

LESSENING THE DISPARITY BETWEEN
ORIGINAL OWNERS AND GOOD-FAITH
PURCHASERS OF STOLEN ARTWORK: THE
IMPLEMENTATION OF A UNIFORM
INTERNATIONAL DATABASE

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INTRODUCTION

The Museum of Modern Art (MoMA) in New York City received an early work of Pablo Picasso, titled *Boy Leading a Horse*, in 1964.¹ However a lawsuit claimed that Nazi duress forced the previous owner to sell the painting, putting the museum's ownership of the painting in uncertainty.² The art dealer who originally purchased the painting fled to Switzerland, where the painting stayed until it was sold in 1936 to the former MoMA chairman.³ The case largely hinged on the issue of whether New York or Swiss law provided the applicable statute of limitations standard.⁴ New York case law largely protects the rights of original owners even if the painting is in the possession

1. *Picasso Paintings to Remain in New York Museums Following Settlement*, GUARDIAN (Feb. 2, 2009, 15:39 EST), <https://www.theguardian.com/artanddesign/2009/feb/02/picasso-guggenheim-moma-new-york-nazi>.

2. *Id.*; see *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 463 (S.D.N.Y. 2009) (“[T]wo Picasso paintings... were transferred... as a result of Nazi duress....”).

3. *Picasso Paintings to Remain in New York Museums Following Settlement*, *supra* note 1.

4. See *Schoeps*, 594 F. Supp. 2d at 467 (“The issue is indeed pertinent, as Swiss and New York law provide different applicable standards.”); see generally *State of Limitations*, MERRIAM-WEBSTER (last visited Feb. 27, 2021) <https://www.merriam-webster.com/dictionary/statute%20of%20limitations>.

of a good-faith purchaser.⁵ Whereas, Switzerland allows good-faith purchasers to obtain rightful ownership after a relatively short statute of limitations period.⁶ This case highlights how a preliminary determination of the applicable statute of limitations can determine who claims rightful ownership over a multi-million dollar painting.⁷

These statute of limitations questions become complicated when art, initially stolen by a thief, winds up in the possession of a good-faith purchaser.⁸ The lack of investigation and inquiry, even among reputable art dealers and auction houses, allows collectors to unwittingly acquire stolen pieces.⁹ Thieves recognize the lack of uniform laws across different nations and manipulate specific national laws to “legitimize” the stolen artwork on the open market.¹⁰ The complexities in the legal system and the secretive nature of the art market contribute to a low recovery rate of stolen artwork.¹¹

This comment explores the current culture of art transactions and the development of the law concerning the accrual of the statute of limitations in disputes over ownership of the artwork. Section II.A highlights the breadth of art theft internationally. Section II.B looks at how art theft is perpetuated by the culture

5. *Id.* (quoting *Solomon R. Guggenheim Found. V. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991)); see generally *Good Faith*, MERRIAM-WEBSTER (last visited Feb. 27, 2021) <https://www.merriam-webster.com/dictionary/good%20faith>.

6. See *id.* at 467 (“[T]he exception enabling the owner of lost or stolen property to reclaim it even from a good faith purchaser applies only for five years.”).

7. See *id.* at 468 (determining that New York law applies to the sale of the painting); see also *Picasso Paintings to Remain in New York Museums Following Settlement*, *supra* note 1 (showing how the museum ultimately settled out of court to keep possession of the painting).

8. Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L. J. 955, 977 (2001).

9. Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L. REV. 611, 615 (2011).

10. Adina Kurjatko, *Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. INT'L L. & POL'Y 59, 62 (1999).

11. Amber J. Slattery, *To Catch an Art Thief: Using International and Domestic Laws to Paint Fraudulent Art Dealers into a Corner*, 19 VILL. SPORTS & ENT. L. J. 827, 834 (2012).

surrounding the buying and selling of artwork. Section II.C walks through the statute of limitations laws in common and civil law nations and the policy reasons for their implementation. Section III.A demonstrates why absolute uniformity internationally is impossible. Lastly, Section III.B highlights a uniform procedural change, through the standardization of a uniform international database, that can fix many of the problems with the current legal framework.

I. BACKGROUND

A. *The Breadth of Art Theft*

Art is one of the most highly trafficked commodities in the world, with estimates of illicit trade of cultural property ranging from \$100 million to \$6 billion worldwide.¹² Smugglers favor art because it is highly valuable, easily hidden, and easily transported.¹³ The absence of controlling international law and favorable treatment afforded to good-faith purchasers in civil law nations further incentivizes theft.¹⁴

The lack of uniformity between the transfer-of-chattel laws internationally permits a behavior among thieves, dealers, and buyers akin to forum shopping.¹⁵ This is done through art laundering, which is “the process by which a seller of stolen, or ‘dirty,’ art makes it ‘clean’ by selling it in a country that ensures good title for the [bona fide purchaser] of stolen art.”¹⁶ Thieves bring the artwork into nations with pro-purchaser laws because the assurance of good title for buyers allows for the market price of stolen art to be higher.¹⁷ The imbalance in the treatment of

12. See *id.* at 832–33 (“Estimates of illicit trade of cultural property range between \$ 100 million to \$5 billion worldwide.”); see Andreja Velimirović, *What Do the INTERPOL Stats Reveal About Art Theft?*, WIDEWALLS (Mar. 23, 2018), <https://www.widewalls.ch/magazine/interpol-art-theft> (“[A]rt thefts. . . [are] responsible for losses ranging anywhere between \$4 to \$6 billion worldwide.”).

13. Tucker, *supra* note 9, at 613.

14. *Id.*

15. Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1441 (1992).

16. *Id.*

17. See *id.*

original owners and good-faith purchasers internationally is why a civil law nation like Switzerland becomes the “global capital of art smuggling and laundering.”¹⁸

Attempts to control the theft and subsequent sale of stolen artwork have found little success. Only ten to fifteen percent of stolen artwork is ever recovered.¹⁹ Recovery is further complicated by owners failing to report the theft.²⁰ In France in 2009, almost 38,000 works of art were missing, of which only 145 were reported stolen.²¹ Owners often fail to report the theft “because they fear that they will either endanger their collections by exposing their vulnerabilities to further theft or eliminate the thief’s market, thereby forcing the art underground.”²² Unless laws are implemented which encourage reporting, and reward original owners for doing so, these other motives will continue to perpetuate art theft.²³

B. *The Culture of Buying and Selling Artwork*

1. *Lack of Investigation and Inquiry*

Sales of artwork are unique, as “most sales of [artwork] of more than minimal value are intermediated by a dealer or auction house to which the true or purported owner has consigned or sold the object.”²⁴ This enables most transactions of artwork to involve knowledgeable intermediaries who can exercise due diligence and

18. *Id.* at 1449.

19. Tucker, *supra* note 9, at 613.

20. See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 661 (2000) (recognizing the disparity between the number of international art thefts and reports to the authorities and databases).

21. Adam Sage, *Artful Dodgers: Men from the Ministries Mislaid Heritage of France*, TIMES ONLINE (Jan. 13, 2009, 12:00 AM), <https://www.thetimes.co.uk/article/artful-dodgers-men-from-the-ministries-mislaid-heritage-of-france-gqxvb2bz8dr>.

22. Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L. J. 225, 231 (1997).

