

## Cultural Property, Law and Ethics



*by Jennifer Anglim Kreder*

We witnessed in 2008 the dramatic culmination of various scandals in the cultural property and heritage community. To name just a few of the high-profile events: (1) armed robbery of four paintings by Van Gogh, Cezanne, Degas, and Monet from the Emil Bührle Foundation in Zurich, Switzerland; (2) restitutions of spectacular Etruscan objects from some of the most prestigious U.S. museums and elite collectors to Italy; (3) FBI raids on four California museums whose employees allegedly engaged in antiquities trafficking and the exchange of inflated appraisals for donations to perpetuate tax fraud; and (4) the death of archaeologist Roxanna Brown in FBI custody. These scandals did not arise in a vacuum. The law and ethics of the cultural property market is changing—dramatically. Those interested in cultural property will appreciate the value of some history to understand the current environment.

In 1969, Clemency Coggins laid bare the unauthorized destruction of pre-Columbian sites to obtain objects to sell on the international market. She traced specific objects from looted find-spots to specific display cases in prestigious U.S. museums. Ever since, a raw, polarizing philosophical and ethical debate has raged between archaeologists, on the one hand, and collectors and museums, on the other, as to the extent of the trickle-down impact that the antiquities market has on archaeological sites worldwide.

A main purpose of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (UNESCO Convention) is to curb widespread pillaging

of archaeological sites. The UNESCO Convention initially did little directly to change the legal landscape in the United States, except in regard to a relatively few categories of objects, the importation of which the United States agreed to prohibit pursuant to various statutes and bilateral agreements. The Convention rejected the "blank check" approach, which would have required art importing nations, of which the United States is the largest, to try to block importation of any object exported in violation of any source nation's export regulations. The Convention thus seemingly left undisturbed the international law mantra that nations do not enforce other nations' customs regulations or criminal provisions. The *Hollinshead*, *McClain*, and *Schultz* cases, however, have established (at least in the Second, Fifth, and Ninth Circuits) that one may be prosecuted under the National Stolen Property Act for removing an object from a source nation in violation of a clear national ownership law. The widespread adoption of the Convention, the entrenchment of the McClain doctrine, and the continued dialogue between archaeologists, collectors, and museums have significantly impacted the antiquities market and museum acquisition practices.

Generally, museums, collectors, and archaeologists, of course, are bound to follow applicable law. The debate continues, however, as to whether one in the United States should acquire an object without detailed documentation showing it was exported from a source nation in compliance with that nation's export laws when no U.S. law has been broken. The most common framework for the debate has been that of *cultural nationalism* versus *cultural internationalism*, as was first articulated by Professor John H. Merryman of Stanford Law School. Regardless of the philosophical debate, if the source nation lacks a clear national ownership law applying to objects excavated after its enactment, then the risk of criminal prosecution in the United States is minimal under the McClain doctrine. The same is true of civil liability.

On the other hand, assuming compliance with all applicable U.S. customs regulations and assuming the source nation has a clear national ownership law in place, then the necessary inquiry to evaluate legal risk in the United States becomes an evidentiary matter concerning whether it can be shown that the object was removed from a find-spot within the modern source nation after enactment of a clear national ownership law. A criminal prosecution also would require a showing that the acquirer possessed the requisite level of intent to deprive the owner of the benefit of ownership and a prosecutor willing to bring the case. That case might be brought in the form of a civil forfei-

ture action, which would shift the burden of establishing right to possession onto the purchaser claiming title.

Perhaps the most important impetus for the dramatic change in law and ethics pertaining to the antiquities market is the recent high-profile revelation of the extent of criminal activity providing a steady stream of illicit objects to the high-end antiquities market. In particular, developments in Italy have shown that the market in Etruscan artifacts has been infected with illicit excavation and organized international crime for quite some time. Illicit objects were laundered for years by sophisticated dealers into the international market and wound their way into respected collections and esteemed museums in the United States. We have seen the prosecution of previously esteemed collectors, a museum curator, and *tombaroli*, which is an Italian word meaning "tomb raiders."

### **Italian Criminal Investigations and Prosecutions**

The popular press attributes Italy's recent success reclaiming its cultural patrimony to the book *The Medici Conspiracy* by Peter Watson and Cecilia Todeschini.<sup>1</sup> Although the book is interesting and revealing, the truth is that Italy's recent successes have resulted from events dating back to 1902, when it passed its first "in-the-ground" statute, which vests ownership of unearthed ancient artifacts in the state. Italy ratified the UNESCO Convention in 1978, and Italy signed a Memorandum of Understanding (MOU) with the United States in 2001. Pursuant to the MOU, which was renewed in 2006, the United States agreed to protect pre-Classical, Classical, and Imperial Roman architectural material. Thus, U.S. customs and enforcement agents have been committed to the goal of recovering covered artifacts. Italy, however, has not sat back and waited for the United States to do the heavy lifting.

