

Art & Cultural Heritage Law Newsletter

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Encouraging the Mobility of Visual Art Collections in the EU, Part 1

JASON-LOUISE GRAHAM

Introduction

The concept of the mobility of visual art collections has been a reoccurring focal point of cultural programs in the EU, spurred on throughout several EU council presidencies. Europe is home to one of the largest and most expansive cultural heritage collections in the world – which must respond to extremely high demands. Collection mobility, particularly in the framework of the Lisbon Agenda,¹ which aims for greater social, cultural and economic cohesion, is seen as a policy tool to enhance the many different cultural identities in Europe, but also a tool for cohesion between these diverse entities in a structural manner. However, major obstacles including the high costs of transportation and insurance, different standards of active and passive conservation or discrepancies in safety standards and national laws of repatriation, and thus trust between the players, have made it so that on average museums can show only a minute percentage of their collections at a point in time. With the support of EU council instruments, the theme of collection mobility has been developed throughout major conferences in relation to the different EU council

presidencies² and has resulted in a number of successful national campaigns that have set the international framework and guidelines for best practices of future collection mobility. During Belgium's Council presidency (July 1 – December 31, 2010) Belgian cultural professionals and government representatives for culture played an active role in completing concrete Council recommendations surrounding indemnity schemes for collection mobility, finalizing reports as part of the EU's expert Working Groups in the Open Method of Coordination (OMC) framework.³ With structured access to existing information, recommendations, guidelines, codes and action plans produced by top museum professionals from various member states and EU actors (i.e. expert working groups), many museums will be able to promote and implement the best possible mobility

² The EU Council (Council of Ministers) is made up of one national minister from each country and represents the legislature of the European Union. Every six months, the EU council rotates its presidency chair in charge of running meetings and setting the agenda. This way each country can get a chance to advance both national cultural portfolios as well as a fresh take on EU related portfolios (such as trade and foreign affairs).

³ OMC was introduced by the European Council of Lisbon, and is designed to help states coordinate and collaborate in addressing the reforms needed in order to reach the Lisbon goals. The OMC's fourth cycle ended in 2008. For more information see http://ec.europa.eu/invest-in-research/coordination/coordination01_en.htm#1 (last visited Jan. 14, 2011).

¹ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at <http://www.unhcr.org/refworld/docid/476258d32.html> (last visited Jan. 20, 2011) (hereinafter "Lisbon Agenda").

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Bianca Moscatelli

On behalf of the Art & Cultural Heritage Law Committee,

welcome to our Winter 2011 Issue! This summer we provided you with the diverse perspectives of our distinguished colleagues each addressing a single topic – the current state and future challenges of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as presented at the Committee's panel at the International Law Section's Spring Meeting. For this issue, a new group of accomplished contributors have traveled around the world to report on new important issues and developments in the field of art, cultural heritage, and cultural property law.

In this issue, Leila Aminadollah reports from Italy on the Italian government's continued battle with Getty Museum for the return of its Victorious Youth bronze. Kate FitzGibbon was in even warmer weather, examining in person the rapid and sweeping museum building taking place in Abu Dhabi, and considering how this aggressive cultural development will maintain harmony with the religious and conservative culture of the region. We are also pleased to present the first in a two-part series by Jason-Louise Graham, reporting from Belgium, that will examine the past, present and future of mobility in art collections within the EU.

Our own Sharon Erwin considers the various ways cultural organizations are using social media, and offers some important considerations to those hoping to utilize social media as a networking and fundraising tool. Valentina Vadi, a lecturer of International Law at Maastricht University in the Netherlands, shares with us her investigation into the current state of the law protecting underwater cultural heritage. Finally, Amanda Neiderauer takes a close look at the role of authentication boards, particularly in the context of recent legal action involving the Andy Warhol Foundation, and Naomi Kailes examines troubling inconsistencies within the military exception found in international cultural protection law. We are also pleased to present a review of the first annual National Cultural Heritage Law Moot Court Competition by Emily Monteith and Virginia Cascio. The second annual competition will be held on February 25-26, 2011 in Chicago.

We hope you enjoy this exciting discussion.

*David Bright, Sharon Erwin and Jacqueline Farinella,
Newsletter Editors*

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and loan standards in a concerted manner and on a wider scale.

This article aims to generate an updated and complete overview⁴ of what are the most important instruments and criteria necessary to facilitate collection mobility of public art collections (which are extra commercium, or not technically part of the economic market of goods), within and beyond national borders, as well as what the obstacles may be. This article will accomplish its goal by first presenting the existing legal instruments and denoting the role of important players, like the UK and the Netherlands, in developing and implementing these instruments. Second, this article will use the method of direct sources in the form of interviews with top museum professionals, cultural representatives on an EU level and legal advisors from Belgium to gain insight into the approach and position of cultural institutions to understand the benefits, legal challenges and conduits of mobility of visual art collections in the EU. This article prefaces a future study on the complications, solutions possibilities of collection mobility within Belgium, as a complex and struggling federal system at the heart of Europe.

I. Brief Background of Collection Mobility

BEGINNINGS

The subject of intra- and inter-border mobility of art collections in Europe, following the lead of the UNESCO convention of 1970 (dealing with illicit mobility of cultural objects) as well as the creation of international cultural organizations of museum professionals – the first known as the Réunion des Musées Nationaux, or the BIZOT Group, in the late 1980s⁵ has become an important

4 The first draft of this article was composed on June 1, 2010, two months before the EU expert working group published its final report in August 2010, with recommendations addressed to Member States, the museum community and the European Commission. NEMO, the Network of European Museum Organizations, participated in the work of the group as an observer. This report will feed into discussions by the Cultural Affairs Committee of the future Council Workplan on Culture for 2011 onwards.
5 Resolution on the Implementation of Regulation (EEC) No. 3911/92 and Directive 93/7/EEC (2002) (“... (4) International organisations have drawn up instruments designed to promote

subject on a European level particularly in the early 1990s.⁶ The first legal instruments developed concerning mobility of cultural goods, Regulation (EEC) No 3911/92⁷ “on the export of cultural goods” and Directive 93/7/EEC “on the return of cultural objects unlawfully removed from the territory of a Member State” were constructed “for the protection of the cultural heritage of the Member States”. While these instruments represent a step towards conceptualizing legal frameworks of collection mobility, they also raised the sense of national cultural protectionism⁸ and the bar for future mobility of cultural objects.

Since 2000, with the onset of the Lisbon Agenda, a new impetus was given to the field of culture thanks to a drive to optimize mobility (of goods, services, capital and people) and social cohesion. A dual need emerged wherein culture would be joined into the discussion of economic competitiveness. Firstly without mobility, cultural institutions and their art objects would become stagnant in a continent of free-movement, not only economically and in terms of information mobility but also in terms of innovation. In other words, culture had a need to become liberalized in the Schengen area – the free trade area (for currency, workers, goods and services) ending at the borders of the European Union. A strong institutional framework had to be developed to protect the irreplaceable and invaluable objects once they were transported beyond the safe

this protection, such as the 1970 Unesco Convention ...”).

6 Id. (“... the 1985 Council of Europe Convention and the 1995 Unidroit Convention ...”).

7 Council Regulation 3911/92 (1992).

8 In this light, the European Parliament adopted a Resolution based on the Commission’s report on the implementation of Regulation (EEC) No 3911/92 and Directive 93/7/EEC, on 21 June 2001, where upon the Council established a Resolution on 21 January 2002. This Council Resolution “invites the Commission to pursue the initiatives it has already launched to contribute more effectively to the protection of the Member States’ cultural heritage and to the effective functioning of the mechanisms set up by Regulation (EEC) No 3911/92 and by Directive 93/7/EEC and develop, if necessary, other initiatives, for example a work programme, in the context of the Advisory Committee on cultural goods ...” Council Resolution on the Commission report on the Implementation of Regulation (EEC) No 3911/92 on the Export of Cultural Goods and Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, No C 32/3 (2002).

museum walls and national borders.

This institutionalized cultural framework, however, could not be forged by harmonization under community law. It was, rather, achieved through the Open Method of Coordination (OMC), “an appropriate framework for cooperation” (Council Resolution 21 January 2002), established by the Lisbon Agenda in 2000. This delicate framework would lead to a complex but effective system of coordination between EU Council presidencies, the EU culture committee, competent Member State executives, National Museum Professionals and finally international art/cultural institutions. The latter have played an especially vital role in the development and survival of Europe’s Cultural Programme (both in 2000 and 2007-2013) in its setup and its maintenance.

The theme of culture is largely a non-EU competence, and the initiatives have come from individual member states and from international network groups.⁹ In as much, Mr. Hans Feys of the Flemish Agency for Art and Heritage,¹⁰ mentions that the first suggestions for developing a ‘mobility of collections policy’ came from the renowned BIZOT group, made up of top-museum professionals, who began to feel an untenable financial strain when it came to short term exhibit making. Insurance costs, travel costs, legal obstacles to the mobility of works and

9 The Réunion des Musées Nationaux, also known as the Bizot Group and established in 1986, follow the International Council of Museums (ICOM) code of Ethics for Museum Professionals created in 2006. The Network of European Museum Organizations (NEMO) established in 1992 provides information to museums on EU initiatives and lobbies the EU on issues relevant to museums - promoting their importance to EU policy makers, and encourages exchange of information between museums. The International Organization for the Conservation of Contemporary Art (INCCA) is a network of professionals who have access to each others unpublished information (artist interviews, condition reports, installation instructions etc) through Database for Artists’ Archives, in order to gain knowledge on the active and passive conservation of modern and contemporary art. The Federation of European Art Galleries Association (FEAGA) represents the political interests of over 2000 modern and contemporary art galleries in the EU and Switzerland. It is active on the European policy level in Brussels, and aims to strengthen information about the profession of galleries, especially their support of artist in building an art market.

10 Interview with Mr. Hans Feys, Flemish Agency for Art and Heritage (May 31, 2010).

Continued on page 4

cultural workers, but also obscurity and misinformation were all aspects which impeded the cultural institutions from effectively running their enterprises. The BIZOT group became active, lobbying UNESCO, formulating the needs of museums and aggrandizing their network with other museums in need. Though the EU had competence in the field of culture of Member States, and would not become active in developing a framework for culture until 2000, the legal obstacles and financial disadvantages for cultural institutions were disabling them not only from being competitive on the market, but also disabled them from participating in the exchange of goods (and workers) within the free movement zone. So, according to Feys, two discourses merged: the museum discourse on the need to enhance exhibitions, and the political discourse on the need to create cohesion and foster understanding between cultures by sharing and exchanging the common European heritage and specific cultural traditions of member states. The merger of these two discourses led to the development of this subject in the EU.

COMMUNITY INSTRUMENTS AFTER THE LISBON AGENDA

With the existence of new legal instruments to protect the cultural heritage of Member States and demand of museum groups to ameliorate their capacities to function, appropriate frameworks had to be developed wherein this protection could occur in both a transparent and effective manner, while not removing the option of cultural sharing in the European community.¹¹ In as much a trajectory of conferences to develop such

¹¹ According to Lucie Lambrecht, this refers to the important decision of the Court of Justice of the European Union, decided on December 10, 1968, *Commission of the European Union v Italian Republic*, wherein "the Court ruled (...) that the Italian Republic, by continuing to levy after 1 January 1962 the progressive tax laid down by Article 37 of the law of 1 June 1939 No. 1089 on the export to other Member States of the community of articles of an artistic, historic, archeological or ethnographic interest, has failed to fulfill its obligations under article 16 of the treaty establishing the European Economic Community; (...) Interview with Lucie Lambrecht, May 31, 2010. See Case 7-68, *Commission of the European Communities v Italian Republic*, 1968 E.C.R. 423.

frameworks began, each time led by an EU presidency. In 2003 a first conference was held in Greece (17-19 March 2003), on the Enhancement and Promotion of Cultural Heritage of European Significance. This was followed by Council Resolution 2003-4879 (24 November 2003) on the Cooperation between cultural institutions and museums. After a 2004 reunion of the BIZOT group, the Dutch presidency organized a conference called Collections on the Move in The Hague (9-10 October 2004), becoming the pivotal point for the development of the Collection Mobility framework in Europe. The working group of museum professionals leading the conference published a yellow book known as *Lending to Europe: Recommendations on collection mobility for European Museums*, which aimed to render a report on Policies of Collection Mobility, inspirations and best practices and practical solutions to problems of cultural mobility. It served as a recommendation for the Council upon which to base its benchmark program on culture. This conference has also been important in bringing to light the necessity of strong heritage decrees; definitive frameworks, legal conduits and technical specifications wherein cultural institutions can work legally and become eligible to receive subsidies for their operations. A few days after the conference (27-28 October), and based on the yellow book's recommendations, a Council Resolution 13839/04 (2004) on a Work Plan for Culture 2005-2006 was published (this plan would later be renamed Work plan for Culture 2005-2007). The Resolution establishes mobility as a central part of the work plan. In November of the same year, the Work Plan is adopted by the EU Council of Ministers.¹² The implementation of the

¹² The EU Work Plan for Culture 2005-2007 contains agreed measures relating to five priorities: (1) contribution of cultural industries to the achievement of the Lisbon targets; (2) digitisation of the cultural heritage; (3) upgrading the European Culture Portal; (4) mobility of works; and (5) mobility of artists. The implementation of the plan has to be centrally handled by the member states holding the EU Council presidency from 2004 to 2007. During Austria's presidency the emphasis was on "creativity and content". The next work plan is supposed to be adopted under the

plan must be centrally handled by the member states holding the EU Council presidencies between 2004 and 2007. In as much, the Council of Ministers under the British presidency approved the plan *Lending to Europe* on May 23, 2004.

A key aspect of this plan importantly suggests the creation of an Action Plan to address the issues of mobility and to create a well-functioning framework and reciprocal code of conduct. Accordingly, after the Increasing Mobility of Collections Conference (27-28 November 2005) in Manchester, and a 2006 reunion of the BIZOT group, the Finish presidency organizes a conference 20-21 July 2006 called *Encouraging Mobility of Collections*. In the conference, opened by Finish Minister of Culture Tanja Saarela and EU Commissioner of Culture and Education Ján Figel, museum professionals from all over Europe were gathered to discuss a draft Action plan.¹³ The most important aspect of this Action Plan will consist of creating Expert Working Groups, suggested previously in the *Lending to Europe* document, and their task to address several key problems as well as their aim to coordinate on an EU level. The Working groups must, however, be conducted in line with "Article 151 of the Treaty establishing the European Community whereby any measures to harmonize national legislation are excluded",¹⁴ and thus national experts must work together under the Open Method of Coordination (OMC).

The ensuing Action Plan for the EU Promotion of Museum Collections'

Portuguese presidency at the end of 2007. Bundesministerium für Unterricht, Kunst und Kultur, 2007, Glossary of terms and concepts used in the arts funding programme of the Ministry of Education, the Arts and Culture, available at http://www.bmukk.gv.at/enfr/arts_en/glossary_2.xml (last visited May 25, 2010).

¹³ Drafted in 2006 by Frank Bergvoet and Astrid Weij from the NL, Hillary Bauer from the UK, Jean-Luc Koltz from Luxembourg, Ulriche Emberger and Armin Mahr (chair) from Austria, Minna Karvonen and Paivi Salonen from Finland, Mechtilid Kronenberg Gunther Schaerte and Werner Weber from Germany.

¹⁴ Leeuw, de R. (2006) *Lending to Europe: Recommendations on collection mobility for European Museums*. Netherlands Ministry of Education, Culture and Sciences, 9 (April, 2005), www.codart.nl/images/Lending_to_Europe.pdf (last visited Feb. 22, 2010) (hereinafter "Expert Group Recommendation 2006").

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Mobility and Loan Standards is endorsed by the EU Cultural Affairs Committee on October 17, 2006. In the same year ICOM also re-publishes its code of ethics for museum. Finally, after the launch of the 2007-2013 Cultural Programme,¹⁵ the EU reaches an important level of cultural policy which has now become a cornerstone in development plans with third countries and international diplomatic relations.¹⁶ Finally, the Council's Work Plan for Culture 2008-2010, in accordance with globalization tendencies in the cultural and creative fields, aims to maximize access to these fields through the promotion of UNESCO conventions and the development of data, statistics and methodology. The Work Plan further aims to create a transparent overview of existing practices, and includes the need for an important follow-up schedule for the 2006 Action Plan.

Also important to the collection mobility project are cooperation between museum professionals, development of network groups and web portals, in particular the centralization of information via the NEMO website. These web portals and network groups have created positive opportunities to reduce any remaining discrepancies concerning proper conduct and standards, and have improved transparency and effectiveness of the Collection Mobility project. One result is the Standard Loan Agreement, created by NEMO from a collection of 360 different loan contracts and best practices gathered around Europe in 2005. Additionally, the development of the new CM 2.0 site (www.lending-for-europe.eu) is a prelude to the future of collection mobility and cultural networks becoming digitized.

ACTION PLAN 2006: EXPERT WORKING GROUPS

As a consequence of the vital 2006

¹⁵ Council Resolution on a European Agenda for Culture 2007/ C 287/ 01 (2007).

¹⁶ Initiated by the European Commission, the International Colloquium, "Culture and creativity as vectors of Development" took place in Brussels, from April 2-3, 2009. The conference gathered 500 cultural and development professionals, as well as policy-makers, from ACP and EU countries creating a platform for debates.

Action Plan mentioned above, the Open Method of Coordination (OMC) expert working groups,¹⁷ led by Hillary Bauer (Head of the Cultural Property Unit at Department for Culture, Media and Sport in the UK) and Rosanna Binacchi (Ministero per i Beni e le Attività Culturali Direzione Generale Beni Archeologici, Italy), have been active since 2007, finalizing their report in June 2010. The main topics discussed in this report are based on the specific fields proposed in the draft Action Plan,¹⁸ and include (1) state indemnity and insurance; (2) immunity from seizure for cultural objects on temporary loan; (3) long term loans; (4) prevention of thefts and illegal trafficking; and (5) mobility of museum professionals, or the exchange of expertise. Each sub-group addressed one topic, and was headed by a national representative. Hans Feys, advisor on cultural goods at the Flemish Arts and Heritage Agency, participated in the working group report on value, non-insurance and indemnity schemes. Caroline Marchant (Gestionnaire de la Collection du Patrimoine culturel de la Communauté française at the Ministère de la Communauté française de Belgique) and Nathalie Monteyne (registrar at the Royal Museum of Fine Arts, Antwerp) participated in the working group on long-term loans. Each working group concluded by July 2010¹⁹ with a report on each delegated topic, followed by a general report of the OMC working group. The general report aims to clarify certain common objectives as first defined in the OMC's preliminary September 2009 presentation in Brussels, including:

Propose incentive mechanisms for the mobility of collections including long term loans (e.g. Use standard proce-

¹⁷ In line with Article 151 of the Treaty establishing the European Community any measures to harmonize national legislation are excluded. Expert Group Recommendation 2006, supra note 14, at 9.