23. See Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L. J. 2437, 2455 (1994) (recognizing that motives for not reporting will encourage theft unless the law solves this problem by pressuring all victims to report and rewards them for reporting).

24. Deborah A. Demott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 DUKE L. J. 607, 612 (2012).

detect stolen artwork.²⁵ However, art dealers are reluctant to release many details surrounding their art transactions.²⁶ Even “so-called ‘stringent purchasing practices’ followed by art dealers often simply require sellers of artifacts to sign a form stating that they have good title to the piece.”²⁷ This behavior will continue, so long as dealers maintain a self-interest to not inquire into the nature of the artwork they obtain.²⁸

The lack of investigation and inquiry means that reputable dealers and auction houses often sell stolen artwork.²⁹ Experts believe that “as much as five percent of the entire art market consists of stolen artwork.”³⁰ The culture of secrecy in art transactions results in good-faith collectors owning most stolen art.³¹ A former Executive Director of the International Foundation for Art Research (IFAR) concluded that “85% of all stolen art is hanging on the walls or sitting on the pedestals of unsuspecting collectors.”³² This becomes especially problematic as buyers may rely on the gallery’s reputation without investigating provenance, and these art galleries may not perform the necessary provenance check.³³

2. *The Landscape of Art Loss Databases*

Currently, a perfect solution for dealers and auction houses does not exist, as the international community lacks an effective

25. *Id.* at 612–13.

26. Sarah S. Conley, *International Art Theft*, 13 WIS. INT’L L. J. 493, 496 (1994).

27. Tucker, *supra* note 9, at 614.

28. Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT’L L. 1, 44 n.189 (1990).

29. Tucker, *supra* note 9, at 615.

30. *Id.* at 613.

31. *See id.* at 614 (“[T]he lax commercial conventions of the art trade have resulted in most stolen art being eventually owned by innocent good faith collectors.”).

32. *Id.* at 615.

33. *See, e.g.,* *Menzel v. List*, 246 N.E.2d 742, 743 (N.Y. 1969) (“The [defendants] knew nothing of the painting’s previous history and made no inquiry concerning it, being content to rely on the reputability of the Paris gallery as to authenticity and title.”); *see also* *Menzel v. List*, 267 N.Y.S.2d 804, 808 (N.Y. Sup. Ct. 1966) (“Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title.”), *modified by*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev’d*, 246 N.E.2d 742 (N.Y. 1969).

centralized system for reporting stolen artwork.³⁴ A variety of different voluntary and incomplete databases exist that might contain information regarding specific stolen artwork.³⁵ However, the different databases have different scopes and incentives, as some are formed by an international treaty, some only pertain to individual national governments, and others are run by private entities.³⁶

The Art Loss Register (ALR) has emerged as the leading international database for information on stolen art.³⁷ The ALR is a British for-profit corporation that “holds the largest private database of lost, stolen and looted art, antiques and collectibles, currently listing more than 700,000 items.”³⁸ The ALR database does not provide public access to the data held.³⁹ The ALR works closely with law enforcement worldwide to register stolen items and inform them when items are located.⁴⁰

Outside of the private context, individual governments have created their own databases to catalog stolen artwork. The FBI maintains the National Stolen Art File (NSAF).⁴¹ The database allows any cultural object stolen within the U.S. with a value of more than \$2,000 to be listed.⁴² The NSAF further limits the

34. See Slattery, *supra* note 11, at 835 (“There is no effective centralized system for reporting stolen or missing art works.”).

35. Tucker, *supra* note 9, at 656.

36. See generally *Stolen Works of Art Database*, INTERPOL, <https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> (last visited Aug. 20, 2021); see generally *National Stolen Art File*, FBI, <https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file> (last visited Aug. 20, 2021); see generally *ART LOSS REGISTER*, <https://www.artloss.com/> (last visited Aug. 20, 2021).

37. Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 87 (1995).

38. The Int’l Art & Antique Loss Register Ltd., *About Us*, *THE ART LOSS REGISTER*, <https://www.artloss.com/about-us/> (last visited Aug. 28, 2021).

39. The Int’l Art & Antique Loss Register Ltd., *Register*, *THE ART LOSS REGISTER*, <https://www.artloss.com/register/> (last visited Aug. 28, 2021) [hereinafter *Register*].

40. The Int’l Art & Antique Loss Register Ltd., *Recover*, *THE ART LOSS REGISTER*, <https://www.artloss.com/about-us/> (last visited Aug. 26, 2021).

41. *National Stolen Art File*, *supra* note 36.

42. *Tracking Stolen Art: New Resources for Investigators and the Public*, FBI, <https://archives.fbi.gov/archives/news/stories/2010/december/national-stolen-art-file/national-stolen-art-file> (last visited Aug. 20, 2021).

ability to report stolen objects by only allowing law enforcement agencies in the U.S. and abroad to submit objects for entry.⁴³ However, the database does allow anybody to search for a missing object. The NSAF contains less than 10,000 items of stolen property.⁴⁴

INTERPOL operates the Stolen Works of Art Database (SWA).⁴⁵ The SWA is “the only database at the international level with certified police information on stolen and missing objects of art.”⁴⁶ The SWA restricts its scope by only allowing fully identifiable objects from authorized entities (countries and specific international partner organizations) to be submitted to the database.⁴⁷ The SWA also restricts public access, by requiring a person to become an “authorized user” before being allowed to search for registered objects.⁴⁸ The database currently contains more than 50,000 items.⁴⁹

The International Council of Museums (ICOM) attempted to counter the lack of centralized information by creating the Observatory on Illicit Traffic in Cultural Goods.⁵⁰ The observatory serves as an information databank gathering many resources regarding the illicit traffic of cultural goods and the means to fight it.⁵¹ The observatory also created an international cooperative platform, by creating partnerships with international organizations, law enforcement agencies, research institutions,

43. *National Stolen Art File*, *supra* note 36 (“Stolen object are submitted for entry to the NSAF by law enforcement agencies in the U.S. and abroad.”).

44. See *Tracking Stolen Art: New Resources for Investigators and the Public*, *supra* note 42 (“Currently, the database contains about 7,000 images); see also Thomas Foley, *Art Loss and Databases: The Quest for a Free Single Unified System* 20 (2014) (M.A. thesis, Sotheby’s Institute of Art) (ProQuest) (“[T]he NSAF has approximately 8,000 items of stolen property.”).

45. *Stolen Works of Art Database*, *supra* note 36.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Christa Roodt & Bernadine Benson, *Databases for Stolen Art: Progress, Prospects, and Limitations*, 52 S. AFR. CRIME Q. 5, 11 (2015).

51. *International Observatory on Illicit Traffic in Cultural Goods*, INT’L COUNCIL MUSEUMS, <https://icom.museum/en/our-actions/heritage-protection/international-observatory-on-illicit-traffic-in-cultural-goods/> (last visited Aug. 28, 2021).

and external expert stakeholders.⁵² The advanced search sections serve as a common portal to connect individuals with “existing tools, practices, and resources, and detailed information about organisations [sic] and institutions concerned by and/or involved in the fight against the traffic [of stolen cultural property].”⁵³ The use of a common portal for searches of stolen art serves as an important first step in bridging the gaps created by the limited breadth and scope of current databases.⁵⁴

The implementation of an international database still faces certain issues, as databases are only suitable as a provenance research tool for “uniquely identifiable” objects.⁵⁵ Therefore, the specific circumstances and characteristics of each object may make the database insufficient and make additional sources of information needed to investigate provenance.⁵⁶ Therefore, in many legal systems “consultation of a database on lost and stolen art is *not always* an inherent requirement of good faith.”⁵⁷ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) places the consultation of a database as one of many factors in a judge’s determination of due diligence.⁵⁸ Although some legal systems may not embrace it, an obligation for the victim to register stolen artwork would improve the effectiveness of databases and reduce the current imbalance in the rights of original owners and good-faith purchasers across multiple legal systems.⁵⁹

52. *Id.*

53. *Advanced Search*, ICOM, <https://www.obs-traffic.museum/search> (last visited Aug. 28, 2021).

