A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property

Meghan A. Sherlock*

The problem of stolen art and cultural property has become more frequent and more international in scope in recent years. When stolen art is actually located—an event quite rare in itself—the ensuing conflict is often one between two innocent parties: the original owner whose property was wrongfully taken, and an innocent purchaser who believed she made a bona fide purchase and subsequently obtained good title. With many different jurisdictions presiding over these international disputes over the recovery of stolen art, the result has been a national common law marred with inconsistencies in how these cases are resolved. Despite international efforts to promote uniformity in national domestic laws relating to recovery of stolen artwork and cultural property, the fact remains that each nation, and in the United States each state, has its own rules regarding bona fide purchasers and statutes of limitations. A complex problem arises, therefore, especially in American courts, where there is little consistency.

This Comment proposes a solution to this complex issue by examining the case law in this area and analyzing the shortcomings of two doctrines—the discovery rule and the demand and refusal rule—when applied by themselves without taking into account other considerations. The premise of this Comment is that the two doctrines should be combined in order to create a more consistent and equitable law with specific focus on the recent New York case Greek Orthodox Patriarchate v. Christie's, Inc. *In this case, the court granted summary judgment and did not resolve several factual aspects of the case. The premise of this Comment is that courts should not strictly apply one rule over the other, but rather should take into consideration all factors of each individual case, and apply a combination of the rules in order to come up with the most fair result.*

* B.A. 1996, Dartmouth College; J.D. candidate 2001, Tulane University School of Law. The author wishes to thank Professor Jeanne Carriere for her guidance and support and the staff of the *Tulane Journal of International and Comparative Law* for their assistance in revising and editing this Comment.

I. INTRODUCTION

In 1998, the heirs of a prominent Jewish art dealer, who fled Paris for the United States during World War II, filed suit in Federal District Court against the Seattle Art Museum to recover a Matisse painting that was confiscated by the Nazis in 1941.[1] This was the first lawsuit against an American museum concerning art stolen by the Nazis, and it illustrates the increasing complexity of suits involving the recovery of stolen artwork.

The problem of stolen art and cultural property has become more frequent and more international in scope in recent years. Rising art prices, primarily resulting from the growing interest in art as an investment, have fueled the trafficking of stolen art and artifacts.[2] When stolen art is actually located, an event quite rare in itself, the ensuing conflict is often one between two innocent parties: the original owner whose property was wrongfully taken, and an innocent purchaser who believed she made a bona fide purchase and subsequently obtained good title.

With many different jurisdictions presiding over international disputes surrounding the recovery of stolen art, the result has been a national common law marred with inconsistencies. Even in New York, the cultural capital of the art trade world, the laws applied in state and federal courts are inconsistent. This Comment will attempt to propose a solution to this complex issue by examining the case law in this area and analyzing the shortcomings of two doctrines, the discovery rule and the demand and refusal rule, when applied by themselves without taking into account other considerations. The

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1. *See* Judith Dobrzynski, *Seattle Museum Is Sued for a Looted Matisse*, N.Y. TIMES, Aug. 4, 1998, at E3. Less than a year after the suit was filed, the Seattle Art Museum agreed to return the Matisse painting entitled "Odalisque" to Paul Rosenberg's heirs. *See* Felicia Lee, *Seattle Museum to Return Looted Work*, N.Y. TIMES, June 16, 1999, at E4. The whereabouts of the painting were unknown to the Rosenbergs until the summer of 1997, after a grandchild of the couple who had owned it and had donated it to the museum read about the painting in a book. *See id.*

2. *See* Leah E. Eisen, Comment, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1067-68 (1991).

premise of this Comment is that the two doctrines should be combined in order to create a more consistent and equitable law for New York. Jurisdictions should refrain from strictly applying one doctrine over the other in certain situations. As this Comment will illustrate, cases involving disputes over the ownership of cultural property are very fact-specific, and courts need to analyze thoroughly all of the facts in each case.

II. THE PROBLEM OF ART THEFT AND INTERNATIONAL TRADE OF STOLEN ART

The illegal trade in stolen art and antiquities is a growing problem that affects the global community.[3] No one knows how much art is stolen in the United States or elsewhere in a given year, but there are bulletins and reporters of stolen artwork that illustrate the growing frequency with which art theft occurs.[4] By some estimates, the illegal trade in art has become at least a one billion dollar industry, a black market surpassed only by the international illicit drug trade.[5] Art and artifact theft from individuals, museums, and archaeological sites has increased dramatically in the past few decades, creating a situation where collectors often unknowingly buy stolen goods in good faith.[6]

In general, there are three variations on the international movement of stolen works of art.[7] First, cases of *illegal export* involve instances where a privately owned work of art that is classified as a "national treasure" is smuggled out of its country of origin.[8] Second, many countries declare contents of tombs and other relics of earlier civilizations found or built on the earth the property of the state. Theft of such artifacts constitutes *archaeological theft*.[9] The final variation is *simple theft*, where an object of art is owned by an individual in one country and eventually appears in a private

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3. *See* Emily C. Ehl, Comment, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U. L. REV. 661, 661 (1998) (noting that trafficking in stolen art and cultural goods is not a new problem and has plagued society throughout history).

4. *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 582 (2d ed. 1987). The *IFAR Report* is published by the International Foundation for Art Research that also maintains a stolen art archive; and the Art Dealers Association of America publishes bulletins on stolen art objects.

5. *See* Eisen, *supra* note 2, at 1068.

6. *See* Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 230 (1997).

7. *See* 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS, CASES AND MATERIALS § 2-1 (1979).