¹⁸ The proposed subjects include (1) conduct and administration; (2) value, non-insurance, indemnity and insurance; (3) immunity from seizure; (4) long term loans; (5) loan fees; (6) publications and copyrights; (7) digitization; (8) trust; and (9) reasons to lend/reasons not to lend.

¹⁹ Interview with Hans Feys, advisor on cultural goods at the Flemish Arts and Heritage Agency (May 31, 2010).

dures); Study possibilities to eliminating barriers that still persist in relevant legal and administrative frameworks at national level (e.g. Ensure more MS develop indemnity schemes; Introduce Immunity from seizure protection for loaned objects; Promote due diligence; Share information (through websites, possibly create new ones); Trust one another; Contrast theft and illicit trafficking; Build on capacity through exchanging experiences and experts.²⁰

The method applied by the working groups will not only ultimately lead to a well informed and detailed report, including the specific concerns and particularities member states have to deal with, but also a concise and accessible web database - www.lending-for-europe.eu - which will include this research and resulting reports. This site will be vital in accessing information and best-practice advice in a transparent manner. Finally, through the clearly defined role of the working groups by the 2006 Action Plan, Member States have had the opportunity to participate at an EU level, which at other occasions has seemed inaccessible due to the non-harmonizing legal status of the culture field.

The development of the EU instruments and working groups surrounding cultural mobility confirm that the OMC is complex but effective. Collaboration with international art and cultural institutions, led by the top national museum and art professionals, balance community recommendations, as well as national needs and recommendations, while producing an informed equilibrium among these different needs, consequently recommending new or further guidelines to Ministries of Culture and finally to the Commission who in turn also initiates (recommends) new tools - such as colloquia or action plans. In this way, thanks to the informed balance between museum professionals and EU institutions, Member States have been able to embark on structured advancement in the cultural field. The UK (1986, 1992

²⁰ OMC Working Group, "Mobility of Collections"; Presentation at the European Culture Forum (2009), available at ec.europa.eu/.../OMCgroupMobility_collections_RosannaBinacchi.ppt (last visited Jan. 20, 2011).

Continued on page 6

Exchanges thus give a chance for the works to become less obscure as well as a chance for museums to update their knowledge and capacities.

presidency),²¹ the NL (1986 presidency), PT (1992, 2000, 2007 presidency),²² FR (2000 presidency), GR (2003 presidency),²³ IT (2003 presidency),²⁴ the NL (2004 Presidency),²⁵ the UK (2005 presidency),²⁶ AU (2006 presidency),²⁷ FI (2006 presidency)²⁸ and DE (2007 presidency)²⁹ have all used their presidencies as moments to push major developments in the mobility of collections experienced coordinated developments.

II. The Benefits of Collection Mobility

The benefits of mobility have been defined with the help of the 2004 conference Lending to Europe as well as the 2006 Action Plan. In an interview with Director Paul Huvenne and Collection Manager Yolande Deckers at KMSKA (Antwerp's fine art museum), a true advocate for collection mobility programs who has managed to convince the Flemish government department for Art and Heritage management (IVA Kunsten en Erfgoed) to subsidize several important collection mobility programs, the benefits of collection mobility are palpa-

ble and real.³⁰

Such programs, according to Ms. Deckers, enrich the capacity of small museums to draw visitors, to revive them, but also to enhance the placement of works within a museum context where conditions are far more optimal than public halls or libraries. Secondly, such programs provide important interactions between regions and regional institutions, enhancing the cultural story and through it tourism.

Third, and vitally important, is the boost in passive conservation which derives from such mobility programs. In order to lend a work, both the borrower and lender must prepare conditions for its move in an optimal manner. Before a work can be loaned, the depots must be well researched in order to decide which works can be loaned. The work being loaned will be inspected, a condition and provenance report will be created and the work's existence will become documented more properly. The borrowing museum will have to describe its environment in order for the lending museum to assess whether the work can be conserved properly in it – this means both labor and professional capacity as well as temperatures and security. Exchanges thus give a chance for the works to become less obscure as well as a chance for museums to update their knowledge and capacities. Lastly, Deckers notes that the project will as a consequence lead to an important increase in understanding of the museum's own collection; not only in terms of technical and conservation needs but also in terms of the collection as an entity. Not lending works out would in this regard detract from the museum's full potential and collection discourse. Thus the practice of lending out works, by way of increased understanding, will also lead to more cohesive and coherent collection presentations seen by wider audiences.

Though these examples relate to one region (Flanders) within Europe, the benefits are entirely transposable to a European context and discourse. Collection mobility

21 "The UKRG (United Kingdom Registrar Group) Standard Facilities Report has set the framework for collection management and assessments since 1991." Expert Group Recommendation 2006, *supra* note 14, at 12.

22 See Lisbon Agenda and Council Resolution on a European Agenda for Culture, 2007/ C 287/ 01 (2007). This later act led to the EU Cultural Programme 2007-2013.

23 Conference: Greece: 17-19 March: Enhancement and promotion of Cultural Heritage of European significance.

24 Council Resolution 2003-4879: 24 November 2003: Cooperation between cultural institutions and museums (recommended by the EU commission).

25 During the Netherlands' Presidency, a high level expert group drew up a report in the conference Collections of the Move in The Hague (2004) called Lending to Europe, which consists of a description of the central thematic areas and practical recommendations for museums, Member States and EU institutions.

26 Council Adopts Work Plan for Culture 2005-2007 and the Council of Ministers on Culture 2005 (23 May) - British Presidency - approves 'Lending to Europe'.

27 The Austrian Presidency chaired a team representing the six successive Presidencies of the Netherlands, Luxembourg, the United Kingdom, Austria, Finland and Germany (2004-2007), which prepared a 'Draft Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards'.

28 To encourage the mobility of collections, Finland's EU Presidency organized a conference at the National Museum of Finland in Helsinki on 20-21 July 2006.

29 May 6 - 7, 2007 Bremen Declaration on Mobility of Museum collections. Main topic: Building up trust and networking.

30 Interview with Paul Huvenne, Director, and Yolande Deckers, Collection Manager, Koninklijk Museum Schone Kunsten Antwerpen (April 19, 2010)

within the EU is seen as a policy tool to enhance different cultural identities and cohesion between these diverse entities in a structural manner.

III. The Pivotal Role of Member States: Providing Indemnity Schemes

The 2004 conference Lending to Europe in The Hague showed that proper organization of collection mobility remains very costly. The conference also brought to light the vital role of the State in establishing indemnity schemes and thus the perimeters for subsidizing collection mobility.

As Lucie Lambrecht, Belgian lawyer and specialist in investment, art and cultural property law, explains, indemnity schemes concern the art risk premium or coverage, paid for by the state.³¹ These schemes are meant to relieve museums of the high costs of mobility laid upon them by private insurance companies for collection mobility inside the state or entering the state. They do so by (partly or entirely) transferring the liability of the museums for possible damages to works on loan to the state. This means that museums lending top works to other national museums are covered, but also that museums borrowing top works from other nations are covered for damages as well. When works are borrowed abroad, the borrowing state will simply pay the transportation and borrowing fees, but not the insurance or indemnity costs.

Indemnity schemes are usually applied to works which are no longer available for the market (*extra commercium*), having become too expensive to value (in relation to the market), but are still important cultural heritage.³² Indemnity schemes for collection mobility programs thus concern benefiting public institutions and public interests or goods, promoting the cultural attractiveness of the cities with quintessential culturally representative, or 'blockbuster', shows. But the financial relief also enhances a certain good-will of larger museums to invest more in exchanges with smaller museums who cannot otherwise afford

to borrow big or medium-big works. In as much, if important works from a private collection are to be loaned to a public institution, state indemnity schemes can also be used to cover the costs of the damage risks in these loans, thus avoiding the costs of having to insure these risks on the private insurance market. Museums and public art galleries also have an increased interest from to borrow from private collections because States want to increase the public's accessibility to top works that are not on the market nor in museums, and thus rarely seen. State indemnity covering the private person's costs will be in the public interest after all.

Indemnity schemes cover museums from costs under specific guidelines and situations, but, according to Ms. Lambrecht, such considerations surrounding indemnity are not only a matter of cultural economy but also a matter of politics and policy. The matter is political because collection mobility often involves legislation from different territorial entities, which may have different standards than the loaning country of origin. Countries such as the UK, for example, with a transparent registrar system and clear indemnity schemes, are not only models for best practice, but also the most desired exchange partners because of this trait. The matter is also one of policy because in providing indemnity, states give museums the choice between either the lowest cost and risk – or much more expensive private insurance. Of course in doing so, the state may gain an unfair advantage over the private insurance market and also disrupt the internal market system by discouraging such a business, which they still need at different levels of society. In order not to contradict European law, in terms of unfair advantages due to state subsidy or monopolies, indemnity schemes need strong legal guidelines that create a balance for both the economy and the preservation of cultural property.

IV. How Member States Can Prepare for Change

According to Christiane Bernedes, manager of collections at the Van Abbe

Museum in Eindhoven, most Dutch museums, including contemporary art museums, were positively affected by the Delta Plan for the Preservation of the Cultural Heritage.³³ This plan, lobbied for by the Netherlands Ministry of Welfare, Health and Cultural Affairs and researched by the Institute of Dutch Collections (or *Instituut Collectie Nederland*), developed a system for managing collections in the Netherlands. It aimed to develop a plan of how to keep collections up to par by creating high quality standards of good practice. All museums received money from the Dutch state to develop a registrar system (based on the British model) in which all the necessary information about artworks could be stored. Of course the mere creation of a comprehensive registrar system and even preferably – according to Bernedes – an online database for national museums in Belgium would not only be conducive to transparency nationally and internationally, but would also be helpful in bringing the lagging museums up to par with international knowledge – best practice and conservation standards – as well as strong communicative network relations. Building this knowledge and research of collections, or passive conservation, helps to build knowledge on how to prevent damage to works, what conditions the work should be kept in, etcetera. According to Ms. Bernedes, the Delta Plan was a breakthrough project that ultimately brought the Netherlands to the top of European museum standards and enabled them to launch important initiatives like *Museum Collections on the Move 2004*.

Indeed, in an effort to enhance passive conservation, the Working Group on *Mobility of Collections*'³⁴ final report addressing Member States, the museum

³³ Interview with Christiane Bernedes, manager of collections at the Van Abbe Museum in Eindhoven (April 12, 2010). See *The Deltaplan for the preservation of the cultural heritage in the Netherlands*, S. Scholten, 2008, available at <http://www.icn.nl/bibliotheek/publicaties-medewerkers-icn/scholten-s-pub-deltaplan-preservation> (last visited May 15, 2010).

³⁴ Established by the Council in its Work Plan for Culture (2008-2010) within the context of the implementation of the European Agenda for Culture.

Continued on page 8

³¹ Interview with Lucie Lambrecht (May 31, 2010).

³² According to Mr. Feys, contemporary art is usually still too inexpensive to apply to the indemnity coverage scheme in relation to the costs of such a program.

... it is the state's responsibility to provide smaller museums with financial and technical facilities and tools to reach the high standards set by larger museums and international organizations as ICOM ...



Jesse Wakeman

community and the European Commission, published in August 2010, are available on both the European Commission's website,³⁵ the CM 2.0 site (www.lending-for-europe.eu), and the NEMO website.

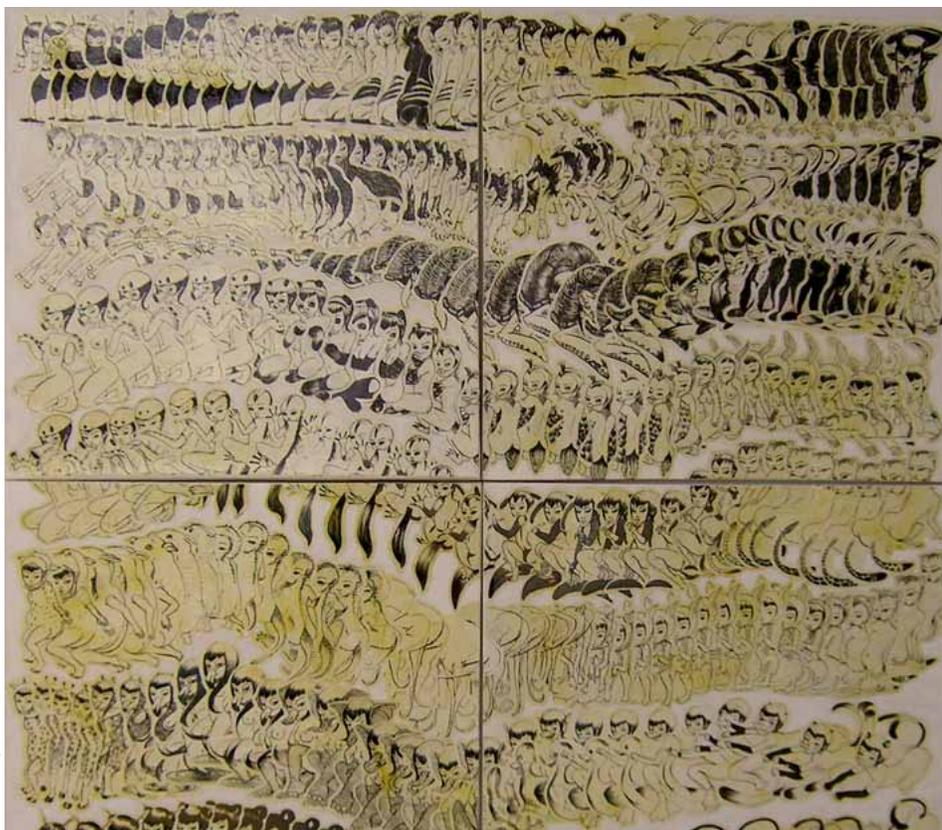
Conclusion

Bernedes suggests it is the state's responsibility to provide smaller museums with financial and technical facilities and tools to reach the high standards set by larger museums and international organizations as ICOM, so they can ultimately have the ability to participate with the international exchange. According to Ms. Lambrecht the creation of strong indemnity policies for mobility programs in countries such as the UK and the Netherlands, has led to the reduction of costs of insurance over time trust between par-

ties grow accordingly. Such policies can be established within the framework of clear national cultural policy programs. Finally, along with the implementation of best standards and practices defined by the last Working Group under the Council's Work Plan for Culture (2008-2010), the process of digitization is clearly gaining importance. The forum has, importantly, become digitized so all participants may remain up to date, but in the UK and the Netherlands we can also see how the digitization of national collections (in registrar systems) becomes an important aspect of passive conservation with long-term benefits. This next important step in collection mobility will invoke many questions surrounding copyright law, but perhaps also enable a vaster interaction between more international players. ♦

³⁵ The European Commission, http://ec.europa.eu/culture/our-policy-development/doc1575_en.htm (last visited Jan. 20, 2011).

Additional sources used for this article are on file with the author.



Lai-Chung Poon

Investing in Underwater Cultural Heritage: Challenges and Prospects

VALENTINA S. VADI

Ancient shipwrecks contribute to our understanding of history, providing a glimpse into different epochs and societies. In recent times, the advancement of technology has made it possible to find, visit and remove artefacts from shipwrecks that have been kept remote in the abyss for centuries. The increasing capability to reach these archaeological treasures has intensified the debate on related ownership and management issues. While private actors have claimed possession rights under the law of salvage and sold the artefacts, the scientific community and the public at large would demand the preservation of cultural heritage. In this broader context, the question whether salvage may be considered a form of investment and therefore, besides admiralty law, is also governed by international investment

law has been at the forefront of legal debate for the past two years.

The issue emerged with regard to the salvage contract between a British company and the government of Malaysia for the recovery of an ancient shipwreck in the straits of Malacca.¹ In the Malaysian Historical Salvors case, an Annulment Committee of the International Centre for the Settlement of Investment Disputes (ICSID) held that the performance of the company under the salvage contract fell within the meaning of “investment” as defined by the Malaysia/UK Bilateral Investment Treaty (BIT).²

1 Malaysian Historical Salvors, Sdn, Bhd v. The Government of Malaysia, Award on Jurisdiction, May 17, 2007, ICSID Case No ARB/05/10, available at the website of the International Centre for the Settlement of Investment Disputes, available at <http://www.worldbank.org/icsid> (last visited Nov. 27, 2010).

2 Malaysian Historical Salvors, Sdn, Bhd v. The Government of Malaysia, Decision on Application for Annulment, April 16,

The dispute began in 1991, when the Malaysian government entered into a contract with Malaysian Historical Salvors (MHS), to locate and salvage the cargo of an ancient shipwreck, the Diana.³ Under the terms of the contract, artefacts directly related to Malaysian history and culture would be retained by the government, while the other recovered items would have been sold at Christie’s.⁴ The government would receive the sale proceeds, while paying a percentage of the sum to the company.⁵ The salvage efforts took almost four years; when MHS found and salvaged the sunken vessel, nearly 24,000 entire pieces of Chinese blue-and-white porcelains were recovered.⁶

The dispute arose with regard to the proceeds of the auction and the quantity of items, which Malaysia withheld from sale. The company commenced arbitration at the ICSID, holding that Malaysian courts had denied due process and that there was a violation of the BIT. For its part, the Respondent objected to jurisdiction over the dispute, arguing that the contract was not an investment. This line of argument was upheld by the sole arbitrator who dismissed the claim on jurisdiction. The Arbitrator considered that the nature of the Claimant’s activities was largely similar to a commercial salvage contract and that under ICSID practice and jurisprudence, an ordinary commercial contract could not be considered as an investment.⁷

Given the unusual nature of the salvage company’s activities, the Arbitrator, Mr. Michael Hwang, paid particular attention to the criterion as to whether the contract made a significant contribution to the economic development of the host state. Adopting a teleological approach to the interpretation of the ICSID Convention, the Arbitrator interpreted the word “investment” as an activity

2009, ICSID Case No ARB/05/10, available at the website of the International Centre for the Settlement of Investment Disputes, available at <http://www.worldbank.org/icsid> (last visited Nov. 27, 2010).

