GLOBAL PERSPECTIVES ON CULTURAL PROPERTY CRIME

Edited by
Michelle D. Fabiani,
Kate Melody Burmon and
Saskia Hufnagel
Global Perspectives on Cultural Property Crime

This book provides transnational insight into cultural property crimes and the cutting-edge work tackling issues ranging from currency crimes to innovative research methods.

The volume brings together authors from a number of fields to address contemporary issues and advances in the fight against cultural property crime. It combines the perspectives of law enforcement officials, researchers, journalists, lawyers, and scholars, with specialities in the disciplines of criminology, law, archaeology, museum studies, political science, and economics, from countries all around the globe. This allows for a more comprehensive examination of issues facing these professionals and highlights similarities between the challenges encountered in different disciplines as well as in diverse locations. It seeks to disseminate the most current work in this field from a broad array of viewpoints in order to further facilitate an exchange of ideas and lay the groundwork to inspire future collaborations. Most significantly, it provides more specific suggestions for moving forward that could help assist stakeholders to connect and work directly with each other, despite international borders and discipline-related boundaries.

The book will be a valuable resource for researchers, practitioners, and policymakers working in the area of cultural property crime.

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Transnational Criminal Justice

The concept of ‘transnational criminal justice’ has frequently been interpreted in the academic literature as ‘international criminal justice’ or ‘global criminal justice’. Many publications that use the term ‘transnational’ therefore discuss international criminal justice and international legal frameworks. Another form of studies that has developed under the umbrella of transnationality in the field of criminal law is comparative. There has hence been a move from the terminology of ‘international’, ‘global’ and ‘comparative’ criminal justice towards ‘transnational’ criminal justice.

This series considers these developments, but focuses primarily on publications that adhere to a more literal interpretation of the term ‘transnational’. The aim of the series is to provide a forum for discussion of bilateral and multilateral relationships between nations in the field of criminal justice. International law influences these relationships, but is not the focus here. Equally, to explain transnational relationships, comparative analyses are required. While incorporating comparative studies in this series, their aim is the explanation of challenges to criminal justice cooperation in bilateral or multilateral relationships.

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Global Perspectives on Cultural Property Crime

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Part 1

Challenges of ownership

Past and present
1 Introduction

Michelle D. Fabiani

The 2018 Transatlantic Cultural Property Crime Symposium brought together academics and practitioners to foster a dialogue on current and proposed efforts to combat cultural property crime. Speakers represented diverse professions with varying perspectives on cultural property crime, including law enforcement officials, journalists, legal professionals, and scholars with specialities in the disciplines of criminology, law, archaeology, museum studies, political science, and economics. Further, the symposium hosted speakers and attendees from around the world: the United Kingdom, the United States, Canada, Germany, Poland, Ukraine, Australia, South Africa, Italy, Sweden, Switzerland, Luxembourg, and Brazil. This created a unique environment to establish the most recent innovations and research in cultural property crime from a transnational perspective.

Unlike other conferences and meetings addressing cultural property crime, the scope of this symposium included a broader approach with central themes of conflict and cultural property crime; repatriation, restitution, and recovery; definitions of key concepts; research and methodology; innovative methodological approaches; law enforcement investigations; law and cultural heritage and property protection; and anti-money laundering. Thus, this symposium provided a more comprehensive approach to this discussion of cultural property than is often available. The current edited volume draws out four dominant themes among the presented work and elaborates on how the field of cultural property crime can move forward and increase collaboration: (1) challenges of ownership: Past and present; (2) the intersection of art, antiquities, and currency crimes; (3) innovative research and challenges in the field; and (4) policing and policy.

Part 1 explores an area of particular complexity in addressing cultural property crime—the Challenges of Ownership: Past and Present. The history of a work of art remains instrumental in determining its value and legitimacy. Yet, provenance research presents several challenges in both methodology and buy-in from art collectors and others responsible for conducting their due diligence. Despite such an opaque market, few immediate stakeholders perceive significant benefit from transparency. This part of the book presents difficulties and potential solutions facing consultants, researchers, and others attempting to combat the opacity of the art market and determine complexities surrounding current and past ownership of works of art.