8. *See id.*

9. *See id.*

collection in another country.[10] As one leading art scholar points out, simple theft cases are the least complicated to resolve, while illegal export and archaeological theft cases usually present more complex ethical issues, and the applicable law is far less clear or simple.[11]

Because of the unique nature and international presence of cultural property and artwork, the global community has recognized the need to create remedies to deal with stolen artwork sold to unsuspecting or unknowing collectors who believe they have acquired valid title. While it is clear that the missing object is depriving society of real, nonmonetary benefits, these benefits are often difficult to measure and can be articulated only by using vague terms like "cultural importance."[12] But the notion of such cultural importance is by no means new. Throughout history, robbed graves and plundered tombs have led to legislation to prevent such acts. Even the Romans felt the need to pass laws protecting art from theft.[13]

Among the measures taken to make the law dealing with return of stolen artwork more consistent and clear are several multilateral conventions in which art-rich nations have come together to attempt to prevent the illegal importation and exportation of art.[14] However, since few art-acquiring nations participate in such Conventions, these multilateral efforts have not been very successful.[15] The first comprehensive treaty for the protection of cultural property in times of peace was the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (hereinafter, *UNESCO Convention*).[16] The UNESCO Convention provided for the prevention of the export of stolen cultural property from source nations and the import of such property to other nations.[17] The Convention also explicitly recognized that "the interchange of cultural property among nations for scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among

10. *See id.*
11. *See id.*
12. *See id.* at 2-2.
13. *See* Preziosi, *supra* note 6, at 230.
14. *See* Eisen, *supra* note 2, at 1068-69.
15. *See id.* at 1069.
16. *See* Kurt Siehr, *International Art Trade and the Law*, *in* 6 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 101 (1993).
17. *See* Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

nations."[18] Further, this Convention allowed for the signatory countries to establish their own systems of regulatory controls. But of the more than fifty signatories, only one is an art-acquiring nation, a fact which has contributed to the ineffectiveness of this Convention.[19]

Thus, international law can only indirectly influence local policies and deficiencies.[20] The recovery of stolen art objects still depends almost exclusively on differing domestic laws governing bona fide purchase and limitations periods on actions for the recovery of objects.[21] Despite international efforts to promote uniformity in national laws relating to recovery of stolen artwork and cultural property, the fact remains that each nation, and in the United States each state, has its own rules regarding bona fide purchasers and statutes of limitations. A complex problem arises, therefore, especially in American courts, where there is little consistency.

III. DEVELOPMENT OF LAW DEALING WITH STOLEN ARTWORK DISPUTES

This Part traces the development of localized legal responses to the problem of disputes between original owners and bona fide purchasers over stolen artwork and culturally important objects. While the focus of this Comment is on New York in the Second Circuit of the U.S. Federal Appeals, because of its remarkable position as a center for art trade and collection, this Comment begins with a more general overview. Cases and rules from jurisdictions outside of the Second Circuit will also be examined for contrast.

Over time, as the problem of recovering stolen artwork from bona fide purchasers has grown, so too have the responses from the legal community. Specifically, statutes of limitations for prescriptive possession of stolen art and cultural property and the defense of the doctrine of laches have developed to assist the legal community resolve illegal art trafficking situations, which often involve expensive and culturally important works of art. However, a great deal of uncertainty and inconsistency in the application of these principles remains.

Under American common law, the general rule is that a purchaser of stolen goods does not automatically acquire title to those

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18. *See id.*

19. *See* Eisen, *supra* note 2, at 1069. Since the United States terminated its membership in 1984, Canada is the only signatory nation that is considered to be an art-acquiring state. *See id.*

20. *See* Siehr, *supra* note 16, at 251.

21. *See id.* at 107.

goods because a thief cannot transfer legal or marketable title.[22] The major exception to this rule is that a thief or bona fide purchaser of stolen goods can acquire full title to those goods through adverse possession.[23] In practical terms, this means that the expiration of the established limitations period precludes the original owner's right to sue the subsequent bona fide purchaser of his or her stolen property in replevin, and vests title in that bona fide purchaser.[24] Furthermore, "statutes of limitations do not intend either to shield wrongdoers or to provide them with peace of mind concerning potential liability."[25] Rather, the rationale behind statutes of limitations is "the realization that the passage of time can make the prosecution of delayed claims burdensome and unfair."[26]

The cause of action for recovery of stolen art traditionally accrued at the time of the wrongful taking, and not upon the discovery of the identity of the party in possession of the property.[27] However, courts have determined that the traditional adverse possession rule, that the statute of limitations begins to run at the time of the theft, is inappropriate for dealing with possessory rights for concealable goods like artwork.[28] In response, there has been judicial manipulation of the statutes of limitations bar to expand plaintiffs' rights to bring such claims beyond the expiration of the applicable limitations period.[29]

As one of the most dynamic cultural centers in the world, New York is the most important jurisdiction in the United States when it comes to resolving disputes over stolen artwork. It was among the earliest jurisdictions in the United States to alter the traditionally applicable adverse possession rule in a dispute between a good-faith purchaser and an original owner over a work of art.[30] New York courts then began a practice of requiring a claimant to demand return of artwork such that the statute of limitations began to accrue after the possessor refused to return the object.

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22. *See* Ehl, *supra* note 3, at 664; *see also* Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 89 (1999).
23. *See* Ehl, *supra* note 3, at 665.
24. *See* Eisen, *supra* note 2, at 1072.
25. *Id.*
26. *Id.*
27. *See id.* at 1074.
28. *See* Ehl, *supra* note 3, at 665.
29. *See* Eisen, *supra* note 2, at 1074-75.
30. *See id.* at 1078-80.

