AN AVENUE FOR FAIRNESS: DISCLOSURE-BASED COMPENSATION SCHEMES FOR GOOD FAITH PURCHASERS OF STOLEN ART

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I. INTRODUCTION

The global art market, a nearly 65 billion dollar industry,[1] has been called "the only sector of economic life in which one runs a 90% risk of receiving stolen property."[2] In the United States, under the common law and codified in the Uniform Commercial Code,[3] a thief conveys no title and good faith purchasers of stolen art are often forced to surrender art assets to true owners at great financial loss.[4] Current equitable defenses available to good faith purchasers facing impending forfeiture are difficult to mount and practically unavailing, with innocent possessors often suffering "total loss" in assets in excess of millions of dollars.[5] Both equitable defenses

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[1] *See Global Art Market Reaches USD 63.7 Billion in 2017, with Dealers Taking the Lion's Share*, ARTBASEL, https://www.artbasel.com/news/global-art-market-reaches-usd-63-7-billion-in-2017--with-dealers-taking-the-lion-s-share (noting that the market is rebounding after two years of decline, with the United States as the largest market worldwide).

[2] Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 663 (2000) (quoting Elisabeth des Portes, The Fight Against the Illicit Traffic of Cultural Property, in The Law of Cultural Property and Natural Heritage 5-1, 5-4 (Marilyn Phelan & Robert H. Bean eds., 1998)).

[3] Uniform Commercial Code § 2-403.

[4] For one such case, consider *Benningson v. Alsdorf,* in which a good faith purchaser of Picasso's *Femme en Blanc* settled out of court with an heir to the painting's true owner. After lengthy proceedings, Alsdorf paid Benningson $6.5 million for clear title to the work, after having purchased it on the market some years earlier for $357,000. There is no indication that Benningson ever knew of his claim to the painting before he was notified of his status as an heir by the Art Loss Register. *Benningson v. Alsdorf*, (Cal. Super. Ct. June 16, 2003); *aff'd*, No. B168200 (Cal. Ct. App. Apr. 15, 2004); *dismissed*, No. S124828, (Cal. Nov. 30, 2005).

[5] *US Couple Forced to Give Up Their $1.75M Pissarro*, NEWSER (Nov. 11 2017, 1:56 PM), http://www.newser.com/story/251295/us-couple-forced-to-give-up-their-175m-pissarro.html (quoting an American

available to good faith purchasers in such cases consist of statute of limitations defenses. Each defense incorporates judicial analysis of the parties' respective due diligence performance, taking into account actions by the true owner *after loss* and by the good faith possessor *before and after purchase*.

In order to more fairly balance the equities between the parties and avoid total loss to the good faith purchaser, I propose an additional step to be taken in courts' due diligence analyses in art replevin actions. Courts should determine whether a good faith possessor of stolen artwork should be entitled to compensation after forfeiting artwork to the true owner. To do this, courts should analyze both the *quality* and *quantity* of due diligence performed by both the true owner and current possessor and the relative potential loss between the parties. This sliding scale judicial analysis, in which good faith purchasers are rewarded for due diligence and disclosure, creates a solution in which neither party is made entirely whole in accordance with the underlying notion that neither party can be denominated a "wrongdoer." Rather, each party has his or her loss mitigated based on the equities of the particular situation.

First, this note will explain the problem of art theft and its influence on the United States art market. It will then present the law applicable to good faith purchasers of stolen art, the defenses available to them in replevin actions, and the problems associated with those defenses using exemplary cases. Next, it will discuss application of patent and salvage law concepts to equitable considerations in art replevin actions. Finally, this note will propose a new sliding-scale framework for equitable analysis in such cases, in which courts award compensation to

collector's attorney, who deemed his client's forfeiture of a $1.75 million dollar Pisarro painting to it's true owner a "total loss").

good faith purchasers who affirmatively attempt to protect their investment by conforming with art market standards of due diligence.

