

10-1993

Preventing the Theft and Illegal Export of Art in a Europe Without Borders

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Recommended Citation

Kimberly A. Short, Preventing the Theft and Illegal Export of Art in a Europe Without Borders, 26 *Vanderbilt Law Review* 633 (2021)

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NOTE

Preventing the Theft and Illegal Export of Art in a Europe Without Borders

ABSTRACT

The opening of internal borders within the European Community presents tremendous opportunity for European economic growth. Yet with all the potential benefits come many problems. Increased illegal art trafficking is one of these problems. This Note examines European treaties, laws of the individual EC Member States, and Community-wide treaties and regulations designed to prevent the theft and illegal export of art. The Note discusses how the differing interests of the Member States have prevented agreement on legislation to protect art and resulted in measures inadequate to protect Europe's vast art treasures. After analyzing the latest EC regulatory attempt to protect art, the author concludes that the current laws will not halt illegal art trade in the European Community and makes a proposal for improving the present situation.

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I. INTRODUCTION

The Roman Empire, revolutionary France, and Nazi Germany are among the victors of military conquests who stole from the art collections of other states to augment their own. These conquerors attempted to justify their actions by dressing them with ideological notions that superior states should have superior art collections—essentially connoisseurship by force. For example, the French plundered other states to amass their vast art collections.¹ In the eighteenth century, a Hussar lieutenant rationalized the French practice of pillaging by telling the French Convention² that art works of other states had been “soiled too long by slavery” and that they had liberated the art by bringing it to France, “the homeland of liberty and sacred equality.”³ Napoleon, too, thought all great art

1. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 132 (1977) [hereinafter DUBOFF, *DESKBOOK*].

2. The Convention was the governing body of the French Republic from 1792 until 1795. OWEN CONNELLEY, *FRENCH REVOLUTION/NAPOLEONIC ERA* 5 (1979).

3. John Henry Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in *LAW AND THE VISUAL ARTS* 156 (Leonard D. DuBoff & Mary Ann Crawford DuBoff eds., 1974) [hereinafter Merryman, *National Patrimony*].

belonged in France, as the true home of artistic genius.⁴ In fact, plundering Italy was Napoleon's explicit mission in 1796.⁵ Similarly, during the Second World War, Nazi officers stole art from museums and private collections throughout Central Europe⁶ to create a cultural center for the "superior" Aryan race.⁷

Modern "conquerors" need neither bloodshed nor ideology to pillage Europe's art collections. Instead, the opening of internal borders between European Community (EC) Member States, combined with the modern practice of collecting illegally exported or stolen art, threatens to result in a renewed plundering of Europe's vast art wealth. Under the EC open border ideal, art may now be moved as easily as any other good.⁸ The states of the European Economic Community signed the Single European Act⁹ in 1986 to advance realization of the fundamental principle of

French artists also believed France to be the proper home for great art. In October 1796, many prominent French artists of the French Revolution era signed a petition to the Directory, the governing body of France at the time, which stated: "The French Republic, by its strength and superiority of its enlightenment and its artists is the only country in the world which can give a safe home to these masterpieces." *Id.*

4. DUBOFF, *DESKBOOK*, *supra* note 1, at 132. In 1796, Napoleon wrote from Milan: "All men of genius, all those who have attained distinction in the republic of letters, are French no matter in what country they may have been born." Merryman, *National Patrimony*, *supra* note 3, at 156. Napoleon attempted to legalize his acquisitions by including art concession clauses in treaties with the Italians, including the Bologna Armistice Convention (1796) and the Treaty of Tolentino (1797). DUBOFF, *DESKBOOK*, *supra* note 1, at 132. After the fall of Napoleon in 1815, many of the states tried to recover their art works. *Id.* at 133. However, many works had been destroyed, defaced, or poorly restored. *Id.*

5. FELIX MARKHAM, *NAPOLEON* 43 (1963). Napoleon recognized the importance of protecting the art he took, requesting that experts be sent to select works suitable to send to Paris and to arrange for safe transport. *Id.* Napoleon wrote to the Directory on May 9, 1796: "I repeat my request for a few reputable artists to take charge of the choice and transport of the fine things we shall think fit to send to Paris." *Id.* The Italian Renaissance art that Napoleon took from Italy greatly influenced the neo-classical and romantic schools in nineteenth-century French art. Paul M. Bator, *An Essay on the International Art Trade*, 34 *STAN. L. REV.* 275, 308 (1982).

6. Stephan Kinzer, *Weimar Journal; Amber-Tinted Rumors Whisper of Buried Booty*, *N.Y. TIMES*, May 27, 1992, at A4. A senior Nazi officer, Erich Koch, amassed numerous valuable art works, possibly including the famed *Amber Chamber*. The *Amber Chamber* was a room with walls of amber, filled with amber figurines, made as a gift to the Russian royal family from King Frederick I of Prussia. *Id.*

7. DUBOFF, *DESKBOOK*, *supra* note 1, at 144. In addition to collecting art, Hitler had "degenerate" Post-Impressionist works destroyed. *Id.*

8. Alan Riding, *Europe, Unifying, Has Fears for Its Art*, *N.Y. TIMES*, Dec. 28, 1992, at C9.

9. Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA]. The SEA amended

the European Community: the free movement of goods, persons, services, and capital.¹⁰ The internal market officially came into being on January 1, 1993, despite the ongoing debate surrounding the issue of eliminating customs and border checks. Thus, it will be more difficult to enforce the export controls that most EC Member States place on art¹¹ and to detect the movement of stolen art.

As early as 1989, EC Member States recognized that current provisions failed to protect their art treasures adequately and began working to develop more effective measures.¹² Despite early recognition of the problem, the European Community has done little to remedy it. Like many other issues facing the European Community, protecting art treasures fuels regional tensions and raises the question systemic to European integration: how to prevent one problem, here, the theft and illegal export of art, without undermining the fundamental principle of free movement of goods, persons, services, and capital within the European Community.

Europe has much to lose if the European Community does not develop proper measures to prevent art from being taken illegally from one EC Member State to another or removed from the European Community altogether. The European Community contains some of the world's greatest art collections, housed in major museums such as the Louvre (France), the Prado (Spain), the National Gallery of England, and the Uffizi (Italy). Churches, private collections, and smaller galleries and museums that cannot afford adequate protection also hold many important works.¹³

the Treaty Establishing the European Economic Community (EEC Treaty), and its articles were incorporated into the EEC Treaty. RALPH H. FOLSOM, *EUROPEAN COMMUNITY LAW IN A NUTSHELL* 23 (1992).

10. JOSEPHINE STEINER, *TEXTBOOK OF EEC LAW* 4 (3d ed., 1992). The twelve EC Member States are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. *Id.* at 3-4. The European Community (EC) coordinates nineteen states whose economies have an output of over 6.5 trillion dollars each year and encompasses a population of 375 million people. Tom Redburn, *The New Europe Looks More Like An Old Friend; 1993's 'Mythical Significance' Holds Little Magic for the EC Single Market*, *INT'L HERALD TRIB.*, Dec. 28, 1992.

11. These states include the United Kingdom, France, Spain, and Italy. *See infra* part III.B.

12. Riding, *supra* note 8.

13. DUBOFF, *DESKBOOK*, *supra* note 1, at 70. Larger museums also suffer from thefts. For example, in 1990, a Renoir portrait was stolen from the Louvre. Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 *SUFFOLK TRANS-*

This Note addresses the problem of illegal art trafficking in the European Community.¹⁴ First, Part II discusses the magnitude and causes of illegal art trafficking in the context of the EC objective of eliminating internal frontiers, the realization of which will facilitate illegal movement of art from and within the European Community. Next, Part III surveys and analyzes non-EC agreements in effect among European states and the laws enacted by individual Member States to protect and regulate the movement of cultural property.¹⁵ Part IV sets out EC treaties and legislation that are designed to prevent the theft and illegal export of art. Part V then discusses the detriments and benefits of an active art trade. Part VI assesses the effectiveness of the recently passed EC legislation on the export of cultural property. Finally, the Note concludes that the European Community must recognize the true goal of export controls as the protection and preservation of Europe's common cultural heritage, which will best be protected through an active, regulated art trade.

II. THE MAGNITUDE AND CAUSES OF ART THEFT

A. Overview

Art theft posed a severe threat to the art treasures of the Member States of the European Community even before the elimination of border controls in 1993. In 1986, the illegal art trade ranked second in value only to drug trafficking on the international black market.¹⁶ Moreover, statistics indicate that the rate of art theft increases with each passing

NAT'L L.J. 609, 609 n.2 (1992).

14. This Note does not address the many contract, title, and ownership issues which arise from both legal and illegal art transactions. See generally INTERNATIONAL SALES OF WORKS OF ART (Pierre Lalive ed., 1988) (providing a summary of many European states' laws on these issues, including those of Greece, Italy, and France). Also, the controversy about the repatriation of art works, such as the controversy surrounding the *Elgin Marbles*, is outside the scope of this Note. See *infra* note 172 and accompanying text.

15. For the purposes of this Note, no distinction has been drawn between "art," such as paintings and sculpture, and archeological "artifacts," although the Note focuses primarily on art. Some scholars distinguish the two categories on the basis of whether the object was intended to be useful and has "scientific" value (artifact) or has primarily aesthetic value (art). See Bator, *supra* note 5, at 285.

16. Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. 1067, 1068 (1991). Art traded on the black market each year has been estimated to be worth over one billion dollars. *Id.*

year.¹⁷ In 1991, one scholar estimated that illegal trade in art for that one year doubled the 1986 figure.¹⁸

Theft is widespread throughout the European Community. For example, thieves robbed three French museums on the same day in 1990,¹⁹ and thefts for that year totalled more than 60,000 art works in the European Community alone.²⁰ England is robbed of 5,000 paintings per year,²¹ and between 1970 and 1989, 244,403 paintings, statues, frescoes, coins, and other items were stolen from Italy.²²

The profitability of the art market fuels art theft. Internationally, the trade in art has been placed as high as fifty billion dollars per year.²³ Single paintings sell for tens of millions of dollars, such as Vincent Van Gogh's *Portrait du Docteur Gachet*, which commanded seventy-five million dollars, before calculating the auctioneer's commission.²⁴ Not only are the prices paid high, but so are the profits. For example, in 1987, Van Gogh's *Irises* sold for 53.9 million dollars; the seller had paid only eighty-seven thousand dollars for the painting in 1947.²⁵

Also, the value of art works has risen at a rate faster than that of inflation, making art a good investment.²⁶ The art market tends to rise

17. Margules, *supra* note 13, at 609 n.1. Between 1980 and 1985, painting thefts per year almost doubled. *Id.*

18. Joseph F. Edwards, *Major Global Treaties For the Protection And Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 921 (1991). The author attributes the drastic increase to the higher prices that buyers are willing to pay for art works. *Id.*

19. Margules, *supra* note 13, at 609 n.2. Within an hour, two Parisian museums were robbed: a Renoir was stolen from the Louvre Museum and a painting by Ernest Hebert was stolen from the Hebert Museum. *Id.* Also, the Musee Carnavalet was robbed of a Paul Huet landscape on the same day. *Id.*

20. Kate Dourian, *Traffic In Stolen Artwork Faces Attack; Insurance: Police in Europe Fear That Theft Will Increase When Border Controls Are Dropped Next Year*, L.A. TIMES, Nov. 24, 1991, at A30.

21. *Id.*

22. Clyde Haberman, *Italy Fears That Its Art Treasures Will Scatter in a Unified Europe*, N.Y. TIMES, Mar. 5, 1990, at A1. Italy possesses over sixty percent of the world's cultural property, and much of it is in unguarded churches and inadequately secured museums and galleries. *Id.*; DuBOFF, *DESKBOOK*, *supra* note 1, at 70. Not surprisingly, Italy's problem with art theft is especially acute. According to the Italian government, fifty million dollars worth of art is stolen each year. LEONARD D. DuBOFF, *ART LAW IN A NUTSHELL* 11 (2nd ed., 1993) [hereinafter DuBOFF, NUTSHELL].

23. Eisen, *supra* note 16, at 1067.

24. Edwards, *supra* note 18, at 920.

25. Eisen, *supra* note 16, at 1067. Another seller made a 42.02 million dollar profit on the sale of Pablo Picasso's *Yo Picasso* in 1989. *Id.*

26. Dourian, *supra* note 20. Paintings, silver, and antiques have all appreciated at a

when the stock market declines, reflecting a belief that art is more valuable than money or stocks.²⁷ For example, in 1975, the value of French Impressionist works rose 230 percent, while stocks on the Dow Jones rose only 38 percent.²⁸

Several other factors contribute to the extent of the traffic in stolen art. Stolen art is often used in other illegal activities, such as money laundering schemes²⁹ and arms and drug deals.³⁰ Art also serves as collateral for loans.³¹ Additionally, insurers willingly pay ransom money for stolen art works because the thief usually demands an amount lower than the amount due to the owner under the policy.³²

Finally, the low recovery rate for stolen art—ten percent worldwide³³—does not deter thefts.³⁴ The French recovery rate is less than thirty percent.³⁵ In Italy, as art thefts have increased, the recovery rate has decreased from thirty percent to ten percent.³⁶ Catching art thieves is difficult because they do not fit a typical profile³⁷ and because they usu-

rate faster than inflation. *Id.*

27. DuBOFF, NUTSHELL, *supra* note 22, at 42-43.

28. *Id.* at 43.

29. Dourian, *supra* note 20. Detective Richard Ellis of Scotland Yard's Art and Antiques Squad explains how drug dealers use art purchases to launder money: "If you have a bundle of money which has been acquired through a drug sale, you can go to an auction, buy in cash and then use it as collateral. You can recoup the money later on with a receipt. Then you have clean money." *Id.*

30. Alexander Stille, *Art Thieves Bleed Italy's Heritage*, N.Y. TIMES, Aug. 2, 1992, at 2:27. For example, in 1991, Italian police found in Jamaica twenty-seven paintings stolen from an Italian museum that apparently had been used to finance a drug deal. *See also*, Margules, *supra* note 13, at 612 n.15.

31. Margules, *supra* note 13, at 612 n.15. Often the art is deposited in a bank, in states such as Switzerland, the Cayman Islands, and Liechtenstein. *Id.* In Switzerland, for example, a stolen or illegally exported art work belongs to its depositor after five years, as long as the depositor is not the thief. Dourian, *supra* note 20. Throughout the five-year period, the work can serve as collateral for loans. *Id.*

32. Margules, *supra* note 13, at 612 n.15.

33. *Id.* at 610 n.4. Small antiques or movable items of silver are almost never recovered. Dourian, *supra* note 20. The recovery rate is higher for major art works than for less-renowned works. Constance Lowenthal, *Debunking Dr. No*, WALL ST. J., Mar. 31, 1993, at A12. Major art works are less likely to be sold on legitimate markets, however. *Id.*

34. Margules, *supra* note 13, at 612 n.15 and accompanying text. Art works may be recovered with time. For example, the French police recovered Monet's *Impression: Sunrise* and other Impressionist works stolen in 1985 at gunpoint from Paris' Musee Marmottan five years later in Corsica. Lowenthal, *supra* note 33.

35. Margules, *supra* note 13, at 610 n.4.

36. Stille, *supra* note 30, at 2:27.

37. Carol L. Morris, Note, *In Search of a Stolen Masterpiece: The Causes and*

ally take the stolen art across national borders.³⁸

Politicians and law enforcement officials agree that art thefts will increase with the opening of the borders between the EC Member States.³⁹ The sixteenfold increase in art theft in Czechoslovakia since it opened its borders serves as an all-too-real example for cultural officials.⁴⁰ Although border controls between EC Member States only gradually loosened prior to 1993, art thefts greatly increased.⁴¹ In 1990, the chief of the Italian art-theft police squad already had noticed an increase in the involvement of organized crime in art thefts and remarked that "1992 will certainly make our job more difficult."⁴²

B. *Opening EC Borders to the Theft and Illegal Export of Art*

The goal of establishing a Europe without restrictions on the movement of goods, persons, services, and capital has existed since the signing of the Treaty Establishing the European Economic Community (EEC Treaty) in 1957. In 1987, the Single European Act (SEA) added sections

Remedies of International Art Theft, 15 SYRACUSE J. INT'L L. & COM. 57, 71 (1988). Art thieves range from the individual stealing to support a drug habit to the seasoned veterans who rob churches and museums at gunpoint. Stille, *supra* note 30, at 2:27. Thieves also come in more benign guises. For example, the U.S. Customs Service allowed a couple to enter the United States with twenty-two suitcases full of Egyptian artifacts because they had eleven children, many of whom were crying. Morris, *supra*, at 71 n.81. The couple attributed the number of suitcases to the size of their family. *Id.*

38. Bator, *supra* note 5, at 293-94. The ease of transporting art makes its theft alluring. John B. McPhee, Jr. et al., *The National Stolen Art File*, THE EXPERT AND THE LAW, Jan.-Feb. 1984, at 8. An oil painting on canvas can be taken from its frame, rolled up, and carried easily. *Id.* Such removal, of course, seriously damages the art work. *Id.*

39. For example, Italian art historian and senator Giulio Carlo Argan stated: "I consider the opening of the frontiers an extreme menace to the cultural heritage of Italy. The law of the European Community shouldn't treat our works of art in the same manner as it treats common merchandise." Pascal Privat, *Arrivederci, Canova*, NEWSWEEK, May 14, 1990, at 72D.

40. DUBOFF, NUTSHELL, *supra* note 22, at 12. Poland also experienced a great increase in art theft when it relaxed its travel restrictions in the 1970s. Mary Battiata, *E. Europe's Art Heritage Being Ravaged By Thieves; Western Collectors Said To Buy*, WASH. POST, Feb. 27, 1992, at A1. *Nova Europa*, a Polish daily newspaper, reported in 1992 that "[m]ost everything of value has already left the country." *Id.*

41. Privat, *supra* note 39, at 72D.

42. Haberman, *supra* note 22. The superintendent of Fine Arts of the Province of Florence said that if crime syndicates become more organized art thieves, then "[i]t would mean locking most of the nation's art in bank vaults. In short, the end of culture as we know it." Privat, *supra* note 39, at 72D.

to the EEC Treaty to speed the removal of internal frontiers.⁴³ For example, Article 8A called for the enactment of measures that would ensure the establishment of the internal market by January 1, 1993.⁴⁴

The EC Commission⁴⁵ created the internal market to improve the economic health of the Member States.⁴⁶ Estimates predict that unification will result in a gross domestic product increase of 4.5 to 7 percent, a price decrease of 4.5 to 6 percent, and an additional 1.75 to 5 million jobs.⁴⁷ The EC also will save approximately 100 billion ECUs (European Currency Units) per year as a result of the elimination of internal barriers.⁴⁸ Europe's economy has indeed shown improvement since the passage of the SEA in 1986: investment in Europe has increased, millions of jobs have been created, new products have become available, and states such as Spain, Portugal, and Ireland have updated their economies.⁴⁹

To create the free market, the European Community abolished customs, baggage, and passport checks. Goods moving within the European Community therefore no longer require customs documentation.⁵⁰ The EEC Treaty itself does not define the terms "goods" and "services." The European Court of Justice (ECJ),⁵¹ however, has held that the terms

43. STEINER, *supra* note 10, at 4. The SEA also extended EC powers and changed EC decision-making procedures. *Id.*

44. Article 8A (SEA) of the EEC Treaty provides:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 8A [hereinafter EEC TREATY].