A. Demand and Refusal Rule

The "demand and refusal rule" is a judicially-created rule used to measure the accrual time of a cause of action. To commence an action to recover stolen property from a bona fide purchaser, an original owner must prove refusal, upon demand, to return the property in question.[31] The rule was first applied in New York in *Kunstsammlungen Zu Weimar v. Elicofon*.[32] This case was brought by the Federal Republic of Germany to recover paintings allegedly stolen by an American serviceman from a castle located in the former East Germany in 1945.[33] The paintings were discovered in 1966 in the Brooklyn home of Mr. Elicofon where they had been openly displayed to friends since his good faith purchase over twenty years earlier.[34] In 1966, one of his friends recognized them from a German book describing stolen art treasures of World War II. After the discovery was published on the front page of the New York Times, the German government demanded the return of the paintings, but Elicofon refused.[35] The Second Circuit applied the "demand and refusal rule," and considered the issue of what search efforts may reasonably be expected of a plaintiff seeking to recover stolen art.[36] The Second Circuit held that the cause of action did not exist until the defendant refused to return the paintings, and therefore, the statute of limitations did not begin to run until after the refusal.[37]

In *DeWeerth v. Baldinger*, the Second Circuit modified the demand and refusal rule and imposed a due diligence requirement on the plaintiff or original owner.[38] This case involved a dispute over ownership of a painting by Claude Monet that disappeared from Germany at the end of World War II and had been in the possession of a good-faith purchaser for thirty years.[39] Plaintiff Gerda Dorathea DeWeerth was a citizen of West Germany and her father had purchased the Monet in 1908.[40] She inherited the painting in 1922 and kept it in her home in Germany until 1943.[41] At this time, she

31. *See id.* at 1078-79.
32. 678 F.2d 1150 (2d Cir. 1982).
33. *See id.* at 1155-56.
34. *See id.* at 1152-53.
35. *See id.* at 1156.
36. *See id.*
37. *See id.* at 1160-61. "Under New York law an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return." *Id.* at 1161.
38. *See* DeWeerth v. Baldinger, 836 F.2d 103, 104 (2d Cir. 1987).
39. *See id.* at 103.
40. *See id.* at 104.
41. *See id.*

sent the painting, along with other valuables, to her sister in another region of Germany for safekeeping during the war.[42] At the end of the war, American soldiers were quartered in her sister's home, and after their departure, DeWeerth's sister noticed the painting had disappeared.[43] Until 1957, DeWeerth made several attempts to locate and recover the missing Monet, but was unsuccessful.[44] In the meantime, the Monet had reappeared in the New York City art market in 1956, where it was displayed until purchased by defendant Edith Marks Baldinger in 1957.[45]

The court applied New York substantive law in this case, including its statute of limitations governing actions for recovery of stolen property that requires suit to be brought within three years of the time the action accrued.[46] Under New York law, the date of accrual also depends upon who is in possession of the artwork.[47] Where an owner pursues the party who took his property, the three-year period begins to run when the property is taken. But when the owner proceeds against one who innocently purchased the property in good faith, the limitations period does not begin to run until the owner demands return of the property and the purchaser refuses.[48]

Even though it was clear in this case that DeWeerth initiated her suit within three years of the date of refusal for return of the Monet, the Second Circuit concluded that she was barred from recovering the painting because her demand had been unreasonably delayed.[49] The imposition of an obligation to exercise reasonable diligence in attempting to locate stolen property is consistent with New York's treatment and protection of the good-faith purchaser.[50] Thus, New York law limiting legal action imposes a duty to attempt diligently to locate stolen property.[51]

The *DeWeerth* court held that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.[52] The New York Court of Appeals has said that the primary purpose of a

42. *See id.* at 105.
43. *See id.*
44. *See id.*
45. *See id.* The parties stipulated that Baldinger had no knowledge of any adverse claim and that the purchase was made for value and in good faith. *See id.*
46. *See id.* at 106.
47. *See id.*
48. *See id.*
49. *See id.* at 107.
50. *See id.* at 108.
51. *See id.*
52. *See id.* at 110.

limitations period is fairness to a defendant.[53] The Second Circuit justified its modification of the demand and refusal rule by its determination that the rule was in conflict with the policy of protecting good-faith purchasers from having to defend against the stale claims of original owners.[54]

In *Solomon R. Guggenheim Foundation v. Lubell*, the New York Court of Appeals further complicated the law, stating that the *DeWeerth* decision should not have been dismissed as barred by the statute of limitations, but rather should have been dismissed based on laches.[55] By returning the law of New York to the demand and refusal rule with no diligence requirement, the New York Court of Appeals abandoned the due diligence requirement the Second Circuit had imposed in *DeWeerth*.[56] The plaintiff in this action sought to recover a watercolor painting, or *gouache*, painted by Marc Chagall in 1912, claimed to be worth $200,000.[57] The complaint alleged that the *gouache* was stolen from the plaintiff in the mid-1960s by an unknown person, that plaintiff learned of defendant's possession of the *gouache* in 1985, and that in 1986 plaintiff made a demand for return of the *gouache* and that defendant refused.[58]

The *Lubell* court held that whether the plaintiff was obligated to do more than it did in searching for the *gouache* depends on whether it was unreasonable not to do more.[59] Whether it was unreasonable not to do more is an issue of fact relevant to the defense of laches and not the statute of limitations.[60] The *Lubell* court rejected the due diligence requirement and relied on a pure demand and refusal rule as the controlling rule in New York.[61] In effect, it transferred the burden of proof to the defendant, requiring it to show that plaintiff had exerted unreasonably little effort in searching for its stolen artwork. The court in *Lubell* also stated that the relative possessory rights of the parties could not depend upon the mere lapse of time, no matter how long.[62] The court then noted that "[i]ndeed, rather than harming the defendant, delay alone could be viewed as having benefited her, in

53. *See id.* at 109 (citing Flanagan v. Mount Eden Gen. Hosp., 248 N.E.2d 871 (1969)).
54. *See* Ehl, *supra* note 3, at 669.
55. *See* Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618, 619 (N.Y. App. Div. 1990).
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 622.

that it gave her that much more time to enjoy what she otherwise would not have had."[63] Thus, it held defendants accountable for demonstrating that the artwork had become their own property by virtue of plaintiff's poor search efforts.