II. ART THEFT GENERALLY

Art plunder is a hallmark of wartime.[6] Recent history gives us one of the most devastating examples. To Adolf Hitler, art meant power. In May 1938, Hitler visited the Uffizi Gallery in Florence, Italy, while meeting with Benito Mussolini.[7] The gallery, with its vast collection of Italian Renaissance art attesting Italy's place in history, made Hitler feel competitive. He had long fostered a dream of amassing a collection to create the "world's greatest museum" in Linz, Germany.[8] The *Anschluss* allowed him to begin, and widespread and targeted looting of Jewish art collections became the immediate norm as German forces invaded Europe. At the end of WWII, the Nazi Party had amassed 8,000 works intended for the museum in Linz.[9] This number is only the tip of the iceberg in terms of the volume of art looted

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[6] *See* ARTHUR TOMPKINS, PLUNDERING BEAUTY: A HISTORY OF ART CRIME DURING WAR, 99 (Lund Humphries, Jul. 2018) ("The sad roll call of humankind's wars down the centuries could equally serve as an unending catalogue of the theft, destruction, displacement and defilement of some of the world's greatest works of art….").

[7] *Id.* at 99.

[8] *Id.* (detailing Hitler's plans for the museum in Linz, along with his plans for the targeted looting of prominent Jewish collections such as that of the Rothschild family just after the German annexation of Austria (the *Anschluss*)).

[9] *See Id.* at 102 (noting, for comparison, that "Washington's National Gallery currently has around 3,000 paintings, and the United Kingdom's Royal Collection about 7,000.").

throughout WWII. Up to 200,000 works of art are thought to have been uprooted, with the works surviving the war's devastation appearing on the art market during the ensuing decades.[10]

Hitler, although responsible for the greatest art theft of the 20th century, is still in good company alongside the common thief. Art theft occurs with startling regularity.[11] Private art theft, in which art is stolen directly from owners, collectors, museums, and galleries, leads to further funneling of stolen goods into the art market.[12] The FBI regards the problem as a "looming criminal enterprise with estimated losses in the billions of dollars annually."[13] These works, too, make their way into the open market, creating more potential for good faith purchasers to unwittingly acquire void title in exchange for thousands, or millions, of dollars.

III. THE UNITED STATES ART MARKET

[10] *See* Kharunya Paramaguru, *The Top Ten Most Wanted Missing Art Works from World War II*, TIME, Nov. 7, 2013, http://world.time.com/2013/11/07/the-top-10-most-wanted-missing-art-works-from-world-war-ii/ (discussing the volume of artwork lost during the war with the client development manager at the Art Loss Register, which is currently "on the hunt for 30,000 items missing from this era.").

[11] Art Law Handbook § 5.01, at 283 (Roy S. Kaufman ed., 2000) ("Each year tens of thousands of art thefts occur annually.").

[12] *See* Adina Kurjatko, *Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. INT'L L. & POL'Y 59, 66 (1999) (discussing sophisticated crime rings associated with art theft and that collectors commission thieves to steal works for their own private collections).

[13] FBI, Art Theft, https://www.fbi.gov/investigate/violent-crime/art-theft.

The United States boasts the largest legal art market in the world,[14] yet, "since World War II, the United States has been the biggest market of illegal art."[15] In fact, experts believe that as much as five percent of the entire world's art market consists of stolen artwork.[16] Each year hammers fall at auction houses and millions of dollars change hands between private collectors, galleries, and auction houses[17]– sending poorly provenanced works of art off to settle into homes of American collectors.[18] The United States' market is essentially a danger zone for collectors who face the difficulty of ascertaining whether the work they have just purchased at high cost and personal financial risk has defective title. To make matters worse, the risk of acquiring a stolen work is often compounded by the customs and traditions of the international art market, in which transactions are presumptively secret and assured conveyance of good title is "completed on a handshake and an exchange of invoice."[19]

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[14] *See* The European Fine Art Foundation, Art Market Report, 2017 at 46 ("In the art trade, the U.S. is by far the predominate country in the world, accounting for 41.5% of world trade in imports, and 38% of exports, and 96% of trade to and from the Americas.").

[15] *See* Phelan, *supra* note 2, at 660 (2000) (citing Alan Riding, *French Museum Chief vs. Art Thieves*, N.Y. Times, June 15, 1991, at 113).

[16] Art Law Handbook § 5.01, at 283 (Roy S. Kaufman ed., 2000).