45. The Commission, originally established by the Treaty of Paris as one of the governing bodies of the European Coal and Steel Community, became a governing body of the EEC under the EEC Treaty. STEINER, *supra* note 10, at 4.

46. Article 2 of the EEC Treaty states that the purpose of unification is to promote "harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations" between EC Member States. EEC TREATY, *supra* note 44, art. 2.

47. FOLSOM, *supra* note 9, at 23. These figures were part of the Cecchini Report sponsored by the EC Commission. *Id.* at 22.

48. *Id.* Customs posts alone cost an estimated eleven billion dollars per year. *Id.* at 125.

49. See Redburn, *supra* note 10.

50. EC: Europe Documents; No 1796—State of Completion of the Single Market (2 of 3), AGENCE EUROPE, Sept. 11, 1992. [hereinafter Europe Documents].

51. The European Court of Justice is the European Community's authoritative judi-

encompass anything that can have a monetary value placed on it and therefore can be the subject of a commercial transaction.⁵² Any border controls retained by an EC Member State may not discriminate against the goods' national origin or the means by which they are transported.⁵³ A Member State may still control the movement of goods throughout its entire territory, including its borders, but may not use this authority to maintain border checks.⁵⁴

The European Community has taken two major steps to enable the free movement of goods: the establishment of a customs union and the elimination of quantitative restrictions on imports and exports. The customs union abolished duties, tariffs, and "measures having the equivalent effect" on goods traded among the Member States.⁵⁵ The ECJ has deemed any fee paid because goods were imported into another Member State, whether paid at the time of the border crossing or not, to be a "measure having the equivalent effect" of a duty and, therefore, in violation of the elimination of customs duties.⁵⁶

Additionally, the EEC Treaty abolished quantitative restrictions on the movement of goods, including quotas and bans on export or import.⁵⁷ The ECJ has broadly defined measures having the same effect as quantitative restrictions as any trading rules "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."⁵⁸ To violate the prohibition against quantitative restrictions on exports, a measure must expressly control exports and create an advantage for domestic products or trade.⁵⁹

The elimination of customs checks included ending baggage searches as of January 1, 1993.⁶⁰ EC nationals moving by road, rail, air, or sea

cial body. Article 164 of the EEC Treaty states: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." EEC TREATY, *supra* note 44, art. 164.

52. *Re: Export Tax on Art Treasures: E.C. Commission v. Italy, case 7/68*, 35 C.M.L.R. 1, 5 (1969). The ECJ held that art satisfied this definition of "goods." *Id.* at 8.

53. Europe Documents, *supra* note 50.

54. *Id.*

55. See EEC TREATY, *supra* note 44, arts. 9, 12, 13, and 16.

56. STEINER, *supra* note 10, at 73. Also, the ECJ has ruled that making import duties minimal does not make them acceptable. *Id.*

57. EEC TREATY, *supra* note 44, arts. 30 and 34.

58. STEINER, *supra* note 10, at 82. The ECJ has applied this definition since its pronouncement in 1974 in *Procureur du Roi v. Dassonville, case 8/74. Id.* at 83-84.

59. *Id.* at 91.

60. Council Regulation, concerning the elimination of controls and formalities applicable to cabin and hold baggage of persons taking an intra-community flight and the

from one EC Member State to another no longer have their baggage checked at internal borders.⁶¹ Individuals entering a Member State from outside the European Community must clear their luggage through customs at their point of entry only.⁶² In its preamble, the Regulation eliminating baggage searches did allow for measures that would prevent illegal art export without contravening Community law.⁶³ The Regulation, however, did not give examples of acceptable controls.

To enable the free movement of persons throughout the EC, passport checks on individuals moving between EC Member States also officially ended on January 1, 1993.⁶⁴ Passengers entering from outside the European Community still must clear immigration and customs, however.⁶⁵ Ultimately, movement among EC Member States should be as easy as movement among states in the United States.⁶⁶ Customs officials may continue to stop persons believed to be involved in criminal activities, such as drug smuggling and terrorism, but they will have to identify these persons without the aid of identity checks.⁶⁷

The EC has more successfully removed barriers to the movement of goods than to the movement of persons.⁶⁸ Both political and mechanical concerns have contributed to the delay in fully implementing a border-free Europe. The United Kingdom, Ireland, Denmark, and Greece con-

baggage of people making an intra-community sea crossing, 3925/91, art. 9, 1991 O.J. (L 374) 6 [hereinafter Council Regulation 3925/91].

61. See James T. Yenckel, *Bending European Borders*, WASH. POST, Jan. 24, 1993, at E1. In the case of travel by air or sea, the elimination of baggage searches applies both to hand and checked luggage. Council Regulation 3925/91, *supra* note 60, art. 1.

62. Yenckel, *supra* note 61. However, luggage belonging to a traveler coming first from a non-EC airport and stopping in an EC airport before continuing to another EC airport will not be checked until the final stop. Council Regulation 3925/91, *supra* note 60, art. 3.

63. Council Regulation 3925/91, *supra* note 60, pmb. The preamble to Council Regulation 3925/91 provides: "Whereas Member States must, however, be free to take specific measures compatible with Community law for the purpose of carrying out special controls, *inter alia*, in order to prevent criminal activities linked in particular to . . . the traffic in works of art," *Id.*

64. EEC TREATY, *supra* note 44, art. 8A.

65. Yenckel, *supra* note 61.

66. Joel Havemann, *Solving the Euro Puzzle—From Auctions To Athletes, EC Stumbles Over Obstacles; Longstanding Rivalries, Suspicions And Jealousies Undermine Efforts to Achieve Unity*, L.A. TIMES, Dec. 8, 1992, at 4.

67. *EC: Please Have Your Passports Ready—'Schengenland'—The New EC Zone With No Internal Borders*, GUARDIAN, July 22, 1992. [hereinafter *Schengenland*].

68. See *Free Movement of Goods*, 1992 COOPERS & LYBRAND EUR. 1 (1993).

tinue to check passports at their frontiers,⁶⁹ and Spain continues to check persons crossing from the British colony of Gibraltar.⁷⁰

The attitude of the United Kingdom has been a major obstacle to the elimination of border controls. As an island state, the United Kingdom believes that it can more effectively guard its borders against illegal immigrants and criminals than EC Member States on the continent and that it should therefore continue to take precautions.⁷¹ The United Kingdom's opposition to the elimination of passport checks also implicates Ireland because the two states have a free movement agreement.⁷² A compromise known as the "Bangemann wave," named for the former EC commissioner in charge of the program to abolish internal frontiers, has been reached with the United Kingdom.⁷³ The "Bangemann wave" simply requires that EC citizens present, or wave, their unopened passports as they pass through immigration.⁷⁴

Other delays stem from the need to redesign facilities to enable travelers to move freely. For example, some airports must be modified to accommodate new EC policies and will not be ready until late 1993.⁷⁵ Also, some customs posts still need to be redesigned to allow traffic to flow freely across internal borders.⁷⁶

Additionally, many of the EC's programs to prevent crime have not been fully implemented. The European Information System (EIS),

69. Redburn, *supra* note 10, at 5.

70. *E.C. Executive Steps Up Campaign to End Border Controls*, AGENCE FRANCE PRESSE, May 8, 1992.

71. *Schengenland*, *supra* note 67. In 1991, 46 million people entered the United Kingdom, not including those entering from Ireland who do not have to have their passports checked. *Id.* Of these, British citizens returning counted for more than 29 million, EC nationals for 8 million, and non-EC nationals for 9 million. *Id.* Over 18,000 were not allowed entry, usually because immigration believed that the individuals were coming for work rather than a short stay. *Id.* Other reasons for exclusion included forged travel documents, no entry visa, no work permits, and failure to qualify for settlement. *Id.* Forty to fifty percent of the persons refused entry were EC nationals, according to immigration service estimates. *Id.*

72. *EC: Delay in Abolition of Controls on Persons at Intracommunity Frontiers*, AGENCE EUROPE, Jan. 7, 1993.

73. *Id.*

74. *EC: The Single Market—Little Progress on Freedom of Movement*, GUARDIAN, Dec. 31, 1992 [hereinafter *Single Market*].

75. *Id.* The elimination of passport checks requires that airports be rebuilt so that passengers moving from one EC Member State to another are not required to pass through immigration. *Schengenland*, *supra* note 67. Airports in the European Community are expected to be ready in December 1993 at the earliest. Redburn, *supra* note 10.