54. See Roodt & Benson, *supra* note 50, at 10–11 (“[T]he identification of a commonly agreed portal could be a vital first step to strengthen compliance with due diligence.”).

55. Nina M. Neuhaus & Sophie Balay, *Databases on Lost and Stolen Art: Is Consulting a Database an Inherent Requirement of Good Faith?*, 19 ART ANTIQUITY & L. 169, 180 (2014).

56. *Id.* at 180; see e.g., Preziosi, *supra* note 22, at 247 (explaining how a photograph or description of a Roman lamp or American coin would not be suitable for a registry as they were produced on such a large scale).

57. Neuhaus & Balay, *supra* note 55, at 180–81 (emphasis in original) (answering the question of whether consulting a database in good-faith jurisdictions are an inherent requirement).

58. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 4(4), June 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention].

59. Neuhaus & Balay, *supra* note 55, at 181.

C. *The Development of the Law*

Legal systems have developed to either favor the original owner or the good-faith purchaser in resolving disputes over legal title to artwork. Generally, civil law nations like France, Switzerland, and Italy favor the good-faith purchaser.⁶⁰ This article will specifically focus on France as the civil law comparison because it displays the general broad civil law principle while also providing some exceptions for original owners to retain their property.⁶¹ Whereas, common law nations like the United States and Great Britain favor the original owner.⁶²

1. *The United States*

The United States' legal system generally follows the common law principle that a thief cannot acquire good title or transfer good title to others, regardless of their good faith.⁶³ However, the presence of a statute of limitations in the U.S. creates an exception to this principle by allowing the purchaser to retain possession over previously stolen goods.⁶⁴ A majority of states follow the discovery rule, which states that "a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."⁶⁵ Therefore, if an owner takes reasonable actions to discover the location of his missing artwork, the statute of limitations against him will not begin until he discovers the location of the artwork. The discovery rule shifts the burden to the owner to show that they took

60. Grover, *supra* note 15, at 1432.

61. See *id.* at 1451–52 (recognizing that France codified the principle that possession is equal to title, but it subjects that rule to two exceptions).

62. *Id.* at 1432.

63. O'Keeffe v. Snyder, 83 N.J. 478, 488 (N.J. 1980); see also Monique Lee, *A Choice of Law Dilemma: The Conflict and Reconciliation of Law Governing Cross-Border Transfers of Stolen Art*, 7 CARDOZO PUB. L. POL'Y & ETHICS 719, 724–25 (2009) ("[U]nder American law, a thief's title to stolen goods is void, and a thief cannot pass titled to a buyer even if the buyer is a bona fide purchaser.").

64. Grover, *supra* note 15, at 1447.

65. O'Keeffe, 83 N.J. at 491; see also *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87–88 (Ind. 1985) ("[T]he statute of limitations in such causes commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement....").

reasonable actions, like reporting the theft and registering the artwork with a relevant database, that justifies delaying accrual of the statute of limitations.⁶⁶

By making an exception to the harsh common law rule, the discovery rule is designed to create an equitable balance of interests by taking into account the practical difficulties that victims of art theft face in locating their stolen works, without punishing innocent good-faith purchasers of stolen art.⁶⁷ The flexibility of the rule allows for the mitigation of unjust results that would result from strict adherence to a rule of law.⁶⁸ The court in *O'Keeffe* believed the rule would "encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's [or owner's] ability to recover stolen art works."⁶⁹

New York has a "worldwide reputation as a preeminent cultural center'... with its many museums, galleries, private collectors, auction houses, and resident artists...."⁷⁰ This position persuaded the New York courts to develop a unique rule heavily favoring the original owner.⁷¹ New York developed the demand and refusal rule, where "a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes [a] demand for return of the chattel and the person in possession of the chattel refuses to return it."⁷² Therefore, a painting could have been missing for many decades and the statute of limitations would not begin until the original owner makes a demand of the current possessor for the return of the painting. Contrary to the discovery rule, the burden of showing due diligence shifts to the purchaser through the defense

66. *O'Keeffe*, 83 N.J. at 500.

67. See Grover, *supra* note 15, at 1460 ("[T]he discovery rule's comprehensive inquiry into all relevant factors sufficiently protects the rights of art theft victims who encounter practical difficulties in locating stolen works of art without trampling on the rights and expectation of innocent purchasers of art.").

68. *O'Keeffe*, 83 N.J. at 491.

69. *Id.* at 499.

70. Hawkins et al., *supra* note 37, at 53.

71. See *Solomon R. Guggenheim Found. v. Lubell*, 568 N.E.2d 426, 431 (N.Y. 1991).

72. *Id.* at 429.

of laches.⁷³ The defendant must show “that the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair. . . .”⁷⁴ This doctrine protects defendants against unreasonable and prejudicial delay in the commencing of a suit.⁷⁵

The demand and refusal rule was designed to accommodate the difficulties that original owners face in seeking the recovery of stolen art.⁷⁶ As we have seen, “original owners... have only a few fragmentary and little-known mechanisms by which to register or recover their stolen art objects.”⁷⁷ Some scholars believe that the strong owner protections do not strip away the protections for good-faith purchasers because of the defense of laches.⁷⁸ The presence of laches as a defense is designed to satisfy the concern that the demand and refusal rule subjects innocent purchasers to suit for many years because of no legal obligation on owners to pursue the claim.⁷⁹ This rule also makes the court’s job a lot easier through added clarity, as “it requires no complex or amorphous balancing.”⁸⁰ The implementation of strong protections for good-faith purchasers enables New York to remain

73. See Hawkins et al., *supra* note 37, at 52 (“Under a laches defense, the burden falls on the purchaser to show that the former owner unreasonably delayed in bringing suit and that the purchaser was unduly prejudiced by the unreasonable delay.”).

74. Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 190 (2d Cir. 2019) (quoting Merrill Lynch Inv. Mangers v. Optibase Ltd., 337 F.3d 125, 132 (2d Cir. 2003)).

75. *Id.* at 193 (quoting Merrill Lynch Inv. Mangers v. Optibase Ltd., 337 F.3d 125, 132 (2d Cir. 2003) to say that [a] party asserting a [doctrine of] laches defense must show that the plaintiff has inexcusably slept on its right so as to make a decree against the defendant unfair.”).

76. Sydney M. Drum, DeWeerth v. Baldinger: *Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. Rev. 909, 942 (1989) (“The *Menzel* [demand and refusal] rule accommodates the special difficulties encountered by plaintiffs seeking recovery of stolen art.”).

77. *Id.* at 944.

78. *Id.* at 942 (“Laches would limit the troubling possibility, raised by the Second Circuit, that owners [under the demand and refusal rule], knowing the relevant facts, could wait idly for decades, or even centuries, before any legal obligation arose to pursue their claims.”).

79. Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 DUKE L. J. 337, 368 (1993).

80. *Id.* at 379.

an international art center without becoming a “haven for stolen cultural property.”⁸¹

2. France

France, a civil law nation, codified the general principle that a good-faith purchaser receives good title from an apparent owner.⁸² However, French law also enables original owners to recover their property from good-faith purchasers through two exceptions.⁸³ First, France follows a reimbursement version of the market overt doctrine.⁸⁴ The general market overt doctrine allows a good-faith purchaser, who bought from a merchant-dealer, to prevail over the original owner of the stolen goods regardless of the owner’s diligent efforts to prevent the theft or recover the goods after the theft occurred.⁸⁵ However, under French law, the original owner may retain the property by reimbursing the good-faith purchaser for the amount the purchaser paid for the good.⁸⁶ The reimbursement theory of market overt may reduce theft by incentivizing the owner to take further precautions against theft, because the owner’s recovery of the goods may coincide with reimbursement of the purchase price.⁸⁷ Second, the original owner retains a right of ownership over goods in the hands of a good-faith purchaser for three years after the date the property was stolen or lost.⁸⁸ Therefore, if the property is stolen, the shorter limitations period encourages a more diligent search by

81. See Drum, *supra* note 76, at 942 (“[The demand and refusal rule] protects New York’s special interests, because the State, as an international art center, will undermine its position if it becomes a haven for stolen cultural property.”).

82. See Code civil [C. civ.] [Civil Code] art. 2276 (Fr.) (“In [matters of movables], possession is equivalent to a title.”).

83. Kurjatko, *supra* note 10, at 74.

84. Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1373 (2011).

85. *Id.* at 1334.

86. See Code Civil [C. civ.] [Civil Code] art. 2277 (Fr.) (“Where the present possessor of a thing or stolen has bought it at a fair or market, or at a public sale, or from a merchant selling similar things, the original owner may have it returned only by reimbursing the possessor for the price which it has cost him.”).

87. Schwartz & Scott, *supra* note 84, at 1371.

88. See Code Civil [C. civ.] [Civil Code] art. 2276 (Fr.) (“[T]he person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft.”).

the original owner.⁸⁹ However, in the absence of good faith, the statute of limitations period is 30-years.⁹⁰

Civil law nations favor good-faith purchasers to protect the security of transactions.⁹¹ By granting a relatively short statute of limitations to the original owner, the purchaser is “secure” in knowing that his transaction will grant him legal title soon.⁹² France’s exceptions to the general civil law principles further its policy goals by ensuring an undisturbed transfer of title to the purchaser along with protecting the integrity of transactions.⁹³

II. ANALYSIS

A. *Why Absolute Uniformity is Impossible*

The stark differences in policy goals of common and civil law nations make uniformity impossible. For civil law nations, the “policy of favoring the [good-faith purchaser] over the original owner is an age-old tradition to which civil lawmakers and jurists zealously adhere.”⁹⁴ The international community will not succeed through further attempts to persuade civil law nations to forego their favored treatment of good-faith purchasers.⁹⁵

In contrast, common law nations work to return the artwork to states of provenance and original owners.⁹⁶ This holds true in

89. Schwartz & Scott, *supra* note 84, at 1373 n.138.

90. See Code Civil [C. civ.] [Civil Code] art. 2261 (Fr.) (stating the requirements for adverse possession); Line-Alexa Glotin et al., *Art Law in France*, (Mar. 3, 2019) <https://www.lexology.com/library/detail.aspx?g=3c8ee44d-e472-4622-b28c-4980b4fe1223> (“Depending on the interpretation of the provisions of the Civil Code, the period may be five years or 30 years. Authors generally consider that 30 years of adverse possession is more consistent with the legal framework.”).

91. See Grover, *supra* note 15, at 1465 (“To civil nations that favor the bona fide purchaser of stolen goods over the original owner, the security of transactions is a cardinal principle.”).

92. Cf. *id.* at 1459 (showing how a universal outer limit on when an original owner could bring a suit provides some degree of security of transaction to the purchaser of stolen art).

93. Kurjatko, *supra* note 10, at 74.

94. Grover, *supra* note 15, at 1432.

95. See *id.* at 1466 (“[F]oolish to continue to pressure civil law nations to abandon their favored treatment of the bona fide purchaser of stolen goods.”).

96. Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT’L LAW. 235, 237 (1996).

the United States, a nation with many museums and collectors that would benefit from a system more favorable to purchasers.⁹⁷ The United States' position as a market nation provides its citizens with the financial resources to purchase valuable artwork,⁹⁸ and its loyalty to the common law principles places these purchasers at heightened risk of facing litigation and the repatriation of the artwork.⁹⁹ The courts have not come to aid these collectors, as the courts have construed "judicial powers liberally to maintain claims of original owners in the recovery of property."¹⁰⁰ The ownership principles of common and civil law nations are completely at odds and stand as the first major hurdle stopping a uniform rule.

1. *Inherent Issues with Uniform Adoption of the Present Systems*

Assuming both sides could agree on one rule, the simplest solution would be the uniform adoption of a present rule. However, underlying problems with each rule detract from the policy goals of either the common or civil law nations.

a. *Discovery Rule*

Under the discovery rule, the court only focuses on whether the original owner exercised proper due diligence.¹⁰¹ If they fulfill the due diligence requirement, subsequent possessors may be subject to liability stemming from actions initiated much

97. See *id.* at 251–52 (“[The U.S. is a] market nation with affluent collectors whose insatiable appetites for cultural objects contribute to the illicit cultural property trade.”).

98. *Id.* at 237.

99. See generally Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 280–81 (highlighting examples of major U.S. museums and collectors that faced challenges to the proper ownership of the purchased artwork).

100. Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 40; see *O’Keeffe v. Snyder*, 83 N.J. 478, 483, 505 (1980) (recognizing the ownership rights of an original owner who waited almost 30 years to report her artwork stolen).

101. See Hayworth, *supra* note 79, at 358 (“[T]he discovery rule in this context is that the court focuses solely on the actions of the true owner, not on the... subsequent possessor’s burden.”).

earlier.¹⁰² Therefore, good-faith purchasers control very few aspects of the court's ultimate decision to grant title.¹⁰³ The purchaser's actions are largely irrelevant to the court.¹⁰⁴ This rule incentivizes the possessor to hide the artwork from the public to stop the original owner from locating the piece.¹⁰⁵

The discovery rule also suffers from an inconsistent application, because the rule applies a case-by-case standard that lacks a uniform definition of due diligence.¹⁰⁶ Original owners may go into court without a clear understanding of what is required to fulfill the discovery rule's due diligence standard.¹⁰⁷ Furthermore, the courts cannot easily solve this problem, as the varied police efforts by jurisdiction create a multitude of ways for an original owner to carry out a diligent investigation.¹⁰⁸ Disparate determinations in U.S. courts display this lack of clarity.¹⁰⁹ Some courts have recognized that institutional or sophisticated art owners may be held to a higher due diligence standard than private owners who lack a relationship with the art world.¹¹⁰ In *O'Keeffe*, the plaintiff was one of these

102. Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1089-90.

103. See *id.* at 1090 ("[P]ossessors generally cannot control whether the court will allow them to retain title to their purchases.").