DOI: 10.4324/9780367823801-2
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In Chapter 2 Fletcher considers the perception of provenance research as a forensic process, exploring multiple individual approaches employed across a range of art market participants and the implications of this for the identity of the provenance research discipline. Chapters 3 and 4 focus on the role of due diligence. In Chapter 3, Fabel and Kimmig look at the 2016 implementation of the German Cultural Property Protection Act and how it shifts the burden of proof from the buyer to the seller, focusing on the development of this shift and the contentious debates it has sparked in European and German law. In Chapter 4 Catrone focuses specifically on the lack of universal standard for due diligence procedures through the lens of paintings with actual or potential Holocaust-era ownership discrepancies and the market’s reaction to them. Finally, Yates transitions in Chapter 5 to focusing on the extent to which auction catalogue analyses can reasonably answer questions about buyer preferences, perceptions, and behaviour.

Part 2 focuses on an important development in the field of cultural property crime, namely the Intersection of Art, Antiquities, and Currency Crimes. When examining issues related to cultural property crime that transcend borders, money laundering is one of the most significant areas of concern. Terrorist groups have always used methods of money laundering to help finance their causes. Increasing evidence suggests terrorist groups, particularly in the Middle East, are using the wealth of archaeological resources in the region to launder money. This section aims to elucidate the concerns regarding money laundering with distinctively diverse contributions from practitioners as well as academics representing multiple countries battling this problem in different ways but affecting the global market.

In Chapter 6, Stoll looks at the potential misuse of the art market for money laundering and terrorist financing through the lens of criminal decision making. Machado and Ollaik expand on the role of offender decision making in money laundering in Chapter 7 by discussing the contributions of rational choice theory to the protection of cultural objects against such crimes. In the final chapter of this part, Chapter 8, Mosna places money laundering related to antiquities in the context of the broader trafficking process, arguing for the role of stricter regulation of the market for effective cultural heritage protection.

Part 3 expands the discussion to what constitutes the forefront of research in cultural property crime, exploring Innovative Research and Challenges in the Field. Rarely can a book on art crime boast a chapter by a physicist, but the unique approach of this text encourages such a contribution, as innovations in radiocarbon dating relate to protecting cultural property. This part of the book focuses on new methodologies to study cultural property crime, as well as challenges faced in collecting data and conducting research in the field. Many of these techniques can be applied in ways that benefit multiple disciplines and understanding the advances in methodology is essential to both practitioners and academics. Similarly, the challenges faced in the field create opportunities for collaboration with the addition of perspectives and resources to solve these problems.
In Chapter 9, Hajdas identifies the value of radiocarbon dating to the field of antiquities (particularly with respect to the identification of forgeries), addresses the limitations of this method in the future due to fossil fuel combustion, and proposes an approach moving forward. Looking to another area of innovative research, Fabiani in Chapter 10 demonstrates how satellite imagery can be used to create spatial data on archaeological looting and applies it to looking at how archaeological looting attempts are related to conflict in Lower Egypt. The last two chapters of this section focus on significant challenges facing the field. In Chapter 11, Loges outlines the ethical challenges around what should be done with artefacts—especially cuneiform tablets—that originated in Ancient Iraq, arguing for a renewed dialogue between different factions in this debate. Finally, in Chapter 12 Burmon presents the results of recent research on macro-level patterns of fine art theft and discusses the challenges associated with conducting such research.

Part 4 extends the discussion to focus on the role of Policing and Policy in combatting cultural property crime. With transnational crimes, the challenges presented for policing and policy compound, as the difficulties in sorting between international and domestic laws and borders increase. The first few chapters in this portion of the book address specific perspectives of various countries. The last two chapters highlight the potential for collaborative approaches to policing and policy. This organisation sets up the conclusion with focused ideas for moving forward that can then feed into more generalised suggestions moving forward in the field.