76. *EC: First Assessment of Single Market is Positive*, AGENCE EUROPE, Jan. 30, 1993.

which will allow authorities to share information about criminals and crime,⁷⁷ has not been created yet.⁷⁸ Also, the EC cooperative police organization, Europol, has not been fully organized to meet the needs of the EC.⁷⁹ Currently, Europol's role is limited to trying to prevent drug smuggling.⁸⁰

Originally, the EC Commission planned to take action against Member States that did not comply with the January 1, 1993 deadline. Former EC Commissioner Martin Bangemann said that he would institute legal action against EC Member States refusing to stop customs checks and that he would encourage Community citizens to sue for damages from Member States continuing this practice.⁸¹ The EC Commission believed that the continuing presence of border controls would be deemed a failure of the unification process inside and outside the European Community.⁸² The new commissioner charged with the elimination of border checks, however, wants to avoid conflict among Member States and will not prosecute provided that the states continue taking steps toward the elimination of the border controls.⁸³

Frustrated by the lack of progress toward eliminating internal barriers, several EC Member States independently signed the Schengen Agreement in 1985 to abolish internal frontiers more quickly.⁸⁴ A second agreement reached in 1990, the "Schengen Convention,"⁸⁵ addressed the actual means for achieving the abolition of border checks.⁸⁶ The Conven-

77. *Id.*

78. Europe Documents, *supra* note 50.

79. *EC: Delay in Abolition of Controls on Persons at Intracommunity Frontiers*, *supra* note 72.

80. *Id.*

81. *Schengenland*, *supra* note 67. This threat was weakened by the fact that the European Court of Justice suffers from a huge backlog of cases. *Id.* Any citizen's case could take as long as two years to come before the court. *Id.* The court could accelerate one of the cases, but probably would decide not to do so. *Single Market*, *supra* note 74.

82. *E.C. Executive Steps Up Campaign To End Border Controls*, *supra* note 70.

83. *EC: MEPs Say Commission Should Be Stricter with Countries Which Have Not Abolished Border Controls*, AGENCE EUROPE, Jan. 29, 1993.

84. *Introduction to Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement*, 30 I.L.M. 68 (1991) [hereinafter *Introduction*]. Italy joined the Convention in 1990, and Spain and Portugal have been admitted as observers to the Convention. *Id.*

85. The convention's full name is the "Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at common frontiers." *Id.* at 73.

86. *Id.* The Schengen Convention covers matters such as the treatment of immigrants, police force cooperation, drug trafficking, arms, and explosives. *Id.*

tion only requires that the parties develop plans to eliminate checks, and it imposes few specific duties on the parties.⁸⁷ The Schengen states did not meet their goal of eliminating border controls by January 1, 1990.⁸⁸ Generally, now, however, border checks between the states have been abolished.⁸⁹

III. NON-EC MEASURES DESIGNED TO PREVENT THE THEFT AND ILLEGAL EXPORT OF ART

A. *Early European Agreements*

Throughout the twentieth century, European states have taken collective action to protect their artistic heritages and to regulate the flow of art works across their borders. In the decade after World War II, many European states entered into agreements for this purpose, such as the Agreement on the Importation of Educational, Scientific, and Cultural Materials (Florence Agreement) (1950),⁹⁰ the European Cultural Convention (Cultural Convention) (1954),⁹¹ and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Hague Convention).⁹² These agreements imposed vague restrictions on the treatment of art. They made a start, however, toward resolving the ongoing conflict among EC Member States about the import and export of art by recognizing that Europe's cultural heritage is a shared one.

87. *Id.*

88. *EC: First Assessment of Single Market is Positive*, *supra* note 76. Part of the Schengen states' delay was attributed to the fact that the Schengen Information System (SIS) was not ready. *Id.* The SIS will contain the names of individuals that any of the states want to keep out and will be used to prevent those persons from entering through another Schengen state. Alan Riding, *It's 1993 and Europe Still Has Borders*, N.Y. TIMES, Jan. 31, 1993, at 5:6. Also, it will contain a list of states whose citizens must have a visa to enter. *Id.* The United States is not on the list. *Id.*

89. Havemann, *supra* note 66. As of December 1992, one writer reported that border checks "have already all but disappeared" between the original five Schengen states. *Id.*

90. Agreement on the Importation of Educational, Scientific and Cultural Materials, Nov. 22, 1950, 131 U.N.T.S. 26. [hereinafter Florence Agreement].

91. European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139.

92. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), *reprinted in* 1 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS (1984) [hereinafter Hague Convention].

1. Agreement on the Importation of Educational, Scientific, and Cultural Materials (Florence Agreement)(1950)

The Agreement on the Importation of Educational, Scientific, and Cultural Materials was one of the first major agreements after the Second World War regarding restrictions on the import and export of art.⁹³ This agreement, commonly referred to as the Florence Agreement, represented an effort by the leaders of European states⁹⁴ to prevent future armed conflicts through the free exchange of ideas. The signatory states declared in the Agreement's preamble that increased international understanding through the exchange of cultural materials would help maintain world peace.⁹⁵

The Florence Agreement's impact was more symbolic than real because it imposed only vague regulations and responsibilities on its signatories. For example, contracting states had to aid in importing and subsequently re-exporting cultural materials used in public exhibitions.⁹⁶ Also, the parties retained the right to prevent the importation and circulation of works for national security or public morality reasons.⁹⁷ This ability to derogate from the agreement's obligations robbed the treaty of much of its force. The Florence Agreement mandated "expeditious and safe" customs checks⁹⁸ and prohibited the imposition of customs duties on the import of cultural materials.⁹⁹ Finally, the agreement created a forum for handling disputes concerning whether materials merited "cultural" status and therefore qualified for the agreement's protections.¹⁰⁰ The treaty provided that the parties could refer their questions to the Director-General of the United Nations Educational, Scientific and Cul-

93. Florence Agreement, *supra* note 90.

94. Belgium, France, Greece, Luxembourg, the Netherlands, and the United Kingdom are the EC Member States that signed the Florence Agreement. *Id.*

95. The preamble of the Florence Agreement states its purpose as:

The free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression used by civilizations are vitally important both for intellectual progress and international understanding, and consequently for the maintenance of world peace; . . . these aims will be effectively furthered by international agreement facilitating the free flow of . . . cultural materials. . . .

Id. pmbi.

96. *Id.* art. II.

97. *Id.* art. V.

98. *Id.* art. IV.

99. *Id.* art. I.

100. *Id.* art. VIII.

tural Organization (UNESCO) for an advisory opinion.¹⁰¹

2. European Cultural Convention (Cultural Convention) (1954)

The European Cultural Convention is similar to the Florence Agreement in many respects. For example, it recognized both the importance of the exchange of cultural materials among European states and of Europe's common cultural heritage. Also like the Florence Agreement, the Cultural Convention imposed only vague duties which could be easily ignored. The agreement permitted each state to develop its own laws on the protection of cultural property.¹⁰² The Cultural Convention only required that each of its fifteen signatories¹⁰³ enact measures to protect its own cultural heritage as part of its larger duty to preserve the common cultural heritage of Europe.¹⁰⁴ The Cultural Convention neither altered pre-existing agreements, nor interfered with the potential for future agreements on the protection of art.¹⁰⁵ Finally, the Cultural Convention created a forum to resolve issues surrounding the exchange and flow of cultural materials.¹⁰⁶ The Cultural Convention requires contracting parties to work together through the Council of Europe to ensure the exchange of cultural property among them.¹⁰⁷

3. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Hague Convention)

Realizing that war remained a possibility despite efforts to maintain peace, European leaders formed the Hague Convention for the wartime protection of art.¹⁰⁸ As of 1983, seventy-one states had ratified or acceded

101. *Id.*

102. European Cultural Convention, *supra* note 91, art. 1. The Cultural Convention required only that signatory states develop "appropriate measures." *Id.*

103. The fifteen states are Belgium, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Saar, Sweden, Turkey, and the United Kingdom. Margules, *supra* note 13, at 616 n.39. Later, Austria, Spain, and Switzerland also joined the Convention. *Id.*

104. European Cultural Convention, *supra* note 91, art. 5. Article 5 provides: "Each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto." *Id.*

105. *Id.* art. 8(a).

106. *Id.* art. 7.

107. *Id.* art. 6.

108. Hague Convention, *supra* note 92, arts. 13 and 14. The current Hague Convention, promulgated in 1954, applies during wars and armed conflicts, even if both of the parties do not recognize the existence of the conflict. Edwards, *supra* note 18, at 951.

to the Hague Convention, including the EC Member States of Belgium, the Federal Republic of Germany, Greece, Spain, France, Italy, Luxembourg, and the Netherlands.¹⁰⁹ The Hague Convention shared the Florence Agreement and the European Cultural Convention's concern for the common cultural heritage of Europe.¹¹⁰ The agreement's preamble reflects this concern, asserting that all cultures suffer from damage to any one culture's artistic heritage.¹¹¹

The Hague Convention contains more concrete measures to protect art than the other early European agreements, and therefore, may have greater impact. As a baseline, contracting parties pledge to forbid the theft, pillage, vandalism, and requisition of art works.¹¹² Moreover, occupying states have a duty to help national authorities protect cultural property if these authorities cannot do so themselves.¹¹³ The Hague Convention also protects art by providing for: (1) refuges located an adequate distance from industrial centers or important military objectives,¹¹⁴ (2) special transport inside and outside the territory,¹¹⁵ and (3) emblems on cultural property, art repositories, and the persons who care for them.¹¹⁶ The Hague Convention not only places prohibitions on the contracting parties, but it also imposes an affirmative duty on the signatories to take preventative measures during peacetime to protect their art treasures in case of war.¹¹⁷ If a state has not taken appropriate steps for protection, another contracting party still must refrain from taking any action which would endanger cultural property in the event of

109. 2 UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION (UNESCO), THE PROTECTION OF MOVABLE CULTURAL PROPERTY 329-30 (1984).

110. See Edwards, *supra* note 18.

111. Hague Convention, *supra* note 92, pmb1. The preamble states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." *Id.*

112. *Id.* art. 4(3).