3 Id. at §7.

4 Id. at §11.

5 Ibidem.

6 Id. at §13.

7 Id. at §148.

Continued on page 10

which promotes some form of positive economic development for the host state. The Arbitrator found that the salvage contract did not benefit the Malaysian public interest in a material way, but only in a cultural and historical way. Accordingly, the Arbitrator concluded that the contract was not an "investment" within the meaning of Article 25 (1) of the ICSID Convention.⁸

The award immediately raised a storm of criticism.⁹ The current author contributed to the emerging debate by emphasizing that the economic benefits of an economic activity do not have to be significant in order to qualify it as an "investment". There is no a de minimis threshold for qualifying an economic activity as an investment.¹⁰ The fact that traditionally investment disputes have involved conspicuous investments does not exclude the possibility that smaller investments are protected by BITs. Some of these criticisms were upheld by the ad hoc Annulment Committee, which annulled the award.¹¹ MHS challenged the award on the ground that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction, which it possessed over the dispute. The Claimant contested the overly restrictive notion of investment adopted by the Tribunal on three

grounds. First, the Claimant made reference to the "travaux préparatoires" of the ICSID Convention. The travaux préparatoires establish that the drafters of the ICSID Convention decided against defining the notion of investment and setting any monetary floor for this notion. Second, the Claimant challenged the elevation of the hallmarks of an investment to the level of jurisdictional conditions. Third, the Claimant contested the introduction of a further jurisdictional requirement of contribution to the economic development of the host state and the quantitative assessment of such contribution. The Respondent countered that the ICSID annulment is a narrowly circumscribed remedy and that the Tribunal had not manifestly exceeded its powers.¹²

The majority of the Ad Hoc Annulment Committee established that the salvage contract is a form of investment on the basis of Article 1 of the BIT.¹³ Therefore, the majority of the Committee reached the conclusion that the Arbitrator exceeded its powers by failing to exercise jurisdiction and that it manifestly did so because it failed to take into account the BIT mentioned above, it elevated certain criteria to jurisdictional requirements and it failed to take into account the travaux préparatoires of the ICSID Convention.¹⁴

A different perspective, which was not considered by the Annulment Committee and was dismissed by the Arbitrator as speculative, considers the conservation of cultural heritage as having a direct linkage with the development of the tourism business and other economic activities.¹⁵ The salvage and preservation of ancient shipwrecks may make a substantial contribution to the social, cultural and economic development of the host state.

In the case at stake, the fact that economic considerations were paralleled by other considerations, namely cultural concerns, probably led the Arbitrator to

deny the nature of investment to the salvage activities. The fact that the salvage contract was not an easily recognizable investment appears to have had an excessive weight in assessing whether there was an investment. A salvage contract may seem to be an unthinkable kind of investment with respect to more traditional investments such as oil exploration, infrastructure building and so on and so forth. Still, the notion of investment has evolved through time.

Finally, as one of the counsels for MHS said, 'The fact that, in MHS, the investment was relatively small and related to cultural heritage, was certainly not a ground to disqualify it as an investment'.¹⁶ Paradoxically, the Malaysian Historical Salvors case may become a leading one not because of the quality of its reasoning but because of its reversal. This reversal may have crucial implications on the cultural policies of maritime states. If salvage contracts with foreign companies may be deemed to be investments, they are not merely regulated by national law, salvage law or cultural heritage law, but they are also governed by international investment law. In this regard, if a dispute arises out of the implementation of a salvage contract, foreign investors may claim that state regulations on the protection of underwater cultural heritage amount to a violation of the fair and equitable treatment or to an indirect expropriation or to other violations of investment treaty standards. Arbitrators will then face the challenge of reconciling cultural heritage protection and the promotion of foreign investments.

The law of foreign investment is one of the oldest and most complex areas of international law. As there is still no single comprehensive global treaty, investor's rights are defined by a plethora of bilateral and regional investment treaties and by customary international law.¹⁷ Investment treaties provide an ex-

8 Ibidem. Under Article 25 (1) of the ICSID Convention, "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre..."

9 See, e.g. V. Vadi, *Underwater Cultural Heritage & International Investment Law: A Case Study* (2007) ITALIAN YEARBOOK OF INTERNATIONAL LAW, 143-158; V. Vadi, *Investing In Culture: Underwater Cultural Heritage and International Investment Law* (2009) 42 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 3, 1-52.

10 "In a draft preceding the Working Paper, a lower limit (\$100,000) had been fixed for the subject-matter of the dispute. That provision had not been retained . . . because disputes involving small amounts could be important as test cases, whereas there would be other cases in which it would be impossible to place a pecuniary value on the subject-matter of a dispute." HISTORY OF THE ICSID CONVENTION, Volume II-1, p. 567 (cited by Malaysian Historical Salvors, Sdn, Bhd v. Gov't of Malaysia, Decision on the Application for annulment, note 114).

11 Malaysian Historical Salvors, Sdn, Bhd v. The Gov't of Malaysia, Decision on the Application for annulment. On the jurisdictional review of ICSID awards, see Philippe Pinsolle, "Manifest" Excess of Power and Jurisdictional Review of ICSID Awards, in F. ORTINO, A. SHEPPARD and H. WARNER (EDS) INVESTMENT TREATY LAW - CURRENT ISSUES VOL. I (2006) 51-58.

12 Malaysian Historical Salvors, Sdn, Bhd v. Gov't of Malaysia, Decision on Application for Annulment, §44.

13 Id. at §§58-61.

14 Id. at §44.

15 V. Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law* Vanderbilt Journal of Transnational Law, 2009, 853-904, at 898.

16 Emmanuel Gaillard, cited by Peterson L. 'Majority Finds that Failure to Examine Wide Definition of Investment in UK-Malaysia BIT was Manifest Excess of Powers on the Part of Earlier Arbitrator' Investment Arbitration Reporter, 20 April 2009, 5.

17 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles* (2007) 15.

From a cultural perspective, however, underwater cultural heritage represents an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and their relations with each other.



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tensive protection to investor's rights in order to encourage foreign direct investment (hereinafter, "FDI"). At the procedural level, investment treaties offer investors direct access to an international arbitral tribunal. Thus, foreign investors can directly challenge national measures aimed at protecting cultural heritage and seek compensation for the impact on their business of such a state regulation. As international law has not yet developed any machinery for the protection of cultural heritage through investment dispute settlement, arbitrators will have to reconcile cultural heritage protection and foreign investment promotion, mapping and interpreting the relevant applicable law.

In conclusion, if a bilateral investment treaty includes a broad notion of investment, salvage contracts may be deemed to be protected under international investment treaties. From an economic perspective, the MHS decision on the application for annulment shows that salvage may represent a form of investment. Therefore, another layer of international regulation could now be considered to govern underwater cultural heritage recovery and management. From a cultural

perspective, however, underwater cultural heritage represents an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and their relations with each other. The question whether international investment law may constitute an appropriate framework in order to reconcile private interests with the public interest of cultural heritage protection in international law is now open. ♦

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Cultural Property as a Military Objective

NAOMI KALIES

International law has provided protection for cultural property for centuries. International cultural protection law has also, however, always allowed for a military necessity exception.¹ The exception is based in the belief that in some occasions cultural property can be a legitimate military target.² The breadth of this exception greatly impacts how much protection is granted to cultural property during armed conflicts.

This article will examine the military necessity exception as it has been historically codified in international treaties and compare that definition with that included in the Rome Statute and therefore the ICC Elements of the War Crime of Attacking Protected Objects. When the Rome Statute's definition is placed into the context of the larger international legal corpus, the only reasonable interpretation leads to a result where the definition of the crime actually precludes prosecution by the ICC, especially in ethnic conflicts.

The Rome Statute defines the military necessity exception in the terms all other international treaties and case law use for general civilian objects.³ Other international legal texts give cultural property a more inclusive status and therefore define the military necessity exception more strictly. Article 8(2)(b)(ix) of the Rome Statute adopted the military necessity exception put forth by Protocol I of the Geneva Conventions for civilian objects.⁴ This choice of language is inter-

esting because, although Protocol I categorizes cultural property as civilian objects, it grants more specific protections to it in Article 53.⁵ When the goal of the law was to protect cultural property, one would think that the more specific protections of Article 53 would have been used to achieve this goal over the general protections of Article 52. This disparity matters because the ICC is the body with the greatest potential to develop strong legal protections for cultural property during war.

I. The Military Necessity Exception in International Law

International legal protections for cultural property have a long history. The Second Treaty of Paris chastised Napoleon for his looting,⁶ and the Lieber Code established certain sites as protected during the American Civil War. The Hague Convention of 1899⁷ created general rules of war and World War II motivated the Hague Convention of 1954,⁸ its protocols⁹ and the Protocols attached to the Geneva Conventions,¹⁰ all of which put forth specific protections for cultural property during war.

Article 35 of the Lieber Code states, "Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places

whilst besieged or bombarded."¹¹ Similarly, Protocol I prohibits "acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples," the use of such objects in military efforts, and subjecting cultural property to reprisals.¹² These objects can only be attacked if they are being illegally used as a shield¹³ and therefore constitutes a "military objective."¹⁴ Protocol I defines a military objective as "limited to those objects which by their nature ... make an effective contribution to military action and whose total or partial destruction, capture, or neutralization ... offers a definite military advantage."¹⁵

Embodied in all of these documents is the principle that cultural property is protected property. Protocol I addresses cultural property separately in its own article highlighting its special status.¹⁶ The case law of international tribunals regards the law protecting cultural property as *lex specialis*.¹⁷ This clear separation of cultural property from other civilian objects highlights the special status international law gives cultural property. It is also this distinction, which the Rome Statute and therefore, the ICC approach deny to cultural property.

II. The Rome Statute and the ICC Elements: A New Standard?

The ICC Elements establish the requirements to prove someone is criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC.¹⁸ The Elements assist the court with interpretation and application of Articles 6, 7, and 8 of the Rome Statute.¹⁹

1 Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 11(2), May 15, 1954, S. TREATY Doc. No. 106-1(B), 249 U.N.T.S. 214 (hereinafter "Hague Convention of 1954").

2 Convention (No. IV) Respecting The Laws and Customs of War on Land, art. 27, Oct. 18, 1907, 36 Stat. 2277 (hereinafter "Hague IV") ("provided [items of cultural property or sites] are not being used at the time for military purposes").

3 The Rome Statute art. 8(2)(b)(xi), July 17, 1998, A/CONF.183/9, 2187 U.N.T.S. 3; Elements of Crimes art. 8(2)(b)(xi), Sept. 9, 2002, ICC-ASP/1/3(part II-B) (hereinafter "ICC Elements").

4 Protocol Additional (No. I) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims

of International Armed Conflicts art. 52, June 8, 1977, 1977 U.N.J.Y.B. 95 (hereinafter "Protocol I").

5 *Id.* at art. 53.

6 Treaty of Paris (1815) Done at Paris 20 November 1815. Reprinted in Fred L. Israel (Ed.) Major Peace Treaties of Modern History 1648-1967 Vol. I (New York: McGraw-Hill, 1967), 577-593.

7 Hague IV, *supra* n. 2 at art. 27.

8 Hague Convention of 1954, *supra* n. 1 at art. 11.

9 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of armed Conflict, art. 1(f), Mar. 26, 1999 2253 U.N.T.S. 172, available at www.icrc.org/ihl.nsf (last visited on June 5, 2010) (hereinafter "Second Protocol").

10 Protocol I, *supra* n. 4.

11 Instructions to the Armies of the United States in the Field (Lieber Code), art. 35, Apr. 24, 1863 (hereinafter "Lieber Code") (emphasis added).

12 Protocol I, *supra* n. 4 at art. 53.

13 Hague IV, *supra* n. 2, at art. 27.

14 Protocol I, *supra* n. 4 at art. 52(2).

15 *Id.*

16 Protocol I, *supra* n. 4 at art. 53.

17 Prosecutor v. Kordić & Kerkez, Case No. IT-95-14/2-T, Trial Judgment, ¶ 361 (Feb. 26, 2001) (meaning the law governing this specific subject matter overrides the law governing general matters).

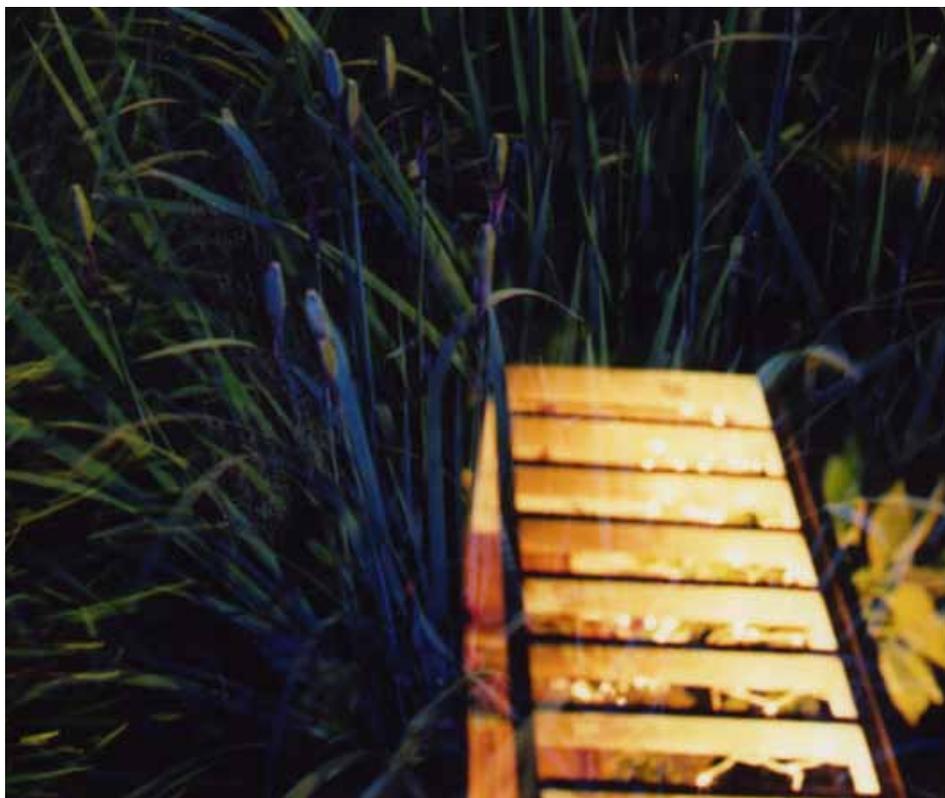
18 Elements of Crimes, *supra* n. 3 at General Introduction

¶ 2.

19 *Id.* at ¶ 1.

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The drafters clearly were referring to cultural property when using the term “protected objects.”



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Article 8(2)(b)(xi) of the Elements prosecutes attacks against cultural property by establishing the war crime of attacking protected objects.²⁰ “Protected objects” are defined as “buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals....”²¹ This definition mirrors the definition of cultural property employed by the Lieber Code, Hague IV, and the Hague Convention of 1954.²² The drafters clearly were referring to cultural property when using the term “protected objects.” It is unclear why the drafters incorporated only the general civilian objects “military objective” exception.

Protocol I specifically prohibited “any acts of hostility” directed against cultural property, the use of cultural property in support of military efforts, and making cultural property the object of reprisals.²³ The Rome Statute did not adopt these specific protections when incorpo-

rating the military necessity exception into ICC proceedings, but the general civilian objects protection for “all objects which are not military objectives.”²⁴ Protocol I defines military objectives as “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.”²⁵

This same definition of military objective was incorporated a year later in the Second Protocol to the Hague Convention of 1954.²⁶ The Second Protocol, however, adopted a more traditional military necessity exception by requiring that “(1) cultural property has by its function, been made into a military objective; and (2) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective” before an attack can be justi-

²⁰ Elements of Crimes, supra n. 3 at art. 8(2)(b)(xi).

²¹ Id. at art. 8(2)(b)(xi)(2).

²² Hague Convention of 1954, supra n. 1 at art. 4(2); Hague IV, supra n. 2 at art. 27; Lieber Code, supra n. 11 at art. 35.

²³ Protocol I, supra n. 4 at art. 53.

²⁴ Id. at art. 52; cf Rome Statute, supra n. 3 at art. 8(2)(b)(ix).

²⁵ Protocol I, supra n. 4 at art. 52(2).

²⁶ Second Protocol, supra n. 9 at art. 1(f).

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fied.²⁷ By excluding the additional language of either Article 53 of Protocol I or Article 6 of the Second Protocol, the Rome Statute's is isolated.

III. Cultural Property and Ethnic Conflict

Cultural property faces its gravest threat during ethnic conflicts. When a rival cultural group is the military enemy, the symbols of that culture "by their nature ... make an effective contribution to military action."²⁸ When territorial claims are involved there is often the desire to erase evidence of the other group's history in the territory and therefore bolster the claims of one's own group.²⁹ It then becomes arguable, under such circumstances, that the "total or partial destruction, capture or neutralization [of cultural property] offer[s] a definite military advantage."³⁰ The case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) is instructive on how devastating the "military objective" standard could be to prosecuting attacks against cultural property.

The ICTY prosecuted some of the most devastating attacks on cultural property since World War II.³¹ The ICTY approaches these issues by incorporating both the general protections of Article 52 of Protocol I and the more specific protections of Article 53 of Protocol I and Article 6 of the Second Protocol.³² The ICTY prosecuted the destruction of cultural property under Article 5(h) of the ICTY Statute persecutions on political, racial and religious grounds³³ and



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under Article 3(d) the "destruction or willful damage done to institutions dedicated to religion ... the arts and sciences, historic monuments and works of art and science."³⁴

Case law of the ICTY has acknowledged the two forms of protection set out in Protocol I by adopting its definition of a military objective, and by continuing to grant cultural property the stronger military necessity protections contained in Article 53.³⁵ In *Hadzihasanovic & Kubura*, where two military commanders were charged with allowing their troops to vandalize the Monastery of GuĐa Gora and the Church of St. John the Baptist in Travnik, the Tribunal held that Article 3(d) of the ICTY Statute incorporated **both the general protections of Protocol I,**

Prosecution Notice of Filing of Fourth Amended Indictment, ¶ 77 (July 9, 2008).