Chapters 13 and 14 focus on the policies in the United Kingdom combatting cultural property crime. In Chapter 13, Gould assesses the efficacy of offences created in the United Kingdom over the last two decades designed to prevent dealing in illicitly acquired cultural objects and considering whether further action is needed. In Chapter 14, Daubney focuses on the legislative mechanisms in England and Wales that allow antiquities discovered through metal detecting to appear on the market. Chapters 15 and 16 explore the roles of police and the effective implementation of international conventions. Hulkevych, in Chapter 15, focuses on the challenges to the current legislative framework in Ukraine and argues for the creation of a dedicated specialised law enforcement body for cultural heritage protection. In Chapter 16, van Herzeele compares the cultural property crime policing networks in Belgium and Italy through the framework of nodal governance and anchored pluralism. In Chapter 17, Musu expands the discussion of policy to look at the connection between the illicit antiquities trade and terrorism financing, focusing on how changes in the political response after 2001 have transformed illicit antiquities trafficking into a major threat to international security.
2 Different strokes for different folks
A re-evaluation of the ontology of provenance research towards a more responsive research discipline

Gareth Fletcher

Introduction

The art market is a unique commercial ecosystem that privileges and rewards sophisticated and informed participants over novice actors. This knowledge asymmetry extends to the field of provenance research, where the accessibility of relevant, often proprietary, resources and databases is constrained by a lack of institutional collaboration. These limitations have implications for the integrity and perceived identity of the provenance research process, as individual methodologies must respond to the specific needs of the researcher and their stakeholders. As a consequence, each researcher applies their own critical threshold to the identification and evaluation of provenance information, which has the potential to influence the nature and integrity of research findings.

This chapter will explore the identity and public perception of provenance research as a forensic process in identifying the potential risks and opportunities associated with determining the authenticity, sociological impact, and legal title in the ownership and transfer of cultural objects. It will explore individual approaches to provenance research as conducted by a range of art market participants and consider the variability of research methodologies in response to the accessibility of contextual information. This chapter will reconsider prevailing perceptions of provenance research as a systematic and structured research discipline, placing greater emphasis on the subjectivity and diversity of associated research approaches. To achieve this, it will scrutinise the various approaches to this process as undertaken by an auction house specialist, a private art dealer, and a public-sector museum curator. These perspectives will be used to identify the factors that contribute to the integrity and articulation of each of their provenance research methodologies and explore the evolving relationship between the researcher and their object of analysis.

It is important for provenance researchers to identify and clearly demonstrate the potential strengths and limitations of their research findings, because the process risks being misinterpreted as an objectively ratified series of measures structured to achieve a static and verifiable outcome. If viewed in this way, provenance research has the potential to be perceived as both standardised and universal processes, and the outcomes to be misconstrued as immutable. In reality, however,
research findings often evolve both in response to the accessibility or integrity of the information available, and the variety and provision of resources consulted. For instance, additional relevant information has the potential to become publicly accessible over time, and research obligations and standards of best practice commonly evolve, often becoming more efficient and resource intensive. Therefore, by acknowledging any challenges encountered during the initial research process, future researchers will be better equipped in their efforts to build on research findings, refining both the accuracy, integrity, and robustness of associated provenance records.

A range of online, archival, and physical resources are currently available for researchers to employ in identifying and articulating the provenance information, or ownership history, of cultural objects. However, some of these resources incorporate proprietary information and require payment to access. This has implications for the perceived objectivity of provenance research, where objectivity is measured by the degree to which the research is accurate, comprehensive, and avoids bias towards specific research tools. Proprietary databases may privilege researchers familiar with their specific characteristics and some cross various international jurisdictions. As such provenance researchers risk privileging those that are universally accessible and free to access. Additionally, proprietary databases often incorporate provenance information from printed sales catalogues that is sometimes unavailable online, which has the potential to benefit researchers in a position to consult these. Therefore, highly objective provenance research will demonstrate its evaluation of a variety of relevant open-access and subscription-based digital and analogue resources, incorporating both proprietary and publicly accessible information. Unless all practitioners undertaking provenance research identify and acknowledge this potential methodological compromise, provenance records run the risk of becoming misleading or even disingenuous. As such, few art market participants are aware of this variability and nuance associated with the intrinsic forensics of provenance research. This risk may be further compounded if participants fail to acknowledge the contextual specificity of each research project, as consumers may incorrectly assume that a universal consensus governs provenance research methodologies. For this specificity and nuance to be overlooked would be a damaging misrepresentation of the collective ontology of provenance research, with the potential to further undermine efforts in harmonising methods and best practice across the broader research community. As such, the integrity and rigor of the tools employed to establish the provenance of cultural objects require further examination, to obtain a clearer understanding of their professional value.