In the mid-1990s, Italy began to firmly press U.S. museums to return objects Italy believed had been illegally exported. It has long been understood that artifacts illegally excavated in Italy are transported through Switzerland before reaching the international market to evade Italian protection laws. Accordingly, Italian police sought assistance from Swiss police in 1995 to conduct a raid on the Geneva warehouses of Italian art dealer Giacomo Medici. As relayed in *The Medici Conspiracy*, the raid uncovered a vast treasure trove of smuggled antiquities, many fresh from the ground, and others in various stages of the market preparation process. A parallel investigation in

Italy uncovered a piece of paper referred to as "the organigram" which seems to reflect an organization/flow chart of a vast smuggling ring implicating key players in the international antiquities market, including a number of U.S. museums, former J. Paul Getty Museum (the Getty) curator Marion True, and prominent art dealer Robert Hecht. The author of the organigram, however, was dead by the time it was found. The chart alone cannot tell us whether these key players knew they were trading in looted antiquities. Nonetheless, the Italian government viewed the organigram in conjunction with other evidence, particularly photographs found at the Medici warehouses, and brought criminal charges against key and lesser players. The photographs have been described as "a smoking gun" in the prosecution and negotiations.

Medici was arrested in 1997 and convicted in 2004, after a lengthy trial in Rome with testimony by Italian tombbaroli. Medici was sentenced to ten years in jail and fined \$10 million. He remains free pending his appeal. Hecht and True were indicted in Rome in 2002 for conspiracy to traffic in antiquities. Hecht was (in)famous for having sold the Euphronios krater to the Metropolitan Museum of Art in New York (the Met) for a controversial \$1 million in 1972, the first million-dollar sale of a piece of antiquity. A raid of Hecht's residence uncovered his personal journal, which has been pivotal in his prosecution. True, who had tightened the Getty's questionable acquisition policies during her tenure as curator there, was the first U.S. museum employee ever to be indicted for alleged illegal antiquities trading. Under True's stewardship, the Getty implemented a policy requiring objects to be acquired from "established, well-documented collections" and to have been in published catalogues before 1995.<sup>2</sup>

Negotiations between the Italians and the Getty were difficult—it took several years before the parties could agree on exactly which antiquities the Getty would return to Italy. On October 25, 2007, the Getty formally agreed to return 40 of the 51 artifacts demanded, including the prized Cult Goddess limestone and marble statue. In the agreement, the Italian Culture Ministry agreed that the Cult Goddess could remain on display at the Getty until 2010, but the other artifacts were to be returned immediately. Pursuant to the agreement, Italy has loaned other artifacts and will continue to engage in "cultural cooperation," including research projects and joint exhibitions. For example, on February 1, 2008, Italy lent the Getty "a bounty of Berninis."<sup>3</sup> Pursuant to the agreement, such loans will be of a four-year duration, which many criticize as too short to accommodate serious academic study.

In the midst of the negotiations in August 2007, Italy dropped the civil charges against True and reduced the criminal charges, but the criminal trial of True and Hecht continues. It is likely that the Italian statute of limitations, which continues to run until the conclusion of a prosecution, will expire before the end of True's trial, and possibly also Hecht's, which would preclude their conviction. In late November 2007, an Italian judge ruled that a local cultural group's claim to the bronze "A Victorious Youth" was barred by the statute of limitations. The Italian government and the Getty are continuing negotiations concerning the statue, with the Getty claiming it had been found in international waters and thus is not subject to restitution.

Additionally, the Greek government charged True with antiquities smuggling, and the Getty returned four objects to Greece, including the prized gold funeral wreath, a photo of which used to grace the cover of the Getty's brochure. A Greek judge dismissed the criminal charges against True, which pertained solely to the gold funeral wreath, in late November 2007 on statute of limitations grounds.

True vigorously maintains her innocence, claiming that she never knew any of the antiquities in question were looted. In late December 2006, in the midst of the negotiations, in a two-page letter she wrote to her former colleagues at the Getty, she railed against their "calculated silence" and "lack of courage and integrity." She wrote specifically in regard to the return of the gold funerary wreath and other objects to Greece:

Once again you have chosen to announce the return of objects that are directly related to criminal charges filed against me by a foreign government . . . without a word of support for me, without any explanation of my role in the institution, and without any reference to my innocence.<sup>4</sup>

Many curators of U.S. museums have publicly supported True, while others have distanced themselves.

Meanwhile, the Italian government on February 21, 2006, finalized negotiations with the Met for the return of the prized Euphronios krater, other vases, and Hellenistic silver. The museum continues to dispute Italy's claim that the silver's find-spot is located in Morgantina, Italy. The Boston Museum of Fine Arts, in September 2006, agreed to return thirteen objects, including a statue of Sabina. On October 26, 2007, the Princeton University Art Museum agreed to return four objects immediately and four more in four years. In January 2008, the University of Virginia agreed to return two ancient Greek

sculptures. The Cleveland Museum of Art reached an agreement with Italy on November 19, 2008 to return fourteen objects.

Italy has proudly displayed many of the returned objects in the Presidential Palace, the Quirinal, in Rome, in an exhibition entitled "Nostoi," which means "homecoming" in Greek. No museum acknowledged any wrongdoing; all received promises for future loans of Italian antiquities or other "cultural cooperation." Not all objects initially demanded by Italy were returned.

The Italians reportedly have since turned their sights on other museums, dealers, and collections implicated in the photo chain linking tombaroli looting to the market. New York art dealer Jerome Eisenberg of Royal Athena Galleries agreed to return eight Etruscan and Roman artifacts on November 6, 2007. Collector Shelby White returned nine spectacular objects in January 2008, and will return another currently on loan with the Museum of Modern Art in New York in 2011. It also should be noted that White reportedly reached an agreement with Greece to return two objects in July 2008.

