

Articles

"Recovering Wartime Losses and Other Stolen Art and Cultural Property Found in the United States"

Thomas R. Kline

The Spoils of War International Newsletter

December 1, 1996

Reprinted with permission from **THE SPOILS OF WAR INTERNATIONAL NEWSLETTER**, Volume No. 3, December, 1996.

This article is intended to give practical advice to theft victims on the best approach to recovering stolen art and cultural property found in the U.S. The article briefly summarizes the criminal and civil remedies available in the U.S. As this article explains, although making a criminal complaint is an option, civil suits remain the primary method to recover stolen art found in the U.S.

Criminal Proceedings

A theft victim who has located his stolen art in the U.S. should immediately contact U.S. law enforcement agencies to inquire whether the agencies can and will seize the art from the current possessor. Not long ago -- as recently as the appearance of the Kanakaria mosaics in the U.S. in 1988(1) -- U.S. law enforcement agencies were extremely reluctant to become involved in stolen art cases due to the complexity of art transactions and the length of time the stolen art may have been missing. Public officials expressed the fear that lawsuits would arise if their intervention in a property matter caused a sale to be lost. In addition, law enforcement agencies in the U.S., which must cope with drugs, weapons and all other criminal manifestations, did not consider art theft to be a major societal problem and have not devoted significant resources to dealing with art theft.

As stolen art cases have attracted more national and international attention, however, law enforcement agencies have taken an increased interest. Many U.S. officials now view art theft and marketing of stolen art to be serious law enforcement concerns, although not on a scale with drug dealing, weapons offenses and many other crimes.

Federal Bureau of Investigation

A theft victim who locates stolen property in the U.S. should first contact the Federal Bureau of Investigation. The FBI is the national police of general jurisdiction. As such, it has seizure authority under the National Stolen Property Act ("NSPA"),(2) which makes it illegal for a person to transport or receive stolen property which has crossed a state or U.S. boundary.(3) If the seizure leads to a criminal prosecution, however, return of the stolen property may be delayed. On the other hand, a successful criminal prosecution might obviate the need for protracted civil litigation as a court determination that the property was stolen in the criminal context might be binding against the convicted criminal in any later civil case.

In any event, seizure of stolen art under the NSPA does not ensure the return of the property. First, it is frequently difficult for the U.S. government to obtain a conviction under this law because the prosecution must prove that the defendant knew that the property was stolen. Second, if the FBI receives conflicting claims of ownership to seized property, it will not normally turn disputed property over to one of the claimants in the absence of full litigation of the ownership issue. This is so because only U.S. courts, not prosecutors, have the ability to resolve a genuine dispute over ownership of property. Therefore, the U.S. government will file an interpleader action and turn over the property to a U.S. court to decide ownership. The U.S. government took this approach in the recent case involving three drawings from the Bremen Kunsthalle which the FBI had seized in New York. After the United States Attorney determined that she would not prosecute, the government filed a civil suit to resolve the conflicting claims to ownership of the current possessor and the Kunsthalle.(4)

U.S. Customs

A theft victim may also contact U.S. Customs to request seizure of stolen property. U.S. Customs may seize goods that are imported in violation of U.S. Customs law(5) or the Cultural Property Implementation Act ("CPIA"),(6) by which the U.S. Congress gave limited acceptance to the UNESCO Convention in 1983. One possessing property in violation of the CPIA

Articles

could be ordered to return that property even if the possessor were a good faith purchaser.

Customs also has very broad civil authority to seize and forfeit property which is "stolen, smuggled or clandestinely imported or introduced"(7) into the U.S. It may use this power to seize art which is fraudulently imported by, for example, false documentation or description.(8) Nevertheless, like the FBI, Customs does not resolve conflicts of ownership between private parties, but typically refers the matter to a U.S. court. Interested parties may then appear in court to put forth their claims to the art.(9)

Local Law Enforcement Agencies

While local law enforcement agencies have played lesser roles in the recovery of stolen art, theft victims should contact them as well. Some local law enforcement authorities, particularly in New York and Los Angeles (the largest U.S. art markets), have experience and are active in the investigation of art theft. These agencies have been responsible for some significant recoveries.

Civil Proceedings

As explained above, even if law enforcement agencies seize stolen art, an agency will typically ask a court to decide disputed questions of ownership. Therefore, the primary method for recovering stolen art in the U.S. is through a civil proceeding.(10)

U.S. courts have generally proven sympathetic to the plight of theft victims in recovering stolen art found in the United States. These courts recognize the fundamental rule of U.S. law that a thief cannot pass title even to a good faith purchaser. A theft victim who can prove he originally held title to the work or was in quiet possession of it and that he lost the object through theft or without his authorization has a good chance of recovering the art. It is imperative, however, that a theft victim contact U.S. counsel to ensure that proper legal procedures are followed.