An example of some of the potential risks associated with provenance research resources can be seen by considering the catalogue raisonné. Information contained within these resources must necessarily evolve in response to continuing scholarship and the emergence of relevant information, which poses a challenge to the dependability of information distributed within a printed medium. The provenance forger, John Drewe, demonstrates the associated risks of an overreliance on these sources through the historic manipulation of archival documentation.
(Salisbury and Sujo, 2010, 72–81). This makes it incumbent on authors and art market professionals to ensure that novice actors within the art market are aware of their potential limitations, to ensure that they are employed judiciously, and in a considered and discriminating manner. Whilst publishing a digital catalogue raisonné might afford greater flexibility to negotiate these challenges, online resources have the potential to be compromised through the corruption of information or external interference. Distributed ledger technologies, such as blockchain, are likely to transform the storage and accessibility of digital provenance information; however, these resources come with their own limitations, especially through their integration of objective information with subjective opinion. To appreciate this is to understand the associated risks in placing too much faith in a fundamentally responsive digital platform, the integrity of which relies on the relevance and usefulness of its historical performance. Successive amendments to immutable provenance information within the blockchain will generate their own connotative significance, and the cumulative aggregation of these amendments could affect the market desirability of a particular object. Just as there is a range of tools to consult in establishing the provenance of cultural objects, there is also a range of approaches to undertaking the research.

Various research methodologies coexist across the provenance research community, and these approaches respond to the identity, commercial requirements, and specific stakeholders in the institution for whom the research is undertaken. Three ethical perspectives influence the identity and structure of research undertaken across the provenance community, including pragmatic, relativist, and utilitarian methodologies (Fletcher, 2020). A pragmatic approach aims to maximise the efficiency of the process of provenance research, with researchers relying on previous experience to prioritise resources most likely to provide relevant outcomes. However, a relativist approach to provenance research might consult a broader range of these resources, favouring those that are more likely to reveal a prestigious ownership history and strengthen arguments for an object’s authenticity. Finally, a utilitarian approach to provenance research is likely to pursue a more systematic and risk-averse methodology, as the general public are often the ultimate stakeholders in their research findings. Consequentially, for objects that are unlikely to enter the international art market, prestigious and conventional provenance information is valued equally from this utilitarian perspective. With reference to these three approaches, it is now important to consider the identity of the provenance research process as undertaken by an auction house specialist, a private art dealer, and a public-sector museum curator. These three perspectives will seek to identify the complexity and integrity of each research methodology, and the potential range of responses to the accessibility and availability of research resources.

**Auction house specialist**

As global auction houses attract thousands of objects for sale per year, ensuring that legal title is transferred from the consignor to the purchaser is a fundamental
business obligation. Transacting objects with defective titles has an impact on the public perception of an auction house brand, and associated warranties of sale through these transactions provide purchasers with limited financial protection (Merryman, Elsen and Urice, 2007). In addition, employing research strategies to demonstrate the authenticity of an object is important and in accordance with the best interests of the consignor as it may potentially influence market demand. However, in the absence of consensus over the authorship of an object, auction houses reserve the right to publish their specialist opinion prior to exposing it to public auction. A detailed and illustrious associated provenance can enhance the cultural and social prestige of an object, and potentially expose it to a new market of collectors. Conversely, certain identities or nuances within a provenance record may act as a disincentive to potential purchasers, especially if the associated information has the potential to introduce unforeseen ethical or legal risks. Therefore, establishing a demonstrable chain of ownership from the creation to the consignment of an object is fundamental to the provenance research conducted by global auction houses. Auction houses operate on a systematic and time-sensitive recurring business cycle; therefore, in-house provenance research is contingent on both the information provided by the consignor and information obtained through the consultation of relevant libraries, databases, and archives.