[17] *Id* at 28. Astronomical art prices are the norm and rising. For example, Claude Monet's *Meule* sold at Christie's for over $81.5 million in November 2016. *Id.*

[18] The term "provenance" will be used throughout this Note. It is "the history or ownership of a work of art…used as a guide to authenticity or quality." *Provenance*, OXFORD ENGLISH DICTIONARY (3d ed. 2007), http://www.oed.com/view/Entry/153408?redirectedFrom=provenance#eid.

[19] *See* Lindholm v. Brant, 925 A.2d 1048, 1057 (2007) (discussing expert testimony presented to the trial court regarding the lackadaisical and secretive nature of art market transactions as the norm).

IV. THE LAW APPLICABLE TO GOOD FAITH PURCHASERS OF STOLEN ART

A. VOID TITLE

The *nemo dat* rule, upheld under United States common law and codified in the Uniform Commercial Code, expresses the baseline principle that one cannot convey greater title to a chattel than one has.[20] Even if one purchases innocently and without notice from a thief, title to the purchased artwork is void as against the true owner. This strict rule provides that title always remains with the true owner, no matter how attenuated the chain of title might be and how many good faith purchasers stand between the true owner and the current possessor.[21] Due to the large number of stolen artworks floating in the art market, the risk of innocently purchasing a work looted during war or stolen at any other time is particularly great in the United States considering the country's status as the "biggest market of illegal art" since WWII. [22] Furthermore, good faith purchasers of stolen artworks in the United States do not enjoy the protection afforded those in civil law countries in which a good faith purchaser may obtain title from a thief superior even to the title of the true owner.[23]

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[20] *See* U.C.C. § 2-403(1) ("…a purchaser of limited interest acquires rights only to the extent of the interest purchased.").

[21] Phelan, *supra* note 2, AT 631.

[22] Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L. REV. 611, 613. The problem shows no signs of stopping soon, the author notes. "It is little wonder that smugglers favor art and antiquities. They are high-value, low-volume items with a ready market. They are valuable, easily hidden, and easily transported."

[23] *Id.*

B. DEFENSES

Good faith purchasers of stolen works of art face an uphill battle in mounting a successful defense to replevin actions brought by true owners or heirs of true owners. Actions in replevin are demands for the repossession of personal property "wrongfully taken or detained by the defendant," and the court decides who has title to the property.[24] Because the good faith of the purchaser is irrelevant to the question of title in the United States, the only recourses available to purchasers are statute of limitations defenses or the doctrine of laches, which rarely work. These defenses often fail due to courts' unwillingness to implicitly encourage trafficking in illicit art by placing the burden of locating stolen artwork on the true owner.[25]

Defenses in art replevin actions incorporate the discovery rule and New York's demand and refusal rule.[26] While the tests have different names, they are "similar, if not equivalent," and "weigh the owner's diligence and delay [in locating the work], the buyer's innocence and reliance, the existence of prejudice, and other equitable factors."[27] Equitable considerations in replevin actions for stolen artworks are fact intensive and must be considered on a case by case basis. Due to often forged provenance records and attenuated chain of title, determining the

[24] *Replevin*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[25] Solomon R. Guggenheim Foundation v. Lubell, 569 N.E.2d 426, 431(discussing the unfairness of placing the burden on an artwork's true owner to find stolen artwork, which would allow "any purchaser, good faith or not…to hold onto stolen artwork" three years after the theft under New York law).

[26] Steven Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2448 (1994).

[27] *Id.*

strength of a party's claim to an artwork is often difficult or nearly impossible. The main considerations that courts undertake in such cases include the strength of the factual evidence regarding claimant's ownership, the extent of the claimant's efforts to find or publish notification about their alleged superior claim to the work, the circumstances of the good faith possessor's purchase, and the purchaser's accordance with due diligence standards currently in place on the art market.[28]

1. New York: Demand and Refusal.

In New York, the hub of the United States art market, "an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand of their return. Until the refusal, the purchaser is considered to be in lawful possession."[29] Because demand is an essential element of the plaintiff's cause of action, and no legal wrong has occurred until refusal, the good faith purchaser of stolen property is given a chance to rectify his or her mistake before incurring legal liability.[30] Application of the demand and refusal rule in New York requires no judicial discretion or analysis of the parties' respective due diligence actions in cases involving stolen art,

[28] *See* Jennifer A. Kreder, *Reconciling Individual and Group Justice with the Need For Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOKLYN L. REV. 155, 207. For her proposal of an international tribunal to settle art replevin disputes, the author also discusses the importance of analyzing the extent to which publication of loss on the part of the true owner "would avoid prejudicing bona fide purchasers who had conducted provenance research before purchase." *Id.*

[29] Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1161 (2d Cir. 1982).