A theft victim who learns the identity of the possessor of his stolen art must promptly make a formal demand for return of the stolen property from the current possessor. Unreasonable delay in making the claim can jeopardize the claim. Making demand is a critical step because the current possessor's refusal may be a substantive requirement of a lawsuit to recover the object.(11) In addition, if a demand is refused, the theft victim must then decide whether to attempt to negotiate a settlement to avoid the expense of litigation or to file a claim in court.(12)

Once a demand is made, there are several important procedures a theft victim should follow to make certain that the recovery of the art progresses smoothly. Whether a theft victim chooses to negotiate or file a case, he should always either propose an agreement with the possessor not to sell or remove the art while the lawsuit or negotiations are pending, or ask the court for a temporary restraining order to safeguard the art while litigation is pending. If negotiations begin, a theft victim should also propose an agreement to toll or suspend the statute of limitations during the negotiation period. With this precaution, the theft victim will have time remaining within the statutory period to file suit if the negotiations fail. If the theft victim chooses to proceed with the civil suit, he should begin to prepare for trial by gathering important documents and pictures to prove title to the art and by identifying witnesses, if any can be found, with knowledge of the objects and their history.

Any legal proceeding brought by the theft victim must be initiated within the applicable statute of limitations period. In the U.S., lawsuits must typically be filed within a defined time period. This period is generally fairly short, such as within two to six years after the occurrence of the injury that is to be redressed. Legislatures and courts have set these time frames based on the notion that it is not fair to allow a claimant to pursue a claim after too much time has passed because evidence will have been lost and memories will have faded. The majority of U.S. courts, however, apply the "discovery rule" to determine when the limitations period begins to "run." In the case of stolen art, the discovery rule holds that the statute of limitations period does not commence until the theft victim discovers, or acting with reasonable diligence should have discovered, the location of the stolen property. This rule effectively imposes on theft victims a duty to conduct a reasonably diligent search for the property after its theft.

Articles

The largest U.S. art market, New York, applies a different analysis, known as the "demand and refusal" rule. That rule holds that the statute of limitations period does not begin to run until the theft victim demands that the current possessor return the property and the possessor refuses.⁽¹³⁾ Even then, however, a theft victim who knows the identity of the possessor of its property cannot unreasonably delay making his demand for the return of the property.⁽¹⁴⁾ Furthermore, even if the statute of limitations is satisfied, the equitable doctrine of laches bars claims where the claimant has failed to act diligently or has unreasonably delayed in searching for stolen property and where there has been prejudice to the current possessor as a result of the theft victim's delay.⁽¹⁵⁾

Conclusion

A theft victim who has located his stolen art in the U.S. may, under the proper circumstances, institute criminal or civil proceedings to recover the art. In either case, a theft victim should engage U.S. counsel to ensure that proper procedure is followed. Experienced counsel will be able to contact the appropriate government authorities and may be able to negotiate successfully the return of the art from its current possessor without the expense or delay of litigation. Even if negotiations fail, qualified counsel can take steps to enhance the chances of recovering the art through litigation.

-
1. In *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990), the Republic of Cyprus and the Greek Orthodox Church of Cyprus recovered mosaics which had been stolen from a church in Cyprus and sold several years later to an Indianapolis art dealer.
 2. 18 U.S.C. §§2314-2315. See, e.g., *Erisoty v. Rizik*, No. CIV.A 93-6215, 1995 WL 91406, at *7 (E.D. Pa. Feb. 23, 1995).
 3. Jack Meador and Jane Meador Cook, and their former lawyer, John Torigian, all of Texas, were indicted on charges brought by the U.S. government under the NSPA growing out of their alleged interstate and international transportation of two manuscripts from Quedlinburg, Germany. William H. Honan, *Abrupt End to a Case of Looted Treasures*, N.Y. Times, Oct. 24, 1996, at C13. These charges were just dismissed by the court, which concluded that prosecutors, who had received an order tolling the statute of limitations to give them time to investigate in Germany, had not obtained the indictment promptly enough after the German government completed its role in providing assistance. *Id.*
 4. Only on very rare occasions does a U.S. government agency turn disputed property over to one claimant in favor of another. See, e.g., *Erisoty v. Rizik*, No. CIV.A 93-6215, 1995 WL 91406, at *7 (E.D. Pa. Feb. 23, 1995) (FBI returned stolen art to original theft victim, forcing purchaser to bring suit).
 5. See, e.g., 18 U.S.C. 541-542, 545 (1994) (whoever smuggles or knowingly enters into the U.S. goods falsely classified will be fined and/or imprisoned).
 6. 19 U.S.C. 2606 (1996).
 7. 19 U.S.C. § 1595(a)(c) (1996).
 8. 19 U.S.C. § 1592(c)(6) (1996) (Customs may seize goods which are imported by fraud, gross negligence or negligence).
 9. See *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1374-1377 (5th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987) (broker in possession of art at time of forfeiture did not have equitable title to work to give him standing to contest forfeiture).
 10. Because of the layers of approval needed, and the lower priority art theft matters receive, U.S. government agencies may also not be able to act with sufficient speed if there is an immediate risk that the artwork may be spirited out of the United States.
 11. See *Solomon R. Guggenheim Found. v. Lubell*, 567 N.Y.S.2d 623, 626 (Ct. App. 1991).

Articles

12. Within the context of settlement negotiation, a theft victim may mention that he has the option of instituting legal proceedings to recover the art. However, a theft victim should be careful not to threaten the possessor with taking legal action or the possessor could accuse the theft victim of the crimes of duress or extortion.

13. See id. at 626.

14. Id. at 627.

15. Hoelzer v. City of Stamford, 933 F.2d 1131, 1137 (2d Cir. 1991).