Archaeologists David Gill and Christopher Chippendale had called the Shelby White–Leon Levy collection into question many years ago. The Gill and Chippendale study revealed that 93 percent of the objects comprising the 1990 *Glories of the Past* show at the Met, which displayed more than 200 objects from the Shelby White–Leon Levy collection, had no known ownership history, and hence no archaeological provenience. Most archaeologists would draw the inference that the objects likely were looted from clandestine digs at archaeological sites. Many collectors would not be so quick to reach that conclusion, because the antiquities market norm in the 1990s was that few purchases were supported by completed provenance documentation. A reported sticking point in White's negotiations with the Italians was whether the Italians would pledge never to pursue another piece in her collection if she returned those sought. Reportedly, "Italy agreed that it would not lay claim to any additional objects that were catalogued [for the 1990 show]. . . . But if evidence were to surface that any other artifacts she owns were looted in Italy, the accord would allow Italian prosecutors to pursue their return."<sup>5</sup>

Other major players in the international antiquities market reportedly targeted by Italy, but not yet having reached any public agreement, include the New Carlsberg Glyptotek (Copenhagen, Denmark), the Miho Museum (Shiga, Japan), the Barbara and Lawrence Fleishman collection, the Maurice Tempelman collection, dealer Fritz Bürki (Switzerland), Galerie Nefer (Switzerland, owned by Frida Tchacos, wife of Werner Nussberger who donated

two items to the Getty), Atlantis Antiquities, and dealer Robin Symes (UK), who in 2005 served 7 months of a 2-year sentence for misrepresentations about his antiquities holdings in the course of his bankruptcy filing. Symes was a prominent dealer who had sold some extremely high-profile artifacts, including the prized Cult Goddess that the Getty will return to Italy in 2010. Symes was implicated in *The Medici Conspiracy* as having been part of the Medici cordata, which was depicted in the organigram as the smuggling ring that laundered looted objects onto the international market, including to the Getty.<sup>6</sup> An October 2008 auction at Bonhams, to pay Symes' creditors, was halted at the last minute at the request of the Italian embassy in London.

Earlier reports mentioned the Toledo Museum of Art and Minneapolis Institute of Arts, but more recent statements by Francesco Rutelli, Culture Minister of Italy, have not mentioned these two institutions. Additionally, the Bunker Hunt collection, which constitutes part of the Shelby White–Leon Levy collection, was mentioned separate and apart from the Shelby White restitution.<sup>7</sup>

Finally, the Italian government busted an international ring of antiquities smugglers, which led in early January 2008 to the largest criminal case against antiquities smugglers to date. On January 17, 2008, General Giovanni Nistri, head of the art squad within the Italian Carabinieri, reported statistics which in his view "show how, at the moment, international trafficking is surely declining."<sup>8</sup> Certainly, if that is the case, Italy's active pursuit of restitutions from high-profile entities and individuals and criminal prosecutions are part of the reason, as well as the 2006 bilateral agreement signed by Italy and Switzerland requiring Swiss customs agents to verify proof of origin and legal export of antiquities arriving in Switzerland from Italy. This is a dramatic legal change to the Geneva Freeport procedures described in *The Medici Conspiracy*.

### **The U.S. Museum Community's Reactions**

Naturally, the American museum community reacted to these events. Again, some history is in order to understand the significance of most recent events. The Association of Art Museum Directors (AAMD), the institution most influential upon art museums' individual missions and guidelines, in October 2001 issued a Position Paper that underscored that acquiring works is a "vital part of a museum's mission."<sup>9</sup> The report stated:

While it is highly desirable to know the archaeological context in which an artifact was discovered because this can reveal information about the origin of the work

and the culture that produced it, this is not always possible. Nevertheless, much information may be gleaned from works of art even when the circumstances of their discovery are unknown. Indeed, most of what we know about early civilizations has been learned from artifacts whose archaeological context has been lost.<sup>10</sup>

Since 2001, the museum community has been steadfast in supporting the cultural internationalist position, which maintains that liberal international exchange of cultural objects is preferable to retention of objects within the boundaries of their countries of modern discovery. The Position Paper described the nature and extent in 2001 of museums' due diligence concerning title and legal importation of an object from another country. It noted: "Conclusive proof is not always possible, because documentation and physical evidence may be inaccessible or lost."<sup>11</sup> Finally, the Position Paper noted that in an effort to deter the illicit trade in artifacts and "to ensure that the importation of art and artifacts from other countries is conducted in a lawful and responsible manner," museum directors considered the following questions:

- Is the country's cultural patrimony in jeopardy from pillage of archaeological and ethnological materials and/or other illegal actions, and how will the acquisition affect such activity?
- Is the importation of the cultural artifacts consistent with the interests of the international community, especially for scientific, cultural, and/or educational purposes?
- Is the importation consistent with applicable law, including relevant international conventions?
- How did the work come into the possession of the seller?
- Is there information and documentation that can be reasonably obtained to shed further light on the origins of the work and the circumstances of its acquisition?
- Is there evidence that the work is being legally exported?<sup>12</sup>

The Position Paper did not give any firm direction to art museum directors as to how the individual questions should be weighed or balanced in the evaluation process. Particularly significant is the last question regarding legal exportation. During the debates concerning the drafting and U.S. implementation of the UNESCO Convention, U.S. collectors and the U.S. museum community adamantly opposed the "blank check" approach, which would have required the United States to give effect to all foreign nations' export



restrictions. Thus, it is quite significant that in 2001, the AAMD decided to include the legality of the exportation of an object among the factors directors should consider.