104. Hayworth, *supra* note 79, at 358.

105. *Id.*

106. See *id.* at 356-57 (explaining how the discovery rule leads to inconsistency because it involves a case-specific standard and there is not a unified approach for an original owner to report stolen artwork).

107. Eisen, *supra* note 102, at 1090.

108. Hayworth, *supra* note 79, at 357.

109. Eisen, *supra* note 102, at 1090 (recognizing that the Second Circuit in *DeWeerth* held that an art collector did not exercise due diligence because he could have retained someone to carry out an extensive investigation, while the New Jersey Supreme Court in *O'Keeffe* held that the plaintiff's mere discussions with associates in the art world was sufficient).

110. See *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *37-38 (E.D. Pa. Feb. 23, 1995) ("Here, defendants are neither a government entity nor even serious art collectors; rather, they are merely a family in search of lost art work that decorated the walls of their family home."); see also *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987) ("[A]lthough an individual, DeWeerth appears to be a wealthy and sophisticated art collector; even if she could not have mounted a more extensive investigation herself, she could have retained someone to do it for her.").

sophisticated art owners.¹¹¹ However, the New Jersey Supreme Court ruled in her favor even though she did not report the art stolen until almost 30 years after the theft.¹¹² Whereas in *DeWeerth*, the Second Circuit contrasted the investigatory efforts of the individual plaintiff with the extensive efforts of a government-owned art museum from a previous case.¹¹³ This case shows the shortcomings of the discovery rule, as a uniform standard is impossible when comparing the investigatory efforts of two plaintiffs with different resources, knowledge, or experience in the art world.¹¹⁴

b. *Demand and Refusal Rule*

Like the discovery rule, the demand and refusal rule allows a true owner to postpone suit for many years and make the good-faith purchaser perpetually vulnerable to lawsuits.¹¹⁵ Accrual solely based on the original owner's demand for the return of the artwork ensures that the good-faith purchaser never determines that his artwork is safe from attack or can be conveyed with certainty.¹¹⁶ This type of rule gravely harms innocent good-faith purchasers by reducing "the repose of innocent purchasers to a nullity by permitting the aggrieved owner to sue, no matter how many years have elapsed since the theft, so long as the demand requirement is met."¹¹⁷

111. See *O'Keeffe v. Snyder*, 83 N.J. 478, 484 (1980) (explaining that the gallery was owned cooperatively by O'Keeffe and other American artists).

112. See *id.* at 485–86, 505 ("Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc.").

113. See *DeWeerth*, 836 F.2d. at 111 (2d Cir. 1987) ("In contrast with the 'continuous and diligent search' following 'many channels' in *Elicofon*, DeWeerth's investigation was minimal."); see also Drum, *supra* note 76, at 940 ("The difference between the district court's favorable and the Second Circuit's unfavorable opinions of DeWeerth's efforts comes from the Second Circuit's repeated comparisons of them with those of the *Elicofon* government-owned art museum.").

114. See Drum, *supra* note 76, at 940 (recognizing the unfairness in holding an individual to the same standard as an institution that generally has more resources, knowledge, or experience).

115. Preziosi, *supra* note 22, at 236.

116. See *id.*

117. John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1140 (1980).

The demand and refusal rule also creates the anomalous situation of favoring a bad-faith possessor over a good-faith possessor.¹¹⁸ The statute of limitations accrues when the possessor receives notice of his wrongful ownership; therefore, a bad faith possessor's statute of limitations would begin tolling immediately in their favor.¹¹⁹ Therefore, "a bad-faith possessor would be free from the threat of suit after only a few years, while the good-faith possessor would remain open to suit indefinitely."¹²⁰

c. *French Civil Law System*

The civil law system creates the opposite problem of the common law, as the law focuses solely on the actions of the purchaser.¹²¹ If the purchaser receives the goods from a qualified merchant, the owner loses any ownership right over the piece and is left with an option to repurchase.¹²² This reimbursement rule, presented as a compromise between the innocent owner and purchaser, disincentivizes the owner to search for their stolen goods if they can only get them back after payment.¹²³ The system's goal for efficient searches backfires, as the owner is much more reluctant to search diligently for the goods if the return coincides with a hefty price tag.¹²⁴

Another criticism of the civil law system is that it perpetuates international art theft by enabling art thieves to pass good title

118. *Id.* at 1139.

119. Eisen, *supra* note 102, at 1080–81; *see also* Harpending v. Meyer, 55 Cal. 555, 561 (Cal. 1880) ("To hold that the statute did not commence running in favor of these defendants from the time of the delivery of the goods to them, because at that time they were conscious of no wrong-doing, which, if they had been conscious of, would have set the statute in motion in their favor, involves an absurdity.").

120. Petrovich, *supra* note 117, at 1139.

121. See Code Civil [C. civ.] [Civil Code] art. 2278 (Fr.) ("Possession is protected, regardless of the merits of the law, against the disturbance that affects or threatens it.").

122. Grover, *supra* note 15, at 1453 ("Civil legal systems allow an original owner to recover stolen art only under narrow circumstances. Even then, the original owner must usually repurchase the artwork from the [purchaser]. This right to repurchase is not an ownership right; it is merely an option to purchase.").

123. Schwartz & Scott, *supra* note 84, at 1371 (recognizing that Brazil, France, Japan, Mexico and Switzerland require the owner reimburse the good-faith purchaser before recovery).

124. *Id.* at 1371–72.

to their buyers.¹²⁵ Thieves sell their ill-gotten goods in purchaser countries that offer higher sale prices because it assures title to buyers.¹²⁶ Collectors from common law countries flock to countries like France because the laws provide buyers with good title after a short limitations period.¹²⁷ While laws protecting purchasers support the public policy of securing transactions locally, they are ill-equipped to deal with the issues of international transactions.¹²⁸ These laws do not work for artwork with strong cultural and historical ties in other countries, as it completely discredits the special significance that the original owner may place on the piece.¹²⁹

2. *The UNIDROIT Convention: A Failure at Uniformity*

Uniformity of laws concerning the stolen cultural property is not a novel idea to the international community.¹³⁰ The UNESCO Convention of 1970 was the first major international agreement that attempted to stop the illicit trade of cultural property.¹³¹ The Convention suffers from not including binding provisions, as it only offers vague language to gain signatures.¹³² However, the Convention still failed to gain widespread support from important countries, as very few art importing countries have signed the

125. Grover, *supra* note 15, at 1432.

126. *Id.* at 1441.

127. *Id.* at 1442.

128. See Karen Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers*, 13 LOY. L.A. INT'L & COMP. L. J. 427, 463 (1990) ("[Rules protecting bona fide purchasers] were devised and directed principally towards the furtherance and security of commercial transactions within national borders.").

129. *Cf. id.* at 463–64 (recognizing that the laws favoring purchasers are fine for ordinary fungible goods, but the historical significance of cultural property requires stronger protections for original owners).

130. Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. INT'L. L. REV. 225, 246 (1993) ("As early as the sixteenth century Europeans have attempted to create legislative protections for cultural property.").