B. The Discovery Rule

Another rule created and used by some courts in resolving cases for recovery of stolen artwork is the "discovery rule." This rule "tolls the running of the limitation period until the injured party, by the exercise of due diligence, discovers or reasonably should have discovered the facts constituting the basis of his claim."[64] The Supreme Court of New Jersey was the first to use this rule in a case relating to the recovery of stolen artwork in *O'Keefe v. Snyder*.[65] Proponents of the discovery rule claim that investigations are more likely to uncover the whereabouts of stolen art than other stolen property because the nature of art is such that those who see valuable art objects tend to remember seeing them.[66]

In *O'Keefe*, Georgia O'Keefe was attempting to recover two small pictures painted by her.[67] In her complaint filed in 1976, O'Keefe alleged she was the owner of the paintings and that they had been stolen from a New York art gallery in 1946.[68] The defendant, Snyder, asserted that he was a bona fide purchaser of the paintings and that he had obtained title to them by adverse possession.[69] The court concluded that O'Keefe's cause of action accrued when she first knew, or reasonably should have known through the existence of due diligence, of her cause of action, including the identity of the possessor of the paintings.[70] In applying the discovery rule, the New Jersey Supreme Court stated that the victim of such a theft must use "due diligence to recover the paintings at the time of the alleged theft and thereafter."[71]

In between *DeWeerth* and *Lubell*, an important decision came down in the District Court for the Southern District of Indiana, and

63. *See id.* at 621 (quoting Marcus v. Village of Mamaroneck, 28 N.E.2d 856 (N.Y. 1946)).
64. *See* Eisen, *supra* note 2, at 1081.
65. O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).
66. *See* Eisen, *supra* note 2, at 1082-83.
67. *See O'Keefe*, 416 A.2d at 862.
68. *See id.*
69. *See id.*
70. *See id.* at 870.
71. *See id.*

was later upheld by the Seventh Circuit.[72] In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, the Church of Cyprus sought recovery of four Byzantine mosaics created in the early sixth century that had been removed from a Church in Cyprus sometime in the late 1970s when the Turkish military occupied the island of Cyprus.[73] The District Court for the Southern District of Indiana applied the discovery rule and concluded that the mosaics at issue should be awarded to the plaintiff.[74]

The *Church of Cyprus* court applied the law of Indiana because it found that Indiana had a more significant relationship to the suit than Switzerland, the place where the mosaics were purchased.[75] In applying the substantive law of Indiana, the court determined that the cause of action for the recovery of the mosaics accrued, and the statute of limitations began to toll, when the Cypriots learned that a museum owner in Indiana possessed the mosaics.[76] This prevented the statute from running until the plaintiffs knew or reasonably should have known who possessed the mosaics.[77]

C. Greek Orthodox Patriarchate v. Christie's, Inc.

In a more recent case in New York, the Greek Orthodox Patriarchate of Jerusalem (the Patriarchate) brought an action seeking the return of the Archimedes Palimpsest, a tenth-century manuscript containing a copy of certain writings of Archimedes (the Palimpsest).[78] The Palimpsest had a long and partially unknown journey before ending up in the hands of the defendants, which included Christie's, Inc. (Christie's), Anne Guersan (Mme. Guersan), and John/Jane Doe (Purchaser).[79] For an undetermined period of time, the Palimpsest was kept in the library of a monastery in Palestine in the desert southeast of Jerusalem.[80] The monastery's

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72. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989); *see also* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

73. *See Church of Cyprus*, 717 F. Supp. at 1388.

74. *See id.*

75. *See id.* at 1376.

76. *See id.* at 1391.

77. *See id.*

78. *See* Greek Orthodox Patriarchate v. Christie's, Inc., No. 98 Civ. 7664 (KMW) 1999 WL 673347, at *1 (S.D.N.Y. Aug. 30, 1999). A palimpsest is a text from which the original writing has been washed off, so that the paper can be reused. *See id.* The Palimpsest involved in this case was written in the tenth century and is a copy of two of Archimedes' most significant works, "On Floating Bodies" and "Method of Mechanical Theorems." *See id.*

79. *See id.*

80. *See id.*

collection was eventually incorporated into the Library of the Patriarchate in Jerusalem.[81] The Palimpsest and hundreds of other manuscripts were subsequently transferred to a monastery in Constantinople belonging to the Patriarchate.[82] The court denied the Patriarchate's request for a preliminary injunction which sought to prevent the auction of the Palimpsest on October 28, 1998.[83] Defendants subsequently moved for summary judgment which was granted in August of 1999.[84]

The District Court for the Southern District of New York applied French law and granted defendants' motion for summary judgment, but noted that even if New York law applied, the result would be the same.[85] In applying New York's choice of law rules, the court concluded that French law should apply because "questions relating to the validity of a transfer of personal property are governed by the law of the state *where the property is located at the time of the alleged transfer*."[86] In this case, the court focused on the alleged purchase of the Palimpsest and transfer of title to Mme. Guersan's father, which took place in France, sometime in the 1920s.[87] Under these circumstances, the court concluded: "Because title passed, if at all, in France, French law should apply to this case."[88] The court proceeded to analyze the facts of this case with respect to the French Code provisions for prescriptive possession.[89] The facts presented led the court to conclude that even though there was not overwhelming evidence of public possession in the early 1960s, the Patriarchate did not point to any disagreement about genuine issues of material fact

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81. *See id.* The Patriarchate is an order of monks, declared a Patriarchate by the Fourth Ecumenical Council of the Christian Church in 451 A.D., which is devoted to large-scale educational and philanthropic activities and to the protection of Christian holy places in the territory which is now Israel, Jordan, and the Palestinian authority. *See id.*

82. *See id.* at *1-*2.

