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SYMPOSIUM:
INTERNATIONAL LEGAL DIMENSIONS OF ART AND CULTURAL PROPERTY

PREFACE

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The market for art and cultural property is international.[1] Demand is intense and not particularly local in terms of consumer preference.[2] Supply responds to this intense international demand. Like most anything else, art finds its way to whomever is prepared to pay for it. Regulation affects *how* it arrives at its ultimate destination, but generally does not prevent it from getting there.

Apart from this international market, legal and policy aspects of art and cultural property have a distinctly international flavor due to historical circumstance. Since many works over time have been removed from their source by way of conquest, expropriation, or theft, claims for cross-border restoration or restitution inevitably involve international law and policy considerations. Even a simple exhibition agreement at a foreign museum may generate complex issues of domestic and international private and public law.

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1. *See, e.g.*, Klint Callaghan, *Russians Rockin' the Art World*, Art Bus. News, July 1, 2005, at 1; Dennis Eng, Do *I Hear $2.5b? Asian Houses Eye a Record Year*, S. CHINA MORNING POST, May 26, 2005, at 2; *The World is Begging for SA Art*, BUS. DAY (South Africa), Sept. 27, 2004, at 30.

2. A trend, however, has been reported of wealthy Asian families "buy[ing] back their Asian heritage." Deborah Brewster, *Asian Art Prices Hit Record Highs*, FIN. TIMES (London), Sept. 22, 2005, at 2. The purchaser, though of Asian origin, may have emigrated to a Western country such as the United States. *See id.* (reporting on the $1,600,000 purchase of a painting of Indian artist Tyeb Mehta by a private collector of Indian origin living in the United States; the bidding was done by the purchaser by telephone from New York).

And yet, there has been a relative dearth of coverage of the international legal dimensions of art and cultural property, the focus of this issue of the *Vanderbilt Journal of Transnational Law* and the symposium held at Vanderbilt Law School on February 18-19, 2005. The keynote presentation of the symposium, the Charles N. Burch Lecture, was delivered by Professor Erik Jayme of the University of Heidelberg, considered by many the premier authority in Europe. In his article, *Globalization in Art Law: Clash of Interests and International Tendencies*, Professor Jayme frames the inquiry for the entire symposium. He identifies five interests that are potentially in conflict: "(1) the global interests of the international civil society, (2) the national interests of states and nations in preserving artworks of national significance in the home country, (3) the private interests of the owners of an artwork or the artists, (4) the interests of the artworks themselves, and finally (5) the market interests."[3]

In resolving the clash of these interests, Professor Jayme acknowledges that they may at first appear irreconcilable. Nonetheless, he urges compromise through the development of and resort to techniques other than litigation.[4] For Professor Jayme the *sine qua non* of any resolution ought to be the guarantee of public access, thereby furthering the global interest of international civil society.[5]

The subsequent article by Professor Norman Palmer, *Bailment or Derailment: Cross-Border Art Loans and the Specter of Ulterior Title*, addresses a clash of interests identified by Professor Jayme in the context of the typical international art loan or bailment. Market interests, along with the more abstract global interests of international civil society, confront the private interests of "owners," who surface as individual or state claimants, seeking to recoup works of art that at some point in the past were allegedly improperly appropriated. Following a thoroughgoing examination of the domestic and international legal landscape, including novel theories of law being invoked to facilitate recovery by claimants,[6] Professor Palmer affords insights into how this particular clash of interests may be resolved or avoided altogether.

Matthias Weller, Senior Research Fellow at the University of Heidelberg, addresses the loan problem in the context of a particular

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3. *See* Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT'L L. 927, 929 (2005).

4. *See id.* at 942.

5. *See id.* at 929.

6. One example is money laundering statutes. *See* Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANSNAT'L L. 947 (2005).

case, *Prince Hans-Adam II of Liechtenstein v. Germany*.[7] His article, *Immunity for Artwork on Loan? A Review of International Customary Law and Principal Anti-seizure Statutes on the Occasion of the Liechtenstein Litigation*, considers a fascinating development in international law—the analogic extension of diplomatic immunity to works of art. The author proceeds to examine rigorously the potentiality and difficulties under international and domestic law of this nascent legal theory.

In *Reflections on Litigating Holocaust Stolen Art Cases*, Donald S. Burris and E. Randol Schoenberg bring to light the litigation strategies relied upon by the cadre of lawyers litigating Holocaust stolen art cases and the legal obstacles likely to be encountered in seeking vindication of private interests of *original* owners cross-border when confronting national interests and other private interests of *current* owners. Messieurs Burris and Schoenberg are no ordinary attorneys, but rather the successful litigators of the landmark United States Supreme Court decision in *Republic of Austria v. Altmann*.[8] That case involved a complex set of facts and international procedural considerations associated with an effort by the family of a Holocaust victim to recover from Austria Gustav Klimt paintings that had been confiscated by the Nazis. Though aware of their provenance, the Austrian government resisted restitution, as the paintings had great national cultural significance.

Schoenberg and Burris emphasize the utility to claimants' litigators, first, of the common law rule that a good faith purchaser cannot obtain good title from a thief and second, the public policy interest of the United States in seeking the return of Nazi-looted art. In so doing, however, they also serve to highlight the "international" problem, as many other countries follow the principle that a good faith purchaser's title is not tainted by the bad title of his seller[9] and the fact that not all countries have the same commitment to the return of Nazi-looted art that the United States has.

Dr. Neil Brodie, Co-ordinator, Illicit Antiquities Research Center of the McDonald Institute for Archeological Research at Cambridge University, England, explores yet another of the clash of interests identified by Professor Jayme in his Burch Lecture, that of market interests on the one hand and national or ethnic minority interests on the other hand. In his article, *Historical and Social Perspectives on the Regulation of the International Trade in Archeological Objects: The Examples of Greece and India*, Dr. Brodie grapples with the

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7. Prince Hans-Adam II of Liechtenstein v. Germany, 2001-VII Eur. Ct. H.R. 7.

