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## Globalization in Art Law: Clash of Interests and International Tendencies

Erik Jayme

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# Charles N. Burch Lectureship

Friday, February 18, 2005  
Vanderbilt University Law School  
Nashville, Tennessee

The Charles N. Burch Lectureship was established by Mr. Lucius E. Burch, Jr. in 1982 to honor the contribution of his uncle to the Vanderbilt Law School and the legal profession.

Mr. Charles N. Burch, a graduate of Vanderbilt University Law School in 1889 and a Founder's Day medalist in oratory, was deeply devoted to the interests of the School. He served as a lecturer in law and a member of the University's Board of Trust for thirty years.

The stated purpose of the lecture is to have on an annual basis "a Charles N. Burch lecturer who will deliver a lecture for an honor on some legally related topic not concerning the technical aspects of the practice of law—trying to see that students have as much possible exposure to the argument that great lawyers are generalists by background and only secondary technicians."

Lucius E. Burch, Jr. delivered the inaugural lecture in April 1982 on "The Practice of Law."

# Globalization in Art Law: Clash of Interests and International Tendencies

Erik Jayme\*

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## I. INTRODUCTION

Current issues of international art law usually bring about a clash of interests of strongly different types. In most cases, the solution is derived from an approach that is characterized by a more or less hidden weighing of interests. Therefore, it seems useful to identify these interests in order to show the recent tendencies in international art law.

As far as I can see, the following five typical interests can be extracted from the battle grounds of international art law: (1) the global interests of the international civil society, (2) the national interests of states and nations in preserving artworks of national significance in the home country, (3) the private interests of the owners of an artwork or the artists, (4) the interests of the artworks themselves, and finally (5) the market interests.

## II. THE GLOBAL INTERESTS

Let me start with the global interests. *Globalization* means that the international civil society articulates its interests independently from those of states and nations. It has become a worldwide concern that states do not sufficiently account for mankind's interests independently from state or national interests.

In the field of art law, two main features illustrate the impact of globalization: the first is a claim for public access to important artworks; the second is the protection of the free movement of art objects for international exhibitions.

### 1. *Public Access to Artwork*

The public access argument can be traced back to the early nineteenth century. When Antonio Canova, the famous sculptor and diplomat for the Pope, asked at the Paris conference of 1815 for the return of the artwork Napoleon had taken from Italy to France, he was faced with the argument that the restitution would disperse the

many objects to different places not accessible to the public.<sup>1</sup> In a letter of October 2, 1815, Canova explained to the then-Secretary of State, Cardinal Consalvi, that he had confirmed to the representatives of the other states that the artwork in question would be made accessible in a public gallery. This argument convinced the other participants of the conference. They let the works of art return from France to their places of origin. After Canova's return to Rome, he started building a new public museum, the Museo Chiaramonti, which shows the protection of artwork by the state in its iconographic series of frescoes.<sup>2</sup> In our days, the public access argument has become so important that—to give an example—the German nobility organized for the first time, during the winter season of 2004–2005, a common exhibition: “Treasures of German Castles” in Munich, where century-old collections were shown to the public for the first time.<sup>3</sup>

## 2. Anti-Seizure Statutes

In a global world, international tours guarantee public access to artwork. Global interests favor the enactment of anti-seizure statutes that aim to protect the exhibited works from third party claims and ensure restitution to the lender.<sup>4</sup> Under such anti-seizure statutes, no actions against or sequestrations of artworks on loan are permissible during the time of the exhibition.

In continental Europe, the terms *sauf conduit* or *freies Geleit* are used to underline the idea that works of art are seen as diplomats of good will and therefore enjoy international protection during their voyage across the boundaries of the states.<sup>5</sup> We find such laws, for example, in France, Germany, and Switzerland,<sup>6</sup> and recently also in

1. ERIK JAYME, *KUNSTWERK UND NATION: ZUORDNUNGSPROBLEME IM INTERNATIONALEN KULTURGÜTERSCHUTZ* 25 (Carl Winter ed., Heidelberg 1991).

2. See Yvonne Dohna, *Antonio Canova und die päpstlichen Kunstsammlungen—Ein Museumsdirektor zwischen Tradition und Fortschritt* 157 (Karlsruhe 2000) (doctoral thesis) (on file with author); ERIK JAYME, *ANTONIO CANOVA: DIE POLITISCHE DIMENSION DER KUNST* (Frankfurt am Main 2000) (on file with author).

3. See generally WILFRIED ROGASCH, *SCHATZHÄUSER DEUTSCHLANDS—KUNST IN ADLIGEM PRIVATBESITZ* (Prestel 2004).

4. See ERIK JAYME, *DAS FREIE GELEIT FÜR KUNSTWERKE* (Ludwig Boltzmann Institut für Europarecht 2001); Leila Anglade, *Anti-Seizure Statutes in Art Law: The Influence of “La Danse” on French Law*, in JAMES C. BRADY ET AL., *LIBER MEMORIALIS: PROFESSOR JAMES C. BRADY 3* (Oonagh Breen et al. eds., Round Hall Sweet & Maxwell 2001); ISABEL KÜHL, *DER INTERNATIONALE LEIHVERKEHR DER MUSEEN* (Heymanns 2004); see also Julia El Bitar, *Das Verhältnis zwischen „Freiem Geleit“ und gemeinschaftsrechtlicher Rückgabeklage*, 6/2005 *EuZW* 173, 173–76 (2005) (providing possible conflicts with the law of the European Community).

