EDITORIAL

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WITH THIS ISSUE OF THE *International Journal of Cultural Property,* we mark another significant milestone in the history of the journal and of the International Cultural Property Society which sponsors it. From its first appearance in 1992, the journal has been published by Walter de Gruyter & Company of Berlin. The editors, members of the editorial board, and officers of the International Cultural Property Society join me in thanking de Gruyter and Dr. Dorothee Walther for their work during the early years of the journal.

Beginning with this issue, the *International Journal of Cultural Property* will be published by Oxford University Press. We look forward to a long and rewarding relationship between the Society and OUP that we expect will benefit all of our readers. We also renew our commitment that the journal will continue to be an interdisciplinary, international publication appealing to and presenting stimulating material for a broad spectrum of individuals and institutions with an interest in the larger themes of cultural heritage. This issue also initiates another new feature. We will occasionally publish "special" issues of invited articles that focus on a particular topic. These issues will be assembled by guest editors, permitting us to broaden the perspectives presented.

This first special issue focuses on ethical considerations and cultural property. The president of the International Cultural Property Society, Dr. Daniel Shapiro, joins me as guest co-editor of this issue. A special issue for next year is already being planned under the guest co-editorship of Dr. Patrick J. O'Keefe and Professor Robert Paterson and will focus on heritage issues of indigenous groups.

The topic of this special issue—ethical considerations and cultural property—provides an informative backdrop for two pending legal disputes. The first controversy, in particular, places the public interest in encouraging international loans of art works into conflict with the desire to resolve the remaining claims against art works taken from Holocaust victims during World War II. Two paintings by Egon Schiele were part of a traveling international exhibit on loan from the Leopold Foundation of Vienna to the Museum of Modern Art in New York. In early January, just as the exhibit was closing in prepa-

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https://doi.org/10.1017/S0940739198770018 Published online by Cambridge University Press

ration for its journey to the next venue, two families of Holocaust victims asserted that the paintings had been taken from family members by the Nazis during World War II and had not been returned to their rightful owners at the end of the War. The New York District Attorney decided to initiate a criminal investigation and a subpoena was issued for the paintings to be held in New York.

Because the exact histories of the two paintings differ and Austrian officials have disputed the facts presented by the respective families, no determination of the ownership of these paintings can yet be made.[1] It is clear, however, that in such disputes one is compelled to bring the ethical and moral force which is the legacy of the sad history of the Nazi era into any consideration of the legal and factual background. This attitude clearly encouraged the March 1998 announcement by Elisabeth Gehrer, the Austrian Minister of Culture, that all Austrian collections will be reexamined to determine the propriety of their holdings. She indicated a willingness to return artworks which had been stolen by the Nazis during the War and then retained by Austrian museums in exchange for permitting owners to remove other art works at the end of the War.[2] Gehrer and Austrian museum officials stated that "it was time for 'moral,' not 'legal,' decisions."[3] On the other hand, the delay in the return of the Egon Schiele paintings and the specter of possible future legal proceedings[4] have raised considerable concern for the future of international loans and exhibitions.[5]

The second case involves the forfeiture of an ancient gold phiale from a New York collector, Michael Steinhardt, on the grounds that the phiale was stolen from its country of origin, Italy, and that there were material misrepresentations on the import forms. In November 1997, the Federal District Court granted summary judgment to the United States,[6] and the case is now on appeal. One of the issues involved is whether the United States recognizes the laws vesting ownership of cultural objects in the national government which many countries have enacted in order to remove the incentive of the illegal market to participate in the looting of archaeological sites and the destruction of artistic and cultural monuments by trading in objects which derive from illegal and unscientific excavation.

In the past, the major museums of the world built their collections primarily through the art market either as direct purchasers or as recipients of donated objects and art works. In the future, museums may seek an alternative as the cornerstone of a new internationalism based on loans and traveling exhibitions, which are grounded in inter-institutional cooperation. Some may criticize reliance on loans and exhibitions as a return to an antiquated barter and exchange system rather than the free market characteristic of more recent times. Although ownership of objects may have seemed to provide permanence to collections, an approach based on a spirit of cooperation brings several advantages. First, it ensures that the world's artistic and cultural heritage

https://doi.org/10.1017/S0940739198770018 Published online by Cambridge University Press

really does circulate throughout the world, rather than remaining in a few well-endowed institutions and private collections. Second, it allows these institutions to move away from reliance on the market which has often furnished aesthetically-pleasing, costly but unprovenienced objects whose story is muted for lack of scientific and historical context. Third, it permits the museums of Western Europe and North America to enter into mutually beneficial partnerships with the institutions and governments of source nations, rather than perpetuating an antagonistic stalemate. Finally, it reveals that the classification of nations as either "source" or "market" nations is an over-simplification. Many nations, including the United States, Canada, the United Kingdom, and Italy, to name only a few, are both source and market nations, and this realization would help to reduce misunderstandings which are the product of a false dichotomy.

