THE LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION

3 May 2011

John Sebert, Executive Director
Uniform Law Commission
111 N. Wabash Ave., Ste. 1010
Chicago, IL 60602

Dear Mr. Sebert,

On behalf of the Lawyers' Committee for Cultural Heritage Preservation[1] — a not-for-profit organization that fosters the stewardship of cultural resources through legal education and advocacy — I am writing to comment on the proposed Uniform Law Commission (ULC) act on private rights of action to recover stolen cultural or artistic property and illegally exported artifacts.

If the ULC undertakes a drafting project on this topic, our organization would like to participate as an observer. That said, at this time, we strongly believe that a uniform act is neither desirable nor feasible. The "Prospectus for a Uniform Act on the Civil Resolution of Art Ownership Disputes," which the ULC released on 14 March 2011, does not demonstrate why the proposed act is needed, nor could it, because there is no such need. Nonetheless, if the ULC proceeds in drafting an act, it should first address its fiscal impact, as well as its effect on criminal, tax, and even international law and policy. Lastly, even if the ULC overcomes these challenges and drafts a uniform act, its prospects for enactment would be weak at best.

I elaborate upon these points below, confining my remarks to those questions asked by the ULC in its "Request for Comments," as circulated on 16 March 2011.

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[1] The Lawyers' Committee for Cultural Heritage Preservation is registered with the U.S. Internal Revenue Service as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. For more information, please visit our website at www.culturalheritagelaw.org.

Is there a need for uniform state law on this topic?

The prospectus does not demonstrate that state law is so incomplete, uncertain, or conflicting as to warrant a uniform act on the civil resolution of art disputes.

In fact, United States law on disputed title to art is largely consistent among the states, especially on key issues. All law, both common and statutory, agrees on the most important principle — that a thief cannot acquire, or convey, good title.[2] Even among statutes of limitation, as much as they vary from jurisdiction to jurisdiction, there is still near universal adherence to the discovery or due diligence rule (with the notable exceptions of New York and California).

Neither does the prospectus support its claim that existing variances in state law impede the functioning of the national and international art markets. On the contrary, the international market boomed in 2010, growing 51% to €43 billion euros (approximately U.S. $57 million). The United States largely drove this growth, making up 46% of last year's global market. [3] And the vast majority of the U.S. market was in those states with the country's least uniform laws — New York and California.

Nor does the prospectus substantiate the argument that state variations — in and of themselves — lead to forum shopping. Litigants in art ownership disputes are already prevented from forum shopping, because most federal and state courts apply a similar "significant contacts" test to determine the applicable substantive law, which includes state choice of law rules.[4] Furthermore, the proposed uniform act purportedly would not even address choice of law rules, thus precluding any impact on forum shopping (assuming, for the sake of argument, that the practice does exist).

Lastly, the prospectus does not justify, or try to justify, why art ownership disputes should be treated differently than any other property claims, as only California has seen fit to do. The states have developed comprehensive property laws, which are more than capable of resolving art title challenges. In short, at this time, there is no demonstrated need for the proposed uniform act.

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[2] This long accepted tenet of the common law is also codified at UCC §§2-403.

[3] TEFAF Maastricht, The Global Art Market in 2010.

[4] *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*, 717 F. Supp. 1374 (S.D. Ind. 1985), *aff'd*, 917 F. 2d 278 (7th Cir. 1990).

Are the issues that the Study Committee lists in the memorandum under "Scope of Proposed Uniform Act" the issues that a drafting committee should consider in developing an act? Are there additional issues that a drafting committee should consider? Are there some issues on the Study Committee's list that should not be included in any draft legislation?

Although the prospectus has not revealed a pressing need for a uniform state act, if the ULC were to proceed in drafting one, it would need to consider a number of additional issues.

Most importantly, the ULC must address what "art" is, and the effect of that definition. The prospectus uses terms of art (no pun intended) throughout, often interchangeably, without any attempt at clarification. But "art," "artistic property," "artifacts," "cultural patrimony," and "cultural property" are distinct concepts for which no accepted definitions exist. Their exact meaning must be spelled out in each state law, piece of federal legislation, or international treaty.