5. Erik Jayme, *L'immunité des oeuvres d'art prêtées—Quelques procédures et législations récentes en Europe*, in *CLAIMS FOR THE RESTITUTION OF LOOTED ART* 175 (Marc-André Renold & Pierre Gabus eds., Schulthess) (2004).

6. See Marc Weber, *Bundesgesetz über den internationalen Kulturgütertransfer*, 123 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 495, 518–21

Belgium.<sup>7</sup> For the United States, we may mention the Federal Immunity of Seizure Act.<sup>8</sup>

The global interests in public access to artwork are typically taken care of by public and private museums, which are faced with a growing number of legal problems concerning provenance and restitution.<sup>9</sup>

### 3. Protection of Human Rights

Another legal expression of the global society is the protection of human rights.<sup>10</sup> This is, of course, a controversial subject. Human rights are conceived as individual rights rather than the public concern of the civil society. There is a tendency, however, to emphasize the universal aspect of human rights; a universal jurisdiction for violations of human rights is recognized more and more frequently.<sup>11</sup> This tendency is rooted in international criminal law<sup>12</sup> but also has a certain influence in civil matters such as art law.<sup>13</sup> Even where damages cannot be compensated, court proceedings might produce an impetus to reformulate codes of conduct within the global society.<sup>14</sup>

Later in my presentation, I will discuss the legal quality of the Washington Conference Principles on Nazi-Confiscated Art of December 3, 1998.<sup>15</sup> But, we can already note here that violations of

(2004); Andrea F.G. Raschèr & Florian Schmidt-Gabain, *Besserer Schutz für den internationalen Leihverkehr unter Museen? Die „Rückgabegarantie“ im Kulturgütertransfergesetz*, 2005 AJP/PJA 686 (providing Swiss law).

7. Frédéric Dopagne, *Immunité d'exécution et biens culturels étrangers: À propos de l'article 1412ter du Code Judiciaire*, 124 JOURNAL DES TRIBUNAUX 2-4 (2005).

8. See 22 U.S.C. § 2459 (2005) ("Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display").

9. See generally NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST* (IAL) (2000).

10. See Axel Halfmeier, *Menschenrechte und internationale Privatrecht im Kontext der Globalisierung*, 68 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 653 (2004).

11. See, e.g., López-Jacoiste Díaz, *Comentarios a la Ley belga de jurisdicción universal para el castigo de la violaciones graves del Derecho internacional humanitario reformada el 23 de abril de 2003*, 55 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 839 (2003).

12. See Gene Bykhovsky, *An Argument Against Assertion of Universal Jurisdiction by Individual States*, 21 WIS. INT'L L.J. 161, 162-64 (2003) (describing the history of universal jurisdiction).

13. K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEXAS INT'L L.J. 1, 4 n.22 (2004).

14. See Halfmeier, *supra* note 10, at 682.

15. *Washington Conference Principles on Nazi-Confiscated Art*, 19 IPRA 284, 284-85 (1999).

human rights transcend the individual rights, and their protection has become part of the global interests.<sup>16</sup>

#### 4. *Peace and Time Limitations*

The last, but not least important, aspect of the global interest concerns peace. For centuries, art objects were taken during and after wars and brought from one country to another. If we look at the legal instruments which aim at promoting peace, we see, above all, that the factor of time leads to a certain limitation of actions: by prescription or *usucapio* in the Roman law tradition, or by adverse possession in the common law world.<sup>17</sup> Both of these legal features result in the passing of title to the possessor.<sup>18</sup>

There is a tendency, however, to consider the possessor's bad faith.<sup>19</sup> In those situations, the limitation argument will not be admitted or, at least, the period of limitation is extended.<sup>20</sup> For instance, special statutes concern claims of victims of the Holocaust. At the same time, the owner of an artwork is obliged to claim his property once he has knowledge of the present-day possessor. Here, the "discovery rule establishes the temporal boundary on the basis of fault and reasonableness."<sup>21</sup>

In addition, there is art litigation where states and nations are involved. In those situations, the global interest in peace pleads for a settlement rather than a national judgment which cannot be executed in a foreign territory.

16. Human rights may also be used as a strategy to restrict exclusive proprietary rights. See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 345-48 (2003) (discussing the use of human rights to restrict intellectual property rights). For "cultural" human rights, see GABRIELE BRITZ, *KULTURELLE RECHTE UND VERFASSUNG: ÜBER DEN RECHTLICHEN UMGANG MIT KULTURELLER DIFFERENZ* (2000).

17. *But see* California Bufano v. City and County of San Francisco, 233 Cal. App. 2d 61, 71 (1965) (noting that the application of the doctrine of adverse possession to personal property is not well established).

18. See David L. Carey Miller, et al., *Restitution of Art and Cultural Objects: A Re-Assessment of the Role of Limitation*, 6 ART, ANTIQUITY & LAW 1 (2001).