83. *See id.* at *3.

84. *See id.* at *1.

85. *See id.* at *6.

86. *Id.* at *8 (quoting Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981)). The court in *Kunstsammlungen* also cited the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246 (1971): "Whether there has been a transfer of interest in a chattel by adverse possession or by prescription . . . [is] determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place."

87. *See id.* at *5.

88. *See id.*

89. *See id.* at *6: Article 2262 provides: "All actions, real as well as personal, are prescribed by thirty years, without the one who alleges such prescription being obliged to show a right thereto or an inferred objection of bad faith being able to be raised against him." Article 2229 states that to qualify for prescriptive possession, "a possession must be continuous and uninterrupted, peaceful, public, unequivocal, and as owner." *Id.*

that could be resolved at trial.[90] In so concluding, the court granted defendants' motion for summary judgment to uphold the Purchaser's possession.

The court recognized the importance of the choice of law in this case because, as in most ownership disputes revolving around stolen artwork that crosses national boundaries, French law and New York law treat good faith purchasers of allegedly stolen art very differently.[91] French law allows good title to be obtained by prescription over a thirty-year period.[92] In contrast, New York law strongly favors the rights of original owners over even good faith purchasers, allowing for a cause of action to accrue against a good-faith purchaser when the true owner demands return of the object at issue and the person in possession of it refuses to return it.[93]

Upon completing its analysis of French law, the court went on to discuss what would be the result if, in the alternative, New York law applied in this case. The principle of laches is applicable "'where it is clear that a plaintiff unreasonably delayed in initiating an action and a defendant was unfairly prejudiced by the delay.'"[94] The court further explained that in the context of claims of lost or stolen works of art or cultural artifacts, "[t]he doctrine of laches . . . safeguards the interests of a good faith purchaser of lost or stolen art . . . by weighing in the balance of competing interests the owner's diligence in pursuing his claim."[95]

Next, the court examined the holdings of *DeWeerth* and *Lubell*.[96] This analysis illustrated that although New York state courts and the United States Court of Appeals for the Second Circuit have disagreed as to whether the claimant needs to show reasonable diligence in the context of a statute of limitations, both have ruled that the claimant's reasonable diligence in locating the lost property is highly relevant to the laches defense.[97] The court gave examples of cases in which the application of the laches defense was an issue for trial, and cases in

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90. *See id.* at *7.
91. *See id.* at *4.
92. *See id.*
93. *See id.*
94. *Id.* at *7 (citing Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992)). "Doctrine of laches, is based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." BLACK'S LAW DICTIONARY 875 (6th ed. 1990).
95. *See id.* (quoting *Czartoryski-Borbon v. Turcotte*, 221 N.Y. L.J. 27 (1999)).
96. *See id.* at *8 (citing DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987); Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618, 619 (N.Y. App. Div. 1990)).
97. *See id.*

which the record was sufficiently clear on summary judgment to determine whether a particular search was diligent.[98]

In applying these standards, the court pointed to several facts from which it concluded that the Patriarchate was not diligent at all.[99] The Patriarchate was presumably unaware that the Palimpsest was missing until it went up for auction in 1998; the Patriarchate had not asserted claims to any other manuscripts, nor announced any were missing; and the Patriarchate's own expert on French law conceded that "the Patriarchate has shown no great interest for the Palimpsest until recently."[100] The Patriarchate's argument in response, which the court was quick to reject, was that as an order of monks it did not have the ability or resources to conduct an extensive search as would be needed in a case such as this one.[101] The court pointed to a similar argument made in *DeWeerth*, and responded that even if it had not been able to conduct an extensive investigation itself, the Patriarchate could have hired someone else to do it for them.[102] After all, it was able to retain counsel quickly to proceed with this case the day before the auction was to take place at Christie's.[103]

The second part of the laches defense involves determining whether there was any prejudice suffered by defendants attributable to

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98. *See id.* at *9. The court discussed the *Czartoryski* case, in which a Polish prince brought suit to recover a painting by Jan Mostaert, which was allegedly stolen during World War II. The court in that case refused to grant summary judgment because the facts conflicted as to whether plaintiff's family availed itself of numerous resources available to locate stolen art. *See* Czartoryski-Borbon v. Turcotte, 221 N.Y. L.J. 27 (1999). Likewise, in *Republic of Turkey v. Metropolitan Museum of Art*, the United States District Court for the Southern District of New York found that it could not grant summary judgment because there was a genuine issue of material fact as to whether defendant was prejudiced by plaintiff's delay in making a demand for stolen artifacts. *See* Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

In contrast, the court examined two cases where the facts were sufficiently clear to determine whether a search was diligent. In *Kunstsammlungen*, both the district court and the Second Circuit concluded that the museum's search was diligent because it immediately reported the theft to the government and various German museums, wrote the U.S. Department of State for years, and had professors from Harvard assist in the search. *See* Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 849-52 (E.D.N.Y. 1981); *see also* Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1165 (2d Cir. 1982). In *DeWeerth*, the Second Circuit concluded that the original owner had not acted diligently because she failed to conduct any search for 24 years. *See DeWeerth*, 836 F.2d at 112.