Depending on their size of operations, auction house specialists might enjoy access to an international network of colleagues available to assist with provenance research, providing a competitive advantage for organisations operating on a global scale. This would suggest that the methodologies employed by auction specialists are time-sensitive and constantly in flux, and are informed by, and contribute to, the increasing accessibility of information. As such, auction house specialists are likely to be more pragmatic in their approach to the provenance research, in order maximise the likelihood of achieving efficient research outcomes. The pragmatic approach, therefore, has the potential to favour particular resources or research tools, which introduces the risk of overlooking important contextual information. As such, it might be necessary to conduct additional research for an object at a later date, which is critical information to be communicated to purchasers prior to transaction. This pragmatic identification of commercially applicable provenance information informs the research approaches of auction house specialists, contrasting with those undertaken by public-sector museum curators.

**Public-sector museum curator**

Museum curators operating within the public sector allocate time and resources to research the ownership histories of potential acquisitions, permanent collections, and external institutional loans. Through this process, they are obliged to observe best practice guidelines and museum codes of conduct to mitigate potential risks associated with establishing the authenticity and legal ownership of cultural objects. As such, provenance research within the public sector tends to adopt a utilitarian identity, by which the methodologies and professional conduct
of curators undertaking research are aligned with the best interests of their attendant public. In view of this, perhaps the strongest motivation for curators to establish the provenance of a specific object is to obtain evidence that might be used to substantiate its authenticity. Although recent exhibitions have sought to delegitimise perceptions of authenticity as a prevailing and dominant cultural archetype, the provision of an authentic visitor experience consistently informs both attendance and revenue figures. While it is important to ensure that legal title accompanies objects exhibited within permanent collections, within the UK, and in many other international jurisdictions, Immunity from Seizure legislation protects objects on loan for temporary exhibitions from potential ownership claims (Pettersson and Bergevoet, 2010). This legislation has contributed to a reduction in disputes over legal title for exhibitions in UK public-sector institutions, establishing a responsive environment for intra-institutional loans and public engagement within the cultural sector (Gwoździewicz-Matan and Jakubowski, 2017).

Although museums are beginning to recognise the public appetite for incorporating provenance information within accompanying object labels, the number of objects in permanent collections that need to be researched creates its own logistical challenges. As art dealers and auction houses often handle fewer objects than museum curators, they are more likely to provide provenance information for objects on display. A reason for this might be that commercial transactions are often a catalyst through which relevant and potentially prestigious provenances emerge and, in accordance with the United Kingdom Museums Association Code of Ethics, objects from public museum collections are seldom deaccessioned onto the international art market.

Provenance research is usually conducted systematically and within a specific time period by museum curators, in order to mitigate both object and reputational risks to these predominantly publicly funded institutions. The resources consulted as part of this more systematic research process will necessarily vary between organisations, as regional museums tend to attract less government funding and have smaller research budgets than their national counterparts. In addition, few UK museums subscribe to commercial price databases that require payment for access, and publicly accessible provision of these resources is relatively uncommon. This is likely to benefit galleries and other art market participants operating in locations with greater access to these research tools. In this way, research approaches undertaken by museum curators diverge from those employed by art dealers operating within the commercial art market, whose research methodologies are often well funded, more adaptive, and contextually specific.

**Commercial art dealer**

The provenance research conducted by commercial art dealers is often contingent on the economic impact of potential research outcomes. In most cases, dealers are positioned to allocate more time to researching the biography of objects
than auction house specialists and museum curators and may be more selective in their allocation of relevant resources. Principally operating within the private market away from public scrutiny, dealers establish their own commercial and ethical guidelines to develop and sustain their professional reputations. For dealers, provenance research affords an opportunity to establish new relationships between individuals, objects, and locations, all of which contribute to the historiographical context of items for sale. This process might uncover an exceptional or prestigious attribute of a particular object, with potential financial implications if introduced to the retail market. In fact, the economic impact of nuanced ownership histories has become increasingly relevant for dealers, as collectors have become more insistent on the accuracy and demonstrability of associated provenance information. For dealers, establishing and transferring legal title is a necessary component of any commercial transaction, especially in order to avoid handling illicitly sourced objects and to preserve and maintain professional reputations. Consequently, establishing the ownership history of an object as part of the due diligence process prior to transaction is a necessary and effective avenue for dealers to avoid potential disputes over legal title. However, operating within the private market affords its own element of commercial protection, as potential ownership claims are increasingly resolved through private arbitration or mediation (Varner, 2012). In this way, the professional conduct of a dealer may receive less public scrutiny than is afforded to public-sector museums or international auction houses, which may partly explain the expansion of private treaty transactions conducted by auction houses such as Christie’s and Sotheby’s (Flynn, 2016).