19. See *City of Gotha v. Sotheby's* (Q.B. 1998) (LEXIS UK Cases, Combined Courts) ("It is said that it would be contrary to public policy to apply a German limitation period when (the defendant) deliberately and unconscionably concealed facts relevant to the plaintiffs' claims").

20. See, e.g., CAL. CIV. PROC. CODE § 338(c) (2005).

21. Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitation*, 54 U. TORONTO L.J. 129, 137 (2004).

## III. THE NATIONAL INTERESTS

Let us now turn to the national interests of the states.

1. *Art and National Identity*

Artworks are important elements of national identity.<sup>22</sup> To give an example: when the European Union decided in December of last year to open negotiations with Turkey to prepare an accession treaty, the minister of cultural affairs of the small country of Denmark advanced the idea to collect in a book the most important Danish artworks.<sup>23</sup> “We must know why we are and how we are,” the minister said. He installed seven commissions to find out which are the “twelve pearls” of Danish painting, architecture, design, theatre, music, and literature. Each Danish citizen is to receive a copy of the book including a CD and DVD in order to foster the consciousness of Danish identity.

Again, this idea can be traced back to the early nineteenth century, when nations that longed for unification, such as Italy and Germany, based their identity on artworks. Once more, Antonio Canova played an important role in this development. He created national artworks—for example, the sculpture in the church of Santa Croce in Florence of Italy as a person mourning at the tomb of the national poet, Vittorio Alfieri.<sup>24</sup> In Prussia, a disciple of Canova’s, Christian Daniel Rauch, was to become the sculptor of the German national artworks such as the statue of Queen Louise of Prussia, located at her tomb in Berlin.<sup>25</sup> But also in earlier times, national pride motivated states to retain important artworks in their home countries. Thus, when Guido Reni—the most famous Italian painter of the seventeenth century—finished the *Nozze di Bacco e Arianna* for Queen Henrietta Maria of England, Pope Urban VIII ordered a copy by Romanelli to be sent as substitute to the Queen, because “non

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22. For the United States, see Nicole B. Wilker, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177 (2004). *But cf.* SAMUEL P. HUNTINGTON, WHO ARE WE?—THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 37–58 (2004) (where art does not appear among the components of American national identity).

23. See Aldo Keel, *Zwölf Perlen—Leitkultur—jetzt auch auf Dänisch*, NEUE ZÜRCHER ZEITUNG, Dec. 18, 2004, at 35.

24. Erik Jayme, *Die Entstehung des „nationalen“ Kunstwerks: Zu seiner Deutung anhand Antonio Canovas „Italia“*, 26 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 217 (2004).

25. See Philipp Demandt, *Der Herold deutscher Helden*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 30, 2004, at 14.



*volere che l'Italia restasse priva di così gran tesoro*"<sup>26</sup> (He did not want Italy to be deprived of such a great treasure).

## 2. Export control

These national interests generate statutes which erect trade barriers by controlling the export of national cultural property; these barriers are considered justified even in light of the fundamental principle of free market circulation. Thus, Article 30 of the Treaty Establishing the European Community contains exceptions to the prohibition on cross-border trade restrictions between member states.<sup>27</sup> One of these exceptions concerns restrictions justified on the ground of "protect[ing] of national treasures possessing artistic, historic or archaeological value."<sup>28</sup> Note that this exception only applies to "national" treasures. For other works of art which do not belong to these national treasures, such trade restrictions are not permitted. For "national" artworks there is a tendency to restrict alienability.<sup>29</sup> They may become *res extra commercium*.<sup>30</sup>

## 3. The Nationality of Artwork

The above-mentioned Article 30 of the European Treaty raises a difficult question, which is how to define the nationality of artworks.<sup>31</sup> There have been several attempts to determine the connecting factors that are significant for determining the link between an artwork and a nation. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of November 14, 1970 tries, in Article 4, to define the country of origin by five categories.<sup>32</sup>

26. Sergio Guarino, "Il quadro della Regina": la storia delle Nozze di Bacco e Arianna di Guido Reni, in EXHIBITION CATALOGUE "L'ARIANNA DI GUIDO RENI" 30 (2002).

27. Treaty Establishing the European Community, art. 30, Nov. 10, 1997, 1997 O.J. (C 340) 3, 189 [hereinafter EC Treaty]

28. EC Treaty art. 30.

29. See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (arguing that strict inalienability should replace market inalienability of cultural property).

30. See MARC WEBER, UNVERÄUßERLICHES KULTURGUT IM NATIONALEN UND INTERNATIONALEN RECHTSVERKEHR (2002); see also JÖRG SPRECHER, BESCHRÄNKUNGEN DES HANDELS MIT KULTURGUT UND DIE EIGENTUMSGARANTIE (2004).

31. See Reinhard Mussnug, *Die Staatsangehörigkeit des Kulturguts*, in INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE: FESTSCHRIFT FÜR GEORG RESS 1531 (Jürgen Bröhmer et al., eds., 2005).

32. U.N. Educ., Sci. & Cultural Org. [UNESCO], *Means Of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, Fr., Feb. 27, 1970, art. 4 [hereinafter UNESCO Convention].