34 See, e.g., *Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, and Pusic*, Case No. IT-04-74-T, Trial Judgment, ¶¶ 60, 72, 87, 153, 171, 186 (June 11, 2008).

35 *Prosecutor v. Hadzihasanovic & Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defense Interlocutory Appeal of Trial Chamber Decision on Rule 98BIS Motions for Acquittal, ¶ 45 (March 11, 2005); see also *Prosecutor v. Strugar*, Case No. IT-01-42-A, Appellate Judgment, ¶ 277 (July 17, 2008); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, ¶¶ 302-07 (Jan. 31, 2005).

Article 52 (outlining the "military objective" standard for civilian objects) and the specific protections of Article 53 (creating a higher military necessity standard for cultural property).³⁶

The ICTY applied these standards in a two-staged fashion. First it applied the general protections of Article 52 and the "military objectives" standard.³⁷ It then analyzed if the specific objects at issue qualified for the more specific protections and stricter military necessity standard of Article 53.³⁸ In *Kordić & Cerkez*, the ICTY limited the more specific protections to three categories of objects: "historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples."³⁹ In that case, Kordić, a Bosnian Croat politician, and Cerkez, the Commander of a Brigade of the Croatian Defense Council, incited and carried out ethnic cleansing against Bosnian Muslims between November

36 *Hadzihasanovic & Kubura*, at ¶¶ 45 & 46.

37 *Prosecutor v. Kordić & Cerkez*, Case No. IT-95-14/2-A, Appellate Judgment, ¶ 89 (Dec. 17, 2004).

38 *Id.* at ¶¶ 90-91.

39 *Id.* at ¶ 90.

27 *Id.* at art. 6(a)(i) & (ii) (emphasis added).

28 Protocol I, supra n. 4 at art. 52(2).

29 Final Report of the United Nations Commission of Experts on the Former Yugoslavia, 27, U.N. Doc. S/1994/674 (May 27, 1994), available at <http://www.his.com/~twarrick/commxyul.htm> ("This purpose appears to be the occupation of territory to the exclusion of the purged group or groups").

30 Protocol I, supra n. 4 at art. 52(2).

31 This conflict serves as a prime example of the point that in ethnic conflicts the symbols of the other ethnic group—their art, architecture, and religious and historical sites—become military targets.

32 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3, May 25, 1993 (amended July 7, 2009), available at <http://www.icty.org/sections/LegalLibrary/StatuteoftheTribunal> (last visited June 5, 2010); *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 157 (Sept. 1, 2004).

33 See, e.g., *Prosecutor v. Dordevic*, Case No. IT-05-87/1-PT,

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As opposing cultures vie for territory, the historic and religious buildings, monuments and other cultural sites, are looked to as proof of one's claim to the territory.

1991 and March 1994.⁴⁰ The charges included the targeting of mosques in each town.⁴¹

The two-staged analysis of the ICTY demonstrates just how deficient the ICC's approach to prosecuting attacks against cultural property is likely to be. The ICC definition of military necessity equates cultural property with civilian objects, so an ICC judge would never get to the second-stage of the ICTY analysis. The *lex specialis* status granted to cultural property is lost in an ICC prosecution.⁴² The analysis of a recent appeal serves as an illustration.⁴³ In Brdjanin, the Appellate Tribunal applied only the military objective standard as defined in Protocol I since the buildings did not meet the limits laid out in Kordić & Cerkez.⁴⁴ The prosecution had the burden of proving "that the destruction in question was not justified by military necessity."⁴⁵ The trier of fact considered all direct and circumstantial evidence and assessed the factual context within which the destruction occurred.⁴⁶ The Brdjanin Appellate Tribunal looked to the methods employed to destroy institutions dedicated to religion and the time and effort expended to carry out that destruction in concluding that the buildings contained no military threat.⁴⁷

Brdjanin shows that an ICC prosecution, applying only the "military objective" standard would require the defendant to show only quick and proportional action to justify destruction of both civilian objects and cultural property.⁴⁸ The analysis ends once the methods and time and effort expended to destroy the object are established.⁴⁹ Without the more specific protections, which the Article 53 analysis provides, items of cultural property are not protected from

"all acts of hostility, use in support of the military effort, or being the object of reprisals" if the destruction is carried out in a manner consistent with other military targets.⁵⁰

IV. Conclusion

Unfortunately, many of the conflicts taking place presently are ethnic wars. As opposing cultures vie for territory, the historic and religious buildings, monuments and other cultural sites are looked to as proof of one's claim to the territory. Under such circumstances, cultural property may be increasingly viewed as a military objective rendering the ICC practically worthless as a venue to prosecute these crimes. The ICC's approach towards cultural property breaks with traditional international law and therefore greatly weakens the ICC's position as an authoritative voice in this field.

Even the saving grace of customary international law is put into doubt by the ICC's approach. The ICTY has held that the protections for cultural property advanced through Article 53 of Protocol I and the Hague Convention of 1954 have achieved customary international law status.⁵¹ Customary international law status means that the legal principles embodied in these texts are accepted as the law regardless of the venue.⁵² The fact that the ICC (the venue with the greatest possibility for trying these crimes at the international level) applies a less strict military necessity standard creates a risk of its customary international law status being challenged.⁵³ Therefore, consistency in setting forth the military necessity exception is so important. ♦

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40 Kordić & Cerkez, Trial Judgment, at ¶¶ 1, 5(e)

41 *Id.* at ¶¶ 804-807.

42 See Kordić & Cerkez, Trial Judgment, at ¶ 361 (holding that cultural property has a special status under international law).

43 Prosecutor v. Brdjanin, Case No. IT-99-36-A, Appellate Judgment, ¶ 337 (Apr. 3, 2007)

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at ¶ 341.

48 See Brdjanin.

49 *Id.* at ¶ 337.

50 Compare *id.* with Kordić & Cerkez, Appellate Judgment at ¶ 90 (granting the higher military necessity standard of Article 53 of Protocol I to cultural property).

51 Hadzihasanovic & Kubura, at ¶¶ 46-48.

52 Ian Brownlie, *Principles of Public International Law* 5 (Oxford Univ. Press 5th ed. 2002).

53 *Id.*

Andy Warhol's Antitrust Woes: Implications of a New Complaint Against the Andy Warhol Foundation on Authentication Boards and the Marketplace

AMANDA NIEDERAUER

On January 15, 2010, a complaint alleging antitrust violations was filed in the District Court in the Southern District of New York against a number of defendants associated with the Andy Warhol Foundation, including the Andy Warhol Foundation for the Visual Arts, Inc. (the "Foundation"), The Estate of Andy Warhol (the "Estate"), Vince Fremont, Vince Fremont Enterprises ("Fremont Enterprises"), The Andy Warhol Authentication Board, Inc. (the "Board"), and other collective defendants (collectively together with the Foundation, the Estate, Fremont Enterprises and the Board, the "Defendants").¹ The complaint (hereinafter the "Shaer Complaint"), filed by Susan Shaer, accuses the Defendants of a "20-year scheme of fraud, collusion and manipulation [in an effort] to control the market in works of art by the late Andy Warhol."² Following a comparable complaint filed in May 2009 by Joe Simon-Whelan regarding the authenticity of his Warhol painting,³ the Shaer Complaint reopens discussions and debate surrounding the supposed monopolies that authentication committees can hold in the art market.

The Shaer Complaint makes a number of claims and accusations against what Shaer labels collectively as "The Warhol Conspirators." One claim accuses the Defendants of acting in direct conflict with their own mission.⁴ To this end, the complaint states that "the very institutions and individuals -- the self-described Warhol 'experts' -- entrusted with protecting Warhol's legacy are deliberately destroying seminal work from

the 1960's."⁵ The apparent basis for this claim stems from Shaer's experience having a painting owned by her (referred to herein as the "Mearns Painting") reviewed by the Board. The Mearns Painting comes from the same series of work as the painting owned by Simon-Whelan, the subject of the May 2009 case against the Defendants. The Warhol painting owned by Simon-Whelan has become a recognized image in the press, a young self-portrait of Warhol in bold reds and blacks with light blue details. According to the Simon-Whelan case, an identical image was greatly valued by Warhol himself; the artist selected the image for the cover of his 1970 catalogue raisonné.⁶

According to Shaer, she submitted the Mearns Painting in 1990 to the Estate, at which time the Estate gave the painting a "C" rating, indicating that the Estate was not able to form an opinion on the painting's authenticity.⁷ This rating was offered before the Board had been assembled. In 2004, nine years after the Board had been established, and fourteen years after the initial opinion from the Estate, the Defendants sent a letter to Shaer inviting her to re-submit Mearns Painting for review.⁸ The letter to Shaer gave no indication that works of the same series had been previously rejected by the Board.⁹ According to the Shaer Complaint, the letter "stated ambiguously that 'additional information has come to the attention of the Board since the date of the Estate's opinion letter.'"¹⁰ The Board had already twice denied the authenticity of the Simon-Whelan paint-

ing (again, in the same series as the Mearns Painting). After learning of these rejections, Shaer decided not to submit the Mearns Painting "for fear that rejection by the Authentication Board was a foregone conclusion."¹¹ The Simon-Whelan piece has since been aptly referred to as "Double Denied."¹² Shaer believes that the request for review was simply part of a greater effort to deny the authenticity of this series of paintings, thereby eliminating them from the marketplace.¹³ The Shaer Complaint goes as far as to accuse "The Warhol Conspirators" of enforcing "a particular vision of Warhol's legacy without regard for the truth."¹⁴ At the end of October 2010 Joe Simon-Whelan announced that he and his lawyer would be withdrawing from the case at the next hearing, and he confirmed that the parallel Shaer Complaint would also be dropped. Simon-Whelan and Shaer, both represented by Seth Redniss, still believe very strongly in their cases, it seems that the financial burden of going up against the Warhol Foundation and related Defendants is just too much.¹⁵ On November 15, 2010 the Simon-Whelan case was officially dismissed after a settlement was reached between the parties. The Warhol Foundation spent nearly \$7 million on the Defendants' defense, and Joe Simon-Whelan received no money in the settlement.¹⁶

The accusations outlined in the Shaer Complaint raise serious questions about the role of authentication boards in the

1 Shaer v. Andy Warhol Found. for the Visual Arts, Inc., et al, No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

2 Complaint at 2, Shaer No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

3 Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., et al, 10 Civ. 6423 (S.D.N.Y. filed July 13, 2007).

4 Complaint at 2, Shaer, No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

5 Id.

6 Jason Edward Kaufman, Warhol Foundation Lawyers Quash Antitrust Lawsuit, ArtInfo.com (Oct. 24, 2010) <http://blogs.artinfo.com/inview/2010/10/24/warhol-foundation-lawyers-quash-antitrust-lawsuit/>

7 Complaint at 26, Shaer, No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

8 Id.

9 Id.

10 Id.

11 Complaint at 27, Shaer, No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

12 Id. at 28.

13 Id. at 2.

14 Id. at 10.

15 Jason Edward Kaufman, Warhol Foundation Lawyers Quash Antitrust Lawsuit, ArtInfo.com (Oct. 24, 2010) <http://blogs.artinfo.com/inview/2010/10/24/warhol-foundation-lawyers-quash-antitrust-lawsuit/>

16 Linda Sandler, Warhol Foundation's \$7 Million Defense Beats Lawsuit, Businessweek.com (Nov. 16, 2010) <http://www.businessweek.com/news/2010-11-16/warhol-foundation-s-7-million-defense-beats-lawsuit.html>.

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“his entire estate...should be used to create a foundation dedicated to the ‘advancement of the visual arts.’”



Lai-Chung Poon

marketplace. Certainly, the accusation that denials made by the authentication board are part of a scheme to wrongly reflect the history of Warhol's work seems difficult to prove given that the authority of the Board is often granted by the artist. Upon his death, Warhol's will stipulated “his entire estate...should be used to create a foundation dedicated to the ‘advancement of the visual arts.’”¹⁷ The Foundation, Estate, Board and those entrusted with the protection and management of these entities are purportedly responsible for upholding the legacy of Andy Warhol in the best ways they see fit, much in the same way an executor of a personal estate is entrusted to act on behalf of the deceased. Given this entrustment, these entities should generally be respected as the authorities for Warhol, his legacy, and his estate, as should most authentication boards with respect to the artists they represent.

However, actions of these entities indicate an apparent monopoly over the market of the respective artist's work,

and simultaneously raise a number of larger issues, including the role of courts in authenticity decisions. Many of the issues in the Shaer Complaint deal with accusations of collusion and fraud, which certainly fall within the authority of the courts. However in other cases, such as a recent case against the Alexander & Louis Calder Foundation, courts have been asked directly to declare a work authentic, which seems to absolutely fall outside of their jurisdiction.¹⁸ In *Thome v. Alexander & Louisa Calder Foundation*, the plaintiff sought a declaration of authenticity by the Appellate Division of the Supreme Court of the state of New York, but the court held that such a judgment was not within its jurisdiction.¹⁹ The court explained: a declaration of authenticity would not resolve [the] plaintiff's situation, because his inability to sell the [Calder sets] is a function of the marketplace. If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's volun-

¹⁷ See The Andy Warhol Foundation for the Visual Arts, at <http://www.warholfoundation.org/foundation/index.html> (last visited Nov. 29, 2010).

¹⁸ *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88 (N.Y. App. Div. 2009).

¹⁹ *Id.*

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tary surrender of that ultimate authority to a single entity.²⁰

While this state appellate court may not think it wise to allow an authentication board such a monopoly, the fact is that this is a system demanded by the buyers and the market. If an inauthentic work came for sale to the market, no reputable dealer or auction house would agree to sell it. The Shaer Complaint states, “[S]ince the painting will never be authenticated by the Board, so long as [the] Defendants are in charge, its market value is effectively zero.”²¹ Assuming this is true, what are implications on the market? Considering the positions of both the purchasers of artwork and the owners and sellers of the artwork, the implications are really twofold. On the one hand, the existence of authentication boards offers certainty and confidence to buyers. If a painting receives the stamp of approval, so to speak, from an authentication board, a buyer can be confident in its authenticity. On the other hand, if an authentication board labels a painting inauthentic in error, the owner of that work can lose out on a great

sum of money. Warhol’s paintings command high prices at auction, with the world record for a Warhol painting at \$71.7 million.²²

The question leads to another discussion that is brought to the forefront with the Shaer Complaint, which is the usefulness and necessity of these authentication boards and foundations to the market. The quality of the overall marketplace relies on authentication boards in order to ensure that the market is not inundated with fakes and replicas. The introduction of inauthentic property to the market leads to a reduction in value for the artists’ work and decreased confidence in the marketplace by buyers. Leslie Prouty, Senior Vice President of Contemporary Art at Sotheby’s New York is thankful that authentication boards, like the Warhol Board, exist. Prouty has stated, “[A] designated authority, such as an artist authentication board or committee, brings confidence to the market.”²³ It would not be in the interest of auction houses, dealers or their clients, to bring works to the market that have been deemed inauthentic by estab-

lished artist authorities. At the end of the day, someone needs to hold the responsibility for serving as the authority on issues of authenticity and for monitoring the property in the market. For artists without authentication boards, these tasks can be an unwieldy. Auction houses and dealers can, of course, make their own judgments in circumstances where no authentication board exists, evaluating provenance and markings on works of art that help to support its authenticity. However, it can at times be a challenge to ensure that inauthentic works are not sold under improper provenance, and the existence of authentication boards and catalogues raisonné are invaluable to the marketplace. Living artists, such as Jeff Koons, recognize the importance of tracking inventory in order to avoid this very problem.²⁴ Many artists have extensive staff support to designate and record inventory as it is created.²⁵

While complaints like those made by Shaer, Thome, and Simon-Whelan bring authentication boards and foundations into scrutiny, such entities seem to benefit the relevant market. In many cases, authentication boards are comprised of a group of experts in the relevant field. Rather than leaving a decision of authenticity up to a single person, the board structure offers a forum for multiple opinions on authenticity. Within the contemporary art marketplace today, authentication boards should be viewed as an asset. Responsibility for these works must fall to someone, and authentication boards, like that for Warhol, help protect an artist’s legacy by monitoring the property that exists on the market. In the decades ahead, living artists will no doubt create new methods to verify the authenticity of their work as it is produced, rather than leaving the task to their descendants or scholars years later. This will greatly benefit the market and allow buyers greater certainty in the works they purchase. ♦

The views expressed above are solely those of the author and may not reflect the views of the author’s employer, Sotheby’s.

²⁰ Id. at 103.

²¹ Complaint at 28, Shaer, No. 10 Civ. 0373 (S.D.N.Y. filed Jan. 15, 2010).

²² Id. at 3.

²³ Interview with Leslie Prouty, Senior Specialist, Sotheby’s Contemporary Art, in New York, New York (June 16, 2010).

²⁴ Id.

²⁵ Id.



Bianca Moscatelli

Art, Law and Cultural Heritage in Abu Dhabi

KATE FITZ GIBBON

"He who has no past, has neither present nor future."

Sheik Zayed Bin Sultan Al Nahayan.¹

Abu Dhabi, the largest and richest of the seven federated states in the United Arab Emirates (UAE), is engaged in the most rapid, lavish, and conscientiously law-abiding exercise in museum-building in the history of the world. Along with a national museum, maritime museum, biennale park and numerous entertainment and sports venues, two major international museums are under construction in a \$27 billion, 670-acre "cultural district" on Saadiyat Island, the "island of happiness." All of these projects are part of

¹ This famous statement by the late Sheikh Zayed, founder of the United Arab Emirates, appears repeatedly throughout the emirate of Abu Dhabi, printed on billboards and etched into stone on museum walls.

Abu Dhabi's re-creation of itself as an international educational and tourist destination.

