisher, Composer & Songwriter Insurance*, ROBERTSON TAYLOR ENTERTAINMENT INSURANCE WORLDWIDE, <http://rtworldwide.com/us/music-event-insurance/music-publisher-composer-songwriter-insurance/> (last visited Mar. 11, 2016) [<http://perma.cc/LKC7-NJJ6>]; *First Group Copyright Infringement Insurance Policy Created for Songwriters/Composers*, SESAC (Feb. 1, 2011), http://www.sesac.com/News/News_Details.aspx?id=1449 [hereinafter *First Group Insurance*] [<http://perma.cc/G7T8-6YMY>].

²⁸⁹ See *First Group Insurance*, *supra* note 288.

that the NSAI's group songwriter insurance plan offers policy amounts beginning at \$100,000 in coverage for less than \$1600 annually, which Bogard stated should be sufficient to protect most songwriters from infringement claims.²⁹⁰

However, a policy like NSAI's group plan may not offer sufficient or appropriate protection for the majority of songwriters, especially with the newly increased potential for infringement findings. Given this greater risk of liability, industry officials may need to evaluate and help develop a more suitable form of insurance to protect songwriters. The next Section considers whether better forms of songwriting insurance are likely to emerge.

B. The Emergence of a New Form of Songwriter Insurance

Though songwriters' risk of exposure to infringement liability may have increased due to the *Blurred Lines* verdict, what is not clear is whether the risk has become so great that more appropriate forms of insurance will be necessary.

Some evidence suggests that when the legal system increases its enforcement of a law, a corresponding increase in the demand for insurance related to the legal issue occurs.²⁹¹ For example, an international study evaluating factors that might influence the demand for Property Casualty Insurance ("PCI") in several countries stated that "the enforcement of property rights creates an economic incentive to acquire and insure property, since government and legal enforcement of property rights help to protect individuals from loss or damage to the asset."²⁹² In essence, individuals who possess property rights in countries where property rights are enforced are more likely to obtain property insurance.²⁹³

Granted, there are some differences between property casualty insurance and insurance for songwriters, especially because the songwriters and their representatives (such as music publishing companies) seeking insurance will likely be those trying to minimize infringement liability.²⁹⁴ Despite the

²⁹⁰ *Id.*

²⁹¹ See Neil Esho et al., *Law and the Determinants of Property-Casualty Insurance*, 71 J. RISK & INS. 265, 268 (2004).

²⁹² *Id.*

²⁹³ See *id.*

²⁹⁴ E-mail from anon. source, owner of a record label and two music publishing companies (one BMI registered and one ASCAP registered), to author (Aug. 15, 2016) (on file with author) [hereinafter Label Owner Interview] ("[T]he vast majority of songwriters will never make enough money to be sued and plaintiffs' attorneys will generally only sue when there is a possibility of recovery. The small percentage of songs where there is enough money to support a recovery are almost always controlled by a publisher. They are

differences, the underlying principle, that a change in the level of legal enforcement of a property right can increase the demand for insurance, still seems applicable. Considering the change in the law, which may be unfavorable to songwriters and their representatives as defendants, it seems reasonable to suspect that songwriters and their representatives may be motivated to obtain insurance to help mitigate the increased risk.

It is important to keep in mind that the cost of insurance and the probability of loss may also affect the demand for songwriter insurance. The international PCI study observed that “[t]he demand for any product or service is affected by price” and “[d]emand for insurance should be positively related to the likelihood of incurring losses due to adverse events.”²⁹⁵ It may be too soon to determine what songwriters consider “too expensive” in terms of songwriting insurance, as it is not yet clear what typical damage awards in successful infringement suits will be.

Another consideration is how an insurance company would determine which songs are insurable. One suggested option is the development of software to determine if a song is infringing and therefore uninsurable.²⁹⁶ Based on the way content recognition software works (such as the software utilized by YouTube to detect infringing content),²⁹⁷ a modification to the existing software may be enough to provide the foundation for a new system that evaluates songs for insurability.

However, one industry veteran warns that “[i]t is possible that someone could come up with [software to detect music plagiarism], much like that used by schools. But someone would have to feed in all of the music masters and all of the lyrics . . . and probably all of the individual instruments by track/channel . . . and it still wouldn’t catch songs which were cited for ‘infringing the feel’ of another song.”²⁹⁸

Also unclear is how much of an increase in infringement suits will occur, or how songwriters as defendants will generally fare in such suits. For the purposes of this Comment, perhaps it is enough to say that both the price of insurance and the probability of loss will play significant roles in determining

the consumers of the insurance because they’ll bear the brunt of the legal action. . . . If there is a market, it is probably with the music publishers.”)

²⁹⁵ Esho et al., *supra* note 291, at 270–71.

²⁹⁶ See, e.g., Liebesman, *supra* note 273; E-mail from Tom W. Bell, Professor of Law, Chapman U. Dale E. Fowler School of Law, to the author (Aug. 19, 2016) (on file with author).

²⁹⁷ See, e.g., Jonathan Strickland, *How Content-Recognition Software Works*, HOWSTUFFWORKS (July 16, 2007), <http://computer.howstuffworks.com/content-recognition.htm> [<http://perma.cc/ZU3Z-4R35>].

²⁹⁸ Label Owner Interview, *supra* note 294.

whether obtaining songwriter insurance becomes a widely accepted practice.

It is unknown what the full effects of the *Blurred Lines* decision will be, and it is unwise to assume that the *Blurred Lines* songwriters will win their appeal. For the time being, it may be safest to assume that the *Blurred Lines* standard will influence the outcome of music copyright infringement suits, at least in the Ninth Circuit.

CONCLUSION

It has been said that imitation is the sincerest form of flattery.²⁹⁹ However, in the new world of music copyright infringement, imitation may be the most expensive compliment a songwriter can give. The post-*Blurred Lines* environment exposes songwriters to a greater risk of infringement than ever before, such that liability can attach to as little as emulating the style or genre of another song. Under this standard, nearly every songwriter could be found liable for some form of infringement. Until greater protections are available, songwriters and their representatives should proactively anticipate infringement accusations from the moment of a song's creation and brace themselves for the lawsuits to come. After all, though some may wish to cast stones, today's victim may easily become tomorrow's offender.

²⁹⁹ Charles Caleb Colton, in BRAINY QUOTE, <http://www.brainyquote.com/quotes/quotes/c/charlescal203963.html> [<http://perma.cc/Q88B-26TW>].