In 2004, the AAMD revisited the issue of acquisition of archaeological materials and ancient art in its June 4, 2004, Task Force Report. It reaffirmed within the Report's Statement of Principles that incomplete documentation of ownership history should be excused, at least in some cases, because of an object's "rarity, importance, and aesthetic merit," "in the absence of any breach of law" or the Principles.<sup>13</sup> Such objects "may be acquired and made accessible not only to the public and to scholars, but to potential claimants as well."<sup>14</sup> Thus, the Report takes the position that in some cases acquisition of an incompletely documented object might benefit a true owner whose chances of finding the object may be increased.

The 2004 Report noted that "it is increasingly important that [the museum] rigorously research the provenance of a work . . . ."<sup>15</sup> The 2004 Report, like the 2001 Position Paper, provided a laundry list of factors for a museum to consider before acquiring a work, but no precise direction as to how to weigh or balance the factors. The 2004 factors are:

- the ownership history of the work of art;
- the countries in which the work of art has been located and when;
- the exhibition history of the work of art, if any;
- the publication history of the work of art, if any;
- whether any claims to ownership of the work of art have been made;
- whether the work of art appears in relevant databases of stolen works; and
- the circumstances under which the work of art is being offered to the museum.<sup>16</sup>

These 2004 factors are directly relevant to legal defenses that may be raised to defeat a civil claim to the work of art, such as statute of limitations, laches, and waiver. Legal claims and litigation are costly for museums to evaluate and defend.

Additionally, Guideline II(A)(2) instructs that museums should "make a concerted effort to obtain accurate written documentation with respect to the history of the work of art including import and export documents." Guideline III states that museums "should require sellers, donors, and their representatives to pro-

vide all available information and documentation, as well as appropriate warranties regarding the origins and provenance of a work of art offered for acquisition.”

Additionally, outside of the Guidelines, Part C is entitled “Legal Considerations.” It requires that museums “must comply with all applicable local, state, and federal U.S. laws, most notably those governing ownership and title, import, and other issues critical to acquisition decisions.” It continues to note the problematic complexity of the law applicable in antiquities cases:

The law relevant to the acquisition of archaeological materials and ancient art has become increasingly complex and continues to evolve. Since the status of art under foreign law may bear on its legal status under U.S. law [pursuant to the McClain doctrine], member museums must be familiar with relevant U.S. and foreign laws before making an acquisition.<sup>17</sup>

Moreover, Part D deals exclusively with the UNESCO Convention. It provides that member museums should not acquire objects falling into any of these categories:

1. any archaeological material or work of ancient art known to have been stolen from a museum, or a religious, or secular public monument or similar institution (Article 7b of the Convention);
2. any archaeological material or work of art known to have been part of an official archaeological excavation and removed in contravention of the laws of the country of origin; or
3. any such works of art that were removed after November 1970 regardless of any applicable statute of limitation and notwithstanding the fact that the U.S. did not accede to the Convention until 1983.<sup>18</sup>

In comparison to the 2001 factors, the 2004 factors focus with precision on key legal standards. Although the 2001 factors mention “applicable law,” which presumably meant criminal law and U.S. import regulations, and one factor implicating foreign export law, the 2001 factors’ core theme reflects concern about the impact of museum acquisitions upon unauthorized excavation in foreign lands and destruction of the archaeological record. In contrast, the 2004 factors take on a more legalistic, and perhaps defensive, approach that primarily reflects fear of costly lawsuits. They inherently implicate legal evaluation of the ability to defeat claims that may be brought.

This is not to say that the Guidelines foreclosed acquiring an object with knowledge that there was a distinct chance it might later be restituted, but

museum deaccessioning generally is strongly disfavored. Guideline F in the 2004 Report states that if a member receives a claim to an object, it should seek an "equitable resolution," "even though this claim may not be enforceable under U.S. law." "Possible options that should be considered include: transfer or sale of the work of art to the claimant; payment to the claimant; loan or exchange of the work of art; or retention of the work of art."<sup>19</sup>

Additionally, archaeological ethics remained a concern for the AAMD. Part E of the 2004 Report, entitled "Incomplete Provenance," provides that in cases where rigorous research could not provide "sufficient information on the recent history of a proposed acquisition," "museums must use their professional judgment . . . in accordance with the Statement of Principles" to determine whether to acquire an object. The exercise of judgment should "recognize that the work of art, the culture it represents, scholarship, and the public may be served best through the acquisition of the work of art by a public institution dedicated to the conservation, exhibition, study, and interpretation of works of art." Examples are provided:

1. "if the work of art is in danger of destruction or deterioration"; or
2. "the acquisition would make the work of art publicly accessible, providing a singular and material contribution to knowledge, as well as facilitating the reconstruction of its provenance thereby allowing possible claimants to come forward."<sup>20</sup>

Another notable factor that museums were instructed to take into account was:

whether the work of art has been outside its probable country or countries of origin for a sufficiently long time that its acquisition would not provide a direct, material incentive to looting or illegal excavation; while each member museum should determine its own policy as to length of time and appropriate documentation, a period of ten years is recommended.<sup>21</sup>

In this very important respect, the 2004 Guidelines injected a factual assessment of the acquisition's likely impact upon looting. In 2004, the AAMD's view was that a ten-year separation between the likely date an object was improperly excavated and its acquisition date meant that the acquisition likely had no "direct, material incentive to looting or illegal excavation." Most archaeologists would dispute this assessment.