99. *See Greek Orthodox Patriarchate*, 1999 WL 673347, at *10.

100. *Id.*

101. *See id.*

102. *See id.* In *DeWeerth*, the court noted that even if plaintiff "could not have mounted a more extensive investigation herself, she could have retained someone to do it for her." *See Deweerth*, 836 F.2d at 112.

103. *See Greek Orthodox Patriarchate*, 1999 WL 673347, at *10.

the Patriarchate's delay in bringing its claim.[104] The court concluded that because the Patriarchate's delay in bringing the action rendered defendants' case much more difficult to prove, laches barred the action.[105] The court relied on the standard of prejudice set forth by the Second Circuit in *Robins Island*: "A defendant may suffer prejudice either because it would be inequitable, in light of a change in defendant's position, to allow plaintiff's claim to proceed or because the delay makes it difficult to garner evidence to vindicate his or her rights."[106] The court pointed to the latter of these two factors, and concluded that the difficulties in garnering evidence are enhanced by "the distance over which the transfer(s) of title to the Palimpsest may have occurred, which may have been Constantinople (or Istanbul), Paris, or any point in between."[107] In a case with such complex facts, the court sided with the defendants and seemingly took an easy way out by finding prejudice resulting from the Patriarchate's delay in bringing suit.

The Patriarchate pointed out that Mme. Guersan did not have any proof of her good faith acquisition of the manuscript, such as a receipt, contract, or bill of sale.[108] The court dismissed this argument because the Palimpsest was acquired so long ago that it was not unreasonable for key documents, if any had ever existed, to have been misplaced over time.[109]

In conclusion, the court emphasized the Patriarchate's delay of almost seventy years in seeking the return of the Palimpsest after it was transferred to Mme. Guersan's father.[110] To the court, the most troubling aspect of the case seemed to be that it "would be confronted with the Patriarchate's claim that it clearly possessed the Palimpsest at the beginning of this century against defendants' claim that they clearly possess it at the end, with little or no evidence of what happened in between."[111] Again, by granting summary judgment, the court discounted any chance of discovering what really happened to the Palimpsest, and therefore gave up any chance of resolving the dispute in the fairest manner possible.

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104. *See id.*
105. *See id.*
106. *See id.* (citing Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.3d 409, 424 (2d Cir. 1992).
107. *Id.*
108. *See id.*
109. *See id.*
110. *See id.* at *11.
111. *Id.*

IV. ANALYSIS & CRITICISM: WHY STRICT APPLICATION OF EITHER THE DISCOVERY RULE OR THE DEMAND AND REFUSAL RULE SHOULD BE REPLACED BY A COMBINATION OF THE TWO

As illustrated by the above cases, there is a conflict among jurisdictions regarding the legal rules applied to cases involving recovery of stolen art and cultural property. Of course, these cases are all very fact-specific and should not all be determined in the same manner. Yet, there needs to be more consistent application of the rules to eliminate confusion and to aid in the deterrence of the trade in stolen artwork.

Over the years, the stage has been set for New York to become a preeminent international forum for the trade of stolen artwork and cultural property. As such, all courts, but New York courts in particular, must continue moving toward an environment more protective of original owners if it is to avoid becoming a haven for stolen artwork and cultural property. To do so, New York courts should apply the discovery rule and the demand and refusal rule in combination, as opposed to applying strictly the demand and refusal rule, or as was recently the case in the *Greek Orthodox Patriarchate*, not applying the demand and refusal rule at all.[112]

As mentioned above, the discovery rule has been used in New Jersey and Indiana, but not New York. This rule tolls the running of the limitation period until the injured party, by the exercise of due diligence, discovers or reasonably should have discovered the facts constituting the basis of his claim.[113] Proponents of the discovery rule assert that the shift in emphasis from the conduct of the possessor in refusal to the conduct of the owner plays a vital role in differentiating the discovery rule from both the previously employed adverse possession doctrine and the demand and refusal rule.[114] They also contend that the rule's shift in emphasis better protects innocent victims than the demand and refusal rule.[115] This is because innocent victims of art theft will be able to take action to recover their property when they know or should know the facts constituting the basis of the claim. In other words, "by focusing on the actions of the owner, rather than on those of the possessor, advocates of the discovery rule claim that the doctrine protects innocent victims by allowing them to

112. *See id.* at *10 (describing the United States District Court for the Southern District of New York's reliance on the laches defense to bar the Patriarchate's claim to the Palimpsest).

113. *See* Eisen, *supra* note 2, at 1081.

114. *See id.* at 1087.

115. *See id.*

retain title to their stolen property as long as they take appropriate steps to recover it."[116]

However, "appropriate steps" can mean different things in different situations. As noted earlier, cases revolving around recovery of stolen artwork are all very fact-specific, and variations on situations are very possibly infinite. It is the premise of this Comment that in certain circumstances, it is unreasonable to place a heavy burden on original owners, and that the discovery rule should be applied regardless of due diligence. There are circumstances and fact patterns in which it seems inequitable to require original owners to search diligently for tens of years at a time. At the same time, there are situations in which due diligence should be considered. The following examples should illustrate the difficulties that courts face in these cases, as well as the need to apply a combination of the two rules.