131. Monique Olivier, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 642 (1996).

132. Fox, *supra* note 130, at 251.

treaty.¹³³ Therefore, to address its shortcomings, UNESCO requested the drafting of the most recent international agreement concerning cultural property, the UNIDROIT Convention.¹³⁴

The UNIDROIT Convention entered into force on July 1st, 1998.¹³⁵ The Convention represents the only concerted attempt to define a uniform substantive rule for the good-faith purchase of cultural property.¹³⁶ Unlike its predecessor, it promotes uniformity by not permitting countries to avoid following specific provisions by inserting reservations besides those expressly authorized in the Convention.¹³⁷ For the purpose of this comment, it stands out from the UNESCO Convention by specifically addressing disputes between original owners and good-faith purchasers.¹³⁸

The Convention largely follows the common law tradition that cultural property must be returned to its rightful owner.¹³⁹ However, the final Convention diluted the strict common law principles to compromise with civil law nations.¹⁴⁰ The Convention primarily relies on the discovery rule, but it provides some protection for purchasers through an absolute time bar on an original owner's claim.¹⁴¹ Furthermore, the Convention

133. See *id.* at 249 ("Although there are seventy signatory members to the treaty, the United States is the first and only major 'market nation' to implement it."); see also Olivier, *supra* note 131, at 647 ("Although over 80 nations ratified the UNESCO Convention, only six art importing nations have signed the treaty and adopted legislation for its implementation.").

134. Ian Goldrich, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 *FORDHAM INT'L L. J.* 118, 139 (1999).

135. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention> (last updated July 27, 2021).

136. Pecoraro, *supra* note 28, at 40.

137. Compare UNIDROIT Convention, *supra* note 58, art. 18 ("No reservations are permitted except those expressly authorised in this Convention."), with Fox, *supra* note 130, at 250 (recognizing how reservations placed on the UNESCO Convention by the U.S. made it largely ineffective).

138. Goldrich, *supra* note 134, at 140.

139. *Id.* at 142; see also UNIDROIT Convention, *supra* note 58, art. 3(1) ("The possessor of a cultural object which has been stolen shall return it.").

140. Grover, *supra* note 15, at 1454-55.

141. See UNIDROIT Convention, *supra* note 58, art. 3(3) ("Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the

broadens the reimbursement version of market overt seen under French law by reimbursing good-faith purchasers regardless of whether they purchased the item from a market, public sale, or dealer in like goods.¹⁴²

Even with an agreement appeasing the interests of both sides, the Convention could not overcome the unwillingness of civil and common law nations to forego their rules.¹⁴³ To date, only 50 countries have ratified the treaty.¹⁴⁴ This experience “illustrates the unworkability of an international agreement that expects civil law nations to convert to the common law position in favor of the dispossessed owner.”¹⁴⁵ Furthermore, common law nations appear uninterested in a compromise that damages the position of the original owner.¹⁴⁶ Without a foreseeable path to compromise, absolute uniformity will never be achieved between two sides that vehemently stand by their principles.¹⁴⁷

B. *What is the Solution? A Worldwide Centralized Registry*

Any solution for art transactions must consider the unique issues created by the international context of many of these

location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.”).

142. Grover, *supra* note 15, at 1455; *see also* UNIDROIT Convention, *supra* note 58, art. 4(1) (“The possessor of a stolen cultural object required to return it shall be entitled . . . to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.”).

143. *See* Pecoraro, *supra* note 28, at 40 (recognizing an unwillingness by both sides to change as the primary and insurmountable obstacle to uniformity).

144. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, *supra* note 135.

145. Grover, *supra* note 15, at 1453–54.

146. *See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, *supra* note 135 (demonstrating that even an international agreement predicated primarily on the common law tradition fails to receive support from large market nations like the United States and the United Kingdom).

147. *See* Grover, *supra* note 15, at 1432 (“Like the common-law policy of favoring the original owner of stolen chattels over the BFP, the civil-law policy of favoring the BFP over the original owner is an age-old tradition to which civil lawmakers and jurists zealously adhere.”).

transactions.¹⁴⁸ Artwork often carries with it a variety of cultural, religious, and social meanings.¹⁴⁹ Therefore, transactions involving artwork should not be viewed by the law the same as transactions for ordinary fungible goods.¹⁵⁰ One such solution is specifically defining what constitutes good-faith for dispossessed owners and purchasers through the use and development of an international computerized stolen art registry.¹⁵¹ This would solve many of the problems stemming from the current culture of artwork transactions and would avoid the difficulty in harmonizing the substantive laws of civil and common law countries.¹⁵²

1. *How Would the Implementation of the Registry Benefit the System?*

The inefficiency of the present system and the stability that an art loss database would provide are not new concepts.¹⁵³ A unified registry lifts the "shroud of secrecy" that currently hangs over art transactions.¹⁵⁴ The availability of information on stolen artwork enables subsequent purchasers to feel confident in the validity of the artwork they purchase.¹⁵⁵ Reliance on this type of standard of due diligence encourages continuity in the courts, thereby better preparing owners' and possessors' expectations of the courts' decisions.¹⁵⁶

148. See Burke, *supra* note 128, at 463 ("Special rules for commercial transactions involving the transfer of valuable art objects must be established in a transnational context.").

149. *Id.* at 450.

150. See *id.* at 464.

151. Pecoraro, *supra* note 28, at 41.

152. See *id.* at 42 (recognizing that defining good faith of the buyer and due diligence of the owner using the registry would remove the need to choose between the two systems or significantly change the substantive law of many countries).

153. See *O'Keeffe v. Snyder*, 83 N.J. 478, 497 (1980) ("An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties.").

154. Conley, *supra* note 26, at 506; see also *infra* Part I.B.1 (focusing on the issues caused by the lack of transparency in transactions for art).

155. Eisen, *supra* note 102, at 1094; see also Conley, *supra* note 26, at 505 ("A uniform system reporting stolen art would bring a relative degree of certainty to the status of a prospective purchase.").

156. Eisen, *supra* note 102, at 1094.

Furthermore, encouraging owners to register stolen artwork will increase the abysmal recovery rates seen today.¹⁵⁷ Not only will the system aid in the recovery of stolen artwork, but increasing accountability among dealers and auction houses disincentivizes art theft by removing any prospect of a future legitimate buyer.¹⁵⁸ A uniform international registry fixes problems caused by the lack of uniformity, like art laundering, by eliminating the ability of subsequent purchasers to claim stolen artwork in good faith.¹⁵⁹

2. *Formation of the Registry*

The first hurdle faced in creating an international registry is who to task with its creation. One possible solution is the formation and control of a government agency.¹⁶⁰ The UN General Assembly encourages Member States to develop their national databases on stolen works of art in conjunction with INTERPOL's Stolen Works of Art Database.¹⁶¹ However, the law enforcement agencies of these governments are often ill-equipped and underfunded to expend significant resources fighting art crime.¹⁶² For example, the Metropolitan police's art and antiquities crime unit has faced multiple closures, and only maintains three agents to police the UK art market and maintain a national database.¹⁶³ This leaves the world's second-largest market for art and antiquities virtually unsupervised by any specialist police

157. Kurjatko, *supra* note 10, at 68.

158. Slattery, *supra* note 11, at 835.

159. See Kurjatko, *supra* note 10, at 68 ("An art title registration system would give purchasers constructive notice of title, so could not argue that they bought stolen art pieces in good faith.").

160. See Hawkins et al., *supra* note 37, at 88 ("Ideally, an ALR-type registry would be operated by the government.").

161. G.A. Res. 73/130, at ¶ 17 (Dec. 13, 2018).

162. Foley, *supra* note 44, at 59 ("Except for the Carabinieri, all other law enforcement agencies are ill-equipped and under-funded to fight art crime").