113. *Id.* art. 5.

114. *Id.* art. 8(a)(1). The Hague Convention lists military objectives such as aerodromes, broadcasting stations, national defense establishments, ports, and railway stations. *Id.* In the Persian Gulf War, Iraq kept military equipment near cultural monuments, probably believing that the equipment would not be attacked for fear of harming the monuments. Edwards, *supra* note 18, at 948 n.138.

115. Hague Convention, *supra* note 92, arts. 12 and 13.

116. *Id.* art. 17.

117. *Id.* art. 3. Article 3 states: "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate." *Id.*

hostilities.¹¹⁸

B. *Laws of the EC Member States Designed to Protect Art from Theft and Illegal Export*

Many EC Member States have their own laws governing the export and import of cultural property. Almost all states use export controls to regulate the flow of art works from the state.¹¹⁹ Export controls take two forms: screening regulations and embargoes.¹²⁰ Screening regulations allow a state to develop criteria to determine whether to allow the export of cultural property.¹²¹ The standards used by states include age, economic value, historical importance, and country of origin. The practice of screening controls the export of art because it allows a state's art to remain represented in the international market and fosters cultural exchange among states, while discouraging thefts and illegal sales.¹²² Embargoes have not proven as successful as screening in preventing illegal sales, smuggling, and theft.¹²³ The complete prohibition of exports diverts demand for art works to the black market where a state has no control over the goods exported.¹²⁴

Few states have import controls on cultural property.¹²⁵ Some states impose duties on the import of art,¹²⁶ and others prohibit the import of illegally exported or stolen art.¹²⁷ Import controls require that one state recognize another's restrictions on the export of art when determining whether an art work has been illegally exported.¹²⁸ This requirement may lead to political controversies and explains the unpopularity of im-

118. *Id.* art. 4(5). For example, a contracting party must not harm buildings which house art. *Id.*

119. Bator, *supra* note 5, at 313-14. Few states, the United States being a notable exception, do not restrict the export of art. *Id.* The United States policy was called into question, however, when Jackson Pollack's painting *Blue Poles* was sold to an Australian museum. Merryman, *National Patrimony*, *supra* note 3, at 157-58. Also, Denmark, an EC Member State, does not have export controls on art. DUBOFF, NUTSHELL, *supra* note 22, at 15. States do, however, encourage the export of works by living artists. *Id.* at 15-16.

120. DUBOFF, NUTSHELL, *supra* note 22, at 15.

121. *Id.*

122. *Id.*

123. *Id.* at 16. For example, after the Mexican government placed an embargo on pre-Columbian art in 1992, black market sales increased dramatically. *Id.* at 16-17.

124. *Id.* See *infra* notes 198-201 and accompanying text.

125. DUBOFF, NUTSHELL, *supra* note 22, at 18-19.

126. *Id.* at 18.

127. *Id.* at 19.

128. Bator, *supra* note 5, at 327.

port controls.¹²⁹

The United Kingdom, France, and Italy are among the EC Member States that have laws governing the export of art. In fact, the United Kingdom and France have not signed the UNESCO Convention because they thought that their own controls were more effective.¹³⁰ Each state's system of screening uses different criteria and procedures to decide whether to permit export. Despite their differences, all states' laws have the same goal: keeping cultural goods within their borders.

1. The United Kingdom

The United Kingdom's system of art export controls is based on set criteria and committee recommendations.¹³¹ If the work of art has been imported into the United Kingdom in the past fifty years, is less than one hundred years old, and is worth less than four thousand pounds, then it does need an export license.¹³² If the work requires an export license, then a panel of experts reviews the license request; if the panel recommends refusal, then they send the application to the Reviewing Committee on the Export of Works of Art.¹³³ The Reviewing Committee bases its decision whether to grant a license on the work's historical, aesthetic, and academic importance.¹³⁴ If the Reviewing Committee finds

129. *Id.* For example, the unwillingness of EC nations to recognize each other's definitions of "cultural property" was an obstacle to agreeing on measures to control the export of art. *See infra* notes 178-182 and accompanying text.

130. Morris, *supra* note 37, at 71. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was opened for signature in November 1970. Edwards, *supra* note 18, at 925. The UNESCO Convention focused on preventing the flow of cultural materials from art-rich states and the pillaging of archaeological sites, places of religious significance, and monuments. *Id.* at 926. Also, it prohibited the importation of cultural property unless its export had been expressly permitted by the exporting state. *Id.* at 928.

131. The United Kingdom does not have any legislation pertaining specifically to the export of art, but it regulates its export through the government's export and import authority. Bator, *supra* note 5, at 320 n.82.

132. *Id.* at 320.

133. Morris, *supra* note 37, at 69.

134. The Reviewing Committee examines whether the artwork is "so closely connected with [the United Kingdom's] history and national life that its departure would be a misfortune," is "of outstanding aesthetic importance," and is "of outstanding significance for the study of some particular branch of art, learning, or history." Bator, *supra* note 5, at 320. These criteria are known as the "Waverly criteria." *Id.* at n.84. *But see* DuBOFF, DESKBOOK, *supra* note 1, at 76. DuBoff writes that the United Kingdom enacted its art export controls to control international monetary exchange and to increase tax revenues rather than to prevent art from leaving the United Kingdom. *Id.*

that the work meets the criteria, then it temporarily denies the license in order to give public museums and collections the opportunity to buy the work at its market value.¹³⁵ Once a set amount of time elapses without a domestic buyer, the Reviewing Committee issues the license.¹³⁶

The United Kingdom's licensing system has kept some important works in the state,¹³⁷ but many others have been exported because of lack of funds to purchase the works.¹³⁸ Nevertheless, the United Kingdom retains more art than it would without any controls by creating an opportunity for museums to purchase the works and eliminating the primary motive for smuggling art. Owners have no financial incentive to smuggle the art from the state because they will receive the market value for the work, whether from the intended purchaser or the British government.¹³⁹

2. France

France has a two-tiered system of export controls on art: some works may not be exported at all, and others may be exported only after inspection and approval. Works that have been deemed by the Minister of Cultural Affairs to have "national historic, artistic, scientific or technical interest"¹⁴⁰ are known as "classified," "scheduled," or "registered" and absolutely may not be exported from France.¹⁴¹ If a work does not fall

135. Morris, *supra* note 37, at 69. The museum or collection must pay the price that the exporter would have received from the party to whom the piece would have been sold. *Id.* at 69 n.61.

136. Bator, *supra* note 5, at 320 n.85.

137. *Id.* at 320. Paintings such as El Greco's *Dream of Phillip II*, Rubens's *The Holy Family*, and Titian's *The Death of Actaeon* were purchased by museums before they could be exported. *Id.*

138. *Id.* at 321. For example, the United Kingdom lost Velasquez's *Juan de Pareja* when no British museum could pay 2.3 million pounds. *Id.* at 320 n.85. The Metropolitan Museum of Art (New York) bought the Velasquez painting. See THOMAS HOVING, *MAKING THE MUMMIES DANCE* 248-74 (1993) for the story of the painting's purchase.

139. See Bator, *supra* note 5, at 321. The British government further decreases financial incentive to export art illegally through tax benefits. Owners receive reductions in estate duties for selling works to the National Gallery, the British Museum, or any other national museum; to any University, County Council or Municipal Corporation; or to the National Art Collection Fund or Friends of National Libraries. *Id.* at 317 n.81. This arrangement has the benefit of keeping the art work in the United Kingdom's public collections.

140. Morris, *supra* note 37, at 70 n.70.

141. *Id.* at 70. Greece has a similar system under which anything older than 1830 belongs to the state. Terry Williams, *EC Ministers Debate How to Keep National Treasures at Home*, REUTER LIBR. REP., Oct. 17, 1990, BC Cycle. The Netherlands

into one of these three categories, then the owner must apply to the Ministry of Education for an export license.¹⁴² If an inspection demonstrates that the work was created after 1920 and that its artist is alive, then export does not require a license, and the Ministry issues a certificate of exemption.¹⁴³ The Ministry usually grants a license to works from before 1920,¹⁴⁴ but may decide to wait six months to give a French museum the opportunity to purchase the work.¹⁴⁵ Compensation is not provided to the owner of a work that may not be exported;¹⁴⁶ thus, unlike under the United Kingdom's system, monetary incentives to smuggle art remain. The requirement that all works be inspected and licensed makes the French system difficult to administer,¹⁴⁷ as well as susceptible to corruption.¹⁴⁸

3. Italy

Under Italian law, any work of artistic or historical importance more than fifty years old must receive approval from the Ministry of Education before export is permitted.¹⁴⁹ If approval is denied, then the government has two months to buy the art work.¹⁵⁰ Sales that do not comply with the law are deemed void, fines may be assessed, and the illegally sold or exported works will be confiscated.¹⁵¹ If the art cannot be recovered, the party making the illegal transfer may have to pay the government the value of the object involved.¹⁵²

also has a system similar to France's. The sale of art in state museums is restricted, and the government has made a list of approximately three hundred works and collections which may not leave the state without approval. Suzanne Perry, *EC Debates the Difference Between Picassos and Paint*, REUTER LIBR. REP., Oct. 17, 1990, BC Cycle. The list consists mainly of church-owned silver and sculptures, but also includes a Rembrandt and a Bruegel. *Id.* The Dutch government bases its decision whether to grant permission to export an art work on the work's connection to Dutch history. *Id.* Spain requires that all antique cultural objects receive an export license from the government. *Id.*

142. Morris, *supra* note 37, at 70.

143. *Id.* at 70 n.71.