The first one concerns “cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the state concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory.”<sup>33</sup>

To focus on the nationality of the artist as does Article 4 of the UNESCO Convention results in many uncertainties. Take the example of the Italian painter Giambattista Tiepolo, who worked at the Royal Court of Madrid. Do those paintings belong to Italian cultural property because they were created by an Italian—at that time a Venetian—painter, or are they part of the Spanish cultural heritage because they were created in Spanish territory by a foreign national? In my view, the nationality of artworks is determined by the present-day interests of a country where the society considers the concerned artwork as part of its identity. It is not so much the nationality of the artists as the reception and appreciation that the work has enjoyed in a certain country that determines the national interests in preserving cultural property in the territory of a state.

These interests are linked to the present-day consciousness and feelings within a society. To give another example: in 2004, the famous painting created by Eugène Delacroix in 1830, *Le 28 Juillet: La liberté guidant le peuple* (*The 28th of July: Liberty Guiding the People*), toured twenty-two museums in France as an icon of the French Republic.<sup>34</sup> History tells us that the painting was acquired by the state in 1831, but had to be returned to the painter in 1839 for several decades during the reigns of King Louis-Philippe and Emperor Napoléon III, and it eventually was displayed in the Louvre only after 1874.<sup>35</sup> The national importance of an artwork may change. For assessing the national interests in an art case, it is always the present-day interest which matters.

#### 4. Nations, Minorities

Artworks are also of great importance for entities that are not yet recognized as states, such as “nations” or other ethnic minorities. There are special statutes that create rights of return for such objects.<sup>36</sup> In general, the line is blurred between the protection of minorities and the cultural rights of the members of ethnic groups.<sup>37</sup>

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33. UNESCO Convention, *supra* note 32, art. 4(a).

34. See EUGÈNE DELACROIX, *Le 28 Juillet: La liberté guidant le peuple* (1830).

35. Ministère de la culture—base Joconde, <http://www.culture.gouv.fr/documentation/joconde/fr/pres.htm> (follow Recherche avancée, then input “La Liberte Guidant le Peuple 28 Juillet 1830” in the “Titre” field).

36. See James A. R. Nafziger and Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT’L J. CULTURAL PROPERTY 77 (1990); see also INTERNATIONAL LAW ASSOCIATION, REPORT OF THE

## IV. THE INTERESTS OF PRIVATE PARTIES

Let me now turn to the interests of private parties, such as those of the owners or of the artists who created the cultural goods.

1. *Ownership Restrictions*

The owner of an artwork has an interest in enjoying its possession or selling it to whomever he likes. These interests may conflict with national or global interests. To give an example from German court practice: the art object in this case was the so-called *Silberzimmer der Welfen* (Silver Chamber of the Royal Family of Hannover) that consists of extremely precious furniture created in the eighteenth century and that today is situated in the castle of Marienburg.<sup>38</sup> The owner is the current head of the Hanover family who objected to the registration of these art objects as national cultural property in Germany. He brought an action against the State of Lower Saxony.<sup>39</sup> In his view, the registration of the art objects as national cultural property, resulting in an export prohibition, constituted an expropriation since the prices he could obtain outside Germany were much higher than those within Germany.<sup>40</sup> In addition, he argued that the silver furniture was not of national importance.

The Federal Administrative Court rejected the owner's arguments.<sup>41</sup> The court relied on the opinion of a commission of five experts to ascertain the national importance of the Silver Chamber. These five experts were: one representative of the public administration, one university professor, one private collector, one art dealer, and one dealer in antiquities. They all agreed that the Silver Chamber was a unique and complete ensemble of the highest quality, which reflected German history.<sup>42</sup> Furthermore, the court decided that export control was not an expropriation under the German Constitution because the Silver Chamber was not barred from sale in Germany.<sup>43</sup>

The case clearly illustrates the clash of private and public interests. The constituent elements of proprietary rights do not only include the use of the cultural good for private purposes, but also the

SEVENTY-FIRST CONFERENCE HELD IN BERLIN, 872, 877 (London 2004) (on file with author).

37. See BRITZ, *supra* note 16.

38. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] May 7, 1993, *Neue Juristische Wochenschrift* [NJW] 3280 (F.R.G.).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

possibility to sell it or to donate it to a person the owner is free to choose. The public interests limit these proprietary rights.<sup>44</sup>

## 2. *Conflict of laws—lex rei sitae or lex originis?*

There are, of course, situations where public interests are not involved or are less significant. When an artwork is stolen and two persons claim ownership, the question arises as to whose private interests should prevail—those of the former owner or those of the innocent buyer.<sup>45</sup> The answers of the legal systems vary. These differences have generated special conflicts problems in international situations. In private international law, the *lex situs* at the time of acquisition,<sup>46</sup> and more recently, the law of the *lex originis* (the country of origin) have emerged as solutions for choice of law.<sup>47</sup> In the European Community, Article 12 of the directive 93/7/EEC concerning the restitution of cultural property seems to favor the *lex originis* while, in general, the *lex rei sitae* prevails.<sup>48</sup>

## 3. *The Artist and the droit de suite*

In addition to the interests of the owner, there are the interests of the artist. As far as intellectual property and the rights deriving there from are concerned, it is usually the law of the state where protection is sought that applies. In Europe, it is above all the *droit de suite* which has been generating special conflicts problems. This right consists of the participation of the artist in the purchase price when his work of art is sold by a commercial art dealer or by an auctioneer. In Germany, the artist is entitled to claim five percent of that price.<sup>49</sup> In the United Kingdom, there is no such right.