The museums include a Louvre-franchise global fine art museum and a Guggenheim satellite for modern art. An agreement between the Louvre and the government of Abu Dhabi to loan renowned artworks from French national collections has raised allegations of conflict of interest in France. The Louvre Abu Dhabi, as the new museum will be called, has also begun to acquire important ancient and modern artworks on the open market through its museum partners and agents.² While Abu Dhabi has given scrupulous attention to legal issues regarding antiquities, some of these materials originally came from sensitive

² Didier Rykner, First Acquisition Committee for the Louvre-Abou Dhabi, *Art Tribune* (May 25, 2009), <http://www.thearttribune.com/spip.php?article535>.

source countries such as China, Afghanistan, Pakistan, and Egypt.³

In the process of creating a cultural hub in the heart of the Middle East, Abu Dhabi has integrated education and global art history on an unprecedented scale. It has deliberately chosen to use art as an educational tool in bringing the inhabitants of the UAE, a deeply religious and traditional people, into intimate contact with other ways of thinking and life around the world. This openness to outside influence, with a concurrent emphasis on the value of the UAE's traditional culture, is a consistent theme in the recent history of the region.⁴ The combined focus on culture, education and diversity in the UAE stems directly from the vision of Sheik Zayed bin Sultan al-Nahayan, a central figure in the founding of the modern UAE.⁵

The Saadiyat Island development is intended to form an educational-cultural nexus for the entire Middle East. It includes a spectacular museum in honor of Sheik Zayed, focusing on natural history, archaeology, and UAE heritage studies, as well as a campus of New York University.⁶ Talks are also taking place with Yale University to create a school, which would teach art, architecture, dance and drama.⁷ These educational cum development projects are seen as serving not only the inhabitants of the UAE and other Gulf states, but the global community of the Islamic 'umma.⁸

³ Staff at the Abu Dhabi Tourism Development & Investment Company (TDIC) stressed the organization's commitment to respect for international instruments on cultural heritage; they also noted that Agence France Musées has both acquisition authority and responsibility for legal compliance. Interview with TDIC staff in Abu Dhabi (Apr. 8, 2010).

⁴ Sheikh Zayed Bin Sultan al Nahayan's personal philosophy of leadership through consensus, tolerance for diversity, deep religious faith, emphasis on global understanding and promotion of modern education for all continues to resonate throughout UAE society on every level.

⁵ Frauke Heard-Bey, *From Trucial States to United Arab Emirates xxix-xxx* (3rd ed. 2009). See also Sheikh Zayed bin Sultan Al Nahyan, Founder of the UAE, UAE Embassy, Washington, DC, <http://www.uae-embassy.org/uae/history/sheikh>.

⁶ Erin Conroy & Jen Thomas, *First look at the Zayed National Museum* (Nov. 25, 2010), <http://www.thenational.ae/news/uae-news/first-look-at-the-zayed-national-museum>, and *About NYU Abu Dhabi*, <http://nyuad.nyu.edu/about/>.

⁷ Rachel Boyd, *Arts institute plans intensify*, *Yale Daily News*, Sept. 13, 2007, available at <http://www.yaledailynews.com/articles/view/21282>.

⁸ The Islamic 'umma is the global community of the faithful; a

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Abu Dhabi's planned combination of museums, university campuses and entertainment venues in a single complex is unprecedented.

Questions remain about how the ultra-modern content and diversity of educational and museum activities will remain in harmony with UAE domestic social policy and its outreach to the rest of the Muslim world. While the UAE has recently enacted numerous laws that draw on civil law codes, under the UAE Constitution and for reasons of national religious sentiment, UAE law must be consistent with Shari'ah, Islamic law. The UAE's firm commitment to Shari'ah as well as to compliance with perceived norms of international law and Abu Dhabi's forward-thinking economic, social, and educational policies raise fascinating questions of where, when and how potentially competing principles of law will be resolved.

The Saadiyat Island Global Museums

Abu Dhabi's planned combination of museums, university campuses and entertainment venues in a single complex is unprecedented. Abu Dhabi has contracted, for an unknown amount, for a Solomon R. Guggenheim Museum franchise that includes the Guggenheim name, art "products" for exhibition, and curatorial and administrative services.⁹ The Guggenheim was the first extensive international museum-franchise operation, with branches in Venice, Bilbao, Berlin, and Las Vegas. Former director Thomas Krens described the Abu Dhabi Guggenheim as "truly global, representing art from the Middle East, Russia, Eastern Europe, Asia, Africa, as well as Europe and America. It will change the model of the art museum."¹⁰

The Abu Dhabi Louvre expansion is a component, albeit a very large one, in France's 20-year Le Grande Louvre Project, which coincided with major cultural institution-building in France: a branch museum in Lens, France, the opera Bastille, Cite de la Musique and the new Bibliotheque Nationale de France.

The \$1.3 billion dollar Louvre-Abu Dhabi agreement entered into in 2007

community that transcends tribal, racial, and national boundaries.
9 Stella Wai, A Branding Context: The Guggenheim & The Louvre, Master's Thesis, Ohio State Univ. ii-iii (2008), available at <http://drc.ohiolink.edu/handle/2374.0X/107242>.
10 Id. at 44.

involved a \$520 million payment for 30-year use of the Louvre trademark and \$247 million for loans of 200-300 artworks over 10 years.¹¹ In addition, the Louvre will provide Abu Dhabi with four temporary exhibitions a year for 15 years for \$253.5 million, and curatorial and managerial work by a new agency, Agence France-Museums, for \$214.5 million over 20 years. Abu Dhabi will refurbish a wing of the Paris Louvre to be named in honor of Sheik Zayed bin Sultan al-Nahayan, the founder of the UAE, restore the Théâtre du Château de Fontainebleau, to be named after the current UAE president, Sheik Khalifa bin Zayed al-Nahayan, and finance a new art research center in France.¹²

International discussion has focused on how Abu Dhabi's wealth will affect competition for artworks, the potential thinning of France's cultural assets and the risk to artworks in overseas transport and display.¹³ In France, critics have raised questions of conflict of interest between the Louvre Abu Dhabi acquisitions committee at Agence France-Museums and French museums in competing for artworks in the open market.¹⁴ Among the nineteen artworks acquired through Agence France-Museums for the Louvre Abu Dhabi in 2009 were an important Mondrian, a Bellini Madonna and Child, a Murillo, an Ingres, three Manets, a Gothic sculpture of Christ, Limoges enameled works, a Leger stool from the 1920s, a Greek black-figure amphora, a schist sculpture of a Bodhisattva, a marble head of the Buddha from China, a section of a Mameluke Holy Quran, and a fibula from the Damagnano treasure that was long sought by the Louvre itself.¹⁵

11 Alan Riding, The Louvre's Art: Priceless. The Louvre's Name: Expensive, N.Y. TIMES, Mar. 7, 2007, available at <http://www.nytimes.com/2007/03/07/arts/design/07louv.html>.

12 Ambassade de France, Abou Dabi, Visite de Cheikh Sultan Bin Tahnoon en France (Apr. 28 2007), http://www.ambafrance-eau.org/france_eau/spip.php?article828.

13 H. Astier, Gulf Louvre deal riles French art world, BBC NEWS (Mar. 6, 2007), <http://news.bbc.co.uk/2/hi/europe/6421205.stm>.

14 Didier Rykner, First acquisitions by the Louvre-Abu Dhabi, Art Tribune (Apr. 3, 2009), <http://www.thearttribune.com/spip.php?article544>.

15 Didier Rykner, Long sought by the Louvre, now acquired by the Louvre Abou Dhabi, Art Tribune (June 15, 2009),

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French Culture Minister Renaud Donnedieu de Vabres stated, "We're not selling the French legacy and heritage. We want this culture to radiate to parts of the world that value it. We're proud that Abu Dhabi wants to bring the Louvre here. We're not here to transform culture into a consumer product."¹⁶ It is also important to note that there are economic and diplomatic interests at play beyond the commoditization of national art treasures: in May 2009, French President Nicolas Sarkozy inaugurated a military base in Abu Dhabi one day and placed the foundation stone for the Louvre Abu Dhabi the next.¹⁷

Whatever critics may say about Abu Dhabi buying its way into the traditionally Western culture club, the emirate is at the forefront of global changes in museum goals and management. Abu Dhabi's plan to draw tourists with art offerings is fully in line with current international branding of museum names and focus on fulfilling the audience's expectation of a museum experience. By packaging the artworks in startling architectural creations by Frank Gehry, Jean Nouvel, Tadao Ando and Zaha Hadid, Abu Dhabi is delivering the Louvre, Guggenheim, and its own national brands with a flourish.

UAE History

For centuries, the region of the present-day Emirates has consisted of many small sheikhdoms whose ruling families controlled, sometimes with the help of Bedouin fighters, the settled communities along the coast and in major oases.¹⁸ Up until the mid-twentieth century, the economy had been based on pearl fishing, date palm agriculture, maritime

http://www.thearttribune.com/Long-sought-by-the-Louvre-now.html?var_recherche=abu%20dhabi.

¹⁶ Molly Moore, Plans for 'Desert Louvre' Provoke Outrage in France, *WASH. POST*, Mar. 11, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/10/AR2007031001261.html>.

¹⁷ Agence France-Presse, Sarkozy In Abu Dhabi To Open Gulf Base For France, *Defense News* (May 25, 2009), <http://www.defensenews.com/story.php?i=4106900&c=MID&s=TOP>, and T. Ramavarman, French President to Open Naval Base Tomorrow, *Khaleej Times*, May 25, 2009, available at http://www.khaleejtimes.com/DisplayArticle08.asp?xfile=/data/theuae/2009/May/theuae_May613.xml§ion=theuae.

¹⁸ Heard-Bey, *supra* note 5, at 165-196, 239.



Brandon Jacob Mills

raiding and trade, herding and the overland caravan trade.¹⁹

The Gulf region has been a transit point for traders to the Far East, first by Muslim traders, then for the Portuguese in the 1500s and the British beginning in the 1600s. Reorganization by the Arab tribes in the 1800s led to increasing conflicts with the British and to a series of treaties beginning in 1820 with the then-constituted Trucial States. An 1892 treaty gave Britain control of the region's external affairs. Britain's decision to withdraw from the region came suddenly in 1971, but was met by a determination by the emirates of Dubai and Abu Dhabi to build a federation of Arab states in the region. Five others joined them; Sharjah, Ajman, Fujairah, Umm Al-Qwain and Ras Al-Khaimah. The UAE joined the United Nations in 1972.²⁰

Independence came at a time of very rapid development that transformed the UAE from a subsistence economy to a

¹⁹ *Id.* at 170-191,

²⁰ *Id.* at 238-245, 362-363, 367-368.

modernized state built with the oil-wealth discovered in the 1960s. In terms of human rights and social policy, the UAE is one of the most liberal Arab states, but power and authority continue to run along princely family lines. The ruling families of the Emirates hold executive authority as members of a Supreme Council. The ruler of Abu Dhabi has consistently served as President of the UAE and that of Dubai, Vice-President and Prime Minister. Laws are drafted by a Council of Ministers, passed to a partly-elected, partly-appointed National Assembly, and then to the Supreme Council, but the President and the Supreme Council have the authority to issue federal laws without Assembly approval.²¹

Sheik Zayed bin Sultan al-Nahayan, the first President of the UAE, was a remarkable figure in the Arab world; his social philosophy of pluralism, cultural diversity, gender equality, and tolerance remains at the forefront of Abu Dhabi's

²¹ *Id.* at 375-383.

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The Emirate's legal structure reflects the nation's abiding concern for building a modern society upon the solid ground of tradition.

plans for development. Sheik Zayed saw the family as the essential support for education and preservation of culture, but believed that it should be enriched and expanded by state-supported access to education for all Emirati citizens.

Emiratis view advanced Western-style education as an absolute political necessity for retaining control of their nation and culture. The rulers strive to embrace all the aspects of globalism and modern society that can coexist with essential Emirati moral values and social norms. Speaking at a recent exhibition in Abu Dhabi of Islamic art, HE Zaki Anwar Nusseibeh, Vice Chairman of the Abu Dhabi Authority for Culture and Heritage (ADACH), pointed to the museum projects as part of the Abu Dhabi Government's "overall strategy to reinforce Abu Dhabi's engagement with its own heritage and history and to underline its commitment to the authentic voice of its inner national identity."²²

Currently, Emiratis are a minority in their own country, comprising less than 20% of the total population.²³ In these circumstances, official encouragement to explore the world outside coexists with concern for maintaining Emirati traditions and family cohesion. Younger Emiratis often take good jobs and the government-supported social safety net for granted, but their commitment to country and tradition is clear. As one female law student told me, "I want you to see my face. Remember me. I am going to be someone important in my country." Emiratis are well aware of how difficult it can be to maintain cultural identity. When a young docent at an art exhibition explained to women visitors how women's crafts preserved clan identity and Muslim traditions in Soviet Central Asia, the women were so moved that they cried.

Legal Development in the Emirates

The Emirate's legal structure reflects the nation's abiding concern for building

²² The exhibition was of the recently established private collection of Nasser D. Khalili. TDIC, Arts community urged to support Abu Dhabi's cultural ambition (Jan. 24, 2008), <http://www.ameinfo.com/145004.html#story>.

²³ UAEinteract.com, Expat growth widens UAE demographic gap UAE (Sept. 25, 2008), http://www.uaeinteract.com/docs/Expat_growth_widens_UAE_demographic_gap_/32128.htm.

a modern society upon the solid ground of tradition. From the outside, there appear to be two separate legal structures. One is civil code-based, drawn from outside sources and applying to commerce, trade, contracts, and other aspects of public life. The other is based on Shari'ah Islamic law and customary tribal law ('urf) and is applied in separate Shari'ah courts to cases involving marriage, divorce, inheritance and other family matters. This appearance of division into civil and Shari'ah systems is deceptive, however, as Shari'ah is inseparable from all aspects of human life and society, comprising "an infallible doctrine of duties the whole of the religious, political, social, domestic and private life of all those who profess Islam."²⁴ Shari'ah is learned by all citizens from infancy and is often expressed through "adab" (social rules of propriety and customary law). The lessons of Shari'ah often cannot be applied directly to complex contemporary legal disputes; these gaps are filled by the modern civil codes. However, in contrast to certain other Muslim countries where Shari'ah is the official foundation for law but is given very limited practical application, it is inconceivable that laws contrary to Shari'ah would be acceptable in any realm of UAE law.²⁵

Legal development in the UAE has been necessarily rapid. Through the early 20th century, there were multiple jurisdictions and judicial practice was based upon a tribal system of rules and norms that worked together with Islamic Shari'ah.²⁶ Family and tribal disputes were brought to elders or sheiks; special pearl courts made up of panels of the larger merchants handled fishery and trade issues.²⁷ Rulers were the chief

²⁴ Encyclopaedia of Islam (1934), 320, 321.

²⁵ Butti Sultan Butti Ali Al-Muhairi, The Development of the UAE Legal System and Unification with the Judicial System, 11 Arab L. Q. 116, 123-126 (No. 2, 1996).

²⁶ Id.

²⁷ In the last century, the judge of the pearl court was one man, a respected individual from the pearling community, appointed by the Ruler. The pearl court heard disputes arising between divers, boat-owners, merchants and investors. Although decisions were generally based upon customary law and tradition, the pearl courts and other ad hoc judicial bodies were imbued with the spirit of Islam and shari'ah in the wider sense. Id. at 124-125. Heard-Bey supra note 5, at

source of law and authority; in the larger towns they might bring in “qudah”, who were sometimes foreign professional judges trained in Shari’ah outside the region, sometimes respected local persons knowledgeable in “fiqh”, the jurisprudence of Shari’ah. The various judges and courts opined on disputes, but usually did not have the power to enforce their rulings. Criminal law penalties varied from immediate application of Shari’ah-based penalties to negotiation and blood-money payments; statutes and codes were unknown.²⁸

By the 1940s and 1950s, when oil exploration began, the population of the emirates included British and European professional and technical workers and large numbers of immigrant Arab, Indian, Persian and other Muslim businesspeople and laborers. The British Crown exercised complete extraterritorial jurisdiction over non-Muslim foreigners beginning in 1946, utilizing the Indian Code. The indigenous courts primarily used the “Majella”, a 19th century Ottoman codification of Shari’ah, for textual law.²⁹ Problems developed because the archaic forms of the Majella were unsuited to modern conflicts. The civil codes adopted by many Arab nations at the time were essentially foreign and unacceptable to the local communities.

The sudden departure of the British in 1961 from Kuwait and 1971 from the UAE left a vacuum that increased the pressure to create new legal structures. While Abu Dhabi and Dubai initially adopted a penal code based upon the Indian Penal Code, other modernizing Arab states used Egyptian and French civil law-based systems. It was thought that having a civil system in the UAE would facilitate pan-Arabic unity. At the same time, a series of conventions in Beirut and Baghdad had renewed discussion regarding the study of Shari’ah in Arab schools of law as an official source of law and the appropriate grounding for enactment of substantive law.

28 Heard-Bey, *supra* note 5, at 57-160.

29 W. M. Ballantyne, *The States of the GCC: Sources of Law, the Shari’ah and the Extent to Which It Applies*, 1 Arab L. Q. 3, 5-6, 8 (Nov. 1985).

Shari’ah constitutes a main source of legislation under Article 7 of the 1971 UAE Constitution. Article 75 of the law establishing the Supreme Court (Law 10/1973) states, “The Supreme Court shall apply Shari’ah, Union Laws, and other laws in force conforming to the Islamic Shari’ah. Likewise it shall apply those rules of Custom and those principles of natural and comparative law which do not conflict with the principles of Shari’ah.” Similarly – but not identically – worded legislation applies to other courts (Article 8 of Law 6/1978), effectively making Shari’ah the principal source of law. One consequence has been that although the UAE has subsequently enacted numerous codes based largely upon civil law models, there remains considerable ambiguity regarding the validity of current or future laws which conflict in any way with Shari’ah.³⁰

The primacy of Shari’ah is a serious matter in the UAE. For example, in 1978, the UAE rulers tasked a High Committee of non-Emirati, Egypt and Iraq-trained legal scholars to create criminal, civil, and commercial statutes based upon Shari’ah, by identifying and correcting areas where UAE law conflicted. There were multiple goals in “islamizing” UAE law: it was hoped that codification would resolve the disparities between the preferred systems of Islamic and tribal law in the different emirates and ameliorate domestic public concern over crime associated with the influx of foreign workers. A Shari’ah-based code would also meet the challenges of populist Islamic movements by demonstrating the fidelity of the UAE to Islam. While it was acknowledged that a codified Shari’ah would leave many gaps, some thought that these could be filled by legislation in harmony with Shari’ah principles. Others did not believe that Shari’ah could be codified: Shari’ah was “a divinely ordained system in which human legislature has no right to intervene.” Government could only “enact administrative regulations ... without materially

30 Butti Sultan Butti Ali Al-Muhairi, *The Position of Shari’ah within the UAE Constitution and the Federal Supreme Court’s Application of the Constitutional Clause concerning Shari’ah*, 1 Arab L. Q. 219, 222-224 (No. 3, 1996).

impinging on it.”³¹

The result was a foretaste of conflicts that would continue to arise in harmonizing Shari’ah and adopted law. The draft penal code delivered by the High Committee in 1978 was rejected; the largely civil law-based code met neither the goals of Islamization nor of unifying UAE law. A Federal Penal Code was adopted only in 1987, after a decade of substantial modification brought the system closer to the jurisprudence of Shari’ah.³²

Decisions regarding display and access to art in museums, the subject matter and methodology of Western-leaning education, the distinctions between national and international projects involving the wider Muslim world, the nature of state versus private ownership, the status of ‘found’ objects, and the propriety of joining in certain international agreements – all issues are potentially subject to Shari’ah-based regulation. To raise just one of these potential areas of discussion, the application of Shari’ah to making art, art collecting and display is far more nuanced and complex than as is generally understood by Westerners, who have often heard only that figural representation is prohibited by Islamic law.