144. Bator, *supra* note 5, at 315 n.76.

145. Morris, *supra* note 37, at 70-71.

146. Bator, *supra* note 5, at 316.

147. *Id.* at 315 n.76.

148. *Id.* at 316 n.78. Bator was told that while André Malraux was Minister of Cultural Affairs, the Ministry would arrange for a seller to receive an export license if the seller donated a gift of equal artistic significance to the Louvre. *Id.*

149. Edwards, *supra* note 18, at 935.

150. Merryman, *National Patrimony*, *supra* note 3, at 159.

151. *Id.* at 160. The fines range from 350 to 26,250 dollars. *Id.*

152. *Id.*

In addition to laws controlling the export of art, Italy also used state funds to create a national art registry.¹⁵³ The registry only allows Italian cultural officials to know what art has or has not been taken, not to protect the art still remaining in Italy.¹⁵⁴

IV. EC TREATIES, REGULATIONS, AND DIRECTIVES DESIGNED TO PREVENT THE THEFT AND ILLEGAL EXPORT OF ART

A. *EC Treaties*

1. Article 36 of the EEC Treaty

In addition to the many European agreements made by EC Member States to prevent the theft and the illegal export of art,¹⁵⁵ the EEC Treaty itself contains a provision specifically designed to protect cultural property. Article 36 of the EEC Treaty allows quantitative restrictions on imports and exports to protect national art treasures.¹⁵⁶ It does not, however, permit Member States to develop protective measures as a pretense for restricting intra-community trade.¹⁵⁷ EC governing bodies have strictly construed deviations from the free movement of goods,¹⁵⁸ thereby limiting Article 36's effectiveness.

In 1968, the European Court of Justice addressed the use of Article 36 to protect national treasures in *Re: Export Tax on Art Treasures*:

153. Haberman, *supra* note 22. The Ministry of Cultural Affairs' budget is less than one billion dollars per year—only two-tenths of one percent of government spending. *Id.*

154. *See id.* As of 1990, after seventeen years of work, only 1.5 million art works had been registered. *Id.* The official in charge of the project estimated that this represented only five percent of Italy's art treasures. *Id.* Thus, it seems impossible that all of the art was catalogued in time for the opening of the borders in 1993. Still, as noted above, the registry serves only as a means of recording information and does not provide security to the works.

155. *See supra* part III.A.

156. EEC TREATY, *supra* note 44, art. 36. Article 36 states that the provisions for the elimination of quantitative restrictions between Member States "shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on the grounds of . . . the protection of national treasures possessing artistic, historic or archaeological value . . ." *Id.*

157. *Id.* The last sentence of Article 36 provides: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." *Id.*

158. STEINER, *supra* note 10, at 70.

E.C. Commission v. Italy.¹⁵⁹ Italy had included a tax on the export of cultural property in a law designed to prevent its export.¹⁶⁰ The court invalidated the tax, stating that Article 36 referred only to Articles 30 through 34, which prohibit quantitative restrictions.¹⁶¹ Therefore, the ECJ concluded that Article 36 only allowed a Member State to use quantitative restrictions to protect cultural property.¹⁶² The ECJ decision allows total or partial prohibitions or restrictions, provided that they do not take the form of a tax or duty.¹⁶³ The Italian law, however, levied a customs duty or tax on the export of art, and therefore, was impermissible under Article 36.¹⁶⁴

2. The Treaty on European Union (Maastricht Treaty)

Although the Treaty on European Union (Maastricht Treaty)¹⁶⁵ focuses mainly on economic issues, such as establishing a single European currency and a central bank,¹⁶⁶ it also contains a provision on culture.

159. *Commission v. Italy*, *supra* note 52.

160. Article 37 of Italian Law No. 1089, June 1, 1939, taxed the export of artistic, historical, archeological, and ethnographic articles to other Member States. *Id.* at 7. The EC Commission did not object to trying to prevent the export of art under Article 36 but only opposed the means employed by the Italians. *Id.* at 9.

161. *Id.* at 10. Article 16 of the EEC Treaty abolished all customs duties and measures having equivalent effect. See EEC TREATY, *supra* note 44, art. 16.

162. *Commission v. Italy*, *supra* note 52, at 10. The ECJ, construing Article 36 narrowly, held, "In order to be able to rely upon Article 36, the member-States must remain within the limits traced by that provision as regards the objective to be reached and the nature of the means." *Id.*

163. *Id.* The ECJ defined a measure having the equivalent effect as "any tax which by altering the price of exported merchandise has on the free circulation of the merchandise the same restrictive effect as a customs duty." *Id.*

164. *Id.* at 9.

165. The Treaty was signed in Maastricht on February 7, 1992. *Maastricht—What's in the Treaty*, PRESS ASS'N NEWSFILE, July 20, 1993. Originally, the Maastricht Treaty was to take effect on January 1, 1993, but its implementation has been delayed because some Member States rejected it. *Commission Wants Maastricht Ratifications by Year-End*, REUTER EUR. COMMUNITY REP., July 20, 1993, BC Cycle. On July 23, 1993, the British parliament voted to ratify the Maastricht Treaty after a long battle, enabling the Treaty's enactment to proceed. *Belgium's Dehaene Hails Maastricht Vote in Britain*, REUTER EUR. COMMUNITY REP., July 23, 1993, BC Cycle. Both the United Kingdom and Germany will not officially ratify the treaty until a court case about the legislation concludes. *Id.* The EC Commission hopes that the treaty will be in effect by January 1, 1994, when the second phase of the economic and monetary union begins. *Commission Wants Maastricht Ratifications by Year-end*, *supra*.

166. See *Maastricht—What's in the Treaty*, *supra* note 165 (setting out key provisions of the Maastricht Treaty).

The Maastricht Treaty's provision calls for encouragement of national cultures and for cooperation among the EC Member States to conserve and safeguard cultural property.¹⁶⁷ Like earlier European agreements on art,¹⁶⁸ the Maastricht Treaty views Europe as having a common cultural heritage, but it also emphasizes the individual national and regional cultures and the importance of preserving them.¹⁶⁹

B. *EC Regulations and Directives*

The European Community responded to the concerns of cultural officials on December 9, 1992 by approving a regulation on the export of cultural goods,¹⁷⁰ ending a debate which began in 1989.¹⁷¹ Southern states, such as Italy and Greece, defeated earlier attempts at reaching an

167. Title IX, Article 128(2) of the Maastricht Treaty provides that:

Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples;
- conservation and safeguarding of cultural heritage of European significance;

....

4 GREGG MYLES, EEC BRIEF 228 (rev. 1992) (quoting the Maastricht Treaty, Title IX, art. 128(2)).

168. See *supra* part III.A.

169. Title IX, Article 128 provides: "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." EEC BRIEF, *supra* note 167, at 228 (quoting the Maastricht Treaty, Title IX, art. 128(2)).

170. Council Regulation on the export of cultural goods, 3911/92, 1992 O.J. (L 395) 1 [hereinafter Council Regulation 3911/92]. Although adopted in December 1992, the Regulation provided that it would not go into effect until the passage of the Directive on the return of illegally exported cultural property. *Id.* art. 11. The Directive was not adopted until March 15, 1993. Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State, 93/7, EEC 1993 O.J. (L 74) 74 [hereinafter Council Directive 93/7/EEC]. Regulations made by the EC Council or Commission do not require implementation by the individual Member States because they automatically apply to them as promulgated. STEINER, *supra* note 10, at 16. Article 189 of the EEC Treaty reads: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." EEC TREATY, *supra* note 44, art. 189. Directives issued by the EC Council or Commission dictate only the end which must be achieved by a Member State; the states may implement the goal as they see appropriate. STEINER, *supra* note 10, at 20. Article 189 provides: "A directive shall be binding, as to result to be achieved, upon the Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EEC TREATY, *supra* note 44, art. 189.

171. Riding, *supra* note 8.

agreement on export controls by demanding that longer limitations periods be set on the return of cultural goods.¹⁷² With Germany's vote, the states successfully blocked legislation on the export of cultural property.¹⁷³

The Regulation adopted on the export of cultural property requires an export license for cultural property to be removed from the European Community.¹⁷⁴ The license must be presented at the border through which the art work leaves the European Community.¹⁷⁵ A competent authority in the Member State where the work was located as of January 1, 1993 handles the licensing request.¹⁷⁶ The Regulation permits Member States to continue to use Article 36 to protect national treasures.¹⁷⁷

The Regulation does not conclusively define "cultural goods," but instead, allows the individual Member States to devise their own defini-

172. *Italy, Greece Block Accord on Cultural Treasures*, REUTER LIB. REP., June 19, 1992, BC Cycle. On June 18, 1992, EC ministers reached agreement on all matters pertaining to cultural property except the issue of time limitations on the return of illegally exported cultural property. *Id.* Italy and Greece wanted longer time limits than had been proposed and did not want any time limits on the return of art works in public collections that had been illegally exported from an EC Member State. *Id.*

Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State was adopted on March 15, 1993. Council Directive 93/7/EEC, *supra* note 170. The enacted Directive requires that the object (1) be a national treasure as defined by the Member State's own laws, (2) fit within one of the agreed upon categories of art works, and (3) have left the Member State after January 1, 1993. *Id.* arts. 1 and 13. If these criteria are met, then a Member State's ability to recover the work is governed by two statutes of limitations. First, the Member State must formally demand return of the cultural property within one year of the time it learns of the object's location or the identity of its possessor. *Id.* art. 7(1). Second, restitution proceedings may not be commenced more than thirty years after the object illegally left the Member State which is demanding restitution. *Id.* If the object is part of a public collection, then the requesting state has a seventy-five year period in which to request return. *Id.* All Member States must enact any legislation necessary to comply with the Directive within one year of its adoption. *Id.* art. 18.