163. Anna Brady, *Closure of London's Art and Antiquities Crime Squad 'Would be Madness Says Former Chief'*, ART NEWSPAPER (Sept. 7, 2017), <https://www.theartnewspaper.com/news/closure-of-londons-art-and-antiques-squad-would-be-madness-says-former-chief> (explaining how the Metropolitan police's art and antiquities crime unit temporarily closed after its three officers were deployed to investigate a fire).

officers.¹⁶⁴ Italy's Carabinieri Art Squad stands alone as a properly run and funded government art unit.¹⁶⁵ The Carabinieri maintains the Leonardo database containing more than 1.1 million stolen objects and boasts nearly 300 specialized officers.¹⁶⁶

This lack of funding leads to a severe gap in the reach and scope of art loss databases.¹⁶⁷ As we have seen, databases like INTERPOL's Stolen Works of Art Database and the FBI Stolen Art File severely limit those who may submit claims.¹⁶⁸ Limiting your reach to specific governments and agencies creates large gaps in the database when the degree of cooperation differs greatly from country to country.¹⁶⁹ The limited nature and funding of partnered organizations and governments severely hurt the ability of common portals like the Observatory on Illicit Traffic in Cultural Goods to properly function.¹⁷⁰

Therefore, the uniform international database should be created and run through the private sector, like by insurance companies or museums, which are largely affected by the theft of

164. See Scott Reyburn, *A Green Light for Art Criminals?*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/arts/london-police-art-antiques-unit.html> (displaying how in the context of the recent closure the large London art market is unsupervised).

165. See Leila Amineddoleh, *How Italy's Art Crime Squad Has Protected Cultural Artifacts for Five Decades*, ARTSY (Jan. 22, 2020), <https://www.artsy.net/article/artsy-editorial-italys-art-crime-squad-protected-cultural-artifacts-five-decades> (highlighting the struggles of other countries to replicate the successes of the Carabinieri).

166. *Id.*

167. See Foley, *supra* note 44, at 34 ("Attempts to pool information on stolen works to create a comprehensive international database have failed largely because of a lack of funding.").

168. See *Stolen Works of Art Database*, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> (last visited Feb. 12, 2021) (explaining how INTERPOL strictly limits those who may submit information to the database are authorized entities like UNESCO and ICOM); see also *National Stolen Art File*, *supra* note 36 ("Stolen objects are submitted for entry to the NSAF by law enforcement agencies in the U.S. and abroad.").

169. Foley, *supra* note 44, at 34–36 (explaining how countries' varying degrees of cooperation in maintaining stolen art databases results in large gaps between different databases, and therefore calls for an international database for stolen art to fill this gap).

170. See generally *infra* pp. 10–11 (discussing how the Observatory functions as a single portal pooling together the current resources).

valuable artwork.¹⁷¹ The most important aspect is that the database should be constructed as a non-profit, as its primary focus should be on providing a comprehensive database to all interested parties.¹⁷² Therefore, the database would avoid the conflicts of interests that occur with for-profit databases like the ALR, which publicly appear willing to put profits above ethics.¹⁷³ ICOM could control and oversee the unified database with contributions provided by museums all over the world.¹⁷⁴ Similarly, the growth of the art market brought many more insurance companies into the art world with heavy financial incentives to improve the recovery rate of artwork.¹⁷⁵ If necessary, funding could also be obtained through user fees from inquiring owners and purchasers in an amount sufficient to ensure the promotion of the database internationally.¹⁷⁶ The publicity and higher recovery rate would immediately outweigh the costs, which would already be lessened by spreading them out among cooperating parties.¹⁷⁷

171. See Foley, *supra* note 44, at 59 (“[A] unified database could be built by the people it affects most, i.e. insurance companies, museums, galleries, auction houses and private collectors.”).

172. See Derek Fincham, *Stolen Rockwell and Spielberg and Theft Databases*, ILLICIT CULTURAL PROP., (Mar. 5, 2007), <http://www.illicitculturalproperty.com/stolen-rockwell-and-spielberg-and-theft-databases/> (recognizing how a free system comprehensive database would earn a lot of money and insure the legitimacy of the art trade).

173. See Kate Taylor & Lorne Manly, *Tracking Stolen Art, for Profit, and Blurring a Few Lines*, N.Y. Times (Sep. 20, 2013), <https://www.nytimes.com/2013/09/21/arts/design/tracking-stolen-art-for-profit-and-blurring-a-few-lines.html> (highlighting controversial practices of the ALR like charging fees as much as 20 percent of the work's value for its return and withholding information until receiving payment).

174. Foley, *supra* note 44, at 59.

175. See *id.* at 60 (“As a result [of more insurance companies insuring art], the premium value of insured art globally is between [\$500] million and \$1 billion, with a recovery rate for stolen art as low as 1.5%, it would make a lot of sense for insurance companies to come together and build a unified database.”) (citing Kathryn Tully, *Should Your Art Be Insured?*, FORBES (Oct. 31, 2012, 01:20 PM), <https://www.forbes.com/sites/kathryntully/2012/10/31/should-your-art-be-insured/?sh=5b1701157e25> (for dollar figures)).

176. Hawkins et al., *supra* note 37, at 92.

177. Foley, *supra* note 44, at 61.

3. *Implementation of the Registry*

a. *Accompaniment of International Legislation*

Implementing a private stolen art database on this scale faces many challenges. The first of which stems from the decision to run the database from the private sphere, as it lacks the authority of law or government.¹⁷⁸ Therefore, the formation of the database must be accompanied by an international agreement that recognizes the use of the new database as a requirement to due diligence and good faith. The United Nations has repeatedly emphasized the importance of establishing databases to aid in the recovery of stolen and looted cultural property.¹⁷⁹ The UNIDROIT Convention also showed a willingness to use art loss registers in determining the possessor's due diligence.¹⁸⁰ This language by the international community shows a recognition of the importance of databases in recovering stolen and missing cultural property; however, it must now take the final step in recognizing one centralized database as a requirement of due diligence and good faith.

b. *Integration with the Current Legal Systems*

The required use of a uniform art loss database only changes the procedures required for due diligence by the owner, and good faith by the purchaser.¹⁸¹ Under U.S. law, due diligence by the original owner depends on the timely registering of the artwork. This requirement negates the nebulous due diligence requirements under the discovery rule.¹⁸² Under any legal

178. *Cf. id.* at 26 (recognizing that the ALR lacks the authority of law or government).

179. See S.C. Res. 2347 ¶ 17(e) (Mar. 24, 2017) (calling upon Member States to consider adopting databases devoted to collecting information on criminal activity related to cultural property and stolen or missing cultural property); see also G.A. Res. 73/130, *supra* note 161, at ¶ 23 (inviting Member States to consider establishing and developing national, regional and international databases inventorying cultural property).

180. UNIDROIT Convention, *supra* note 58, art. 4(4).

181. *Cf. Pecoraro, supra* note 28, at 41–42 (recognizing the use of a worldwide computerized registry as removing the need to impose changes to the substantive laws of good-faith acquisition laws in many countries).

182. Preziosi, *supra* note 22, at 245.

system, a purchaser would only become a good-faith purchaser if he consulted the registry, and the work was not present on the database.