As Joseph Alsop noted in “The Rare Art Tradition”, three cultures have appreciated ancient objects for their historic and instructional value as well as their intrinsic worth: the classical Greek and Roman, leading into the western European, the Chinese, and the Islamic.³³ Although clearly preferring the art of the word and the abstract to the representational, Islamic leaders generally preserved and maintained monuments of cultural expression from widely divergent philosophical and moral systems, from the Egyptian pyramids to Greek temples to Christian churches, including the books, images and artifacts within them.

The debate over the propriety of representational imagery has been active

31 Problems of Modern Islamic Legislation, *Studia Islamica*, 12 (1960), 99-129.

32 Butti Sultan Butti Ali Al-Muhairi, *The Islamisation of Laws in the UAE: The Case of the Penal Code*, 11 Arab L. Q. 350, 368 (No. 4, 1996).

33 Joseph Alsop, *The Rare Art Traditions*, 29 (1982).

Continued on page 24

throughout the last century. A well-known instance in the Holy Qur'an describes God's grant to the Prophet Solomon of the power to rule unseen creatures; Solomon demands that the jinn (devils) make beautiful images for his pleasure. As a prophet, and infallible, Solomon was not capable of doing something forbidden.³⁴

Many scholars point to examples from "hadith", or traditions based upon the sayings and actions of the Prophet Muhammad recorded after his death, that distinguish between the Prophet Muhammad's strict prohibition against making images to serve as idols (a key issue in the early days of Islam, when the Prophet was striving to eradicate idol worship in the Arabian Peninsula) and the making of beautiful objects that served a purpose other than worship. Most commentators now hold that the prohibition is tied to the intended use of the images. This position is supported by hadith regarding images on textiles, which were acceptable when made into cushions.³⁵

The question of intent was raised in the 19th century with respect to photography. While some sought (and others still seek) to ban its use, Sheik Muhammad 'Abduh (1849-1905), a highly influential Egyptian jurist and Muslim reformer, held that the Shari'ah is not opposed to the fine arts and letters, saying of photography, "In general I am inclined to think that Shari'ah does not forbid one of the best ways of learning, especially if it does not conflict with the Islamic beliefs and worship."³⁶ Today, Islamic television channels and websites are widely distributed globally, making Islam one of the most visible religions on television and the Internet. Al Jazeera, headquartered in nearby Qatar, is a widely respected, preferred source of news and programming reaching 40-50 million households. Nonetheless, the correct use

and understanding of images remains a matter of serious debate among Islamic scholars.

There are also numerous hadith that caution against the vanity and social impropriety of having many luxurious things in a poor society.³⁷ The most literal arguments in each instance may also be brought to a more abstract and higher philosophical level. Among the most challenging of the hadith are those that address the human soul and spirit "that warn against promoting human capacity for concretization while weakening human capabilities for abstraction."³⁸

In the current context, there is so far no indication that the presentation of artworks will be constrained within a particular vision – the fresh perspective brought to bear by Emiratis may in fact be a relief from the standard global museum narrative and will at least obviate criticism of museum presentation as "neo-colonialist" or "exploitative." It has been noted that while there is strong representation of Christian religious figures in recent Louvre Abu Dhabi acquisitions, they include no nudes.³⁹ Louvre Museum president Henri Loyrette said in 2008 that the type and nature of the exhibits had been affected "to no extent so far" by the fact the new museum would be in a Muslim country and that it would be a "universal museum."⁴⁰ TDIC deputy chairman Mubarak Al-Muhairi stated, "In principle, there are no restrictions, but both sides will agree on what is shown."⁴¹

The general supervision of all aspects of the museum projects is under the Abu Dhabi Tourism Development & Investment Company (TDIC). Beyond the delegation of certain acquisitions to the Agence France Museums committee, there has been no official comment from TDIC, but informal discussions with art-staffers indicates that the primary concern has been to act with extreme caution and to abide with all national and interna-

tional laws. By delegating its acquisition functions, Abu Dhabi seems to have placed the burden of compliance on France-Museums instead.

Developing UAE law seeks out practical guidance from all major legal systems. Shari'ah is not the only law that considers the content and meaning of images; a categorical statement by a French panelist at a recent conference in Dubai that architects' moral rights would preclude tourists from taking photographs without permission of any of the landmark buildings under construction in the UAE prompted a dozen questions from the floor.⁴² It is hoped that Abu Dhabi will look widely in the law to seek practical solutions to future cultural heritage issues.

Archaeology in the Emirates

Archaeological work in the UAE has had enthusiastic local support since it began in 1959. A number of federated states already have museums with archaeological galleries; there are extensive, well-mounted exhibitions covering both ancient history and recent archaeological excavations in the Dubai and Sharjah museums and part of the new Sheik Zayed Museum in Abu Dhabi will feature archaeological exhibits. The emirates have also produced books in Arabic and English that encourage respect for ancient objects and archaeological heritage among children.⁴³

In 2005, Abu Dhabi created a new body responsible for culture and heritage under ADACH, absorbing several former departments and the National Library. ADACH has since introduced new regulations for all cultural heritage, archaeological and paleontological sites

34 Taha Jaber al-Alwani, *Fatwa Concerning the United States Supreme Courtroom Frieze*, 15 J.L. & Religion 1, 6-7 (2000-2001).

35 *Id.* at 16-20. See also Finbarr Barry Flood, *Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum*, ART BULLETIN, Vol. 84, No. 4, 644-645 (Dec. 2002)

36 Al-Alfi Abu Saleh, *The Muslim Art, its origins, philosophy and schools* (in Arabic) 84 (1969), in Rabah Saoud, *Introduction to Muslim Art* (July 2004).

37 al-Alwani, *supra* note 34, at 14-15.

38 *Id.* at 21-22

39 Rykner, *First acquisitions by the Louvre-Abu Dhabi*, *supra* note 14.

40 Daniel Bardsley, *Abu Dhabi's Louvre to get Middle East Art*, THE NATIONAL (Aug. 18, 2008) <http://www.thenational.ae/news/uae-news/abu-dhabis-louvre-to-get-middle-east-art>.

41 Riding, *supra* note 11.

42 Comment by Jean Pierre Clavier, UAE College of Law 18th Annual Conference, *Building and Construction Contracts Between Traditional Legal Rules and Developed Legal Systems*, April 20-22, 2010 Dubai, UAE.

43 UAEinteract.com, Sharjah Museums Department launches Sharjah Archaeology Museum, http://www.uaeinteract.com/docs/Sharjah_Museums_Department_launches_Sharjah_Archaeology_Museum_website/40728.htm. Children took part in a "crazy bone day" in April in Dubai, digging up replica dinosaur bones in an event produced by the Field Museum in Chicago. UAEinteract.com, *World's largest Dinosaur comes to Dubai*, http://www.uaeinteract.com/docs/World%E2%80%99s_largest_Dinosaur_comes_to_Dubai/29850.htm.

Despite uncertainties due to potential conflicts of law and anticipatory anxiety about the reaction of a conservative population to artistic excess from the Baroque to Basquiat, the addition of a new, major cultural hub to the global scene should be welcome news to all.

requiring cultural heritage and environmental impact assessments.⁴⁴

Domestically, the first campaign to inform a broader public on the value of archaeological heritage began in Abu Dhabi in April 2010 with a lecture series and release of a documentary on the archaeological history of the UAE region that was distributed to all schools, universities, federal and local governmental departments, cultural institutions, associations, UAE embassies abroad, foreign embassies and diplomatic missions in the UAE.⁴⁵

In August of 2010, the National Council for Tourism and Archaeology (NCTA) approved a draft law protecting the UAE's archaeological heritage. The law, which has been several years in the works, will regulate excavation, ensure documentation and protect UAE antiquities. The law will next be sent for review to the federal Cabinet. The Council announced in June that the law would boost the UAE's efforts to join the World Tourism Organization and World Heritage Committee, an affiliate of UNESCO. The UAE has not signed either the 1970 UNESCO Convention or 1995 UNIDROIT Conventions.⁴⁶

Antiquities Smuggling

The customs departments of the federated states enforce local laws prohibiting import of undeclared objects including antiquities. To date, the UAE lacks a federal law governing the smuggling of antiquities. Under regulations adopted by the Gulf Cooperation Council in 2009, any cultural object passing through the Emirates must have an export certificate, giving ownership and origin. (The

44 Under Abu Dhabi Law no. 28 of 2005, ADACH is responsible for preserving archaeological and historical sites and inventorying movable cultural heritage; carrying out excavations; licensing scientific missions; managing and developing museums and preserving the cultural possessions in museums and tracking violations and infringements to the Emirate's cultural heritage, by cooperating with the competent authorities. See Abu Dhabi Authority for Culture and Heritage, <http://www.adach.ae/en/portal/heritage/introduction.aspx>.

45 UAEinteract.com, Film unveils UAE's rich archaeological history UAE, http://www.uaeinteract.com/search/show.pl?url=http://www.uaeinteract.com/docs/Film_unveils_UAEs_rich_archaeological_history/40588.htm&words=musallam.

46 UAEinteract.com, NCTA passes Federal Archaeological Resources Protection Act (Aug. 29, 2010), <http://www.uaeinteract.com/french/news/default.asp?ID=222>.

Gulf Cooperation Council comprised of Bahrain, Kuwait, Qatar, Oman, Saudi Arabia, and the UAE organizes cooperation in agriculture, industry, investment, security, and trade.)

Cases involving illegal excavation or importation of artifacts are rare. In 2010, the Abu Dhabi police seized a collection of coins from a Syrian national that had been taken from an offshore site twenty years before. Dr. Mark Beech, archaeologist and Cultural Landscapes Manager for ADACH, has stated that 60-80 percent of the antiquities he is asked to identify for Customs are fakes made in Iran.⁴⁷

However, antiquities from many countries appear to have been declared and brought commercially into the UAE for many years: there are close to 100 large cases of global antiquities of varying quality from the Barakat Gallery that line the walls of another Abu Dhabi architectural marvel, the \$3 billion Emirates Palace Hotel.⁴⁸

Conclusion

Despite uncertainties due to potential conflicts of law and anticipatory anxiety about the reaction of a conservative population to artistic excess from the Baroque to Basquiat, the addition of a new, major cultural hub to the global scene should be welcome news to all. It is good news for archaeologists that a nation with the financial ability to move the markets and to act in any way it chooses has taken such care to work within the law and to focus its energies on preserving its archaeological sites and teaching its people to value ancient culture. It is good news for internationalists that a powerful nation in the Middle East has made the global museum experience a core component of its educational mission for its own people, for the Islamic 'umma, and for all the peoples of the world. It is certainly interesting news to lawyers that a valuable but largely unfamiliar legal perspective may soon be brought to bear on matters of cultural heritage. ♦

47 Loveday Morris, For Sale: Iraq's Smuggled Heritage, *THE NATIONAL* (Feb. 16, 2010), <http://www.thenational.ae/news/uae-news/for-sale-iraqs-smuggled-heritage>.

48 Viewed by the author in Abu Dhabi (April 2010).



Jesse Wakeman

Arts and Cultural Organizations – Setting the Pace with Social Media

SHARON ERWIN

Arts and cultural organizations are, in many ways, setting the pace for the innovative use and development of social media. Interestingly, they are doing so at a time when their corporate counterparts are increasingly curtailing the use of social media, at least by their employees. The use of social media by arts and cultural organizations has evolved from simply a passive presence to a means of increasing participation and support, creative uses of social media and the integration of social media into art forms. At the same time, there are cautionary tales about the downside to using social media in the arts, including very public disputes involving arts organizations on blogs, Twitter, YouTube and Facebook.

After reviewing some of the available research concerning the use of social media and examples of the ways in which

arts organizations are using social media, this article will conclude with fundamental considerations for crafting a social media policy, whether for an arts organization or a corporate organization. Some guidelines for specific arts disciplines are also provided.

The University of Massachusetts Dartmouth Center for Marketing Research, in a study published last year,¹ found that nonprofit organizations in 2008 and 2009 outpaced the business world and academia in the use of social media, including familiarity with, usage of, monitoring of, and attitude towards, social media.² By way of comparison with corporate America, relatively

¹ Still Setting the Pace in Social Media: The First Longitudinal Study of Usage by the Largest US Charities (2007 and 2008 Studies), available at <http://www1.umassd.edu/cmrr/studies-research/socialmediacharity.cfm> (last visited Jan. 22, 2011).
² Id.

recent studies show a significant rise in the blocking of social media by corporate employers. A survey by Robert Half Technology, for example, published on October 6, 2009, reported that 75% of surveyed companies were blocking employees' use of social networking sites (up 20% from February, 2009), and that 54% of corporate America prohibits employees from visiting social media sites while at work.³ Social media sites, according to another survey, were a more popular category to block than sites involving shopping, weapons, sports or alcohol.⁴

The reasons arts organizations, many of which are nonprofit organizations, use social media include deepening connections with existing patrons, marketing, building community, fundraising, advocacy, education/sharing industry information, audience research, collaboration, hiring, crisis management, and the integration of social media with artistic expression. Use of social media may also be a means of self-preservation. According to a study released in June of this year by the National Endowment for the Arts (NEA), individuals who participate in the arts through electronic media "are nearly three times as likely to attend live benchmark arts events as non-media participants (59 percent versus 21 percent).⁵ In addition, they attend twice as many arts events on average (6 events versus 3 events in one year) and in a greater variety of live art forms". Based on its research, the NEA concludes, "media-based arts participation appears to encourage - rather than replace - live arts attendance."⁶

Arts organizations are not only using social media to maintain and improve relationships, but as a means of

³ News Release, Robert Half Technology, Tweet This But Not That: Many CIOs Establish Stricter Social Networking Policies, Survey Shows (April 13, 2010), available at <http://rht.mediaroom.com/SocialNetworkingPolicies> (last visited Jan. 22, 2011).
⁴ ScanSafe, August 2009 Survey.

⁵ Audience 2.0: How Technology Influences Arts Participation, National Endowment for the Arts, <http://www.arts.gov/research/new-media-report/index.html> (last visited Jan. 22, 2011).
⁶ Id.

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Innovative uses of social media for multiple purposes, using multiple platforms, are exemplified by The Brooklyn Museum, which created Brooklyn Museum 1stfans, a “socially networked museum membership.”

fundraising. By way of example, IndieGoGo provides an open platform for artists and arts groups to pitch projects to the world, while allowing fans and supporters to experience, influence and fund the projects they want to see created.⁷ Originally limited to film projects, IndieGoGo now extends its fundraising tools to any project raising up to \$100,000 - including writing, music, social causes, technology, events, ventures, and political ideas.⁸ Other arts organizations have added fundraising through social media to their arsenal of fundraising tools. Research conducted by Charity Dynamics and Blackbaud in 2009 concluded that social media “continues to drive new levels of success for nonprofits’ special events, as well as for the individuals participating in and fundraising for those events.”⁹ The social media tools identified as having the strongest impact as of the release of the report include Facebook®, Twitter®, and YouTube®.¹⁰

Facebook, by way of example, makes fundraising easy by offering Events and Group applications that can be used for fundraising purposes. Both applications are easily accessed under an individual or organization’s profile picture. Events provide a date, time, location and an option for more information. Events are time specific and “are removed from Facebook once the event is over.”¹¹ Groups, in comparison, can be used to start a network for an organization.¹² A Facebook Group makes it easy to “post updates about ongoing fundraisers and other group events and notices.”¹³

7 Indiegogo, <http://www.indiegogo.com> (last visited Jan. 22, 2011).

8 News Release, IndieGoGo, IndieGoGo, Professional Fundraising Platform, Acquires Distribution Service, Distribber (March 15, 2010), available at <http://www.indiegogo.com/about/pr/154> (last visited Jan. 22, 2011).

9 Donna Wilkins and Mark C. Davis, Making Event Participants More Successful with Social Media Tools (Feb. 2010), available at http://www.blackbaud.com/files/resources/downloads/WhitePaper_EventParticipantsSocialMedia.pdf (last visited Jan. 22, 2011).

10 Id.

11 USA FUNDRAISING, <http://www.usafundraising.com/fundraising-ideas/online-fundraising/fundraising-on-facebook.html> (last visited Jan. 22, 2011).

12 Id.

13 Id.

Facebook, Twitter and YouTube are all tools “to help people connect with each other,” providing a means to engage donors and potential donors.¹⁴

Innovative uses of social media for multiple purposes, using multiple platforms, are exemplified by The Brooklyn Museum, which created Brooklyn Museum 1stfans, a “socially networked museum membership.” 1stfans use Facebook, Flickr, Twitter, Art Feed, blogs and podcasts to build the museum community and to make personal connections with its members. The Museum offers 1stfan members the opportunity to mingle at exclusive meet-ups, access artist-created content on a 1stfans Twitter Art Feed, and receive updates through Facebook, Flickr and Twitter about 1stfans events, behind-the-scenes insights from Museum staff, and “other cool stuff going on in the art world.”¹⁵

The Houston Ballet, Massachusetts Museum of Contemporary Art and Luce Foundation Center for American Art each have embraced social media through innovative and creative uses of Flickr, offering backstage passes, amplifying programming, and engaging stakeholders in real decision-making.¹⁶ Flickr is an online image and video management and sharing application, complete with an online community experience.¹⁷ The Houston Ballet has used Flickr to provide subscribers with a photo tour of its warehouse permitting subscribers to enjoy a behind-the-scenes look at its production.¹⁸ It has also featured such photostreams as a behind the scenes photo shoot of making head casts for a scene in one of their ballet productions.¹⁹

Other arts organizations and artists are exploiting the creative possibilities

14 Mark A. Pitman, Twitter for Nonprofits and Fundraising, THE FUNDRAISING COACH, <http://fundraisingcoach.com/free-articles/twitter-for-nonprofits-and-fundraising/>.