In turn, if the ULC attempts to draft a uniform act, it must first and foremost define these terms. Given that no uniform act exists in a vacuum, any drafting committee must also recognize the impact of its chosen definitions on criminal, tax, and even international law, despite the prospectus' assertions to the contrary. By changing statutes of limitations — or, more significantly, repose statutes — a uniform act could determine what is, or is not, stolen property. This would unavoidably, and dangerously, intrude into penal law at both the state and federal levels. In particular, the National Stolen Property Act (18 U.S.C. §§ 2314-15) would be affected, because its text does not define "stolen property." In applying the NSPA, the courts therefore look to other laws, and they would surely look to a uniform act.

A uniform act would also inevitably involve international law and policy. The prospectus may contend that an act would not "deal with property claimed to be owned by a foreign government as its cultural patrimony or *property removed from a country in violation of its export restrictions*." However, this statement is contradicted by the prospectus' own description of the proposed act, which reads: "a uniform act on private rights of action to recover stolen cultural or artistic property and *illegally exported artifacts*" [emphasis added]. Because foreign states are the only possible claimants seeking title to "illegally exported artifacts," a uniform act must anticipate these sovereigns' involvement, and the reverberating consequences of it.

In addition to considering all these implications, the ULC must also evaluate the fiscal repercussions of the proposed uniform act, especially those of the title registry. The title registry would necessitate the creation of an entire new bureaucracy, which would largely duplicate existing efforts in the private sector. Such an endeavor would be elaborate, costly, and time-consuming. It would consequently undermine the UCL's very purpose, which is to make the law *more* efficient, not *less* so.

If the ULC develops the type of non-partisan, well-conceived and well-drafted legislation for which it is known, what do you believe are the prospects for enactment of this legislation in a substantial number of jurisdictions?

Given the conceptual and concrete difficulties inherent in crafting a uniform law on the civil resolution of art disputes, as noted above, it would be all but impossible for the ULC to develop the type of legislation for which it is so renowned.

Even if these challenges were overcome, and a uniform act drafted, its prospects for enactment would not be strong. To be successful, a uniform act must be accepted by the major "art market states," New York and California. Neither is likely to adopt such a statue at this time, particularly given its guaranteed effect on statutes of limitation.

New York once considered supplanting its demand and refusal rule with a discovery rule like that which prevails throughout the rest of the country. In 1986, such a bill even made it through both houses of the New York State Legislature and onto the desk of Governor Mario Cuomo, who vetoed it on the recommendation of the United States Department of State, Department of Justice, and Information Agency. The governor feared that the measure would turn New York into "a haven for cultural property stolen abroad." The New York State Court of Appeals, the highest court in the state system, agreed and has since itself refused to adopt a different rule.[5] Nor is such an effort likely to find support in the New York executive, which is headed by Governor Andrew Cuomo, son of the former governor.

Just last year, California adopted a new statute of limitations, which entered effect at the beginning of this year. This statute, which is unique in the country, gives claimants six years to file "an action for the specific recovery of a work of fine art brought against a museum, gallery,

[5] *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143 (N.Y. App. Div. 1990), *aff'd*, 77 N.Y. 2d 311 (1991).

auctioneer, or dealer" and three years for any other "article of historical, interpretive, scientific, cultural, or artistic significance." [6] The statute runs from the moment of actual discovery, as did its predecessor. A 2002 California law had actually abolished the statute of limitations altogether for Holocaust-era claims, so long as the action was commenced before 31 December 2010, although this was struck down by the 9th Circuit Court of Appeals.[7] A petition for certiorari is now pending before the U.S. Supreme Court. Nevertheless, California has demonstrated its commitment to resolving art title disputes as it sees fit, even if it means going the course alone.

For these reasons, neither New York nor California would adopt a uniform act on the civil resolution of art disputes, and their refusal would doom such a measure from the outset.

In conclusion, the Lawyers' Committee for Cultural Heritage Preservation does not believe that a uniform act is currently desirable or feasible, but we will participate in the drafting process should the ULC proceed.

Sincerely,

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[6] Cal. Code Civ. Proc. § 338(c).

[7] Cal. Civ. Proc. Code § 354.3 (Deering 2007); *Von Saher v. Norton Simon Museum* 592 F.3d 954 (9th Cir. 2010).