This type of internationalism is epitomized by the Schiele exhibition. The delay in the return of the paintings, however, has cast the security of some international loans into doubt.[7] On the other hand, the federal immunity procedure available under United States law provides a secure method for protecting art works on international loan. In fact, the New York District Attorney admitted that this procedure would have immunized the Schiele paintings from the legal imbroglio in which they are now entangled.[8] Despite the availability of federal and state immunity, the negative publicity surrounding the Schiele paintings may make it more difficult to foster the international cooperation which is so advantageous for both lender and borrower.[9] Both are now more aware of the necessity to undertake appropriate legal steps to protect the objects in such exhibits.[10] It is also desirable to ensure that the federal immunity procedure is kept as simple as possible while also providing adequate notice to those who might have a claim against art works brought into the United States.

While the Schiele dispute was pending in New York State court, the leadership of the American Association of Museums and the Association of Art Museum Directors entered the Steinhardt case on the side of the collector. Although carefully limited to the propriety of the forfeiture and the question of whether the United States should recognize the national ownership laws of foreign nations, such as Italy, their position nonetheless seems to be at odds with the Code of Ethics of the International Council of Museums (which is described in the article in this issue by Elisabeth des Portes) as well as the codes of ethics of many individual museums. Nor does this position seem likely to foster international cooperation and understanding between American museums and foreign countries.

The pending cases in New York thus raise three conflicting ethical values, all of which may have a significant impact on the public interest. After more than fifty years, the world is now eager to resolve the remaining disputes which are the legacies of the appalling acts of World War II. Particularly as the generation of Holocaust survivors dwindles, the urgency to resolve these

https://doi.org/10.1017/S0940739198770018 Published online by Cambridge University Press

disputes increases. In addition, there is a clear public interest in the elimination of the black market in antiquities and the protection of archaeological sites and of objects and artifacts in their context, which increases scientific knowledge, understanding of the past, and appreciation for the objects themselves. Finally, all who have an interest in cultural heritage and especially the general public benefit from international collaborations that permit artistic, cultural and historical works to travel throughout the world. While we await the final outcomes of the Schiele and Steinhardt cases, it is to be hoped that voluntary and legal procedures may be devised which can further these legitimate interests. In this way, the internationalism of cooperation among nations and institutions will be encouraged.

NOTES

1. For example, in April, a German court revoked the declaration of heirship on which the Reif family's claim to "Dead City" was based. Judith H. Dobrzynski, German Court Revokes Ruling on Ownership of Schiele Paintings, *New York Times,* April 16, 1998, at E6.

2. Jane Perlez, Austria Is Set to Return Artworks That Nazis Plundered from Jews, *New York Times,* March 8, 1998, at A1.

3. *Id.* at A23.

4. On May 13, 1998, Justice Laura Drager of the New York Supreme Court issued her opinion quashing the subpoena of the two paintings. Her opinion held that the New York Arts and Cultural Affairs Law § 12.03 exempting art works on loan from outside of the state for purposes of exhibition applied to seizures of any kind, both civil and criminal. She also determined that the federal immunity statute, 22 U.S.C. § 2459, did not preempt the New York state statute. However, the New York District Attorney Robert Morgenthau has already indicated his intent to appeal this decision, and it is likely that the paintings will remain in New York for a considerable length of time while this litigation is resolved. Judith Dobrzynski, Judge Rejects Seizure of 2 Schieles, *New York Times,* May 14, 1998, at E1.

5. The Museum of Modern Art has stated that two lenders for a Bonnard retrospective decided to withdraw their paintings from the exhibit; one lender indicated that the decision was in response to the Schiele controversy, despite the availability of the federal immunity from seizure procedure. Judith Dobrzynski, Lenders Pull Two Bonnards from a Show at the Modern, *New York Times,* April 29, 1998, at E1.

6. United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997).

7. *See supra* note 5.

8. Immunity from Seizure Act, 22 U.S.C. § 2459.13. *See also* Judith Dobrzynski, Judge Rejects Seizure of 2 Schieles, *New York Times,* May 14, 1998, at E1.

9. *See supra* note 5.

10. The publicity surrounding the Schiele disputes has prompted American museums to be more careful in accepting paintings for exhibition loans and in lending their paintings abroad. Judith Dobrzynski, Lenders Pull Two Bonnards from a Show at the Modern, *New York Times,* April 29, 1998, at E1 (statement of the spokesman for the Metropolitan Museum of Art referring to increased due diligence on the part of American museums).

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