Interview with Art Loss Register
In-House Counsel Chris Marinello

LEILA AMINEDDOLEH

The Art Loss Register (ALR) originated from the International Foundation for Art Research (IFAR), a New York-based nonprofit. IFAR began an art theft archive and started publishing “Stolen Art Alert” in 1976 in hopes of deterring international art crimes, but it soon became apparent that there was a need for an electronic, searchable catalogue that would be available to international law enforcement agencies, auction houses, and collectors.

Operating this database was not feasible for the non-profit, lacking funding to hire the necessary administrative staff, legal professionals, and technical experts. Thus, the ALR was established as a for-profit entity in London in 1991 and is now the world’s largest private database of lost and stolen art, antiques and collectibles; it is a tool that is searched by many art purchasers as a step of due diligence. By drawing international attention to suspicious ownership, the ALR operates a successful recovery service to restore property to rightful owners. The business has been expanded to negotiate compensation to the victims of art theft and legitimize current ownership. In addition, the ALR has become an industry leader in mediating art related disputes.

There are two aspects of the ALR’s services. First, the database acts a deterrent to art theft. Registering all items on the database aims to dissuade thefts because potential purchasers will be on notice that missing items do not have good title. Second, the ALR successfully reunites owners with their lost items. The ALR has a record of successfully recovering stolen items and has recovered over £150M to date. Among the recoveries are valuable paintings, estate jewelry, and cultural heritage property.

Art dealers and collectors may benefit from the ALR’s services. In addition to searching and recovering services, the ALR offers positive registration services so that an ownership record is created which may assist in recovering objects should they go missing. The ALR’s services are professionally rendered by employing state-of-the-art information technology and a team of trained art historians and specialists. The prices for the services of the ALR are affordable for collectors and crime victims. With a relatively small fee, clients will be able to avoid expensive litigation costs. In fact, most fees are covered by the ALR’s subscribing insurance companies.

Resolving legal issues through the ALR may help to overcome diplomatic difficulties because the organization has many diplomatic channels (like Interpol) around the world at its disposal. These relationships allow ALR representatives to speak with all parties, facilitate agreements, and allow negotiations to progress.

Although the ALR sometimes employs outside counsel for particular matters, the organization has only one in-house...
Welcome to the Summer 2011 issue of the Art & Cultural Heritage Law Newsletter. We are pleased to bring back to the newsletter an interview with a professional working in the area of art and cultural heritage law, and for this issue Leila Amineddoleh has interviewed Chris Marinello, in-house counsel at the Art Loss Register, who discusses his role as counsel to this exciting organization. We are also very fortunate to include in this issue the presentations of the distinguished panelists - Allan Gerson, Mark Feldman and Laina Lopez - from this year’s ABA Section of International Law Spring Meeting held in Washington D.C., each providing their unique perspective on the topic “Shield or Sword: Why has the Foreign Sovereign Immunities Act Become One of the Most Frequently Litigated Statutes in Cultural Property Disputes?”. Also in this issue, Martha Lackritz proposes a series of steps that museums and collectors can implement to scrub their collections for dubious ownership, and Marcy Wagman addresses the challenges facing music artists in the increasingly complex digital age and the new music industry business models.

Finally, Aaron Rosenthal, Emily Casey and Nicole Roth review the Second Annual National Cultural Heritage Law Moot Court Competition, which was held at the DePaul University College of Law this past winter. The next competition is scheduled for February 24 and 25, 2012, and those interested in participating can find more information at www.law.depaul.edu/chmoot/.

We hope you enjoy this exciting discussion.

David Bright, Sharon Erwin and Jacqueline Farinella, Newsletter Editors
attorney, Christopher A. Marinello. He is responsible for overseeing legal issues, including litigation, negotiations, and transactional matters. Chris has over 20 years of experience in private practice and litigation. As a partner at his own law firm, he negotiated countless art related disputes between dealers, collectors and museums as well as government seizure actions. In addition to handling legal issues for the ALR, he trains and works with FBI agents, has taught at several universities, and travels internationally to work with foreign governments, attorneys, collectors, and agencies.