15 1stFans, Brooklyn Museum, <http://www.brooklynmuseum.org/join/1stfans> (last visited Jan. 22, 2011).

16 Debra Askanase, Using Flickr Creatively: Three Arts Organizations Innovate, Community Organization 2.0 (June 23, 2009), <http://www.communityorganizer20.com/2009/06/23/using-flickr-creatively-3-arts-organizations-innovate>.

17 Id.

18 Id.

19 Id.

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of social media and the use of multiple platforms. One example is the production of *Fatebook: Avoiding Catastrophe One Party at a Time*, during the Philadelphia Fringe Festival, produced and created by New Paradise Laboratories, in which social media is a part of the art form rather than merely supporting it. In *Fatebook*, the characters live in cyberspace, and their “lives intersect with each other and with audience members through a variety of social media networks” over time, culminating in real space performance.²⁰

Individual artists experimenting with social media as a public space for the creation of a new form of public include Ranjit Bhatnagar, who adapted an early net.art project by crowdsourcing a sonnet via Twitter, and Yoko Ono, who is well-established on Twitter and creates participatory Facebook and Flickr albums.²¹ Yoko Ono’s Facebook page and her Flickr albums include numerous photos posted by others.²²

Yet another example of an innovative use of multiple platforms, including cell phones, is the Museum Without Walls™: AUDIO program of the Fairmount Park Art Association in Philadelphia.²³ The program provides an “easily accessible outdoor sculpture interpretive program” for Philadelphia’s preeminent collection of public art. Museum Without Walls is a “multi-platform” interactive audio experience – available for free by cell phone, audio download, or on the web, offering “the untold histories that are not typically expressed on outdoor permanent signage.” Nearly 100 unique voices are featured, including artists, educators, scientists, writers, curators, civic leaders, and historians. As described by the Art Association:

Each Museum Without Walls™:

²⁰ FATEBOOK: *Avoiding Catastrophe One Party at a Time*, <http://www.fatebooktheshow.com/about.php> (last visited Jan. 22, 2011).

²¹ An Xiao, *Always Social: Getting Noticed (2008-2010)*, Part Two (June 16, 2010), <http://hyperallergic.com/6700/social-media-art-pt-2>.

²² See <http://www.facebook.com/yokoonoopage> and <http://www.flickr.com/photos/yokoonoofficial>.

²³ Experience Museum Without Walls™: AUDIO, FAIRMONT PARK ART ASSOCIATION, <http://www.fpaa.org/ExperienceMWW-AUDIO.html> (last visited Jan. 22, 2011).

AUDIO program compliments the viewer’s experience of outdoor sculpture with a story that is as unique as the artwork it describes, featuring different voices, themes, and production styles, produced by award-winning public radio producers and journalists. Programs explore personal and cultural connections to the art, while offering insights into the artists and their processes, what the sculptures represent, the history surrounding the works, and why the pieces were commissioned and installed at specific sites in Philadelphia.

Visitors to the website can log in to comment, or share the audio slideshows through Vimeo, a networking site for filmmakers and video creators to showcase their own work and receive feedback on what they have accomplished.

Just as the arts are using social media in unique and exciting ways, there are also unique social media pitfalls for arts organizations, or at least issues with an arts twist. An arts-related social media controversy debated on theater Web sites and newspaper blogs, including *The New York Times*, involved twittering from Broadway auditions. While conducting a casting session for “*Gay Bride of Frankenstein*,” the casting director posted several messages on her twitter feed about auditioning performers. Without mentioning performers by name, the director sent tweets such as: “If we wanted to hear it a different way, don’t worry, we’ll ask.” “Seeing #70 right now. I’m tired. My ears are bleeding.” “Holding your foot above your head IN YOUR HEADSHOT is a BAD IDEA!” The ensuing Twitter/blog storm had the casting director tweeting her defense: “There is NO rule/guideline against Twitter/Facebook/MySpace/Friendster. Freedom of Speech. Ever heard of it?” As the controversy grew, Actors’ Equity Association weighed in, stating that “Auditions are job interviews; to have them mocked is unfair to actors and others working on the project.”²⁴

The dispute ended up with the casting

²⁴ Dave Itzkoff, *Casting Director Tweets at Tryouts, to Negative Reviews*, *New York Times* (Aug. 14, 2009), http://www.nytimes.com/2009/08/15/theater/15tweet.html?_r=1.

director meeting with Actors’ Equity, which then issued the following statement:

AEA firmly believes that Twitter is a valuable promotional tool for producers to reach a wide potential audience but that tweeting has absolutely no place in the audition room, which is a safe haven for actors who are now seeking employment in this competitive market.

The casting director apologized, while the producer, composer and co-writer of “*Gay Bride of Frankenstein*” took over running auditions.²⁵

A more recent controversy in which comments have poured in relates to the controversy surrounding Evanston, Illinois’ NEXT Theatre’s production of *Return to Haifa*, publicized as an original work and/or original adaptation of a play adapted into English from the underlying novella, commissioned by the Theatre, but which led to claims of infringement by the Israeli playwright who adapted the play into Hebrew with the permission of the novella’s copyright owner, the estate of the Iraqi author.²⁶ The dispute raises fundamental issues of Board of Directors governance and fiduciary duties, contract law and intellectual property rights – all debated in theater blogs. As stated by Chris Jones in his blog, the story “is a cautionary tale of the need for artists to secure rights and permissions, especially when dealing with an incendiary work. And the fallout from the affair has almost destroyed a small but hitherto respected theater in Evanston, along with the career of its former artistic director.”²⁷ Much of the fallout has been played out very publicly through the blog, comments to the blog, and list serves referencing the blog and its comments.

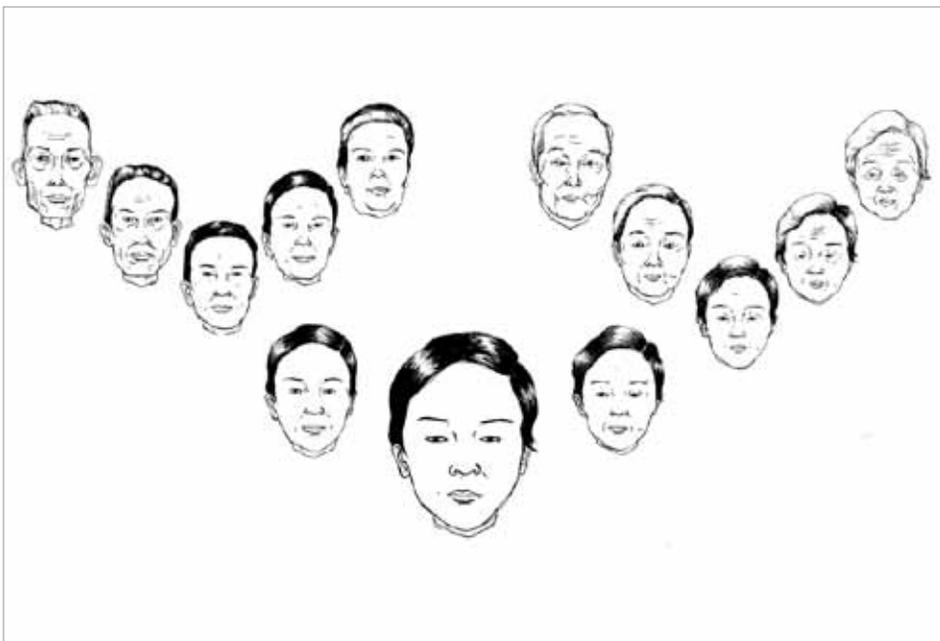
Yet another theater company became mired in a bitter dispute involving the use of social media, in this case Facebook, due to the public airing of internal dissention. The Skylight Opera Theater

²⁵ *Id.*

²⁶ Chris Jones, *Return to Haifa: Play on conflict stirs up plenty*. Here’s the full story, *CHICAGO TRIBUNE*, (June 25, 2010), http://leisureblogs.chicagotribune.com/the_theater_loop/2010/06/return-to-haifa-play-on-conflict-stirs-up-plenty.html.

²⁷ *Id.*

Lai-Chung Poon



in Milwaukee, Wisconsin, suffered financial difficulties that led to the elimination of five positions. Some performers and supporters rebelled, fueled by several “exceptionally energetic and thorough bloggers.”²⁸ Two singers with minor roles commented about the theater’s problems on its Facebook page, including the comment by one singer, “I’ll cap his knees with an aluminum baseball bat” in reference to the Managing Director. The Director took the comments as personal threats and, after consulting with theater’s counsel, fired the two singers.²⁹

Thereafter, two dozen singers, actors, directors and designers withdrew from the season’s performances, and the theater lost at least a dozen subscribers and a handful of donors. As a result, the theater instituted a Board member outreach to members of the local artistic scene, formed a Committee to discuss the company’s artistic direction and hired an outside public relations consultant.³⁰

As the above social media disasters establish, the increasing use of social media also calls for the development of a

comprehensive strategy that fits an organization’s mission and goals. Social media is not a strategy in and of itself, but it does provide tools and tactics to effectuate strategy. The first step in developing any effective policy, therefore, is to determine the uses to be made of social media. As mentioned at the beginning of this article, the purpose may range from deepening connections with existing patrons, to marketing and building community to fundraising, advocacy, audience research, crisis management and the integration of social media with artistic expression.

Whatever the purpose, certain key elements should be included in an organization’s social media policy. These include:

- >> Staff Role(s)
- >> Tone and Organizational Culture
- >> Public vs. Internal Policies
- >> Reach
 - Extend to independent contractors?
 - Enforceable?
- >> What are other organizations in your discipline/industry doing?
- >> Internal/External Monitoring
- >> Risk Assessment
- >> Technical Concerns
- >> Measuring Results

Policies should also address inappropriate behavior, language, tone;

trade secrets (customer lists, purchasing/pricing issues); confidential information (donors for example); proprietary information, Intellectual Property and publicity rights; privacy and personal information; accuracy and correcting inaccuracies; proper attribution and credit; appropriate disclosures and best practices for the organization, in its discipline, with consideration given to the organization’s mission. The use of common sense and respect are paramount, regardless of the nature of the organization. Just as important is the need to measure results and continually reassess, revise and update.

There are useful resources for those creating a social media policy in the arts, including *The Secret Underground Guide to Social Media for Organizations*, Colin McKay, www.twitter.com/canuckflack; *How (and Why) to Develop a Social Media Handbook*, Nina Simon, <http://museumtwo.blogspot.com/2008/10/how-and-why-to-develop-social-media.html>; and examples of social media policies, including <http://123socialmedia.com/2009/01/23/social-media-policy-examples> (Corporations, Law Schools, Newspapers, Government).

Industry specific guides include *A New Internet and Social Media Strategy for Dancers and Dance Companies*, Doug Fox, <http://greatdance.com/thekineticinterface/2009/03/social-media-internet-marketing>; *Social Media for the Arts and Artists*, <http://socialmediaart.ning.com>; and *Orchestras and New Media: A Complete Guide*, Marc VanBree, http://mcmvanbree.com/dutchperspective/archives/200904_id272.htm.

As the NEA study suggests, social media use and innovation by arts and cultural organizations are likely to increase as organizations recognize the link between social media interaction and live participation. Given the downside to the pervasiveness of social media, arts and cultural organizations need to be prepared with a thoughtful and comprehensive social media policy. ♦

²⁸ Daniel J. Wakin, *Milwaukee Theater Has Drama of Its Own*, *The New York Times* (Aug. 3, 2009) <http://www.nytimes.com/2009/08/04/arts/music/04sky/light.html>.

²⁹ *Id.*

³⁰ *Id.*

The Getty Museum's Non-Victorious Bid to Keep the "Victorious Youth" Bronze

LEILA AMINEDDOLEH

The relationship between the Italian government and the J. Paul Getty Museum, the wealthiest museum in the world, has once again been strained over legal battles concerning items that the Italian government claims were illegally acquired by the museum. Relations between the Getty and Italy have already been tense due to Italy's forceful request for the return of cultural heritage property scattered around the globe. The public became acutely aware of Italy's aggressive pursuit against museums and looters with the publication of *The Medici Conspiracy* by Peter Watson and Cecilia Todeschini. The book recounts the Italian government's raid on an international crime syndicate dealing in looted antiquities originating in Italy and ending with sales to reputable institutions around the world, including sales to the Getty Museum. In the wake of Italy's repatriation quest, the Getty has been charged with numerous accusations of irresponsible acquisition practices, questionable provenance and surreptitiously housing looted pieces.

The book also put museum curator Marion True in the spotlight. In the spring of 2005, Italian prosecutors announced their decision to try Marion True, a curator at the J. Paul Getty Museum in Los Angeles, for criminal association and receipt of stolen property in connection with antiquities believed to have been illegally unearthed in Italy and smuggled out of the country.¹ True was the first American curator indicted for the trade of allegedly illegal-acquired antiquities.² Her highly-publicized trial was reported in the *New York Times*, and the public watched as American museums receptively communicate with

the Italian government regarding repatriation of Italian property as a way to avoid litigation and negative media attention.³ Just last month, the case against True was dropped after a Roman court found that the statute of limitations had run out.⁴

Marion True's trial awakened the public's interest in the market for looted antiquities; in turn, the art world has become more aware of Italy's stance in demanding the return of property. This international awareness of looting has even helped deter plundering. The leader of the *Amra dei Carabinieri's* art theft squad, Generale Nistri, reported a notable decrease in tomb raiding in 2009.⁵ Italy is a country rich in antiquities and art, and those cultural items not only bring in millions of tourism dollars each year, but they also form part of the Italian identity. In light of these considerations, Italy justifies its assertive position in seeking the return of its looted items. However, this is not a recent trend; the nation has a history of protecting its artistic treasures.

Although the Mediterranean nation is now aggressively vying for the return of stolen art objects, legal protection for antiquities has existed in Italy for centuries. Antiquities laws in Southern Italy were promulgated as early as 1822, while the first antiquities laws covering modern Italy were passed in 1902.⁶ The law was updated in 1939 in the "General Regulations for the Protection of Things

3 Elisabetta Povoledo, *Princeton to Return Disputed Art to Italy*, *N.Y. TIMES*, Oct. 27, 2007, <http://www.nytimes.com/2007/10/27/arts/design/27prin.html>.

4 Elisabetta Povoledo, *Case Involving Former Curator Marion True Ends*, *N.Y. TIMES*, Oct. 13, 2010, <http://artsbeat.blogs.nytimes.com/2010/10/13/case-involving-former-curator-marion-true-ends/?scp=1&sq=marion%20true&st=cse>.

5 Marion Maneker, *Italy Defends Its Patrimony*, *ART MARKET MONITOR*, Jan. 7, 2010, <http://www.artmarketmonitor.com/2010/01/17/italy-defends-its-patrimony>.

6 See Andrew L. Slayman, *The Trial in Rome*, *ARCHAEOLOGY*, Feb. 6, 2006, <http://www.archaeology.org/online/features/italytrial/>

of Historical and Artistic Interest," which claims national ownership of antiquities in addition to regulating their excavation and exportation.⁷ Furthermore, in 1978, Italy ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁸ Additionally, Italy signed a Memorandum of Understanding with the U.S. in 2001 (which was renewed in 2006), in which the U.S. agreed to protect pre-Classical, Classical, and Imperial Roman architectural material, as such terms are defined in that agreement.⁹

Supported by international legal tools, Italy has negotiated with governments and museums for cultural heritage property repatriation. In 2007, Italy and the Getty came to an agreement for the return of Italian pieces on display; the museum agreed to transfer 40 objects to Italy in exchange for an agreement for "broad cultural collaboration," Italy's promise to loan significant art works and enter into joint exhibitions with the Getty.¹⁰ Left out of the agreement was a resolution of the issues regarding the Getty Bronze; in the agreement, both parties agreed to defer discussions on the statue until a later date.¹¹

The Getty Bronze, also known as the

7 *Id.*

8 See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, United Nations Educational, Scientific and Cultural Organization, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E>

9 Agreement Between the Government of the United States of American and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, U.S.-It., Jan. 19, 2001, as amended on Jan. 19, 2006 and Jan. 19, 2011, available at <http://exchanges.state.gov/heritage/culprop/itfact/pdfs/it2001mou.pdf>.

10 Press Release, *The J. Paul Getty Museum, Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome* (Aug. 1, 2007) available at http://getty.art.museum/news/press/center/italy_getty_joint_statement_080107.html.

11 *Id.*

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The museum's founder, J. Paul Getty, had reservations about the legal status of the bronze. Although he loved the statue and wanted to purchase it, he never did.

“Victorious Youth” or the “Fano Athlete,” is a life-size bronze statue of an athlete crowned with an olive wreath. Most likely it was created during the second or third century B.C. in Greece. Art historians believe that it was looted by the Romans, and then lost at sea in transit to the Italian Peninsula. The bronze statue was dredged up from the Adriatic Sea by a fisherman from Fano in 1964, and then he sold it to Italian dealers for \$5,600 shortly afterwards. In 1977, the Getty purchased the statue for \$4 million, 800 times more than what the fisherman’s sale price. Italy claims that the bronze was illegally traded and that it is stolen state property, first buried in a garden and then hidden by a priest. They claim that it was smuggled out of Italy, without the required export papers, and that the Getty Museum does not have clear title to the work since the institution did not fulfill its responsibility in completing due diligence. On the other hand, the Getty argues that it purchased the statue through legal channels with clear title. They claim that the work was not stolen, and that it was discovered in good faith outside of the territorial waters and soil of Italy. In response, Italy points out that the Getty always had knowledge about the statue’s questionable provenance. The museum’s founder, J. Paul Getty, had reservations about the legal status of the bronze. Although he loved the statue and wanted to purchase it, he never did. The museum acquired the piece in 1977, the year after Getty’s death.