[30] *See* Phelan, *supra* note 2 at 641 (discussing foundations of New York's demand and refusal rule and its special application in cases of stolen artworks).

in part due to the belief that placing a burden of due diligence on the true owner would encourage trafficking of stolen art.[31]

In *Solomon R. Guggenheim Foundation v. Lubell*, the Guggenheim museum brought an action in replevin against Rachel Lubell for a Mark Chagall painting worth an estimated $200,000 that was stolen from the museum sometime in the late 1960s.[32] Lubell purchased the painting from a New York gallery in good faith in 1967 for $17,000.[33] The court's main question revolved around whether the museum's due diligence conduct after the painting was stolen was relevant to application of the demand and refusal rule. Lubell argued that the museum's failure to investigate loss of the work barred its action in replevin by way of the statute of limitations.[34] In its analysis of the museum's actions, the court noted that it took some time for the museum to even notice that the painting "was not where it should be."[35] After this, the court noted that it was "undisputed…that the Guggenheim did not inform other museums, galleries, or artistic organizations of the theft" and did not contact other entities such as the FBI, the New York Police, or Interpol. In fact, it seemed as if the Guggenheim cared little about the location of the work, as the museum's board

[31] *See* Solomon R. Guggenheim Foundation v. Lubell, 569 N.E.2d 426, 431 (1991) ("…New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and …foreclose…[his or her] rights…would encourage illicit trafficking of stolen art.").

[32] *Id.* at 427.

[33] *Id.*

[34] *Id.*

[35] *Id* at 428. Guggenheim defended its decision not to disclose the fact that the painting was missing based on the assumption that publicizing the theft "would succeed only in pushing [the painting] further underground." *Id.*

voted to officially remove the painting from its list of holdings in 1979 after concluding that "all efforts to recover [it] had been exhausted."[36]

Because the museum had done nothing to locate the work in the 10 years after its disappearance other than a "search [of] its own premises," the trial court concluded that the museum's conduct was "unreasonable as a matter of law" and granted Lubell's summary judgment motion on the basis that the museum's action was time barred.[37] The Appellate Division modified and dismissed the statute of limitations defense. The Court of Appeals affirmed, reiterating that the *only* relevant factors in the statute of limitations defense were the museum's demand for the painting and Lubell's refusal to return it.[38] The Court refused to "carve out an exception where the chattel to be returned is a valuable piece of art," but nevertheless stated that the museum's apparent failure to undertake reasonable due diligence would be relevant to her laches defense, which remained viable.[39]

Even though the museum arguably abandoned the work by refusing to investigate its loss and later voting to remove it from the museum's holding list, while Lubell dutifully investigated the painting's provenance via contacting the artist and the artist's son-in-law directly, the court arrived at the conclusion that "there [was] no indication that the equities [favored] either party."[40]

2. The Discovery Rule

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[36] *Id.*

[37] *Id.* at 429.

[38] *Id.* at 427.

[39] *Id.*

[40] *Id.* at 431 (noting also that the Lubells "had no reason to suspect that [the painting] was not legally theirs").

Under the discovery rule, the statute of limitations in an action for replevin begins running when an owner knows or reasonably should know of his cause of action and the identity of a chattel's current possessor.[41] As applied to cases involving stolen art, the discovery rule arose during a suit brought against a good faith purchaser by famed and eccentric American artist, Georgia O'Keefe.[42] O'Keefe alleged that the defendant was in wrongful possession of three of her paintings that had been stolen from an art gallery in 1946. [43] In 1975, nearly 30 years later, O'Keefe learned that the paintings were on consignment in a New York gallery, placed there by Ulrich Frank, who sold them to Barry Snyder. [44] O'Keefe sued in replevin for return of the paintings in 1976.[45]

Under the discovery rule, a fact forming the basis of a cause of action might include, among other things, knowledge of the identity of the current possessor. [46] Based in equity, the rule shifts the focus from the "conduct of the current possessor" to "whether the owner has acted with due diligence in pursuing his or her property." [47] By placing the burden of due diligence on the true owner, the rule treats the good faith purchaser slightly more favorably than New York's demand

[41] O'Keefe v. Snyder, 416 A.2d 862, 874 (N.J. 1980).