Have you noticed any trends in art theft during the economic downturn? There has been an increase in smash and grab type art thefts in virtually every market. We have also seen a significant increase in consignment fraud cases. Dealers sell works of art on consignment and then use the funds to pay other debts rather than paying their clients. I have a new case like this every week and the explanation is always the same, “...times are tough, I need the money, I can’t sell anything...” This has become a huge problem in the art world.

In the past you’ve said that art thieves are not the glamorous people we see in movies, like The Thomas Crowne Affair. Tell us about some of the criminals you’ve encountered. Most are common thugs who have no real knowledge of art other than they knew something was valuable. Often, these types of thieves sell the works at a discount to experienced stolen art handlers. Occasionally, I will run into a highly sophisticated gang of art thieves that know the law or have dodgy lawyers at their beck and call. Still, I have yet to meet any art thief or handler that I would describe as glamorous. Once in a while, we encounter sexy young models operating fly by night art galleries that fold up and disappear with their clients’ consigned artwork – glamorous on the outside, but still a common crook.

Why does the idea persist that art thieves are glamorous? I have no idea. I had one recent case where the entire gang of five thieves shared maybe one set of teeth. Hollywood is likely to blame for this persistent exaggeration.

Have you ever been in a dangerous situation during the recovery of artwork? Unfortunately, far too many times. I like to say that if I think there is a chance of getting shot, I’ll ask our Chairman, Julian...
Radcliffe to go. We have a decent insurance policy out on him.

Why don’t people register their stolen art on the ALR database and why do some purchasers still not check the ALR?

I think the failure to register thefts on the ALR database is simply because not everyone knows we exist. If you have had a theft and you are hopeful that one day the item will be recovered, your best chance of recovery is to contact the ALR. As to why some purchasers or dealers don’t check with the ALR prior to purchase, I think many people don’t want to know if they are buying or have bought stolen art. No one likes to have something taken away from them, but the art world has changed and more and more courts are upholding due diligence requirements. If you don’t check before you buy, you risk a title claim and the high cost of litigation. It’s just not worth it.

How can art collectors best protect against theft?

Keep all records of purchase. Take numerous photos of your collection, front and back. Invest in a good security system and consider registering your works positively on the ALR database. Check with your insurance company to see if they subscribe to this service. Properly insure your collection and remember to update the values and schedules every few years. Take great care when strangers do work in your residence. Don’t be a show off, not everyone needs to know that you have six Monets in your living room.

Additional information regarding the recovery of the artwork displayed in the images accompanying this article can be found at: www.facebook.com/note.php?note_id=383273582359 and www.cardozaartlawsociety.blogspot.com/2011/03/art-loss-registry-recover-stolen-print.html

The two rare pieces of Chamberlain’s Worcester Porcelain pictured here were stolen from Berkeley Castle in Gloucestershire over a decade ago and recently recovered with the help of the ALR.
A Proposal for Preserving the Integrity of Museums and the Art Inside

MARTHA LACKRITZ

Some time near the end of the 11th century B.C., a group of Chinese peasants crawled on their hands and knees through tight and unventilated tunnels, dragging sleds of ore behind them. Chinese overseers supervised as the ore was used to make bronze, a fraction of which was later cast by hand in the shape of a rhinoceros—crafted meticulously with folded skin over its neck, and a calm, almost smiling, expression. An opening in its bowl-like back, and a delicate inscription carved into its belly transformed it into a ritual vessel, to be filled with offerings of food or wine.

It was the end of the Shang Dynasty—the unrivaled Bronze Age of China—and nearly the dawn of the Zhou Dynasty. “[N]ot even the superb artisans of the Italian Renaissance could match the Shang Dynasty’s technique of casting bronze,” wrote one historian, in admiration of the deeply religious and feudalistic Shang culture. Next the Rhinoceros traveled through the hands of its patron, Xiaochen Yu (according to its inscription), who boasted of gifts from the king, and of his sovereign’s troubles with nearby insurgency. After centuries of ceremony, the exhausted Rhinoceros was eventually discarded or neglected, left buried beneath the earth collecting patina, until it was discovered in the mid-19th century.