Regardless of who was right factually, by 2004, the AAMD approach to weighing the pros and cons of a possible acquisition became primarily, but

not exclusively, a legalistic one. Although the AAMD recognized that acquisitions—even those that would not violate any applicable law—should not encourage destruction of the archaeological record, risk to the museum's budget became the primary guiding light.

On February 27, 2006, the AAMD Subcommittee on Incoming Loans of Archaeological Material and Ancient Art issued a Report largely extending the 2004 Principles and Guidelines to loans and particularly to long-term loans like those arranged between various U.S. museums and Italy. There are a few important distinctions in the 2006 Report. For example, in regard to determining ownership history, in addition to asking lenders for information and appropriate warranties, the Guidelines provide: "In some cases, the museum may decide that it is responsible and prudent to make further inquiries from other possible sources of information and/or databases." As to loans for visiting exhibitions, the Guidelines provide that principal responsibility for researching ownership history falls upon the AAMD member museum primarily responsible for organizing it. The Guidelines also caution that while the borrowing institution generally will accept the lending institution's assessment of the ownership history, legal issues may arise for the borrowing institution. Finally, it should be noted that the Statement of Principles in Section I(A) heavily reflects the December 2002 Declaration on the Importance and Value of Universal Museums, signed by some of the world's largest and most prestigious museums, including some of those that received restitution demands from Italy.

The AAMD's January 2007 Position Paper, "Art Museums, Private Collectors, and the Public Benefit," presents a long laundry list of factors by which to evaluate a potential loan or donation. None of the factors listed is unusual. Additionally, because the Position Paper applies to all art acquisitions and loans, the de-emphasis of issues related to archaeological ethics does not signify a departure from the Principles and Guidelines previously expressed.

It also is significant that whereas the prior reports, guidelines, and position papers did not in any way address how to weigh or balance the factors, this 2007 Position Paper states: "Each of the 176 institutions represented by the membership of the Association of Art Museum Directors (AAMD) answers these questions according to the unique mandate of its mission and the interests of its community."<sup>22</sup> Thus, AAMD member museums have now been given the directive to individually determine how the factors should be weighed or balanced.

On June 4, 2008, the AAMD issued its "New Report on Acquisition of Archaeological Materials and Ancient Art" (New Report). It announced the creation of a new AAMD website where museums will publish images and information about new acquisitions. The New Report represents a shift in focus from the prior approaches while allowing flexible, case-by-case assessment. Instead of leaving it to individual museums to assess the potential legal risk and the object's possible link to clandestine excavation within the last ten years on a full case-by-case basis, the New Report partially adopts the "blank check" approach in the UNESCO Convention previously rejected by the United States. It "recognizes the date of the [UNESCO] Convention, November 17, 1970," (1970) "as providing the most pertinent threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors."<sup>23</sup> Guideline E states, in relevant part, that AAMD member museums should not acquire a work unless its provenance research:

1. substantiates that the work was outside its country of probable modern discovery before 1970, or,
2. was legally exported from its probable country of modern discovery after 1970.

Thus, in the AAMD's view, amnesty is the rule for objects excavated prior to 1970. The blank check approach, which was so vigilantly fought by the museum and collector community during the UNESCO debates, now has been adopted by the AAMD.

Principle I(F) nonetheless still retains flexibility of judgment when complete ownership history is unavailable. It states:

Recognizing that a complete recent ownership history may not be obtainable for all archaeological material and every work of ancient art, the AAMD believes that its member museums should have the right to exercise their institutional responsibility to make informed and defensible judgments about the appropriateness of acquiring such an object if, in their opinion, doing so would satisfy the requirements set forth in the Guidelines below and meet the highest standards of due diligence and transparency as articulated in this Statement of Principles.<sup>24</sup>

Guideline II(F) expands upon this flexibility, which can be fairly described as an intentional loophole:

The AAMD recognizes that even after the most extensive research, many works will lack a complete documented ownership history. In some instances, an informed judgment can indicate that the work was outside its probable country of modern discovery before 1970 or legally exported from its probable country of modern discovery after 1970, and therefore can be acquired. In other instances, the cumulative facts and circumstances resulting from provenance research, including, but not limited to, the independent exhibition and publication of the work, the length of time it has been on public display and its recent ownership history, allow a museum to make an informed judgment to acquire the work, consistent with the Statement of Principles above.<sup>25</sup>