[42] *Id.* at 862.

[43] *Id*.

[44] *Id.* at 866.

[45] *Id.* at 862.

[46] *Id.* at 870.

[47] *Id.* at 872.

and refusal rule because it "functions as a balancing test between the [good faith purchaser's] legitimate aims of repose and hardship to the [true owner]." [48]

One court has noted that application of the discovery rule to facts in stolen art cases is "not unlike the process of examining a work of art: the view of the beholder varies depending upon the distance from the subject." [49] Application of the discovery rule is fact intensive and subject to much judicial discretion, but the focus remains on the actions of the theft victim in locating a stolen work. In *O'Keefe*, the court discussed this fact intensive analysis by stating that the meaning of "due diligence" might depend on the "nature and value of the property."[50] For example, the court stated that with respect to stolen jewelry, an owner might be permitted to do less than an owner of an artwork of greater value.[51]

Under the rule, owners of stolen art do not have to perform the *utmost* diligence, but rather diligence that is reasonable under the circumstances. It matters not whether the artwork was in fact discoverable or might have been discovered with a little more effort. [52] The efforts must simply be reasonable "given the facts of the case."[53]

C. EXEMPLARY CASES

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[48] Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes or Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIME 1067, 1081 (1991).

[49] Erisoty v. Rizik, Civil Action No. 93-6215, 1995 WL 91406, 30 (E.D. Pa. Feb. 23, 1995).

[50] O'Keefe, 416 A.2d at 873.

[51] *Id.*

[52] Phelan, *supra* note 8 at 650.

[53] Erisoty, 1995 WL 91406, at 41.

1. Diligence on the Part of the True Owner.

Litigated in foreign courts, but indicative of an American problem, is a recent battle between two Jewish families regarding ownership of a Camille Pisarro painting entitled "La Cueillette des Pois", or "Picking Peas."[54] The painting was among 93 works stolen from a Jewish businessman and collector, one Bauer, during French war-era Vichy regime, no doubt in lockstep behind the Nazi Party's obsession with obtaining remarkable works of art for Hitler's perusal and collection.[55] In 1995, Bruce and Robbi Toll, well-known Philadelphia art collectors, purchased the Pissarro at Christie's in New York for $800,000.[56] Currently, the painting's estimated worth is $1.75 million.[57] Willing to share their investment with the world, the Tolls loaned the work to the Marmottan Museum in Paris in 2017, where it was spotted by Bauer's grandson who took legal action to have it essentially impounded in the Marmottan pending litigation over title to the work. [58] Last November, a French judge ruled that there was no indication that the Tolls knew there was a superior claim of title to the work, affirming them as good faith purchasers who took without notice even though the work was on a list of World War II looted works. [59] Nonetheless,

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[54] *French Court Orders Return of Pisarro Looted by Vichy Government*, NYTIMES, (Nov. 8, 2017) https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html.

[55] *Id.*

[56] BBC News, *Pissarro's Picking Peas returned to Jewish Owners,* (Nov. 7, 2017) https://www.bbc.com/news/world-europe-41906302.

[57] *American couple lose bid in French court to keep Pissarro painting looted during World War II,* LA TIMES, (Oct. 2, 2018), http://www.latimes.com/world/europe/la-fg-france-looted-painting-20181002-story.html. (The Bauer family's attorney based this estimate on the value at which the Toll's had insured the work.).

[58] *Id.*

[59] *Id.*

a Paris appeals court upheld a ruling ordering the Tolls to return the Pissarro to Bauer's descendants in October 2018.[60] The court did not order compensation for the Tolls, whose attorney stated the couple had suffered a "total loss" and that the Tolls "[weren't] responsible for the crimes of Vichy". [61]