First: Imagine a situation in which an individual owns an expensive impressionist painting. The painting is stolen while the owner is on vacation, and upon her return, the owner merely reports the theft to local police, does not report it to any of the registers or bulletins of stolen and missing artwork, and makes no further efforts to recover the painting. After five years, the painting turns up in a small but reputable museum where it is displayed to the public for fifty-five years. The museum decides to sell the painting and it turns up at an auction. If the woman, or a member of her family, now demands the return of the painting, would anyone believe that she should equitably be entitled to claim to this painting? Application of the demand and refusal rule in New York would likely end in her recovery of the painting because that rule disregards both the original owner's and the present possessor's actions prior to the demand. From this example, it is easy to see how the strict application of the demand and refusal rule can be inequitable.

In applying the discovery rule to this example, on the other hand, the limitation period would begin to run when the owner knew or should have known the facts constituting the basis of the claim. In this situation, through due diligence the owner *should have* learned the location of the painting in the museum five years after the painting was stolen, and this constitutes the basis of the claim. Thus, since the owner waited fifty-five years to demand the return of the painting, the action would be barred.

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116. *Id.*

Another possible fact situation is one similar to the *Greek Orthodox Patriarchate* case. In this case, the Palimpsest languished in obscure libraries for nine centuries until it was rediscovered in 1907 in the Convent of the Holy Grave in Constantinople.[117] In 1918, the Ottoman Empire was dissolved after its defeat in World War I, and the book collections in Constantinople were broken up.[118] This type of case presents multiple factors that should dictate different treatment of the original owner than that of the individual art owner whose work is stolen. The fact that the manuscript disappeared at the end of a war and during the collapse of an empire surely must be considered important. Historically, from ancient times until the last century, it has been the privilege of the victorious party to loot, capture, and sack the enemy's property.[119] Today, however, it is common opinion that pillage, looting, or capturing in times of war, armistice, or occupation confers no valid title to the perpetrator.[120] This is not an act of simple theft and it should not be treated as one. It is true that the events leading to the Palimpsest's disappearance occurred over eighty years ago, and therefore determining what actually happened is likely to be impossible. But no effort was made at all to determine the manuscript's path over the years, and the court did not even consider as relevant the fact that it was allegedly stolen during a time of political and social unrest.[121]

Another important factor that courts should take into consideration in such cases is the nature of the original owner. In this case, the original "owner" is an order of monks, the composition of which undoubtedly changed multiple times over the seventy years since the Palimpsest disappeared. This fact undoubtedly makes investigation into the actual disappearance of the manuscript that much more difficult, and as a result it should by no means be disregarded as the court did in this case. It is not at all similar to the situation in which an individual owner blatantly fails to make any

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117. *See* Malcolm Brown, *Archimedes Text Sold for $2 Million*, N.Y. TIMES, Oct. 30, 1998, at F5.

118. *See id.*

119. *See* Siehr, *supra* note 16, at 109.

120. *See id.* at 113.

121. Recently, courts have begun to treat differently cases revolving around recovery of property stolen or pillaged during times of war. *See generally* Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT'L L. 1511, 1520-21 (1999) (explaining that in the past few years, Jewish nongovernmental organizations have become very active in lobbying for more attention to issues related to claims involving art lost and stolen during the Holocaust); *see also* Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted By the Nazis In World War II?*, 30 RUTGERS L.J. 441 (1999).

attempt to recover her property. It should follow that the nature of the original owner here, an order of monks, in fact makes meeting a due diligence requirement even more difficult because there is likely to be more confusion. Monks are also committed to a certain lifestyle in which they are unable to pursue such matters, or at least unable to make such matters a priority. Further, it is more difficult to point the finger at one individual who consciously decided not to pursue the stolen property.

Strict application of the demand and refusal rule here would likely result in return of the manuscript to the Patriarchate because the limitations period would not have begun to toll until after they demanded the return of their property and Christie's refused to return it. At first glance, this rule appears to favor the original owner. However, even though the New York court chose to apply French law instead of New York law, it still analyzed the case under New York law, and in fact did not apply the demand and refusal rule at all. While the court firmly adhered to the conflicts rules of New York and the Second Restatement to determine whether to apply French law or New York law, it is not, and should not be, out of the question to evaluate this conflicts issue in another way. A good example of an alternative approach is that used in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*[122] The allegations made in this case were very similar to those in *Greek Orthodox Patriarchate*. The Church of Cyprus claimed it never intended to relinquish ownership of the mosaics, that they were improperly removed without the authorization of the Church, and that they should be returned to the Church.[123] The defendants claimed that Goldberg should be awarded the mosaics because "she purchased them in good faith and without information and reasonable notice that they were stolen."[124] The Seventh Circuit affirmed the Indiana District Court's application of the two-step "most significant contacts" test used for choice of law in Indiana tort cases.[125] Both courts concluded that Indiana law should apply, specifically "because the place where the mosaics were purchased, Switzerland, has an insignificant relationship to this suit."[126]

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122. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989).

123. *See id.* at 1375-76.

124. *Id.*

125. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Arts, Inc., 917 F.2d 278, 286 (7th Cir. 1990).

126. *Church of Cyprus*, 717 F. Supp. at 1376.

In *Greek Orthodox Patriarchate*, the Patriarchate claimed that it had never intended to relinquish ownership of the Palimpsest, that it was improperly removed, and that it should be returned.[127] Defendants alleged that Mme. Guersan should be allowed to keep the Palimpsest (and put it up for auction) because her father purchased it in good faith.[128] France had no significant relationship to the suit in *Greek Orthodox Patriarchate*. The only connection it has is the fact that Mme. Guersan's father purchased the manuscript there and allegedly obtained title there and the Palimpsest was situated there for many years. Mme. Guersan chose to bring the manuscript to New York for auction. The Patriarchate did not discover the location of the Palimpsest until it turned up to be auctioned at Christie's in New York, and it brought its suit in New York.