44. *Id.* (“Der Schutz solcher Eigentumsobjekte gegen Abwanderung dient mithin allein einem qualifizierten öffentlichen Interesse an der Bewahrung herausragender deutscher Kulturgüter”).

45. See Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchaser of Stolen Art*, 64 FORDHAM L. REV. 49, 89 (1995) (stating that both the “former owner and good faith purchaser are by definition legally innocent of wrongdoing”).

46. See Celia M. Caamina Domínguez, *La Propiedad de los bienes culturales Robados en Derecho Internacional privado*, in CUESTIONES ACTUALES DEL DERECHO MERCANTIL INTERNACIONAL 71 (Alfonso Luis Calvo Caravaca & Santiago Areal Ludena eds., Madrid 2005) (on file with author).

47. See Florian Kienle & Marc-Philippe Weller, *Die Vindikation gestohlener Kulturgüter im IPR*, 24 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 290 (2004); see also Christian Armbrüster, *La revendication de biens culturels du point de vue du droit international privé*, 2004 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 723, 739–41; see also BELGIAN LAW ON PRIVATE INTERNATIONAL LAW, art. 90 (July 16, 2004).

48. Council Directive 93/7/EEC, art. 12, 1993 O.J. (L 74) 74, 76 (EC).

49. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, available

A famous case involved three pieces of art created by the German artist Joseph Beuys, who died in 1986.<sup>50</sup> A friend of his, the painter Gotthard Graubner, acquired the artworks for some hundred deutschmarks.<sup>51</sup> In 1989, the owner sold the works at Christie's in London for 462,000 pounds sterling.<sup>52</sup> The artist's widow brought an action in Germany against the seller claiming five percent of that sum.<sup>53</sup> The question arose as to whether German law applied and thus the *droit de suite* or English law, where such claims are unknown.

The German Federal Court of Justice held in favor of the defendant.<sup>54</sup> According to the court, German law did not apply to a sale which had taken place in its entirety in the United Kingdom.<sup>55</sup> The fact that the works had been sent from Germany to London after negotiations with an agent of Christie's in Germany was not considered to be a sufficient connection with Germany for applying German law.

## V. THE INTERESTS OF THE ARTWORKS

### 1. *Religious Functions*

The Beuys case also involved the interest of the art market. Before turning to this type of interest, I would like to address the interests of the artworks themselves. Upon first impression, this may seem strange. But, our current view of artworks as mere objects without any interests of their own has developed only relatively recently. The modern view of artwork as objects without independent interests starts at the Renaissance period, where commentators such as Giorgio Vasari, who described the life and works of the leading artists, accompanied the development of art. In the centuries prior to the Renaissance, however, artworks were mainly considered the ensouled objects of a living religious cult, sometimes merging with the

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at <http://bundesrecht.juris.de/bundesrecht/urhg/gesamt.pdf> (stating, in Section 26(1) (Folgerecht), that an artist is entitled to five percent of the proceeds from the sale of an original of the artist's artwork).

50. Thorsten Braun, *Joseph Beuys und das deutsche Folgerecht bei ausländischen Kunstauktionen*, 15 IPRAx 227 (1995). See Kurt Siehr, *Das urheberrechtliche Folgerecht inländischer Künstler nach Versteigerung ihrer Werke im Ausland*, 12 IPRAx 29 (1992).

51. *Id.*

52. *Id.*

53. *Id.*

54. Bundesgerichtshof [BGH] [Federal Court of Justice] June 6, 1994, 15 IPRAx 246 (1995).

55. *Id.*

holy persons they were representing.<sup>56</sup> This religious function evaporates when artworks of such kind are taken out of their contexts.<sup>57</sup>

## 2. Protection of the Context—Parks and Gardens

The same applies to all unauthorized excavations that neglect the context, which would have attributed meaning and significance to those artworks. The artworks have an interest in being understood within the context of their original function. It is important, therefore, to know the provenance of an artwork. One might also add the interests of art scholarship to understanding and to describing the meaning of cultural goods.

Usually, special statutes take care of these interests in that they aim at protecting and preserving artworks in their specific contexts. It is interesting to note that, in recent times, even parks, gardens, and their iconographic programs,<sup>58</sup> have become objects of public concern and legislative acts.<sup>59</sup> In addition, cultural goods lost in the sea are the object of protection.<sup>60</sup>

## 3. Integrity

Finally, the artworks have an interest in the protection of their integrity. Existing law does not prescribe any duty of the owner of an artwork to preserve its integrity. There is only an obligation of the owner, under certain statutes of public law, to abstain from alterations of the artwork. In addition, the artist has a similar claim against the owner.<sup>61</sup> What is lacking is a legal duty of the owner to

56. Tonio Hölscher, *Die Macht der Texte und Bilder in der griechischen und römischen Antike*, 2005 *AKADEMIE- JOURNAL* 42, 43–44. See generally HANS BELTING, *BILD UND KULT—EINE GESCHICHTE DES BILDES VOR DEM ZEITALTER DER KUNST* (Munich 1990).