2. Diligence on the Part of Good Faith Purchaser.

On the opposite end of the litigation and contest spectrum, good faith purchasers of stolen art sometimes actively seek out true owners, even when the true owner's heirs have done little to ascertain a specific work's location or demand its return. In 2002, an American professor read about a claim against the British Museum brought by an heir of Arthur Feldmann, whose collection of Old Master drawings had been looted from his villa in 1939 by the Nazi Party.[62] The press surrounding the lawsuit cast doubt on the provenance on an Old Master drawing in her own collection that her father had purchased in good faith in the 1970s from a gallery in Amsterdam. [63] Fearing that she might be in possession of "a drawing with … a painful history," the professor contacted the International Foundation for Art Research (IFAR) to conduct an independent analysis of the drawing's provenance.[64] IFAR concluded that the drawing, entitled *The Liberation of Saint Peter from Prison* and drawn by one of Rembrandt's pupils, had been

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[60] *Id.*

[61] Newser, US Couple Forced to Give Up Their $1.75M Pissarro, (Nov. 11 2017), http://www.newser.com/story/251295/us-couple-forced-to-give-up-their-175m-pissarro.html.

[62] Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Liberation of Saint Peter from Prison – Feldmann Heirs and Private Person," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[63] *Id.*

[64] *Id.*

owned by Feldmann and was stolen along with the majority of his collection during WWII.[65] In 2004, the professor returned the drawing to the Feldmann heirs in an exercise of what IFAR regards as an "unprecedented initiative" on the part of a good faith purchaser.[66] In exchange for her efforts, and what one might deem another "total loss", the professor asked only for anonymity, basing restitution of the work on moral grounds rather than legal ones. [67]

V. ART TITLE INSURANCE

Art title insurance for individual collectors is a relatively new phenomenon. It became an option for collectors, museums, and non-profits in 2006, when the ARIS Title Insurance Corporation announced its creation. [68] ARIS describes itself as the "sole insurer and underwriter of title insurance for fine art."[69] In ownership litigation with a purported true owner, individual collectors who purchase an ARIS policy are covered for defense costs and indemnified for the purchase price of the artwork in the event they must surrender the work.[70]

Given the increasing amount of litigation over title to artwork and the difficulty of mounting a successful defense in replevin actions, collectors make the prudent choice when they purchase art title insurance. Defense costs and indemnification for the purchase price of the

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[65] *Id.*

[66] Dalya Alberge, *Gift of Art to Atone for Looting by Nazis*, THE TIMES, Dec. 2, 2004.

[67] Bandle, *supra* note 61 (discussing, however, that the professor may have been able to establish clear title to the painting under Dutch law if she had chosen to litigate).

[68] Tucker, *supra* note 22, at 644, 645.

[69] ARGO GROUP, ARIS, https://www.argolimited.com/aris/.

[70] Tucker, *supra* note 22, at 645.

artwork provides *some* relief in the event of forfeiture, but still not much considering the reality that "purchase price" coverage reflects neither appreciation of value nor the value of potential restoration and conservation efforts after purchase.[71] Art title insurance is also very expensive, even more so than real estate title insurance.[72] Even though insurers justify high rates by citing the "non-transparent nature of the art market,"[73] the high cost of premiums and low indemnity assurance set good faith purchasers up for failure, as they will certainly still be forced to forfeit artwork that has most often appreciated in value.

By performing the proposed sliding scale due diligence analysis in art title litigation, judges will offer good faith purchasers of art what might be deemed additional insurance payout, although it might be smaller or larger depending on the level of diligence investigation. By searching relevant databases and attempting to establish a definitive history of provenance and chain of title (even if proven too difficult), the good faith purchaser has insured himself or herself again. Indeed, courts might consider the fact that a good faith purchaser *has obtained* title insurance in the due diligence analysis, as companies like ARIS help investigate provenance. [74] Furthermore, the fact that the purchaser has obtained an insurance policy naturally evidences his or her commitment to lawfully owning the work and protecting its value and enduring ability to be shared with the greater public through loans.

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[71] Consider, for example, the defendants in *Erisoty*, who purchased a work at auction for approximately $30,000 and later personally spent four years restoring the artwork, which was torn. In 1993, the work was estimated to have been worth almost $200,000. Erisoty v. Rizik, 1995 WL 91406, at 14.

[72] *See* Tucker, *supra* note 22, at 646 (noting that real estate title insurance is typically less than 1% of sale price, while art title insurance can be as much as 7% of sale price).

[73] *Id.*

[74] ARGO GROUP, Benefits of Title Insurance, https://www.argolimited.com/aris/benefits-title-insurance/.