173. Council Directive, 93/7/EEC, *supra* note 170. Germany opposes any legislation on the return of cultural goods because its individual federal states control their own cultural matters, and it does not want a conflict with them. *Italy, Greece Block Accord on Cultural Treasures*, *supra* note 172.

174. Council Regulation 3911/92, *supra* note 170, art. 2(1). "The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export license." *Id.*

175. *Id.* art. 4.

176. *Id.* art. 2(2).

177. *Id.* art. 1.

tion.¹⁷⁸ The Regulation does contain an Annex which lists categories to which the EC Member States agree that the Regulation applies.¹⁷⁹ The categories are based on the age, economic value, and type of object.¹⁸⁰ While the Regulation only protects objects on the list, the national laws of the individual Member States may protect a broader category.¹⁸¹ The Member States reached this compromise because they did not want to have to recognize all of another state's "national treasures."¹⁸²

V. THE COMPETING BENEFITS AND DETRIMENTS OF AN ACTIVE ART TRADE

Despite the danger posed to Europe's art treasures now that they can be moved easily throughout the European Community, many obstacles existed to the development of an effective means of preventing the theft and illegal export of art. As with any issue facing the European Community, Member States have differing interests to protect and differing perspectives on art trade and export. Moreover, resolving this controversy necessitates that states balance the harms against the benefits of art trade.

The debate over the export of cultural property divides the EC Member States into northern and southern factions and into those Member States that benefit from active art trade and those that do not. Southern Member States fear that the opened borders will result in the movement of their art treasures to the wealthier northern Member States. France, Spain, Italy, Portugal, and Greece, therefore, wanted rules which would enable them to keep their national patrimonies intact.¹⁸³ Furthermore, in southern Europe, the government and the church have been the primary art patrons, and these institutions favor keeping the art in the state.¹⁸⁴ In northern Europe, however, the government has traditionally supported

178. *Id.* pmb. The preamble states that the Regulation's Annex "is aimed at making clear the categories of cultural goods which should be given particular protection in trade with third countries, but is not intended to prejudice the definition, by Member States, of national treasures within the meaning of Article 36 of the Treaty . . ." *Id.*

179. *Id.* art. 1.

180. *Id.* Annex. For example, the definition covers paintings which are more than fifty years old and worth more than 150,000 European Currency Units. *Id.*

181. *Id.* art. 2(2). Cultural goods to which the Regulation does not apply are governed by the laws of the Member State of export. *Id.* art. 2(4).

182. *Culture: Export Regulation and Restitution Legislation to Protect National Treasures*, EUR. REP., Jan. 15, 1992, at IV.10.

183. Riding, *supra* note 8. Spain's EC cultural affairs minister noted that now "people go to a little village and take things and sell them." Perry, *supra* note 141.

184. Stille, *supra* note 30, at 2:27.

an active art trade.¹⁸⁵

States want to retain cultural property as part of their national wealth and as a means of promoting tourism.¹⁸⁶ Of course, if a party outside the state will pay fair market value for the art work, then the state's monetary wealth will not decrease.¹⁸⁷ Art-rich EC Member States, such as Greece, Spain, Italy, and France,¹⁸⁸ allege, however, that the prices paid for works do not actually represent fair market value, nor do they compensate a state for the social costs of having the work exported.¹⁸⁹ Moreover, they claim that the price paid cannot compensate the state for the resulting decrease in the intangible cultural and identity wealth bound up in a state's art collection.¹⁹⁰

Trade in art has many benefits, however. One of the main benefits of an active legal art trade is the preservation of cultural property. Legal transactions enable art to flow to where it is wanted, and therefore to where it will be preserved for the benefit of all.¹⁹¹ The prohibition of art export by art-rich states often harms these states' treasures. For the very reason that some states are art-rich, these same states are preservation-poor. The sheer volume of the cultural materials possessed by art-rich states overwhelms their resources, financial and otherwise, making them unable to care for the works properly.¹⁹²

185. *Id.*

186. Bator, *supra* note 5, at 303. Recognizing the importance of tourism, the Council of the European Communities has devised a "Community action plan" to promote tourism. Council Decision on a Community plan to assist tourism, July 13, 1992, 92/421/EEC 1992 O.J. (L 231) 26. The plan contains specific provisions addressing the importance of cultural heritage to tourism. *Id.* Annex (5) and pmbl. Significantly, the plan views the cultural heritage as a common one, calling it "European" and noting its contribution to "the idea of 'European citizenship.'" *Id.* pmbl.

187. Bator, *supra* note 5, at 303.

188. See Riding, *supra* note 8.

189. Bator, *supra* note 5, at 303 n.55. "Art-rich" states have vast art resources, while "art-poor" states want to purchase art from these states. Margules, *supra* note 13. Art-poor states, such as the United States, Japan, and the United Kingdom, do not necessarily lack their own cultural property, however. *Id.*

190. Bator, *supra* note 5, at 304. This is most easily seen with art of historical importance, such as the Notre Dame Cathedral in Paris. *Id.*

191. See *id.* at 297. Bator admits that while many art-rich states do not care properly for their art treasures, exporting to art-poor states does not ensure better treatment of the works. *Id.* For example, damage could be sustained during transport, or the object could be moved to a location with a higher risk of earthquake, fire, or war. *Id.*

192. See John Henry Merryman & Albert E. Elsen, *The Importance of a Licit Market*, reprinted in 1987 LAW, ETHICS, AND THE VISUAL ARTS 63 (John Henry Merryman & Albert E. Elsen eds., 1987) [hereinafter Merryman, *Licit Market*]. One author has written about duplicative art works that "Italian archaeologists laugh hollowly

Also, many works are not exhibited because the best examples of any given era, school, or artist are already on display within the state.¹⁹³ No reason exists to preserve cultural property if it cannot be seen or studied; therefore, export controls seem counter-productive.¹⁹⁴ Other states' museums and private collections would benefit from these duplicative works and would properly care for them.¹⁹⁵ Although many export controls endeavor to keep art in public collections,¹⁹⁶ private ownership may foster art in both the short and long run.¹⁹⁷

Additionally, legal trade in art deflates the demand for art in illegal markets by providing a legitimate market. Despite strict controls, demand for art works will exist; controls will only divert the demand into illegal markets.¹⁹⁸ The sale of art on the black market has high costs for art works. For example, works do not command their full value on the black market,¹⁹⁹ and the black market increases the risk of destruction of

when newspapers report the theft of some "unique, priceless" Etruscan vase. They know, but the public does not, how many thousands of these "unique, priceless" vases they already have in storage and quite literally don't know what to do with." Bator, *supra* note 5, at 298 (quoting Gaskill, *They Smuggle History*, ILLUSTRATED LONDON NEWS, June 14, 1969, at 28).

193. See Merryman, *National Patrimony*, *supra* note 3.

194. See Bator, *supra* note 5, at 299.

195. See Merryman, *National Patrimony*, *supra* note 3, at 162. Selling duplicative works would be a "good will" gesture to museums, dealers, and collectors and might increase their willingness to obey export controls. *Id.* Great controversy surrounds the practice of deaccessioning, or selling, works from the collections of museums. Discussion of this issue is beyond the scope of this Note. See generally DUBOFF, *DESKBOOK*, *supra* note 1, at 933-43.

196. This goal is reflected by laws which allow museums a set amount of time to match the offer made by a foreign purchaser. See *supra* part III.B.

197. See Bator, *supra* note 5, at 300. Private collectors often donate their collections to public museums and collections or make their collections available for public viewing. *Id.* Also, private collectors may be more daring than those in charge of cultivating public collections, and thus they preserve art that will become historically important in the future. *Id.* Others disagree, such as Giulio Carlo Argan, who is an art historian, the former Mayor of Rome, and an Italian senator. Haberman, *supra* note 22. Argan believes that the purchase of art by private investors wrongfully takes it from the public domain where it can be studied by scholars and enjoyed by the public. *Id.*

198. See Perry, *supra* note 141. According to Joel-Marie Million, president of the Druout group of auctioneers in Paris, strict controls "stimulate the black market. Sales go underground. You need to be flexible if you're not going to encourage fraud." Riding, *supra* note 8. Anthony Brown, a senior director at Christie's auction house in London, agrees, contending that strict controls are "bad for everyone who wants a legitimate art market and not one taking place behind closed doors." *Id.*

199. Privat, *supra* note 39. Usually art works sell for less than one-third of their fair market value on the black market. *Id.*

the cultural property.²⁰⁰ Also, it leaves the government without any control over transactions involving art works.²⁰¹

The ability to continue actively and legally trading in art also has economic importance to some EC Member States. This is especially true of the United Kingdom.²⁰² The London art trade produces great revenues for the government and provides jobs for many individuals.²⁰³ Approximately five billion dollars changes hands each year in the United Kingdom's auction trade, and London is the location for fifty to seventy-five percent of the EC's art trade.²⁰⁴ In order to continue this high volume of trade, the United Kingdom wanted a narrow definition of "national treasures" in any EC art policy²⁰⁵ and opposed measures requiring the return of cultural property.²⁰⁶ Restitution demands would necessitate that an auction house pull an art work from the auction indefinitely until the foreign state's claim is resolved.²⁰⁷ Strict policies could force the art market out of the European Community completely.²⁰⁸

In addition to the economic importance of art trade, an active art market has other intangible virtues. For example, living artists need a free

200. See Bator, *supra* note 5, at 295-97.

201. DuBOFF, NUTSHELL, *supra* note 22, at 16.

202. Germany, the Netherlands, and Belgium also have active art markets. Riding, *supra* note 8.

203. Official figures estimate that London has 2,400 art dealers. Allison Roberts, *London is Mecca for Art Smugglers*, THE TIMES, Feb. 24, 1993. Of these, Interpol estimates that six hundred dealers have knowingly sold illegally exported art. *Id.* Lord Gowrie, chairman of Sotheby's and former Arts Minister in the United Kingdom (1983-85), said that many come to London to buy art, noting that "people do not come from all over the world to Britain for the sun." Lord Gowrie, *If Brussels Fails to Get It Right*, DAILY TELEGRAPH, Feb. 10, 1992, at 14.