The overarching guiding light to operating within the loophole and deciding whether to acquire an object with incomplete ownership history back to 1970 is stated in Guideline II(F) (second paragraph): "In both instances, the museum must carefully balance the possible financial and reputational harm of taking such a step against the benefit of collecting, presenting, and preserving the work in trust for the educational benefit of present and future generations."<sup>26</sup> This emphasis is less legalistic than that of the 2004 Report. The guiding light is not that of preserving archaeological context, but that of the bottom line of the museum. This approach also underscores the importance of museum leaders' fiduciary obligations to manage museums and the objects within them for the public. As stated by Philip de Montebello, the esteemed former Director of the Met, who led the institution for thirty years, in regard to the "close correlation between public trust and a museum's reputation":

A nick on either one constitutes a serious breach of both. In essence, a museum should have zero tolerance for even a single derisory comment from a credible source occasioned by even a single wayward step from its mission, and to that end, every effort should be made to assure the absolute integrity of all we do.<sup>27</sup>

The 2008 Report largely mirrors the remaining due diligence standards of the 2004 Report, but a few differences should be highlighted. Guideline II(A) seems to strengthen the due diligence standard: "Member museums should thoroughly research the ownership history of archaeological materials or works of ancient art . . . prior to their acquisition, including making a rigorous effort to obtain accurate written documentation with respect to their history, including import and export documents."<sup>28</sup> Moreover, Guideline II(C) states that member museums "should require sellers, donors, and their representatives to provide all information of which they have knowledge, and

documentation that they possess, related to the work being offered. . . .”<sup>29</sup> Thus, the AAMD is recognizing that the old days—of almost unquestioned faith in representations by esteemed donors about an object’s ownership history—are over. The market’s previous standard of full anonymity and secrecy is changing.

The American Association of Museums (AAM) also weighed in on the debate in its new “Standards Regarding Archaeological Material and Ancient Art” (AAM Standards), approved by its Board of Directors on July 2008. The new AAM standards largely mirror the AAMD approach, but arguably put even more of an emphasis on the date UNESCO was opened for signature, November 17, 1970 (1970). The AAM Standards state that even if an acquisition would be legal, museums “should not acquire any object that, to the knowledge of the museum, has been illegally exported from its country of modern discovery or the country where it was last legally owned.”<sup>30</sup> The standards “recommend” that “museums require documentation that the object was” (1) “out of its probable country of modern discovery” by 1970; or (2) legally exported out of its country of modern discovery. The AAM policy also contains a loophole “when there is substantial but not full documentation” of provenance, and states that if a museum utilizes the loophole, “it should be transparent about why this is an appropriate decision in alignment with the institution’s collections policy and applicable ethics codes.”<sup>31</sup>

Dr. Kwame Opoku, a frequent contributor to the debate concerning repatriation of African objects from Western museums, who wrote an essay in 2008 that attracted a rejoinder on Afrikanet.info from de Montebello, critiqued the AAM loophole:

The solution of the AAM is what one often finds where there is division of opinion and both sides are almost equally strong: a bold general principle with an exception which almost negates totally the general principle. Both sides win. One step forward and one back.<sup>32</sup>

Certainly the expression of the U.S. museum community’s new attitude toward the “blank check” approach represents a significant development. Also significant is the fact that the Getty and the Indianapolis Museum of Art had already adopted the 1970 “blank check” approach for new acquisitions—without a loophole—in 2006 and 2007, respectively.<sup>33</sup>

The AAM standards apply to new acquisitions, but the standards take a revolutionary position in regard to existing collections. They state in relevant part:

In order to advance further research, public trust, and accountability museums should make available the known ownership history of archaeological materials and ancient art in their collections, and make serious efforts to allocate time and funding to conduct research on objects when provenance is incomplete or uncertain. Museums may continue to respect requests for anonymity by donors.<sup>34</sup>

This standard is revolutionary because there is no limit to the number of objects within a museum's collection to which the standard applies, and some of the most prestigious institutions' collections contain hundreds of thousands of objects. The task of full provenance research as to all archaeological and ancient art objects obtained after 1970 would be enormous. As stated by Lee Rosenbaum, who pens the influential CultureGrrl blog: "Did they realize what they were saying?"<sup>35</sup> It should be noted, however, that the new standards are aspirations, not requirements.

Finally, the new AAM Standard 4 seems to be a more reconciliatory approach toward handling claims to objects as well. It states:

Museums should respectfully and diligently address ownership claims to antiquities and archaeological material. Each claim, whether based on ethical or legal considerations, should be considered on its own merits.

When appropriate and reasonably practical, museums should seek to resolve claims through voluntary discussions directly with a claimant or facilitated by a third party.<sup>36</sup>

This new standard heavily reflects the cooperative approach to claims to Nazi-looted art previously advanced by the AAMD and the AAM, as well as what are referred to as the "Washington Principles," eleven principles acceded to by 44 governments, at a conference held in Washington, D.C. on December 3, 1998, which were reinforced in 2000, in Vilnius, Lithuania.<sup>37</sup> The AAMD, on June 4, 1998, issued guidelines that called on member museums to resolve legitimate claims to art in their collections "in an equitable, appropriate, and mutually agreeable manner." The Washington Principles drew heavily from the AAMD guidelines and call for nations to reach "just and fair" solutions to Nazi-looted art claims. The AAM November 1999 Guidelines, amended in April 2001, echo the AAMD standard. Similarly, the museum standards recommend the use of mediation over litigation, while Washington Principle 11 encourages nations "to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms



for resolving ownership issues.<sup>38</sup> AAM Guideline 5 highlights that museums must review such claims while minding their fiduciary obligations to hold collections in the public trust. All of these standards and guidelines recognize that there is a tremendous variety in individual cases, and thus call for case-by-case evaluation. Although conciliatory in nature, it cannot be denied that the guidelines and principles are vague and lack instruction as to what is "equitable," "appropriate," or "just and fair" in difficult cases. Things have changed since this conciliatory tone was struck in 1998.