57. Erik Jayme, *La Repubblica delle Arti ed il suo impatto sul diritto internazionale: Note sul pensiero di Antonio Canova*, in *OLTRE IL DIRITTO* 132–34 (Maria Costanza, ed., Padova 1994). See John Merryman, *Il controllo nazionale sull'esportazione die beni culturali*, in *RIVISTA DI DIRITTO CIVILE* 633, 637–38 (1988).

58. See Erik Jayme, *Rechtsschutz ikonographischer Programme am Beispiel romantischer Gärten*, in *HISTORISCHE GÄRTEN—SCHUTZ UND PFLEGE ALS RECHTSFRAGE* 71 (Gerte Reichelt ed., Wien 2000).

59. See NIKOLAUS KRAFT, *DER HISTORISCHE GARTEN ALS KULTURDENKMAL – RECHTSFRAGEN DES KULTURGÜTERSCHUTZES IN AUSGEWÄHLTEN RECHTSORDNUNGEN EUROPAS* (Wien 2002) (on file with author).

60. See NADINE CHRISTINA PALLAS, *MARITIMER KULTURGÜTERSCHUTZ* (Berlin 2004).

61. See, e.g., Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz][UrhG][Copyright Act], Sept. 9, 1965, BGBl I at 1273, available at <http://bundesrecht.juris.de/bundesrecht/urhg/gesamt.pdf> (stating, in Section 14 (Entstellung des Werkes), that the artist has the right to prevent the defacement of the artist's work).

protect the artwork, a gap which can be filled only by creating rights based on the interests of the artworks themselves which are taken care of by art organizations.

## VI. THE INTERESTS OF THE ART MARKET—FREEDOM OF TRADE

Let me turn now to the fifth and last interest in the battleground of art law—the interest of the art market and the freedom of trade.

### 1. *Free Market and Export Control*

One of the constituent principles of the international community is the idea of a free market where goods may circulate without national restrictions and prohibitions. In the European Community, the protection of national art treasures is an exception to this principle. But even there, such “prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member States,” as prescribed by Article 30 of the Treaty Establishing the European Community.<sup>62</sup> Furthermore, a common market is based on the freedom of establishing business centers wherever the entrepreneur likes. In the context of art law, we may recall, with respect to the common market of the European Community, the recent case of *Inspire Art* decided by the European Court of Justice, in which it was held that a Dutch art dealer formally incorporated in the United Kingdom as Inspire Art Ltd. did not have to comply with the corporate law restrictions under Dutch law.<sup>63</sup>

### 2. *Antitrust Law*

In addition, the free market is based upon free competition which is protected by antitrust law that gains, in particular in the United States, special importance with regard to the great international auctions houses.<sup>64</sup> Art law has generated other intricate questions with regard to the free access of art dealers to art fairs, which have become increasingly important for the art market.<sup>65</sup> Non-

62. EC Treaty art. 30.

63. *Europäische Gerichte*, 56 NJW 3331 (2003); see Norbert Horn, *Deutsches und europäisches Gesellschaftsrecht und die EuGH-Rechtsprechung zur Niederlassungsfreiheit—Inspire Art*, 57 NJW 893 (2004).

64. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 389 (2d Cir. 2002) (abrogated in another context by *Hoffman-La Roche LTD v. Empagran S.A.*, 124 S.Ct. 2359 (2004)).

65. Oberlandesgericht [OLG] [Trial Court München] Oct. 13, 1989, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 370 (F.R.G.).

discrimination of art dealers on the one hand and the preservation of quality standards of art fairs on the other hand have been the poles between which the courts have tried to elaborate solutions.<sup>66</sup> These solutions should be extended to international exhibitions of contemporary art, which have a great impact on the market.<sup>67</sup>

### 3. Legal Certainty

The art market and its main participants, the art dealers and their customers, also share a common interest, which is legal certainty as to ownership and acquisition. Thus, the main objection against the UNIDROIT-Convention on Stolen or Illegally Exported Cultural Objects of 1995 has been based upon the use, in some articles of the convention, of broad and general terms such as the "essential cultural importance" of an artwork which have become the main reason for abstaining from the ratification of this Convention.<sup>68</sup> Once again, this illustrates the clash between market states, where the international art market has a considerable impact on the national economy, and other states where restrictions and export control result in an economically weaker art market.

## VII. THE CLASH OF INTERESTS

Having identified the different interests struggling with each other in art law, I would like to stress that, in a way, all these interests are legitimate as such. Litigation under the various legal systems will therefore result in varying decisions depending on which of the interests are given preference. But, for international mediation and settlement situations, being aware and taking the divergent interests into account will be helpful in producing convincing and thus re-pacifying results. To give an example: a settlement would be the most convincing solution to the case of *Maria Altmann v. Republic of Austria*,<sup>69</sup> in which the dispute concerns about six paintings of the

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66. Oberlandesgericht [OLG] [Trial Court Frankfurt] Apr. 29, 1993, NJW-RR 1390 (F.R.G.).