In 1969 it was deeded to the de Young Museum in San Francisco as part of a gift from Avery Brundage, an art collector and President of the Olympics Committee. Over three decades later it made a short trip across town to its new home, the Asian Art Museum (the “AAM”), where it now sits within a glass box, still admired daily for its rarity and craftsmanship. I frequented the Asian Art Museum while in law school, and therefore decided to use one of its most valued pieces, for a sample study in how museums might best equip themselves against the threat of repatriation. It struck me, while researching museums’ acquisition policies, that few museums have adequate policies in place to examine those objects that are already in their collections. Why not adopt a “pre-existing collections policy,” to go alongside with the increasing ubiquitous “collections policy”?

Over the past decade, terms like “cultural patrimony,” “artistic heritage,” and “aesthetic genocide” have become worrisome and polemical exhortations

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for museums, collectors, law-makers, art dealers, gallery owners, and archaeologists, to name a few. On the one side are foreign governments, newly empowered by international law and public critique, who are distressed by the massive amount of art that lines the walls of major Western museums – art whose history clearly places their origins in the countries of the complaining governments. How they got there is often an unanswerable question, though the more difficult question is whether they should stay where they are or return to their homelands.

International laws have attempted to curb the number of antiquities that leaves underdeveloped and art-rich nations by prohibiting the illegal excavation, destruction, transport, and trade of such goods during times of warfare and peace; but with few mechanisms for enforcement, they have had questionable success. Museums, as popular public establishments, remain under the spotlight of the debate. Their duty to their patrons and to the nations who bore the fruit of their collections remains unclear. Fears that underdeveloped nations will have nothing left to show of their own cultural history seem just as pressing as fears that museums will be stripped of their well-established collections. Without a solution that satisfies all parties, art owners remain fretful of losing their prized possessions, while governments continue to see their nations’ historic valuables vanish from their native landscape.

While most major museums have become more attuned to the dangers of unscrupulous collecting, it is this author’s opinion that few have undertaken efforts to conduct a thorough study of the objects that they already possess. Doing so would better prepare them for potential restitution requests and litigation. It would also satisfy an “ethical” duty to so-called source countries. Because a complete study of a museum’s collection is costly and impractical, I propose a series of steps that museums and collectors can implement in order to realistically examine their artwork. After identifying potential “problem pieces” museums can more adequately decide whether their provenance deserves a closer inspection, and whether or not they pose a threat to the museum either legally or ethically.

Identifying “Problem Pieces” and Addressing the Problem

As is clear from both the international and national laws surrounding cultural property, such laws’ primary purpose is to prevent the illicit excavation, movement, and sale of works of art. Accordingly, the first question to ask when identifying a potential “problem piece” is if there is any evidence that it was improperly excavated or transported. In order to facilitate this inquiry, museums must examine the historical context. War and domestic conflict, as the Hague Conventions demonstrate, are periods particularly susceptible to the illicit trade in cultural property. Did the object leave its origin country during a time of conflict? Did it leave its origin country during a period in which great numbers of art were recorded to have been illegally removed or sold? These are the kind of crucial preliminary questions a museum should ask when studying objects in a museum with incomplete or dubious provenance records.

The next set of questions should address practical issues. Even if an object appears to have been improperly removed from its origin country, what will happen to the object if returned? Does the origin country have a proper facility for it? These questions look at the art from the perspective of its own preservation and integrity, which is of course the principal function of a museum. Recent returns of antiquities from Italy and Greece have met with celebrated returns in sophisticated museums. Unfortunately this is not always the case. In China, one might find both high-quality museums, and underfunded, antiquated facilities with “no safety equipment, no modern storerooms...[no] records of their collections, and no rules governing the collection.” An object’s ultimate destination is thus an important practical consideration.

And finally, museums should look to existing collections in the origin country, and address the object from an ethical point of view. Is this object one that is no longer accessible to natives of its origin country? Are all of its examples in the museums of wealthier nations, or nations whose museums are already rich in international objects of its kind? These are of course not legal obligations, but 4 Author unnamed, “The Mainland’s Environment and the Protection of China’s Cultural Heritage,” originally published in Art Antiquity and Law, Vol. 5, Issue 1 March 2005), accessed at: http://www.museum-security.org/social-environ-ment-of-protection.htm.

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rather ethical questions that address the larger issues of cultural heritage and art accessibility.