Ten years after the pivotal AAMD Report and Washington Principles in 1998, we are in an era where museums have begun to file declaratory judgment actions against claimants. They are throwing down the litigation gauntlet against fragile, perhaps weak, claims. It is telling that in May 2007, the AAMD issued a Position Paper stating that despite the large amount of Nazi-era provenance research that had been conducted in museums between 1998 and July 2006 (which one should note had not been uniformly progressive in all institutions), only "twenty-two works in American museum collections have been identified as having been stolen by the Nazis and not properly restituted after the war."<sup>39</sup> Although those who instructed the filing of declaratory judgment actions certainly felt such action was necessary to fulfill their fiduciary obligations to preserve museum collections for the public, it certainly seems a dramatic turn away from the spirit of 1998 and 1999. Is the same in store for antiquities? Will we transition out of this new phase of openness, to a period of preemptive litigation strikes to defeat claims?

### Conclusion

As a consequence of these developments and others, objects with quality documentation of their ownership history are now highly prized by collectors and museums. Does that mean that one should presume, without more empirical research, that objects lacking impeccable documentation are looted?

Many archaeologists, consistent with policies of the Archaeological Institute of America, would say, "yes." Those policies reflect concern about the destruction of the archaeological record, as well as weaknesses a market filled with unprovenanced objects poses for science. For example, the market demand for undocumented Coptic sculptures allowed fakes to infiltrate museum and private collections for more than forty years, which has distorted our understanding of ancient Egypt and the importance of Christian

iconography there.<sup>40</sup> At the Brooklyn Museum alone, approximately one third of its formerly prized collection of Coptic sculptures are believed to be fakes. At this point, it will be hard, for even experts, to tease out all of the fakes from collections throughout the United States and the world. To try to stop archaeologists from inadvertently enhancing the value of looted artifacts, the American Schools of Oriental Research (ASOR) and the Archaeological Institute of America (AIA) prohibit initial publication in their journals of unprovenanced objects, with the exception of an article highlighting the looting problem.

On the other hand, collectors and many within the museum community would respond, “no.” The customary practice of the collecting market has never required such a high level proof of ownership—even if it should have done so. Additionally, chance finds are possible. Floods and earthquakes happen, people find objects on private property to which national ownership laws may not apply, and old collections do exist. If we ban such objects from museums and scholarly study, what consequences will we experience? What information will we lose in the overarching fight to preserve archaeological context?

Some scholars of antiquity are caught in the middle. In August 2007, the Biblical Archaeological Society issued a Statement of Concern in relation to the “movement that has received much publicity lately that condemns the use of unprovenanced antiquities from consideration in the reconstruction of ancient history.”<sup>41</sup> Although they noted their uniform condemnation of looting, as has the AAM and the AAMD, they stated that a history of the ancient Near East and the Mediterranean basin “cannot be written without the evidence from unprovenanced antiquities.” The Statement identifies many important unprovenanced and looted antiquities: “the Dead Sea Scrolls, the Nag Hammadi Codices, the recently reported Gospel of Judas, the Wadi Daliyeh papyri,” coins, stone seals, and “hundreds of thousands of cuneiform tablets, the basis of our understanding of Mesopotamian history.” The Statement in particular criticizes the ASOR and AIA publication policies, claiming that it is “almost universally recognized” that the policies have “had little or no effect on looting.” At an October 2008 conference in Chicago, at De-Paul University College of Law, some in the museum community were saying the same is true of museum acquisitions. The Biblical Archaeological Society Statement asserted: “Scholars cannot close their eyes to important information.” It continued:

7. We do not encourage private collection of antiquities. But important artifacts and inscriptions must be rescued and made available even though unprov-

enanced. When such objects have been looted, the antiquities market is often the means by which they are rescued, either by a private party or a museum. To vilify such activity results only in the loss of important scholarly information.

8. We would encourage private collectors of important artifacts and inscriptions to make them available to scholars for study and publication. Too often collectors who do make their objects available to scholars are subject to public obloquy. As a result, collectors are disinclined to allow scholars to study their collections, and the public is the poorer.<sup>42</sup>

To conclude, it seems there has been a dramatic shift in significant segments of both the archaeologist and museum/collector camps concerning the best approach for museums and collectors who acquire objects. The initial cultural nationalism versus cultural internationalism framework was useful to start the discussion, but at a point the discussion seemed to become too polarized to lead to useful solutions. The revelation of the extent of infection of the market in certain objects with fraudulent or looted goods has caused the conversation to evolve in both the archaeologist and museum/collector camps. Regardless of one's view of cultural nationalism, the market in cultural objects, or politics,<sup>43</sup> present acquisitions invite a whole host of more complex legal issues to consider. Although hard empirical data would be useful to fully understand the ramifications of acquisition and publication policies, such data necessarily will be very difficult to obtain, because of the clandestine, and often criminal, nature of activities at an object's source, and the path of the object to the seemingly licit market. We cannot allow the lack of such data to become an excuse to close down open communication. Members of the cultural heritage community must continue to let informed logic and ethics guide their policies and practices as they act as stewards of objects for the public trust.

