EDITORIAL

PATTY GERSTENBLITH*

AFTER THE JOURNAL'S FIRST issue of this year devoted to the special topic "Ethical Considerations and Cultural Property," this issue returns to a range and variety of subjects that correspond to the growing diversity of this field and with which our readers are likely to be more accustomed. There should be something here for everyone, but the attention paid in recent months to the recovery and restitution of art works looted during the Holocaust has increased dramatically and is reflected in these pages. The theme of the displacement of art works during World War II has produced an article by Klaus Goldmann discussing the disappearance of German art works at the end of the war, some of which may have ended up in American institutions as well as elsewhere. Waldemar Ritter offers a catalogue of the shipments of cultural objects taken to the former Soviet Union, many of which are still unaccounted for. This catalogue provides a background for the Russian statute forbidding the return of cultural objects to Germany, despite the treaties of cooperation enacted in the early 1990s ensuring this very restitution. Finally, we also publish the guidelines recently formulated by the Association of Art Museum Directors in its attempt to deal with the acquisition or loan of art works that may trace part of their history back to the Holocaust.

With the persistence of media attention amid numerous allegations, claims, and possible law suits that have surfaced in the United States, it is encouraging to note that one of the most prominent of these disputes has reached a mutually satisfying and beneficial solution. In 1987, Daniel Searle, a trustee of the Chicago Art Institute, purchased a Degas pastel monotype, *Landscape with Smokestacks*, that was owned by the Dutch collectors Friedrich and Louise Gutmann. At the beginning of the war, the Gutmanns sent the work to a dealer in Paris, after which its history becomes unclear. Records show that the Nazis seized art works held by this Paris dealer, but it is not certain whether the Degas was among them. Searle argued that the Gutmanns sent the work to Paris for sale and not for safe-keeping, thus providing an alternate explanation for its disappearance. Both of the Gutmanns were killed during the war, at least in part because they refused to sign over their collection to the Germans. The Degas surfaced some time

*Professor of Law, DePaul University College of Law.

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after the war in Switzerland in the hands of a dealer, Hans Wendland, who has been described as "perhaps the most successful wartime fence for art looted by the Nazis."[1] The work was transferred several times before Searle purchased it. The Gutmanns' son and daughter and, after their son's death, their two grandchildren pursued the search for their collection for many years. Only in 1995 did the two grandsons succeed in locating the Degas in the collection of Daniel Searle and on loan to the Chicago Art Institute.

The litigation in this case went on too long and despite numerous attempts to settle out of court. In late July, the U. S. District Court judge denied Searle's motions for summary judgment, apparently rejecting Searle's contentions that the claim was time-barred and that the plaintiffs' allegations lacked sufficient evidence. Soon afterwards, a settlement was reached. Mr. Searle agreed to cede a half-interest in the Degas to the Gutmann heirs and to donate the other half to the Art Institute. The museum agreed to purchase the half-interest of the Gutmann heirs at its current value. Perhaps the most poignant aspect of this agreement is that the plaque to be placed near the Degas at the Art Institute will bear not only the name of Daniel Searle but also the names of Friedrich and Louise Gutmann, the only prominent art collectors to have perished during the Holocaust.[2] Thus, they receive recognition not only as owners of this painting but also for their contribution to the world of art and cultural knowledge through the collection that they built. The Gutmanns' interests were vindicated, an even more costly and debilitating trial was avoided, and, in the words of several involved, everyone won, there were no losers.

At about the same time as the Degas dispute was settled, a claim was filed against the Seattle Art Museum by the heirs of Paul Rosenberg to recover their father's painting, Matisse's *Odalisque*. The documentation for the background of this painting seems quite clear based on both factual evidence compiled by Hector Feliciano[3] and its identification by Virginia Bloedel Wright, a trustee of the museum and the daughter of Prentice and Virginia Bloedel, the individuals who donated the painting to the museum in 1996. It seems unfortunate that a suit must be filed, although it may be necessary in order for the museum trustees to fulfill their fiduciary duties or to enable the museum to recover its loss from another source. The museum has also sued Knoedler and Company, the New York dealer that bought the painting from a Paris dealer, Galerie Drouant-David in 1954, and soon afterwards sold it to the Bloedels.[4] The museum is claiming fraud, negligent misrepresentation, and breach of warranty of title against Knoedler and is seeking damages equivalent to the painting's current value.[5]

Some of the more interesting aspects of this case recall the facts and resolution of the first reported court decision in the United States to address restitution of Holocaust art works, *Menzel v. List*, which was litigated

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in the mid-1960s.[6] In *Menzel*, collector Albert List purchased a Chagall painting that the Menzels had left in their home in Belgium when they fled from the Nazi takeover. The Nazis subsequently seized the painting. Once it was determined that the Chagall should be returned to its original owner, List successfully sued the dealer from whom he had purchased it. In fact, Mr. List was able to recover *appreciation damages*, based on the market value of the painting at the time he surrendered it to Mrs. Menzel, rather than *expectation damages*, based on the price he paid for the painting at the time of the purchase.[7] The Seattle Art Museum's claim against Knoedler raises interesting parallels while presenting new twists. Can a dealer be held liable to an entity that was not part of the original transaction, even though the museum could perhaps claim the status of a third-party beneficiary? Can the museum recover damages when it received the painting as a donation?