A few museums have taken on the task of reviewing their collections for possible stolen artwork. One good example of this is in the Nazi-era provenance research put in place by the Getty Museum in Los Angeles, which attempts to reconstruct the complete history of ownership of all works collected during the period of 1933 to 1945 by publishing information on its website in accordance with the “Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era,” adopted by the Association of Art Museum Directors.\(^5\) However, most museum policies do not adequately address how to deal with objects that have long been a part of their collections. That is the gap that this proposal aims to fill. In order to test my policy proposal, I use the Zun Rhinoceros as a sample subject.

### The Rhino in the Room

Should the Zun piece be voluntarily returned to China? I propose that museums try to answer this question through a six-part test, whose questions should be weighed against each other to determine the interest of the source country versus that of the possessor country. The first three questions deal with strictly legal implications surrounding objects identified as “problem pieces.” The next three questions address ethical issues of preservation and accessibility. Accordingly, the first three questions should be given greater weight than the last three, though they are all important. They are as follows:

1. Is there any evidence that the object was illegally excavated, looted, sold, traded, or smuggled at any time before its arrival in the hands of the museum?  
2. Has the object been openly sold, exhibited, loaned, or displayed before 1995 (the date of the UNIDROIT Convention)?  
3. Did the object arrive as a result of, or in the time period of, armed conflict, from a nation whose cultural property experienced destruction or looting as a result of such conflict?
4. Is the country of origin one whose cultural property exists in greater number outside of its borders than within?  
5. Does the country of origin have adequate facilities for storage, display, and conservation of this item?  
6. Is the object rare in specimen, and if so, does the origin country have any other examples of its type?

For those items in museums with little provenance records (which would include many objects in museum collections), museums may use these six questions as a guide to examine whether or not they have a duty to return items to the countries of origin. So, to answer the question of the Zun Rhinoceros, let us put it to the test:

1. No, there is no evidence that it was illegally excavated, looted, sold, traded, or smuggled at any time before its arrival in the hands of the museum. This factor thus weighs in favor of the AAM.  
2. Yes, the object was openly deeded, exhibited, loaned, displayed, and published since well before 1995. This factor also weighs in favor of the AAM, since the UNIDROIT Convention is not retroactive.\(^6\)  
3. It is unclear whether the Zun Rhinoceros left China during a period of armed conflict in China, but it appears as though it did not – a fact which would also weigh in favor of the Museum.  
4. This question deserves further study. If the proportion of Chinese relics currently outside of China is greater than that within China – which may very well be the case – then this factor would weigh in favor of the object’s return to China.  
5. Yes, China has facilities for storage, display, and conservation of the Rhinoceros – therefore, while some facilities in the country may not be adequate, ultimately this factor also weighs in favor of its return.  
6. Finally, one would have to examine the scarcity of the Zun Rhinoceros and the location of similar vessels around the

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world to determine whether China already has access to objects of similar origin and type. If, in fact, similar objects are small in number, and the majority of the total number resides outside of China, then this factor would weigh in China’s favor. If, on the other hand, there are already a significant number of such pieces in Chinese galleries, then this factor would weigh in favor of the Museum’s continued possession of the piece.

Although the balance could arguably tip in either direction, the test would appear to favor the Museum’s right to the Rhinoceros, especially given the fact that the first three factors, which look at the Museum’s purely legal obligations, weigh against Chinese title to the Rhinoceros.

It is important to note that these questions are intended to apply to objects whose provenance is somewhat unclear, not simply objects whose repatriation is contested. The proposal’s purpose is to analyze works of art whose path from origin to museum acquisition is missing or simply undocumented. The proposal also provides means to study international objects in a museum collection and determine which objects are liable to a cause of action from a foreign country demanding restitution, and how museums can take these factors into consideration when building policy. Ultimately the proposal should set examples for museums to proactively reexamine their own collections.

For those objects that weigh in favor of repatriation, museums should embark on plans for long-term loan, or temporary exchanges with other museums around the world, in order to mitigate the disappearance of artistic objects from institutions that have cared for them and displayed them throughout years of public appreciation. International cooperation between NGOs and public institutions – museums, in particular – can sometimes have a much greater effect than international cooperation through treaties and conventions.