### Notes

1. Peter Watson & Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities* (2006).
2. This policy has since been tightened further, as discussed in Section II.
3. Elisabetta Povoledo, *Getty Is Lent a Bounty of Berninis*, N.Y. TIMES, Feb. 2, 2008. See also Elisabetta Povoledo, *Italy Makes Its Choice of Antiquities to Lend Met*, N.Y. TIMES, Mar. 15, 2006.

4. Associated Press, *Ex-Getty Curator Says She's Taking Fall*, Dec. 29, 2006.
5. Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES (Jan. 18, 2008).
6. Watson & Todeschini, at 79.
7. A bronze krater seemingly of Trebenishte type is currently on loan to the Museum of Fine Arts in Houston from the Shelby White-Leon Levy collection, and there are calls for the museum to release its ownership history. The most probable find-spot for such a krater is within the Former Yugoslav Republic of Macedonia.
8. Associated Press, *Italy's Art Squad Says Archaeological Looting Declining*, Jan. 17, 2008.
9. Association of Art Museum Directors, *Art Museums and the International Exchange of Cultural Artifacts*, Oct. 2001.
10. *Id.* at 1-2.
11. *Id.* at 2.
12. *Id.*
13. Association of Art Museum Directors, *Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art*, June 4, 2004, at I(D).
14. *Id.* Other AAMD Reports, Position Papers and Guidelines discuss evaluating claims and deaccessioning objects.
15. *Id.*
16. *Id.* at II(A)(1).
17. *Id.* at Part C.
18. *Id.* at Part D.
19. It should be noted here that the AAMD in a November 2007 Position Paper stated that one consideration when determining whether to deaccession an object is whether "evidence has come to light that the work was stolen from another institution or that it was illegally exported or imported in violation of the laws of the jurisdiction in which the museum is located." Association of Art Museum Directors, *Art Museums and the Practice of Deaccessioning*, Nov. 2007, at 2. Note that the concept of the violation of a foreign nation's export regulation is not a listed consideration.
20. *Id.* at Part E.
21. *Id.*
22. Association of Art Museum Directors, *Art Museums, Private Collectors, and the Public Benefit*, Jan. 2007.
23. New Report at Statement of Principle I(E).
24. Association of Art Museum Directors, *Art Museums, New Report on Acquisition of Archaeological Materials and Ancient Art*, June 4, 2008, at Statement of Principle I(F).
25. *Id.* at Guideline II(F).
26. *Id.* at Statement of Principle II(F), ¶ 2 (emphasis added).

27. Philip de Montebello, *Art Museums, Inspiring Public Trust, in Whose Muse?: Art Museums and the Public Trust* 151-52 (James Cuno ed., 2004).
28. New Report at Guideline II(A) (emphasis added).
29. *Id.* at Guideline II(C).
30. American Association of Museums, *Standards Regarding Archaeological Material and Ancient Art*, July 2008, at Section 2, ¶ 3.
31. *Id.* at Standard 2, ¶ 6.
32. Kwame Opoku, *New AAM Standards for the Acquisition of Archaeological Material and Ancient Art: A Minor "American Revolution"?*, Museum Security Network Email, Sept. 7, 2008.
33. The Indianapolis Museum of Art policy was a stop-gap pending the adoption of new standards by the AAMD. According to a statement issued by its Director, Maxwell Anderson, and published in THE ART NEWSPAPER on April 30, 2007, the British Museum acknowledged 1970 as a bright line in March 2004. The British Museum is one of the signatories of the 2002 Declaration on the Importance and Value of Universal Museums.
34. AAM Standards at Standard 3.
35. Lee Rosenbaum, *AAM's New Antiquities Acquisition Standards: More Sweeping Than AAMD's*, Aug. 12, 2008, <http://www.artsjournal.com/culturegrl/2008/08>
36. AAM Standards at Standard 4.
37. Nations met again in 2000, to build upon the Washington Principles in Vilnius, Lithuania, under the auspices of the Parliamentary Assembly of the Council of Europe. [http://www.lootedartcommission.com/lootedart\\_councilofeuropa.htm](http://www.lootedartcommission.com/lootedart_councilofeuropa.htm) (last visited Nov. 1, 2008). The Vilnius Forum generated a declaration expressing continued support of the Washington Principles without significantly refining them or expanding upon them. <http://www.lootedartcommission.com/vilniusforum> (last visited Nov. 1, 2008).
38. Washington Principles at Principle 11.
39. Association of Art Museum Directors, *Art Museums and the Identification and Restitution of Works Stolen By the Nazis*, May 2007, at ¶ 3.
40. The fakes themselves seem to date back to the 20th century.
41. The Statement of Concern is reprinted in John H. Merryman, *Art Law Issues*, SM056-ALI-ABA 481 (2007) (available in Westlaw).
42. *Id.* at ¶¶ 7-8.
43. See generally James Cuno, *Who Owns Antiquity?* (2008) (railing against "nationalist retentionist cultural property laws").