Provenance research is often undertaken by commercial art dealers to substantiate or re-evaluate the particular artist to whom an object has been attributed, as additional contextual evidence has the potential to increase its commercial audience. Warranties of sale offered by auction houses provide buyers with additional confidence in catalogued attributions; however, miscatalogued objects offered by private market art dealers are rarely afforded the same protections. As such, the economics of authenticity are contingent on the connoisseurship, or specialist opinion, of specific art dealers or academics, and the accessibility and integrity of the research resources upon which their judgements rely. Therefore, evidence substantiating professional judgements or attributions is often temporal and dependent on the availability of relevant information, which is a form of intellectual relativism that contributes to the identity of provenance research undertaken by art dealers operating within the private sector.

Approaching the process of provenance research from the perspectives of an auction house specialist, public-sector museum curator, and commercial art dealer identifies a variability of research methodologies and professional motivations. This suggests that the external conception and identity of this process require re-evaluation, to emphasise the subjectivity and diversity of research approaches responding to various technical, economic, and sociological considerations. This methodological variability conforms to the preferences of the individual researchers and their affiliated stakeholders, with each researcher applying
a subjective threshold of criticality to the identification and scrutiny of available information. In assessing the primary range of research motivations, the pragmatic provenance researcher prioritises efficiency; the relativist prioritises contextual nuance; and the utilitarian prioritises the interests of their prospective audience. The implications of this range of approaches to provenance research introduce the possibility of variability across research findings, and the potential for this to affect the perception of their comparative reliability. This is problematic as it creates doubt over the veracity and integrity of published provenance information. However, publicising this variability might also be advantageous, as it puts consumers on notice for the need to critically evaluate all listed provenances, and to consult a third party for the avoidance of doubt. Consumers must also be made aware of the range of provenance research methodologies that respond to the specific role and market context in which the individual is operating. To improve the transparency of published provenance records, researchers could signpost potential or overlooked resources to be consulted by future researchers. This would send a signal to promote collaboration across the provenance research sector and raise consumer awareness of the potential limitations to specific provenance records.

Failing to articulate objective standards and best practice guidelines for provenance researchers places the collective integrity of the research community at risk, potentially condoning selective or unsystematic research processes that risk promoting inaccurate or misleading information. In the absence of a formal mechanism to oversee, synthesise, or adjudicate current standards of research practices within the cultural sector, this risk is further compounded, and has the potential to compromise the quality and dissemination of harmonised research methodologies. However, such an objective quality standard for methodological rigor might yet emerge within the provenance research community, which could aim to uphold and publicly promote the scrutiny and best practice processes observed by individual researchers. To achieve this, a non-statutory regulatory body could be established to promote an awareness of the range of methodologies and motivations dictating the character of provenance research and best practice standards across the provenance research community. This body would seek to promote a more sophisticated and nuanced interpretation of the contingent identity of provenance research, that acknowledges and communicates the range of methodological approaches adopted across the research community. A primary obligation of such a body would be to identify misleading or potentially tendentious provenance research methodologies, and to uphold best practice standards of affiliated researchers and increase trust in the provenance research community. This body would also be responsible for aligning external perceptions with the intrinsic complexities and challenges associated with provenance research and promoting the benefits of maintaining rigorous research standards that respond to the particular nuances of individual objects. Provenance research is neither a homogenous nor a standardised process but one that adapts and responds to the characteristics of the object, possessor, and transaction. It is vital for researchers operating within the international art market to acknowledge this reality, as
structural biases and misleading information risk compromising the integrity of future provenance records.