In focusing on the transfer from some unknown seller, possibly the person(s) who originally stole the Palimpsest from the Patriarchate, to Mme. Guersan's father, the court acknowledged that title may not have passed to Mme. Guersan, yet proceeded to examine the validity of the title she may or may not have obtained.[129] The court completely discounted, without further investigation, the fact that Mme. Guersan could produce no evidence of title to the Palimpsest. Further, the court discounted the fact that Mme. Guersan chose New York as the auction site for the Palimpsest.

The court rejected the Patriarchate's public policy-based argument that it should depart from the choice of law rule and apply New York law. On this point, the court alluded to a great deal of uncertainty in the law of New York as it applies to requirements of due diligence or laches defenses.[130] As a matter of public policy, since New York is a preeminent center for international art trade, its courts should continue to move towards greater protection for original owners. By not increasing protection of original owners, New York may gain a reputation as a place where stolen art may be freely bought and sold.[131]

In short, it makes no sense to apply French law simply because one of the parties' fathers purchased a manuscript in France that was stolen from Jerusalem, and has subsequently been brought to New York where it was auctioned and sold. The Palimpsest ended up in

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127. *See* Greek Orthodox Patriarchate v. Christie's, Inc., No. 98 Civ. 7664 (KMW) 1999 WL 673347, at *1 (S.D.N.Y. Aug. 30, 1999).

128. *See id.*

129. *See id.* at *5 ("Because title passed, if at all, in France . . . .").

130. *See id.*

131. See id.

New York by Mme. Guersan's choice, and New York law should govern. By applying New York law over French law, the cause of action would have accrued at the time the Patriarchate demanded the return of the Palimpsest and the defendants refused to do so. Because *Lubell* held that due diligence is not required for statutes of limitations, the only defense remaining if New York law applied in this case would be laches.

The court discussed the laches defense and stated that the owners had unreasonably delayed their pursuit of the object. The principle of laches is applied where it is clear that a plaintiff unreasonably delayed initiating an action and a defendant was unfairly prejudiced by that delay.[132] However, as noted in *Lubell*, the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long.[133]

As the premise of this Comment advocates, the court should have taken into account all the factors of this case mentioned above, including the circumstances under which the manuscript disappeared and the nature of the original owner. Again, considering these factors, it is unfair to simply assume that the Patriarchate was unreasonably delayed in pursuit of the object and initiating an action against the possessor. The whereabouts of the manuscript were unknown for seventy years. The court never investigated the conditions under which the Palimpsest was held prior to its theft: Were there hundreds of manuscripts, rendering it difficult for one of the monks to notice the absence of the Palimpsest? If so, this should further reduce the categorization of the Patriarchate's action as "unreasonable delay." Of course, something with such cultural importance should be looked after and pursued diligently. But as in *Church of Cyprus*, the monks here should have been afforded the benefit of pursuing the Palimpsest when they actually learned of its whereabouts. With these facts, it is not difficult to conclude that even had the Patriarchate searched diligently for seventy years, they would not have been successful: the Palimpsest was not on public display. Under these circumstances, requiring due diligence (from an order of monks no less) in the search for the missing Palimpsest is akin to asking them to search nonstop for a needle in a never-ending haystack for seventy years.

The second part of the laches defense is the requirement that the defendant be unfairly prejudiced by the plaintiffs' delay initiating an

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132. *See id.* at *7 (quoting Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992)).

133. *See* Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618, 621 (N.Y. App. Div. 1990)).

action. Mme. Guersan actually benefited from the delay because she was afforded the opportunity to possess and enjoy the Palimpsest for many years. Christie's and the purchaser were also not unfairly prejudiced because they were made aware of the claim to the manuscript as soon as the Patriarchate learned of its whereabouts. Thus, it can be argued that the defendant was *not* unfairly prejudiced by the delay.

Had the court in this case applied a combination of the demand and refusal rule and the discovery rule, the outcome might have been quite different. First, as held in *Lubell*, there would be no due diligence requirement on the part of the original owner.[134] As proposed by this Comment, so long as the Patriarchate demanded the return of the Palimpsest within a reasonable time of its discovery (i.e., when they knew or should have known its whereabouts), they would not be barred from a cause of action to recover the manuscript. It follows from the premise of this Comment that because of the nature of the events surrounding the disappearance of the manuscript, and the nature of the original owner itself, that applying a combination of the discovery rule and the demand and refusal rule, the Patriarchate did not unreasonably delay its search for the manuscript, and could not have been expected to determine its whereabouts before its public appearance at the auction. Furthermore, the Patriarchate should not be barred from recovery because it made timely demands for the return of what was wrongfully taken decades ago.

V. CONCLUSION

Combining the discovery rule and the demand and refusal rule would preserve a fair chance for original owners who are unable to diligently search for stolen property for reasons beyond their control and to get their property back once they have determined its location. It would allow equitable solutions for those owners who truly *should have known* the location of their stolen property before they possessed such knowledge, without imposing an unduly strict due diligence requirement on original owners.

Because New York is the most common forum for art theft cases, it should adopt a combination of the discovery rule and the demand and refusal rule. This combination would provide the most equitable solutions to these conflicts involving two innocent parties, a fact pattern that often arises due to the wide variety of factual situations that occur in cases that pertain to the recovery of stolen artwork.

134. *See id.*

Where a church or other presumably innocent organization has been the victim of art theft or theft of cultural property, courts should take into consideration the nature of the original owner and the circumstances surrounding the disappearance of the objects. Where the owner is not an individual, but rather a group of people, a due diligence requirement should not be strictly enforced.