A clear requirement to register with and consult the database generates strong incentives for owners and purchasers to take affirmative action in investigating and reporting thefts.¹⁸³ Under the French civil law system, the incentives on the owner to report partially prevents the law from looking solely at the actions of the purchaser.¹⁸⁴ The original owner registering the artwork would preclude a subsequent purchaser from holding the object in good faith and subject him to a much longer limitations period.¹⁸⁵

However, failure to register the artwork with the database would create a rebuttable presumption of a lack of due diligence by the owner.¹⁸⁶ As discussed, certain art objects are not uniquely identifiable, making them unsuitable for registration on a database.¹⁸⁷ The original owner carries the burden to prove the object was not subject to effective registration.¹⁸⁸ Registration would be excused if the owner proves that the object was not registrable,¹⁸⁹ and the previous procedures for determining due diligence and good faith would apply. Therefore, purchasers should consult additional sources of information when dealing with art objects that do not have clearly distinctive characteristics.¹⁹⁰

183. Bibas, *supra* note 23, at 2467.

184. See Neuhaus & Balay, *supra* note 55, at 178 (recognizing a requirement on the victim to register art as addressing the imbalance present in legal systems solely looking at the actions of the purchaser); See *infra* pp. 23 (recognizing that the French system has the problem of only looking at the actions of the purchaser).

185. See Code Civil [C. civ.] [Civil Code] art. 2272 (Fr.) (establishing the statute of limitations for a bad-faith purchaser as thirty years).

186. See Preziosi, *supra* note 22, at 249 n.202 (recognizing that a true owner could overcome the registrability presumption by a preponderance of the evidence).

187. See *infra* pp. 11.

188. Preziosi, *supra* note 22, at 249.

189. *Id.*

190. See Neuhaus & Balay, *supra* note 55, at 179 ("Archaeological and ethnographic objects as well as mass-produced works such as engravings, porcelain or jewellery [*sic*] predominantly fall into [the category of goods lacking clearly distinctive characteristics].").

Additionally, an owner or purchaser might be unaware of the database's existence, particularly in developing countries.¹⁹¹ In such cases, the standard should be "whether a reasonably diligent owner, who affirmatively seeks to recover his property, or a reasonably diligent purchaser investigating the provenance of the object, knew or reasonably should have known of the existence of the registry."¹⁹² Therefore, even if a diligent owner or purchaser had no occasion to learn of the database's existence, they would not be punished for the lack of knowledge. The varying circumstances of art transactions ensure that no exhaustive standards for constituting due diligence can ever be established, but those that occur frequently can be addressed.¹⁹³

c. Confidentiality

Requiring registration with an international database must also contend with the secretive culture present in the art market.¹⁹⁴ Art owners often value their anonymity and might be reluctant to embrace a reporting requirement to a central international database.¹⁹⁵ Therefore, the database should be confidential by providing no public access, like the ALR.¹⁹⁶ However, if a purchaser's inquiry determined that the art object was stolen, the confidentiality of the registration would be subject to the following exceptions: (1) the registry would notify the purchaser that the object was reported as stolen; (2) the owner who registered the artwork or his insurer would be notified that an inquiry discovered the object; and (3) the appropriate law enforcement agency would be notified of the inquiry.¹⁹⁷ Confidentiality is essential to encourage the use of the registry,

191. Hawkins et al., *supra* note 37, at 93.

192. *Id.* at 93-94.

193. Charles D. Webb, *Whose Art is it Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L. J. 883, 897 (1991).

194. See *infra* sec II.B.1 (recognizing the lack of widespread investigation and inquiry in the art market).

195. Neuhaus & Balay, *supra* note 55, at 181.

196. See *Register*, *supra* note 39 ("The ALR holds all the information in strictest confidence and there is not public access to the data held.").

197. Hawkins et al., *supra* note 37, at 92.

as owners will no longer fear disclosure endangering the rest of their collection or driving thieves underground with their art.¹⁹⁸

d. *Retroactivity*

When creating a new requirement for owners and purchasers, the new system must address those items stolen or lost before the implementation of the registry. A failure to address retroactivity leaves decades of stolen art outside the scope of the database.¹⁹⁹ After implementing legislation for the registry, previous owners should be given a reasonably short window to register the previously stolen artwork with the database.²⁰⁰ An argument against retroactively applying the registry is that past victims will not learn of the requirement to register within the short window.²⁰¹ However, most sales of artwork involve knowledgeable intermediaries like art dealers and auction houses.²⁰² Therefore, disseminating information regarding the registry to “museums, universities and similar institutions, art dealer associations, auction houses, insurers, collectors, and law enforcement agencies would effectively reach a great majority of parties who play a significant role in legitimate art transactions, the reporting, and recovery of stolen art.”²⁰³ However, the retroactivity requirement must make an exception for those who purchased artwork before the implementation of the registry. Therefore, failure to adequately inquire about provenance through the registry would operate only against a purchase made after the registry’s implementation.²⁰⁴

198. Grover, *supra* note 15, at 1435–36.

199. Hawkins et al., *supra* note 37, at 94.

200. See Bibas, *supra* note 23, at 2467 n.166 (recognizing the one-year suggestion in the article as an arbitrary period, as any short period would suffice provided it gives victims enough notice and does not leave future buyers needlessly uninformed); see also *id.* (providing a two-year period as a reasonable window to afford owners the opportunity to register and obtain the benefits of the registry).

201. Preziosi, *supra* note 22, at 246.

202. See *infra* pp. 6.

203. Hawkins et al., *supra* note 37, at 92–93.

204. *Id.* at 94.

III. CONCLUSION

The widespread variation present in international law is insufficient to handle the unique problems created by the illicit trade of artwork internationally. The international community has been largely unsuccessful in harmonizing the laws of different countries. Variation among common and civil law nations enables purchasers to buy previously stolen artwork in pro-purchaser countries with little threat of consequences. This problem is exacerbated by the secretive nature of the art industry. Owners are often reluctant to report thefts to the authorities or relevant registries, and even knowledgeable art dealers and auction houses often conduct minimal inquiries into the title of the artwork.²⁰⁵ Currently, even an adequate investigation and inquiry may not yield results, as the available art loss databases vary greatly in their scope and information they can receive.

The failure of the international community to address these various issues stems from the inability to appreciate the policy interests of each nation. A widespread harmonization of the substantive laws is virtually impossible; therefore, this paper suggests a procedural change in how the international community defines due diligence and good faith.

By requiring the registration and inquiry of stolen artwork with a uniform international database, many problems present in the current system are solved without forcing countries into large substantive changes to their established rules of law. Museums and insurance companies have the necessary resources and incentives to develop an international database. The implementation of the database simplifies the calculations necessary by the courts, leading to more consistency in its decisions. The database promotes the openness of the industry through requiring registration, but its confidentiality avoids the publicity that current owners fear when reporting thefts. The encouragement of registration provides subsequent purchasers, no matter the country, with notice that the artwork in question was previously stolen. Although a uniform database cannot cover every conceivable scenario in the art industry, it is an important

205. Deborah DePorter Hoover, *The Disputes In The Art Market: An Emerging Duty Of Care For Art Merchants*, 51 GEO. WASH. L. REV. 443, 455 (1983).

step in bringing equity and accountability to art transactions. The impossibility of complete uniformity requires a unique solution for the art market, and a uniform international art database provides many necessary benefits at a relatively low cost to market participants and concerned nations.