In February 2010, an Italian judge found that the bronze had been smuggled out of Italy, and he ordered that the museum return the piece to Italy. The J. Paul Getty Trust appealed the lower court’s decision arguing that the rules that generally apply to art restitution are invalid in this case, since the bronze has Greek heritage. The museum’s appeal maintains that international law does not require the transfer of the bronze to Italy on the basis of possible (and not fully proven) export violations.¹² The Getty asserts that returning the sculpture would infringe on their legal

responsibility as a trust to protect art for the public.¹³ However, on April 21, 2010 Italian Judge Raffaele Cormio rejected the appeal, finding “no reason” to uphold the Getty’s request to suspend confiscation.¹⁴

Although the courts have ruled in Italy’s favor, having the object returned is a different issue. It is unlikely that the Italian police will be granted permission to travel to Los Angeles to retrieve the statue. Some legal authorities believe that it will be very difficult, if not impossible, for Italy to have the statue returned through the channels of litigation. For example, law professor and president of the Lawyers’ Committee for Cultural Heritage Preservation, Patty Gerstenblith stated, “If the bronze was found in international waters, rather than Italian national waters, I am doubtful that any U.S. court would recognize it as stolen. ... While the Italians claim that the bronze was illegally exported, illegal export does not, by itself, make the bronze stolen or otherwise illegal in the U.S.”¹⁵

However, Italy has options. The Italian Ministry of Culture has had great success in bargaining for the return of objects during the past few years, so Italy may negotiate for the return of the bronze. But Maurizio Fiorilli, the attorney general of Italy, asserts that the Italian government has a strong claim for the return of the statue, and feels that Italy does not need to negotiate for what rightfully belongs to Italy. Fiorilli believes that the piece should be returned to Italy since it is Italian property.¹⁶

According to Fiorilli, the statue was brought to port in 1964, after its discovery by a fisherman from Fano.¹⁷ When it was brought to land, the statue was not presented to customs authorities, and it remained hidden for many years. During

13 Id.

14 See Getty Bronze Seizure Appeal Turned Down but High Court Ruling Still Pending, Agenzia Nazionale Stampa Associata, Apr. 21, 2010, http://www.ansa.it/web/notizie/rubriche/english/2010/04/21/visualizza_new.html_1765197591.html

15 Martha Lufkin, Greek Bronze Will Stay in the Getty Villa, Art Newspaper, Apr. 14, 2010, <http://www.theartnewspaper.com/articles/Greek-bronze-will-stay-in-the-Getty-Villa%20/20504>

16 Id.

17 Id.

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According to Italy, the Getty knew the documentation was false, and this knowledge is federal fraud.



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this time, Italian judicial authorities began penal investigations of the fisherman and the first dealer who purchased the statue. The parties were absolved because the statue was not present. Without the presence of it, authorities could not determine whether the statue was cultural property.

The Italian attorney general asserts that the statue belongs to Italy. If a boat with an Italian flag discovered the statute, international law would deem it property of Italy. And if the statue was not found under the Italian flag, but was found by an Italian citizen and brought to an Italian port, then it should have been declared in order for the owner to receive papers recording its discovery. It was compulsory to present the statue to customs authorities upon docking in order to pay proper taxes and receive proper papers. The fisherman would have only been permitted to remove the statue from Italy with proper documentation. However, this was not done. Instead, the statue was hidden for many years, and then moved between nations. Italy's claim for the statue is strengthened by the fact that the Fano Athlete entered Italian territory from the water, and then remained in Italy for years before leaving the nation.

According to the Italian government, these facts present enough proof that the statue belongs to Italy.

The Italian government also asserts that the Getty purchased the Fano Athlete in bad faith. The museum received documentation from a seller in England, even though the province was false. According to Italy, the Getty knew the documentation was false, and this knowledge is federal fraud. The museum did not properly research the statue's provenance even though there were concerns about it. However, even after purchasing the piece, the museum had forty-eight months to check its records. During that time, the museum never contacted the Italian authorities even though the Italian government had started the process to have it returned.

The Italian government claims that it is necessary for all nations to cooperate in the protection of cultural heritage property. All nations have a duty to preserve and enjoy cultural property, which is why the Italy loans its property to other nations. Cultural property belongs to one country, but it should be shared with the international community. In this case, Italy asserts that the Fano Athlete belongs to Italy. ♦

First Annual National Cultural Heritage Law Moot Court Competition

EMILY MONTEITH AND VIRGINIA M. CASICO

On July 28, 2007, federal agents raided the home of Kenneth George, a 24-year-old college dropout, and seized from his garage an amber bead necklace and two large ceramic masks. The seizure was the culmination of a lengthy investigation into the practice of selling stolen and looted antiquities on Internet auction sites. After the necklace and the masks were seized, George informed federal agents that he had obtained the necklace, which he had listed for sale on eBay, from an antiquities dealer that he met while attending a regional gun show. According to George, the dealer informed him that the necklace had been stolen from a museum in Canada earlier that year. The necklace, which was a Viking cultural object made of large am-

ber beads between 900 and 1,200 years ago, was valued at more than \$10,000. George also told federal agents that he found the ceramic masks while camping illegally in a National Forest after leaving the gun show. George stated that, after pitching a sleeping bag in a small cave within the forest boundaries, he found two "shabby looking" ceramic masks when he dug approximately eighteen inches into the soil near the back of the cave. The Forest Service used thermoluminescence dating to conclude that the masks were at least 1,000 years old, and the commercial value of the masks was appraised at more than \$20,000.

Although the events in this story may sound implausible, this scenario, which formed the basis of the first annual

National Cultural Heritage Law Moot Court Competition, was based on the type of events that increasingly populate the landscape of archaeological resource trafficking in the United States today. As interest in cultural heritage preservation has grown, DePaul University College of Law joined the Lawyers' Committee for Cultural Heritage Preservation in sponsoring the first annual National Cultural Heritage Law Moot Court competition to encourage dialogue about cultural heritage and the law. Over the course of two days, ten teams, having previously briefed the issues, argued in front of panels of practitioners in order to progress in the competition. The final panel of judges included the Honorable William J. Bauer and the Honorable Richard D. Cudahy of the United States Court of Appeals for the Seventh Circuit, and former Illinois Appellate Judge and DePaul University College of Law Dean Warren Wolfson. The panel declared Loyola University of New Orleans the overall Champion of the competition. Widener University School of Law was named the Runner-Up, and one of its teams was also awarded distinctions for presenting the Best Brief. The award of Best Oralist went to Nina Staggers of Widener University School of Law, and Alana McMains of Northwestern University School of Law was recognized as the Honorable Mention Best Oralist.

The Competition's problem revolved around the application of the Archaeological Resources Protection Act (ARPA) to two separate offenses: Kenneth George's excavation of the ceramic masks from Forest Service lands, in violation of ARPA section 6(a), and his offer of the stolen Canadian necklace for sale in interstate commerce, in violation of ARPA section 6(c). Both issues required the participants and the moot court judges to apply principles of statutory interpretation to determine wheth-



Bianca Moscatelli

er the relevant sections of ARPA covered the actions committed by George. Participants were asked to brief and argue the two issues based on these facts as if the Supreme Court had granted certiorari to hear this appeal from a fictional circuit court.

For the first issue, the Court was asked to determine whether ARPA's mens rea of "knowingly" applied to every element of a section 6(a) crime. Specifically, the Court was called on to determine whether section 6(a) required the Government to prove that George knew that the excavated ceramic masks met the ARPA statutory definition of "archaeological resource" at the time that he removed them from the National Forest. Section 6(a) of ARPA states that "[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit."¹ ARPA defines an "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest ... at least 100 years of age."² The mens rea element is found in a separate provision, which states that "[a]ny person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be ... imprisoned not more than one year"³

The Supreme Court has never directly addressed whether the mens rea requirement of "knowingly," which applies to violations of section 6(a), necessarily attaches to the element of "archaeological resources." However, the Court has addressed the application of mens rea requirements to statutory elements generally, most recently in the 2009 decision *Flores-Figueroa v. United States*,⁴ which involved the interpretation of the knowledge requirement in a statute establishing a mandatory sentence if, during the

commission of other crimes, the defendant "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."⁵ The Court held that a statute's scienter requirement applied to all subsequent elements of a criminal provision, but stopped short of establishing a bright line rule for statutory interpretation.⁶ In addition, the majority expressly recognized that "the inquiry into a sentence's meaning is a contextual one," but that "[n]o special context is present [in the case at bar]."⁷

George, the petitioner, made use of the argument that *Flores-Figueroa*, which held that the statute in question required the application of the mens rea to all elements of the offense relying on principles of "ordinary English grammar," established a precedent that required the application of "knowingly" to ARPA section 6(a)'s "archaeological resources" element.⁸ However, the Government offered the argument that the mens rea in *Flores-Figueroa* immediately preceded the elements of the statutory offense; by contrast, the mens rea of "knowingly" in ARPA is found in a later provision separate from the elements of the section 6(a) crime. Therefore, the Government argued, the Court's reasoning that "ordinary English grammar" requires a uniform application of a mens rea to all subsequently listed elements does not control where the context of the statute leaves room for ambiguity in applying a mens rea to the elements of a general intent crime, as it argued was the case with section 6(a). Moreover, section 6(a) differed from the statute at issue in *Flores-Figueroa* in another important respect: In contrast to the element at issue in *Flores-Figueroa*, which was an aggravating circumstance with respect to the crime of identity theft,⁹ "archaeological resources" under ARPA are items that Congress has subjected to regulation. The act of excavating or removing objects from federal or Indian lands without a permit does not automatically

result in a violation of ARPA; in order to render the acts a convictable crime under section 6(a), the "archaeological resources" element must also be present.¹⁰

George was also able to argue that, even if the Court was disinclined to apply *Flores-Figueroa* as a bright-line rule of statutory interpretation, the nature of a section 6(a) crime requires the application of "knowingly" to the crime's "archaeological resources" element. George relied on *Staples v. United States*¹¹ and subsequent case law in which the nature of the regulated conduct determined whether the scienter requirement would be applied to the statutory element.¹² In particular, George pointed to the Ninth Circuit's decision in *United States v. Lynch*,¹³ in which the Ninth Circuit relied on *Staples* to hold that the government was required to prove that the defendant knew that the object he picked up in a National Forest was an archaeological resource because, absent the requirement, the defendant's conduct—picking up an item from the surface of the ground in a National Forest that was only later identified as an archaeological resource—was otherwise innocent and blameless.¹⁴ George argued that it was the masks' status as "archaeological resources" that criminalized the act of removing them from federal lands without a permit and separated them from otherwise "innocent and blameless" conduct.

The Government countered that George's situation was distinguishable from *Lynch* on the basis of the facts known by the defendants in these respective cases. George, unlike the defendant in *Lynch*, knew he was on the land of another; knew he was excavating in the land; and knew he was acting without the landowner's permission. As a result, the Government argued, one would hardly be surprised that the defendant's

¹⁰ See 16 U.S.C. § 470ee(a).

¹¹ 511 U.S. 600 (1994).

¹² See *United States v. X-Citement Video*, 513 U.S. 64 (1994) (holding that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct"); *Staples*, 511 U.S. at 619 (evaluating the nature of the regulated device or conduct and "the expectations that individuals may legitimately have in dealing with the regulated items").

¹³ 233 F.3d 1139 (9th Cir. 2000).

¹⁴ *Lynch*, 233 F.3d at 1144-45.

¹ 16 U.S.C. § 470ee(a) (2006) (emphasis added).

² Id. § 470ee(b)(1).

³ Id. § 470ee(d) (emphasis added).

⁴ 129 S. Ct. 1886 (2009).

⁵ Id. at 1888.

⁶ Id.

⁷ Id. at 1891.

⁸ Id. at 1890.

⁹ See *Flores-Figueroa*, 129 S. Ct. at 1890.

Section 12(c) explicitly states that “[n]othing in this Act shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.

conduct is not an innocent act.¹⁵ Rather, common experience suggests that such conduct is more likely to be illicit and blameworthy. Therefore, the Government argued, following Staples, the Court should hold that the government was not required to prove that George “knew” that the objects of his actions were archaeological resources.

For the second issue, the Court was invited to interpret ARPA section 6(c)’s language to determine whether it applied only to archaeological resources that originated from federal or Indian lands or whether it extended to any archaeological resources, including those that originated from a foreign country. Unlike ARPA sections 6(a) and 6(b), section 6(c) omits any reference to federal and Indian lands, stating only that “[n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”¹⁶ To obtain its conviction under this count, the Government relied on a fictional state statute, which declared that “[a] person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property.”¹⁷

George argued that because of this discrepancy in language, the statute was ambiguous and, thus, that the Court should consider the statute’s Preamble and congressional intent to construe the statute. According to principles of statutory interpretation, the Court should “first determine[s] whether the statutory text is plain and unambiguous.”¹⁸ If the text is plain and unambiguous, the Court should apply the statute according to its terms.¹⁹ If, however, the statute is ambiguous, the Court should look to the

¹⁵ See Staples, 511 U.S. at 609, 614.

¹⁶ 16 U.S.C. § 470ee(c).

¹⁷ Dep. L. Code 35-43-4-2(b).

¹⁸ Carcieri v. Salazar, 129 S. Ct. 1058, 1063 (2009) (citing United States v. Gonzales, 520 U.S. 1, 4 (1997)).

¹⁹ Id. at 1063-64.

statute’s legislative history and preamble, if any.²⁰ In particular, George relied on ARPA’s Preamble, section 12(c) and legislative history to support the position that ARPA only applies to archaeological resources found on federal public or Indian lands.²¹ Section 12(c) explicitly states that “[n]othing in this Act shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.”²² However, the Government countered that because section 6(c) clearly and unambiguously prohibits the trafficking of archaeological resources, without limitation as to the origin of the resources, the Court was prohibited from inferring congressional intent.

Turning next to available case law, both parties noted that the issue was a matter of first impression in the courts, and identified the Seventh Circuit’s decision *United States v. Gerber*²³ as the only judicial application of section 6(c) to non-federal, non-Indian lands. In *Gerber*, the defendant artifact collector, appealing his conviction under section 6(c) for unlawfully removing and selling artifacts from private land and then taking them across a state boundary, argued that section 6(c) did not apply to archaeological resources found on private land.²⁴ However, the Seventh Circuit held that section 6(c) “is not limited to objects removed from federal and Indian lands” because the provision was “a catch-all provision designed to back up state and

²⁰ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) (“the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.”).

²¹ See 16 U.S.C. § 470aa(b) (“The purpose of this chapter is to secure, for the . . . benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands”); 16 U.S.C. § 470kk(c) (“Nothing in this chapter shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land”); see also *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993) (“[ARPA] does not affect any lands other than the public lands of the United States and [Indian] lands”) (quoting 125 Cong. Rec. 17,394 (1979) (remarks of Congressman Udall)).

²² 16 U.S.C. § 470kk(c) (emphasis added).

²³ 999 F.2d 1112 (7th Cir. 1993).

²⁴ Id. at 1113-15.

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local laws protecting archaeological sites and objects wherever located.”²⁵ Furthermore, the court limited the scope of section 6(c) by holding that it applied “to cases in which the violation of state law is related to protection of archaeological sites or objects,” but noted that the applicable law could still have “broader objectives,” such as those embodied in trespass and conversion laws.²⁶

George argued that the Court should find that Gerber was incorrectly decided because ARPA’s Preamble, ARPA section 12(c), and certain statements in the legislative history all suggest that Congress intended that ARPA apply only to archaeological resources found on United States federal public or Indian lands.²⁷ In the alternative, George asserted that Gerber’s holding should be limited to only lands within the United States. Particularly, George emphasized, ARPA’s avowed purpose, as articulated in the Preamble, is to protect “the Nation’s heritage” for “the present and future benefit of the American people.”²⁸

The Government countered that the Court should extend Gerber’s holding to find that section 6(c)’s protections cover archaeological resources originating in foreign lands. The Government pointed out that, as in Gerber, George was convicted of offering for sale in interstate commerce an archaeological object that had not been excavated from federal or Indian land; in this case, an artifact from a foreign country, Canada. The Government argued that based on Gerber’s holding, it follows that section 6(c) should also apply to artifacts from foreign lands because the Seventh Circuit found that section 6(c) is not limited to archaeological objects but is designed to strengthen ARPA’s protection by backing up other federal and state laws.

Thus, the only issue remaining to be determined was whether the DePaulia statute could apply to archaeological resources. Although the fictional state statute does not explicitly protect ar-

chaeological objects, the Government urged the Court to adopt Gerber’s reasoning that the DePaulia law could have “broader objectives . . . that include but are not exhausted in the protection of Indian artifacts and other antiquities.”²⁹ Finally, the Government offered that extending section 6(c) to foreign artifacts would further ARPA’s purpose to protect archeological resources because, in the words of the Seventh Circuit, it was “unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations . . . would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands merely because that is where most of them are.”³⁰

Both issues introduced in this year’s problem were timely questions as to the interpretation and scope of ARPA. The Supreme Court’s decision in Flores-Figueroa was handed down in 2009, and it leaves open the question of how much knowledge the government will need to prove in future prosecutions under ARPA section 6(a).³¹ In addition, ARPA section 6(c) has seen increasing use as a legal tool in the seizure of archaeological artifacts that have been illegally removed from their countries of origin, but such a use of the law has never been tested in the courts.³² Briefing these two issues provided the National Cultural Heritage Law Moot Court Competition participants with a unique perspective on how ARPA can be used to protect national cultural resources, and perhaps even important, international cultural resources as well.

The second annual National Cultural Heritage Law Moot Court Competition will be held in Chicago on February 25 and 26, 2011, with all rounds taking place in courtrooms of the Everett McKinley Dirksen United States Courthouse. ♦

²⁹ Gerber, 999 F.2d at 1116.

³⁰ *Id.* at 1115-16.

³¹ See *United States v. Flores-Figueroa*, 129 S. Ct. 1886 (2009).

³² See Andrew Adler, *An Unintended And Absurd Expansion: The Application of the Archaeological Resources Protection Act to Foreign Lands*, 38 N.M.L.R. 133 (2008).

²⁵ *Id.* at 1115-16.

²⁶ *Id.* at 1116.

²⁷ See *supra* notes 21-22 and accompanying text.

²⁸ 16 U.S.C. § 470aa(b) (emphasis added).