In this context, one may note the new guidelines adopted by the Association of Art Museum Directors to deal with these issues. The guidelines represent a clear step forward for American museums that have previously lacked a uniform policy and procedure for resolving claims against objects in their collections and for deciding under what circumstances a museum may acquire such objects, whether by purchase, gift, or even loan. The guidelines clearly favor the quick resolution of claims, particularly where the claimant is able to bring forth clear documentation. In section II.E., Response to Claims Against the Museum, the guidelines provide

> 1. If a member museum receives a claim against a work of art in its collection related to an illegal confiscation during the Nazi/World War II era, it should seek to review such a claim promptly and thoroughly. The museum should request evidence of ownership from the claimant in order to assist in determining the provenance of the work of art.
> 2. If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.
> 3. AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted.

The guidelines also advocate that each museum should undertake to search its own collections and to publicize the results. This provides a satisfactory parallel to the examination of public collections recently ordered by the Austrian government. Austria, having concluded that its public collec-

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tions contain many objects that had been confiscated and not satisfactorily restored to their original owners, is now enacting new legislation to establish a commission that will review ownership claims to such art works as part of the restitution process.[8] Of course, in the United States, the task is not so simple since the considerable majority of collections are not government-owned and compliance with the AAMD Guidelines is purely voluntary.

While resolution of legal disputes and the adoption of guidelines by the AAMD[9] should both be considered desirable developments, unanswered questions remain. The recovery of Holocaust-related art works, although unique in its scope and its origins, is not very different from the recovery and protection of art works that are looted through war in other parts of the world, such as the Balkans, Iraq, Cyprus, Southeast Asia, and Afghanistan,[10] or even as the result of individual thefts. When the problems of the Holocaust are treated as discrete and individualistic, it becomes easier for institutions and private collectors to ignore comparable problems that arise in other contexts.

Another question is the interpretation of the AAMD Guidelines. In Section II.B.2(a), the guidelines state: "In the absence of evidence of unlawful confiscation, the work is presumed not to have been confiscated and the acquisition may proceed." In the case of the Searle Degas, the parties presented conflicting evidence for the history of the work during the war years. The work was clearly in the Gutmann collection before the war and then sent to Paris. It next appears in the hands of a Swiss dealer known to have "laundered" works looted by Nazis. This same dealer, however, presumably had items with legitimate background in his inventory as well. A gap in the ownership chain of the painting resulted, and it is unlikely that either party could have established with certainty exactly how the painting got from Paris to Switzerland. Ordinarily, the burden of proof is on the claimants, and Searle argued that the plaintiffs' evidence was insufficient to meet this burden. The judge denied Searle's motion for summary judgment without any explanation, published or unpublished, of his reasoning. We can still deduce that, despite the apparent gap in the painting's provenience, the plaintiffs presented enough evidence to allow the question to go to a jury or finder of fact.

How should a museum that is considering an acquisition evaluate the legitimacy of an object's background? This decision is left to the professional staff and trustees of an institution, yet what do the AAMD Guidelines provide? Without "evidence of unlawful confiscation," the Degas may have presented an adequate history so that an acquisition could proceed within the guidelines. Is "evidence" to be interpreted as direct evidence only or does it include the reasonable inferences and probabilities that may be drawn from indirect evidence as well? Would the facts surrounding the

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Degas be enough to caution a museum that is considering such an acquisition? That remains uncertain.

As the fate of the Degas has now been decided and that of the Rosenberg Matisse has yet to be determined, it is clear that the legal decisions concerning these Holocaust art works will continue to take the law in new directions. Questions of evidence, burdens of proof, conflicts of law, statutes of limitation, and financial and moral liability all await resolution. How much impact these new developments will have on the legal issues surrounding other types of art works remains for the future to determine.

NOTES

1. Walter V. Robinson, Holocaust Victims' Heirs Given Share of a Degas, *Boston Globe*, August 14, 1998, at A1.

2. Judith H. Dobrzynski, Settlement in Dispute Over a Painting Looted by Nazis, *New York Times*, August 14, 1998, at A17.

3. Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* 168–69 (Basic Books, New York 1997).

4. Karen Lowe, Heirs of Jewish French Art Dealer Sue Museum for Looted Matisse, *Agence France Presse*, August 4, 1998.

5. Judith H. Dobrzynski, No Easy Route to Recovering Nazi Plunder, *New York Times*, September 9, 1998, at E6.

6. 22 A.D.2d 647, 253 N.Y.S.2d 43 (1964), and 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

7. The problem of adequate damages is particularly acute in cases involving art works because of their ability to increase in value significantly beyond a standard rate of inflation. Despite a very different factual circumstance, the New York court in *In re Rothko*, relying on *Menzel*, also awarded the estate of Mark Rothko appreciation damages when his paintings were sold in breach of his executors' fiduciary duties. 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977).

8. Jane Perlez, Austria Moves Toward Returning Artworks Confiscated by Nazis, *New York Times*, September 11, 1998, at A8.

9. The Art Dealers Association has also recently adopted the AAMD Guidelines. *See* Dobrzynski, *supra* note 5.

10. One of the most recent reported threats to cultural property is the fate of two giant statues of Buddha in central Afghanistan, after that region fell under the control of the Taliban militia, which objects to depiction of humans as idolatrous. The monuments are about fourteen hundred years old and are carved out of mountain cliffs near the town of Bamiyan. It is hoped that sufficient international pressure can be brought to ensure protection of these cultural monuments. Jason Burke, Taliban Seize "Idolatrous" Buddha Icons, *The Independent* (London), September 15, 1998, at 15.

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