Notes
1 Catalogues raisonnés are an important, generally academic, survey of the creative output of a particular artist. As such, the integrity of information contained within these resources is contingent on the objectivity of the contributing author(s). Available in digital and printed form, they are a temporal resource that acts as a document of an artist’s creative production distilled from information available at a specific time and place.
2 In this context, associated provenance information operates within a diachronic narrative, though which its structure and integrity are subject to constant re-evaluation.
3 In the 2015 Dulwich Picture Gallery exhibition, “Made in China”, artist Doug Fishbone challenged the public perception and value placed on the concept of authenticity by substituting a painting from the permanent collection with a replica produced by the Meisheng Oil Painting Manufacture Co., Ltd. in Xiamen, China. Additionally, the 2018 British Museum exhibition, “I Object”, explored themes of dissent, satire, and subversion through objects selected from the permanent collection.
4 For more information regarding the incorporation of provenance information within exhibition planning, visit “The Obligation of Ownership: An Art Collection under Scrutiny” exhibition at the Zeppelin Museum in Friedrichschafen, which chronicles the ownership histories of selected museum objects from the perspective of the collector.
5 Northampton Museum deaccessioned an Egyptian statue of Sekhemka in 2014 and, responding to this, the Arts Council England removed the museum from its accreditation scheme.
6 In accordance with official vetting guidelines, international fine art fairs, such as The European Fine Art Fair held annually in Maastricht, the Netherlands, encourages dealers to provide visible provenance information on labels beside all objects for sale.
7 For example, Article 2.1 in the Terms and Conditions of Sale provided by art dealer Philip Mould Limited maintains that “All statements by us as to the authenticity, attribution, description, date, age, provenance, title or condition of the work constitute our judgement and opinion only (save that this shall not operate so as to exclude any liability on our part for misrepresentation) and are not warranted by us. We do not accept any liability as a result of any changes in expert opinion which may take place subsequent to the sale of the work” (2018). Sales Terms & Conditions | Philip Mould & Company. [online] Available at: https://philipmould.com/legals/sales-terms-conditions [Accessed 21 Dec. 2018].

References
3 Whose duty is it anyway?

On the burden of proof in applying due diligence standards when dealing with cultural property

Paul Fabel and Louisa Kimmig

Introduction

When dealing with cultural property, sellers and purchasers must fulfil a certain set of legal requirements in order to avoid transactions involving objects of dubious provenance. This has several practical effects. First, such items may be stolen and/or exported illegally from their source countries. This means that any purchaser bears the risk that he or she might not only have to ultimately return the object but may also be liable to criminal charges governing unlawful acquisitions. Second, the cultural property in question might be additionally subject to an export control regime since its country of origin protects it as a national treasure. The categorisation as national treasure responds to the country’s fear that with its relocation into another country, the item could lose part of its cultural value. Third, the context in which cultural objects are located plays a highly important role when applying due diligence standards. For instance, separating a piece from a collection renders the collection incomplete and thus deprives the ensemble of its unique character and value. Similarly, archaeological items often display scientific information in connection and comparison to items from the same excavation.

It is highly recommended for participants in the transaction to obtain knowledge of all the actors involved, as well as detailed information on the objects being offered for sale. In doing so, the object’s identity can be kept intact, and the parties’ rights may be secured. However, to come across reliable information can be difficult, since documentation accompanying the object can be forged, expert opinions are subjective and could be disputed, or the price can be artificially inflated or decreased (Renold, 2018: 4f). Additionally, this quest to discover the object’s past becomes even more challenging when information is intentionally withheld. Regardless of whether it has been stolen and/or illegally exported, the chances of the item being reunited with its rightful owner or being relocated to its country of origin diminish exponentially with each border it crosses.

Two central questions arise as a result of the aforementioned state of affairs. First, who is responsible for conducting research on the object and the parties involved in the transaction—that is, who should carry the principal burden of proof, the buyer or the seller? Second, what exactly does this duty entail

DOI: 10.4324/9780367823801-4
(regarding research, documentation, etc.)? It becomes clear that the answers to both questions are difficult to agree upon in a world with different legal systems that can contradict each other. More importantly, there are varied opinions between the art market, whose primary concern is trade facilitation, and public institutions, which are generally in favour of stricter protection laws. Both sides agree that this search should ultimately lead to the identification of red flags before and during any transaction concerning valuable cultural objects. Therefore, the core aim is to assess whether the presented value, history, and background (e.g., provenance) of the object are true, and whether the persons involved in the trade are credible. But the question remains: To what extent should this research be performed and who should bear the weight (and cost) of these procedures?