67. *But cf.* Oberlandesgericht [OLG] [Trial Court Frankfurt] July 1, 1992, 1993 NJW 1472 (F.R.G.) ("documenta").

68. See Heinrich Schweizer, *Die Position der Bundesrepublik Deutschland während der Diplomatischen Konferenz zur Annahme des Entwurfs der Unidroit-Konvention über die internationale Rückgabe gestohlener oder illegal ausgeführter Kulturgüter von 1995 unter besonderer Berücksichtigung des deutschen Verfassungsrechts*, 2003 KUR—KUNST UND URHEBERRECHT 25, 29.

69. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002); *Republic of Austria v. Altmann*, 124 S.Ct. 2240 (2004); *Altmann v. Republic of Austria*, 377 F.3d 1105 (9th Cir. 2004); *Altmann v. Republic of Austria*, 335 F. Supp. 2d 1066 (C.D. Cal. 2004).



Austrian painter Gustav Klimt that are currently exhibited in the National Belvedere Gallery in Vienna.<sup>70</sup> In the clash of interests between the human rights of the heirs of the former owner and the Austrian national interests of preserving the paintings in Austrian territory, global interests favor a solution that would allow public access to these most famous artworks.

A little anecdote may illustrate this aspect of the case. When I gave a lecture in Vienna last November, I took the chance to visit the Belvedere Museum again. When I was trying to find a specific nineteenth century painting—not the Klimts—an employee of the museum said to me: “Have a long look at this painting: it is going to be restituted.” In his eyes, restitution meant “loss forever” for the public.

If we address the many legal issues involved, the Klimt case is not an easy one, and this is not only because of the retroactive effect given by the majority opinion of the Supreme Court to the Foreign Sovereign Immunities Act of 1976.<sup>71</sup> The difficulties also arise because Adele Bloch-Bauer, in her will, expressed the wish that the paintings should be donated to the Belvedere Gallery.<sup>72</sup> Thus, numerous issues of Austrian law, including questions of matrimonial property and the construction of wills, have to be decided by the California courts.<sup>73</sup> In addition, the basis for assuming a commercial activity of the museum in California based on distributing books on the paintings in order to establish personal jurisdiction over the defendant is fairly slight.<sup>74</sup> Therefore, it becomes more and more important, in such cases that touch—and I quote Justice Kennedy in his dissenting opinion—the most sensitive area of foreign relations<sup>75</sup> to develop other legal techniques to overcome or at least to mitigate the effects of the clash of interests.

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70. Fortunately an agreement has been reached for an arbitration to be held in Vienna, see *Der Fall Bloch-Bauer geht an ein Schiedsgericht in Wien*, FRANKFURTER ALLGEMEINE ZEITUNG, May 5, 2005, at 35.

71. See *Republic of Austria v. Altmann*, 541 U.S. 677, 715 (2004).

72. *Id.* at 681–82.

73. See Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Art Works and Other Chattels*, 45 HARV. INT'L L.J. 239, 244, 277 (2004) (suggesting that for artwork litigations courts should return to in rem jurisdiction and dismiss the actions in other fora on the ground of forum non conveniens).

74. See Burkhard Hess, *Altmann v. Austria—Ein transatlantischer Streit um ein weltberühmtes Gemälde Gustav Klimts im Wiener Belvedere*, in Festschrift für Peter Schlosser zum 70. Geburtstag, at 257–73 (Tübingen 2005) (on file with author).

75. *Republic of Austria v. Altmann*, 541 U.S. 677, 715 (2004) (Kennedy, J., dissenting).

## VIII. NEW LEGAL TECHNIQUES IN INTERNATIONAL CASES

In conflicts law there are new legal techniques that have been developed in order to cope with a clash of interests that at the outset seem to be irreconcilable.

1. "Narrative" Norms—*The Washington Principles*

The first type of these new techniques is having recourse to what I have called the "narrative norms,"<sup>76</sup> a term which follows the patterns of postmodernism. Let me turn to the Washington Conference Principles of Nazi-Confiscated Art, which aims at fostering transparency in the provenance of artworks and at facilitating restitution to the pre-war owners of such cultural property.<sup>77</sup> The preamble reads as follows: "In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws."<sup>78</sup> These non-binding principles may have legal effects. They may be taken into consideration for the interpretation and construction of legal texts. They do not bind, but they tell us a story. To put it differently: they are of a narrative character. They might help to overcome obstacles to claims of restitution erected by the law of evidence or of prescription and to avoid acquisition of such works by good faith.

In Germany, the Washington principles provoked many efforts by museums to clarify the provenance of artworks acquired during the Nazi-period and case studies on their success were made.<sup>79</sup> In addition, there have been new studies on acquisitions during the

76. See 2 Erik Jayme, *Die Washingtoner Erklärung über Nazi-Enteignungen von Kunstwerken der Holocaustopfer: Narrative Normen im Kunstrecht*, in MUSEEN IM ZWIELICHT—ANKAUFSPOLITIK 1933–1945—DIE EIGENE GESCHICHTE—PROVENIENZFORSCHUNG AN DEUTSCHEN KUNSTMUSEEN IM INTERNATIONALEN VERGLEICH 247, 251 (Koordinierungsstelle für Kulturgutverluste 2002) (on file with author).