VI. Additional Reward for Disclosure

Above insurance amounts, this Note proposes that good faith purchasers of stolen art who conduct appropriate due diligence and disclose their findings should be compensated if forced to forfeit a suspect work to a true owner. Other sources of law, such as the principles underlying patent law and salvage law, support the concept of reward for honest disclosure. Applying these concepts to art replevin actions will more fairly balance equities between parties and mitigate loss between them.

The Patent Act rewards good faith by granting innovators a limited monopoly in their inventions in *exchange for disclosure.*[75] Because the inventor discloses his creation, he or she does a public good, and society affirms this by respecting the inventor's design and rewarding his or her candor. When good faith purchasers of art conduct title searches in accordance with the customs of the art market, or, in some cases, over and above the lax demands of the market, their candor should be similarly rewarded if they disclose their findings and possession of the work to relevant art cataloguing databases. Applying patent law's *quid pro quo* outlook to good faith purchasers of art will facilitate movement of works through the art market, as a disclosure-based compensation system will bring additional security to buyers while simultaneously bringing more stolen artworks up from the market underground via notice.

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[75] *See* Stephan Kisella, Center for the Study of innovative Freedom, *"The" Purpose of Patent Law*, (Dec. 6, 2010) http://c4sif.org/2010/12/the-purpose-of-patent-law/ (noting that the principle of disclosure is fundamental to patent law)

The concept of rewarding honest disclosure is also found in principles of the law of salvage. Liberal compensation ordered for salvors in exchange for disclosure of their finds is reminiscent of the justification for the "reward" of a patent in patent law. By bringing their discovery to the out into the open, salvors do a public good by both respecting the true owner's claim to title and the public's interest in preserving historical objects and cultural heritage.[76] Compensation systems rewarding salvors for their efforts encourage them to continue their endeavors for their benefit, the owner's benefit, and for the benefit of the public as a whole. A good faith purchaser who diligently researches the title to a work and shares it with the public instead of keeping it in his or her home should be rewarded as a salvor is with the same rationale to reward the purchaser for his honest decision to bring his historical and cultural possessions out into the world for the public good.

Using patent and salvage law concepts in a disclosure-based compensation system provides for a framework of new equity analysis in art replevin actions. For example, when determining whether a salvor deserves compensation, courts look to factors such as the "labor expended…in rendering salvage service[;]…the promptitude, skill, and energy displayed in…saving the property[;]…the risk incurred…and the value of the property saved."[77] A court might use the same factors in an equitable analysis in an art replevin action. Purchasers on the art

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[76] *See, e.g.,* Columbus-Am. Discovery Group v. Unidentified, Wrecked, & Abandoned Sailing Vessel, 742 F. Supp. 1327 (E.D. Va. 1990) (ordering a 90% salvage award for recovery of gold on a shipwreck). *See also* Michael R. Nelson, *Finders, Weepers- Losers, Keepers?* Florida Court Says U.S. Company Must Return Recovered Treasure to Kingdom of Spain, 16 Law & Bus. Rev. Am. 587**, 591** (noting that even though the court awarded compensation, the victory was "moral rather than substantive," as "projected costs for exploration, recovery, and litigation….were $30 million, compared with the final salvage award of roughly $19 million.").

[77] The Blackwall, 77 U.S. 1, 14 (1869).

market expend labor (i.e, time and money) by conducting provenance research in accordance with or above market standards. Courts might also consider whether the good faith purchaser displayed "promptitude" and "energy" in doing a timely and thorough investigation of provenance before or after purchase. "Risk" may be assessed as a combination of these factors, as courts might look at the value of the artwork and the potential loss to the purchaser at the time of sale regarding higher claims of title. Finally, "saving" an artwork can be assessed in terms of time and energy spent conserving the work, insuring it, or loaning it to museums in order to share it with the public.

VII. FRAMEWORK FOR APPLICATION

This Note does not purport the create a hardline reasonable diligence requirement that is applicable to all true owners and good faith purchasers of stolen art, nor does it aim to displace the *nemo dat* rule. Indeed, creation of such a diligence requirement would be difficult, if not impossible, and could not possibly take into account the multitude of variables applicable to transactions involving fine art.[78] Nevertheless, considering the actions of the true owner and purchaser can lead courts to reach a more just outcome by tipping scales in favor of the party who more diligently attempts to protect his or her interest in an artwork. [79]

A. ANALYSIS: TRUE OWNER

[78] Guggenheim, 569 N.E.2d at 431.