The process of raising concerns and finding answers to these questions requires scrutiny and diligent market conduct, also called due diligence. Following this present introduction, the next section outlines the concept of and the obligations for adhering to due diligence standards that exist in international and European law. This article then provides an analysis of Germany’s national concept of due diligence requirements related to the cultural objects’ placement on the market. Possible contradictions between the legal levels shall be revealed, and instances of what the authors call “over-implementation” on a national level shall be presented. Moreover, the question of who must conduct due diligence—the seller or purchaser—is raised, to show how the burden of proof can be used as a powerful instrument to tackle the illicit market and trafficking of cultural objects. This is relevant when considering whether scrutiny must be implemented before or after a purchase, which can have severe consequences for private businesses, and also for the judiciary. Finally, a conclusion shall summarise this paper’s findings.

Due diligence in international and European law

The concept of due diligence

The concept of due diligence is not new; neither does it pertain solely to the field of cultural heritage. As the International Law Association (ILA) (French & Stephens, 2014) states in its due diligence report: “‘Due diligence’ emerged as a concept in international law to mediate interstate relations at a time of significant change … in the 17th [and significantly changing in] the 19th century”. This term evolved over time to reflect ongoing concerns over parties’ respective responsibility. It was famously mentioned during the Alabama Claims Arbitration in 1872, wherein states were made responsible for private acts occurring within their territory.³ As the ILA study group report outlines, the concept of due diligence was refined in the 20th century, spanning all kinds of policy areas and legal texts from state responsibility, over investment law, to humanitarian and human rights law (French & Stephens, 2014: p.4–29). Regardless of the field in which it operates, due diligence has become a “primary norm” in both private and public conduct (French & Stephens, 2014: p.32).
Robert Barnidge Jr. (2006: p.118) agrees, stating that there is indeed an agreed-upon norm, since the principle of due diligence is by definition “a flexible reasonableness standard adaptable to particular facts and circumstances, [providing an] underlying legal framework”. However, he also points out that the extent of its application is always left to the applier’s discretion: “How, whether, and with what breadth the due diligence principle is applied … remains one of political will” (Barnidge Jr., 2006: p.121). It seems that there is a general agreement on the necessity and role of due diligence, but less so regarding who bears the burden and to what extent it must be applied.

**International legal provisions on due diligence in cultural property law and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**

French and Stephen’s (2014) findings and the analysis by Barnidge Jr. (2006) show the dimensions within which due diligence is commonly understood: It is a norm of a more general character, outlining a certain reasonableness standard, which is flexible depending on the circumstances. This is particularly relevant in the field of cultural property protection.

The first international public law convention addressing the protection of cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970—“the UNESCO Convention”). It is complemented by the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (UNIDROIT, 1995—“the UNIDROIT Convention”), which aims to harmonise civil law and procedural law between its Contracting States in order to facilitate the return and restitution of cultural objects, both stolen (in Articles 3–4) and illegally exported (Articles 5–6). Consequently, the UNIDROIT Convention complements the 1970 UNESCO Convention through private law.

One of the crucial differences between both sets of instruments becomes apparent when examining the consequences for the possessor or purchaser of a cultural object once a situation meets the requirements for return or restitution. As the UNESCO Convention does not provide a comprehensive definition of due diligence, nor succeed in unequivocally vesting the burden of proof in the possessor, UNESCO Member States previously tasked UNIDROIT with the drafting of a convention complementing the provisions set out in the UNESCO Convention (Prott, 1996: p.61) This would eventually become the UNIDROIT Convention.

This Convention has a very detailed approach to due diligence. It is placing the burden of proof on the buyer of a stolen (Article 4(1)) or illegally exported object (Article 6(1)). However, there is, strictly speaking, no explicit obligation for the purchaser to conduct due diligence prior to the transaction. It is only required if the possessor of an item wishes to be compensated once the request for return or restitution is made and ultimately resolved in favour of the party making the request. In such an instance, the buyer must demonstrate that he or