77. See Katharina Pabel, *Rechtliche Grundlagen der Kulturgutrestitution in Deutschland*, 7 KUR—KUNSTRECHT UND URHEBERRECHT 1, 4–5 (2005) (on file with author).

78. *Id.*

79. See BEITRÄGE ÖFFENTLICHER EINRICHTUNGEN DER BUNDESREPUBLIK DEUTSCHLAND ZUM UMGANG MIT KULTURGÜTERN AUS EHEMALIGEM JÜDISCHEN BESITZ, HERAUSGEGEBEN VON DER KOORDINIERUNGSSTELLE FÜR KULTURGUTVERLUSTE (Magdeburg 2001); *Museen im Zwielicht, Ankaufspolitik 1933–1945, die eigene Geschichte—Provenienzforschung an deutschen Kunstmuseen im internationalen* (2002).

Nazi-period.<sup>80</sup> What do we learn from these studies? Each and every artwork has its complicated history. Narrative norms are not restricted to the Washington principles. They appear in different contexts such as the restoration and protection of artworks and are expressed in “Chartas” elaborated by international specialists of the respective field.<sup>81</sup>

## 2. Factual Significance of Foreign Art Law—Local Data

Another technique known from conflicts law takes into account foreign art law within the framework of the applicable *lex fori*, a tool which, in the conflicts approach of my teacher Albert A. Ehrenzweig, has become the so-called *local datum*.<sup>82</sup> In one case, the German Federal Court of Justice had to deal with a factual situation where cultural goods had been illegally exported from Nigeria to Germany.<sup>83</sup> The goods had arrived damaged and the buyer asked the insurance company for compensation. The court held that the insurance contract to which German law was applicable was void because it was based on the violation of the Nigerian export prohibitions.<sup>84</sup> Under German law, contracts are null and void if they contravene the good morals which had to be concretized, according to the court, in an international sense taking into account the foreign export control laws.<sup>85</sup> This result has been criticized because it is not entirely clear whether an insurance contract about an artwork to be transported abroad would be considered, under Nigerian law, a violation of the export control law.<sup>86</sup> In any case, taking foreign law into consideration is a legal approach that attributes at least a factual

80. See, e.g., BIRGIT SCHWARZ, *HITLERS MUSEUM—DIE FOTOALBEN GEMÄLDEGALERIE LINZ: DOKUMENTE ZUM “FÜHRERMUSEUM”*, BÖHLAU VERLAG WIEN, KÖLN (Weimar 2004); ILSE VON ZUR MÜHLEN, *DIE KUNSTSAMMLUNG HERMANN GÖRINGS—EIN PROVENIENZBERICHT DER BAYERISCHEN STAATSGEMÄLDESAMMLUNGEN* (Munich 2004); see also SOPHIE LILLIE, *WAS EINMAL WAR—HANDBUCH DER ENTEIGNETEN KUNSTSAMMLUNGEN WIENS* (Wien 2003).

81. See, e.g., GERTE REICHELT, *IDEENGESCHICHTLICHE SKIZZE ZU WASSERGÄRTEN—EIN PLÄDOYER FÜR DIE CHARTA VON FLORENZ* (Wien 2004) (on file with author).

82. See Erik Jayme, *Ausländische Rechtsregeln und Tatbestand inländischer Sachnormen—Betrachtungen zu Ehrenzweigs Datum-Theorie*, in *GEDÄCHTNISSCHRIFT FÜR ALBERT A. EHRENZWEIG 135* (Erik Jayme & Gerhard Kegel eds., 1976).

83. Bundesgerichtshof [BGH] [Federal Court of Justice], *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 59 (82) (F.R.G.) reprinted in 73 I.L.R. 226, 229 (BGH 1972).

84. *Id.*

85. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, as amended, § 138.

86. Wilhelm Wengler, *Die Stellungnahme anderer Staaten zu heterogen verknüpften Sachverhalten als Faktum unter dem im Forumstaat anwendbaren Recht*, in *ZUR RECHTSLAGE DEUTSCHLANDS—INNERSTAATLICH UND INTERNATIONAL 143*, 152 n.13 (Peter Eisenmann & Gottfried Zieger eds., München 1990).

significance to foreign art law, a tool which may help to overcome differences of legal systems and foster cooperation.<sup>87</sup>

## IX. CONCLUSIONS

My conclusions are short: in my view, it is important to articulate the different interests involved in international art cases. Globalization has added the interests of the global civil society to the traditional claims and counterclaims of private parties and of states or nations. Thus, public access to artworks has been fostered by anti-seizure statutes protecting international exhibitions. And, it is this line of tendencies and arguments which conceives of famous artworks as treasures of mankind<sup>88</sup> and which should prevail in the future.

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87. See also J.P. Verheul, *Foreign Export Prohibitions: Cultural Treasures and Minerals*, 31 NETH. INT'L. L. REV. 419, 422 (1984).

88. See CHRISTOFF JESCHKE, DER VÖLKERRECHTLICHE RÜCKGABEANSPRUCH AUF IN KRIEGSZEITEN WIDERRECHTLICH VERBRACHTE KULTURGÜTER 301–05 (Berlin 2005).

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