[79] *Id.*

In analyzing actions of the true owner's diligence after loss, the *Guggenheim* court emphasized consideration of the work's value and the nature in which it was stolen.[80] Other relevant factors include whether the owner has tried to locate the missing work by contacting the Art Loss Register or notified relevant national and international authorities such as Interpol or the FBI. In the case of Nazi-looted works, a court might be more lenient given the difficulty of finding works displaced during WWII, but still might consider whether heirs have actively sought out works known to be in a relative's collection or simply waited for them to appear on the art market before bringing a claim.

For example, in the aforementioned Pisarro controversy,[81] a court might have considered the fact that the true owner actively sought out the painting when it was on loan to a foreign museum. Indeed, the heir of the painting's true owner has been searching for missing pieces of his grandfather's collection for nearly 50 years. Contrasting the true owner's diligence with the relative lack of due diligence on the part of the purchaser might have led an American court to award a smaller amount of compensation to the good faith purchaser, or none at all. In contrast, a court might tip the scales in favor of the good faith purchaser in a case like *Guggenheim*,[82] in which the true owner virtually abandoned the artwork without performing any diligence with respect to the work's whereabouts for nearly ten years.

B. ANALYSIS: GOOD FAITH PURCHASER

[80] *Id.*

[81] *See* discussion *infra* Part IV. C.*1.*

[82] *See* discussion *infra* Part IV. B. *1.*

Courts should take special care in analyzing the good faith actions of purchasers in replevin actions for stolen art. Between the true owner and a good faith purchaser, the purchaser will inevitably suffer the most financial harm after forfeiture, as the true owner is made totally whole while the purchaser is not. A court should consider steps the purchaser has taken to ascertain whether or not he has clear title to a work, regardless of whether the purchaser was incorrect in his findings. By consulting art loss databases, like the Art Loss Register, the FBI art theft database, or international databases for art lost during war time, the purchaser should receive an uptick on the sliding diligence scale, especially considering the lackadaisical nature of provenance research on the art market as a whole.[83] Courts should also consider whether the purchaser has insured the work, engaged in conservation efforts, or attempted to share the work with society in the form of loans to museums.

Consider the previously discussed "anonymous professor" in possession of the Rembrandt drawing, who actively investigated the work's chain of title without any claim brought by the true owner.[84] In a replevin action, a court might award a higher amount to the purchaser who actively consults databases or investigates into the provenance and title of an artwork. The case for recompense to a purchaser is even stronger in cases involving heirs who are *not* proactive in locating their property and simply wait for it to appear on the market. Courts might also take into consideration whether the purchaser has insured the work or engaged in conservation efforts to maintain the work's value. For example, purchasers like the defendants in

[83] Tucker, *supra* note 22, at 615 ("The near-total lack of investigation and inquiry in the commercial art world means that reputable dealers and auction houses often sell stolen art, and collectors unwittingly acquire these stolen pieces").

[84] *See* discussion *infra* Part IV.C.*2*.

Erisoty, who go to great lengths to conserve and repair works of art might be given a buffer of return on their investment in the form of compensation after forfeiture.[85] A court might also factor in the purchaser's willingness to share his investment with the world in the form of loans to museums or other exhibitions, as did Bruce and Robbie Toll with their later forfeited Pisarro painting.[86]

VIII. CONCLUSION

This Note proposes a disclosure-based, sliding scale equitable analysis to be employed in art replevin actions in order to mitigate loss between a true owner and a good faith purchaser of a stolen artwork. Because it does not propose to displace common law or statutory rules, this additional step employed in courts' analyses will be simple to apply and afford fairer outcomes to art purchasers who receive stolen property without notice. This analysis focuses on the quality and quantity of due diligence performed by both parties, so that each party's actions dictate the amount of compensation that might be awarded to a good faith purchaser, thereby encouraging all participants in the United States market to safeguard their investments via actively searching for stolen works or conducting due diligence in accordance with market standards after purchase.

[85] *See supra* note 71.

[86] *See* discussion *infra* Part IV.C.*1*.