8. 541 U.S. 677 (2004).

9. *See generally* Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1432 (1992).

question how best to preserve cultural heritage. He acknowledges that significant regulation and severe penalties may deter certain persons from going public and may actually generate a black market. Dr. Brodie, nevertheless, maintains that "softer" laws simply do not work, in light of the unabating demand for cultural property, the inability of underdeveloped source countries to stem the supply, and the lack of commitment of developed destination countries to enforce laws against illicit trade in cultural property. Dr. Brodie argues for a simpler, more stringent regulation at the source. He makes clear, however, that this cannot succeed without a corresponding commitment to criminalization by the countries that generate the demand. According to Dr. Brodie, consumers ultimately benefiting from the illicit trade are primarily accomplished individuals and institutions in Western countries that will not wish to be tainted with the charge of criminal conduct. Accordingly, he sees norm reinforcement through criminalization of conduct as a critical tool in defeating the illicit trade.[10]

Professor Kurt Siehr offers a unique perspective in his article, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects.* He, too, addresses the clash between market and national interests. Professor Siehr, however, comes to very different conclusions than Dr. Brodie. Professor Siehr analyzes with considerable skepticism the domestic and international laws enacted to regulate and stem the international free flow of art and cultural property, especially as it involves objects of national heritage.

Bringing historical and practical insights to bear, he sets forth a "liberal" perspective. He maintains that, whether licitly or illicitly, art will flow, as there is demand. The appropriate focus should be on the design of a liberal system that fosters the legitimate free flow of art and cultural property. This system will, thereby, also foster global, rather than parochial, interests. In this regard, Professor Siehr prioritizes Professor Jayme's first interest, the "global interests of the international civil society."[11]

In his examination of the interests at stake in the realm of art and cultural property, Professor Jayme explored in some detail the interest of the nation. The idea of national cultural property has proven a very powerful conception. In his article, *Imaginatively Public: Art as Heritage Property, the English Experience,* Professor Joseph L. Sax explores the curious rise of art as a community good in

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10. For a discussion of norm reinforcement through a combination of persuasion and sanctions, *see* Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION (1992). *But see* Dan M. Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem,* 67 U. CHI. L. REV. 607, 607, 609 (2000).

11. *See supra* text accompanying note 3.

an eighteenth and nineteenth century England very committed to individual property ownership. He uses the English experience of that period as the template to solve the contemporary "patrimonial paradox,"[12] that is, the proper allocation of rights in works that have national heritage significance but which are owned by private parties. Professor Sax proposes an "implicit compact sustaining a delicate balance between privilege and responsibility."[13]

Professor Sax's examination of "the patrimonial paradox" implicates the clash of national and private interests of owners. But what of the private interests of the artist and the distinctive interest identified by Professor Jayme of the artwork itself? Does an artist also have an enduring interest in that artist's creative product? If so, what is the nature and extent of that interest? How should it be enforced? These issues and related ones are examined in Professor W. W. Kowalski's article, *A Comparative Law Analysis of the Retained Rights of Artists*. Professor Kowalski explores the varied responses of societies over time to the clash of interests between the artist and the owner. In particular, Professor Kowalski explores critically the right of patrimony, right of integrity, and *droit de suite*, as well as less developed rights granted the artist. He also recognizes that the state cannot be detached from the analysis. The artist's interest inevitably morphs into a *public* heritage interest in the work itself, not unlike the evolution Professor Sax identified. Private ownership rights are inevitably circumscribed as part of a public trust. Thus, in his article, Professor Kowalski seeks to arrive at an appropriate equilibrium among interests of owner, artist, artwork, and society.

The clash of cross-border interests discussed above raises intricate issues for the forum in which litigation is proceeding, as to which state's law is to apply. This is the subject matter of Dean Symeon C. Symeonides' article, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*. Using the case of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*[14] as a starting point, Dean Symeonides urges adoption of a model rule which he has developed. It presumes that the law of the state of origin should be applied. This presumption is modified, however, under certain circumstances, such as when another state has a "materially closer connection." An exception to the presumption is also recognized if third party acquirers not in the state of origin have acted in "good faith." These exceptions ameliorate the impact of the presumption, which otherwise strongly favors countries that are the

12. Joseph L. Sax, *Imaginatively Public: Art as Heritage Property, the English* Experience, 38 VAND. J. TRANSNAT'L L. 1097, 1140 (2005).

13. *Id.*

14. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

source of cultural property over countries that are generating the flourishing demand and are the ultimate destination of the cultural property.

Apart from the choice of law problem, there is also the matter of what are appropriate remedies. In her article, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, Professor Jennifer Anglim Kreder examines "the patchwork of legal remedies potentially available to secure Nazi-looted art . . . ."[15] The article emphasizes that the National Stolen Property Act,[16] through criminal prosecutions or civil forfeiture proceedings, is a valuable tool. Professor Kreder, however, argues for only limited resort to these remedies by the government, such as when the current possessor of the art had notice of criminal conduct and the current claimant was unable to locate the art after the theft.[17]

In sum, the symposium's contributors have sought to address the complex legal and policy issues raised by an explosive global market in art and cultural property. These articles will prove invaluable in the shaping of the international legal response to the "clash of interests" identified by the symposium's keynote speaker, Professor Erik Jayme.

15. 38 VAND. J. TRANSNAT'L L. 1199, 1205 (2005).
16. 18 U.S.C. §§ 2314–2315 (2005).
17. *See* Kreder, *supra* note 15, at 1245.