204. Roberts, *supra* note 203. London is the site of eighty-five to ninety percent of the antiquities trade. *Id.*

205. Perry, *supra* note 141.

206. Riding, *supra* note 8. Even art dealers in Italy do not want their trade burdened by additional regulations. Haberman, *supra* note 22.

207. Riding, *supra* note 8.

208. See Gowrie, *supra* note 203. According to Lord Gowrie, chairman of Sotheby's and former Arts Minister of England, the auction houses of Sotheby's and Christie's have indicated that they might move their headquarters to Geneva, even though they do not wish to do so. Simon Tait, *Battle on the Border*, THE TIMES, June 3, 1992. Controls imposed on auctioneers by France have already moved Sotheby's auctions of French art to Monaco. Havemann, *supra* note 66. Sotheby's circumvents France's system by showing art in Paris one day and then taking the works to Monaco to be sold on the following day. *Id.* Transporting the works leads to an increased risk of destruction or damage. See *supra* note 197 and accompanying text.

art market in order to earn a living.²⁰⁹ The potential to earn a living as an artist in an accessible market creates an incentive to produce art.²¹⁰ Moreover, the ability to export freely gives the living artist the opportunity to be evaluated and appreciated internationally.²¹¹

Beyond the benefits accruing to individual artists, the art market also has the ability to foster understanding and appreciation among states.²¹² Early European agreements on art, such as the Florence Agreement, recognized this characteristic of art, viewing the flow of art as a means of maintaining world peace.²¹³ Moreover, art trade enables states to import works from other states, furthering the education of their own citizens.²¹⁴

Finally, a strictly regulated art market compromises the EC's fundamental tenet of the free movement of goods. EC governing bodies have staunchly protected this principle of the European Community, and exceptions to the free movement of goods have been read narrowly.²¹⁵ For example, the European Court of Justice looks at the effect of a national law or program on the free movement of goods, rather than at the name of the program or the motive behind it.²¹⁶

VI. EFFECTIVENESS OF PROPOSED SOLUTIONS

The European Community had a difficult task in designing a measure that would adequately protect Europe's cultural property while satisfying all of the parties involved. The diversity of the states in the European Community led to differing positions on the export of cultural property. Southern EC Member States wanted more stringent controls on the export of art to prevent its sale to wealthier northern Member States.²¹⁷ Conversely, northern Member States sought looser controls in order to continue the art trade that contributes to their economic

209. Williams, *supra* note 141. Some states do not regulate the export of art by living artists. See *supra* note 119 and accompanying text.

210. Bator, *supra* note 5, at 308.

211. *Id.*

212. See *id.* at 306-07.

213. See *supra* part III.A.1.

214. See Bator, *supra* note 5, at 307.

215. STEINER, *supra* note 10, at 70. See *supra* part IV.A.1 for a discussion of the ECJ's narrow reading of Article 36 of the EEC Treaty, which allows quantitative measures for the protection of art.

216. Steiner, *supra* note 10, at 70. For example, the ECJ held the Irish Goods Council's "Buy Irish" Campaign to violate Art. 30 of the EEC Treaty in *Commission v Ireland*. *Id.* at 82. The ECJ found that the campaign might undermine the European Community's goal of eliminating quantitative restrictions on imports. *Id.*

217. See *supra* notes 183 and 184 and accompanying text.

wealth.²¹⁸

As with most legislation, and especially characteristic of measures requiring extensive compromises by all parties, the Regulation enacted by the European Community on the export of cultural property has many flaws and does not completely satisfy any one Member State's demands. First, the Regulation cannot keep art in the Member State that wants to prevent its export. It purports to prevent the export of art only from the European Community, not from one Member State to another. This arrangement seemingly has the benefit of allowing art trade, while keeping the art in the European Community.

Individual Member States may continue to apply their own laws as to whether a work may be exported, but without internal border controls, may not move to enforce the Regulation until a party attempts to remove the work from the European Community.²¹⁹ Thus, the Regulation does nothing to prevent cultural property from flowing freely to wealthier northern EC Member States from the collections of southern EC Member States. In theory, EC Member States may rely on Article 36 to prevent movement of art treasures between Member States. Again, however, their inability to use border controls as a means of enforcement hinders any effort.

Second, the Regulation contains a loophole that will allow some art to be exported from the European Community. The export of any work not falling within the categories specified by the Regulation's Annex is governed by the law of the Member State from which it is being exported.²²⁰ Thus, a work protected by the laws of a Member State with strict export controls, but not by the Regulation, could be smuggled into a Member State with looser export controls and then removed from the European Community. For example, a work could be taken from Greece, in which all art created before 1830 belongs to the government, to the United Kingdom, which has looser controls based on factors such as the object's connection to British history. The British Reviewing Committee might then issue a license and permit the export of the art work.

218. See *supra* notes 202-208 and accompanying text.

219. Article 2 of Council Regulation 3911/92 only requires a license for export "outside the customs territory of the Community . . ." Council Regulation 3911/92, *supra* note 170, art. 2.

220. See *id.* art. 2(4). Article 2(4) states: "Without prejudice to the provisions of this Article, direct export from the customs territory of the Community of national treasures having artistic, historic or archaeological value which are not cultural goods within the meaning of this Regulation is subject to the national laws of the Member State of export." *Id.*

Without a Community-wide definition of "national treasure," no solution to the above problem exists without compromising the principle of free movement of goods and persons. Because of the differing views among EC Member States as to what constitutes a "national treasure," reaching a uniform definition probably is impossible.

Third, the Regulation does not eliminate the financial incentive to export art illegally. To remedy this omission, it needs to provide compensation to owners of works who are refused export licenses. Such provisions obviate the need to endrun screening controls and encourage owners to sell their works through legitimate channels, rather than on the black market where the risk of destruction is greater and the works generally command less than their fair market value. Also, a measure like the United Kingdom's, which reduces estate duties for selling works to public collections, would decrease the monetary motivations for smuggling, while keeping art in the public domain.²²¹

VII. CONCLUSION

The issue of controlling the export of cultural property arose in the context of efforts to protect Europe's art treasures. Now it has degenerated into a battle of national and regional self-interests. Thus, the EC Member States must reaffirm the true purpose underlying the negotiations: the protection and preservation of art. These goals can best be achieved if the states adhere to the underlying belief of many of the early European agreements to protect art: Europe shares a common cultural heritage that the states have a collective duty to protect. The ambiguity surrounding the true national identity of many significant art works evinces this common cultural heritage. For example, to which state does the *Rokeby Venus*, a work by Spanish painter Velasquez painted in Italy and housed in England, belong?²²² And do the works of Picasso belong to Spain, his birthplace, or to France, his chosen domicile?²²³

The flaws in the enacted Regulation and the difficulties in enacting an effective regulation without undermining the free movement of goods point to a glaring need for a different solution to the problem of the export of cultural property. One solution would involve a compromise: keep art trade relatively unregulated, while focusing on protecting the works in public collections from theft and illegal export. Implementing the first part of the compromise would contribute greatly to the achieve-

221. See *supra* note 139.

222. *Art Sans Frontiers*, THE TIMES, Nov. 11, 1992.

223. See *Privat*, *supra* note 39.

ment of the second part.

First, allowing art trade will boost national revenues, resulting in greater funds for installing security measures in churches, museums, and smaller galleries. To satisfy those who oppose the movement of works to private collections, public collections could be granted a right of refusal to purchase the work. Selling duplicative or less significant works from public collections would generate funds that could be used to purchase art works to prevent them from leaving the state.²²⁴ These sales would raise still more money for security measures and the care of art works in public collections.

The current practice of hoarding cultural property benefits no one. Instead, EC Member States should work together to facilitate the sale, exchange, and exhibition of duplicative art works, rather than allowing them to fall into disrepair, unseen, in warehouses and museum store-rooms. Making these works available for sale would create greater access for museums²²⁵ and private collectors and would dampen demand on the black market, where the risk of destruction and damage is great.

The EC Member States must strike a balance between the need for an active art trade, which is important to some states' economies, and the rights of states to keep their cultural heritages and identities intact. Equally important is a speedy resolution of the issue. The delay in the complete elimination of border controls throughout the EC serves as a grace period for the EC to reach a satisfactory resolution. Already, many states, such as the Schengen signatories, have begun dismantling their checks, and other states will soon follow.

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224. Merryman, *Licit Market*, *supra* note 192, at 63. Merryman and Elsen write, "The nation that both prohibits a licit market and pleads poverty as an excuse for failure to develop and protect its cultural property is acting inconsistently. On the contrary, it would advance the national, as well as the international, interest if the art-rich nation were to treat its cultural treasure as an exploitable national resource." *Id.*

225. Museums often purchase works of dubious provenance. *See* Stille, *supra* note 30, at 2:27.