While museums may be understandably reluctant to delve into the provenance of their collections without provocation or the threat of a lawsuit, there are substantial benefits to voluntarily undertaking such studies. First, proactive efforts to restore objects to their native countries create an avenue of communication between museums, building a rapport that can lead to better loan policies, or shared agreements for exchange of exhibits. Second, this undertaking reinforces the high ethical standards that museums should cultivate for the benefit of their collections and for the collection of art worldwide. Third, museums are better protected from the threat of litigation. Genuine due diligence on the part of museums may not only save them from a future lawsuit, but may also serve as evidence of their own good-faith efforts to comply with the law.

**Conclusion**

International and domestic laws have been effective in bringing to the public eye the necessity of preserving global cultural heritage. Beyond that, however, their broad and unenforceable provisions have made little progress in actually implementing the necessity. To fill this gap, museums should step in, take the moral high ground, and foster better relations between themselves around the world. “It is time for collectors and collecting institutions to recognize that the rules have changed,” urges James Cuno, professor of art history at Northwestern University and President and Eloise W. Martin Director of The Art Institute of Chicago. “They must either resign themselves to accept unworkable and ineffective measures that purport to halt the ongoing destruction of heritage through the curtailment of collecting – or they must take an active, vocal part in finding working solutions and righting the balance.”

Unlike the murky pasts of so many objects of antiquity, whose provenance leaves no trace of where and how they “came forth,” museums now have the responsibility to create a new provenance, a new duty, a new set of ethics and respect – a “coming forth” like the uncovering of a new Zun Rhinoceros at the bottom of a hill in Shandong Province, clean of clandestine handling and dubious ownership – an era of global, cultural cooperation and appreciation.

Martha Lackritz graduated from UC Berkeley School of Law (Boalt Hall) in 2009. She is currently completing her second year of a clerkship with Chief Justice Wallace B. Jefferson on the Texas Supreme Court. She has been admitted to both the California and Texas State Bars.

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MARK B. FELDMAN

The following three articles were presented at the panel discussion entitled: “Shield or Sword: Why has the Foreign Sovereign Immunities Act Become One of the Most Frequently Litigated Statutes in Cultural Property Disputes?” at the ABA Section of International Law. Meeting held in Washington D.C. on April 7, 2011.

As the title of the panel suggests, the Foreign Sovereign Immunities Act of 1976 (“FSIA” or “the Act”) has become a contentious issue in several cases involving efforts to recover cultural property, particularly objects taken from victims of the Holocaust. In fact, cultural property cases such as Republic of Austria v Altmann – holding that suits may be brought under the FSIA based on claims arising decades before its enactment – have helped define the basic reach of the statute. The reason for this lies in the structure of the Act which not only defines the immunities of foreign states in U.S. courts, but which also establishes a long-arm statute that brings foreign states before U.S. courts in cases in which they are not entitled to immunity.

To enable this scheme, the State and Justice Department attorneys who drafted the Act required, among the criteria for disallowing immunity, connections to the United States that they believed warranted litigation in U.S. courts. When the drafters decided – for reasons totally unrelated to cultural property interests – to allow a narrow class of claims against foreign states based on confiscation of property, that expropriation exception to immunity became an important vehicle for obtaining jurisdiction over foreign states in cultural property cases.

The United States was the first nation to codify the law of foreign sovereign immunity by statute. The Foreign Sovereign Immunities Act of 1976 had three broad objectives: (1) to transfer responsibility for immunity determinations from the Department of State to the judiciary; (2) to define and codify the “restrictive” theory of immunity, which allows immunity for purely governmental acts but not for commercial acts by the foreign state or its agencies; and (3) to provide a comprehensive, nation-wide regime for litigation against foreign states and governmental agencies, including such matters as jurisdiction, immunity, service of process, pre-judgment attachment and execution of judgment.

This legislation was initiated by the Executive Branch seeking to minimize foreign policy problems resulting from State Department determination of foreign requests for immunity and responding to private sector criticism that the existing system was lacking in due process and subject to undue diplomatic pressures. Both the statutory text and the legislative history were drafted mainly by State Department and Justice Department attorneys. The section-by-section analysis submitted by the Executive was adopted in large part in the relevant committee reports.

The Nixon Administration first submitted legislation on foreign sovereign immunity to Congress on January 16, 1973. That proposal drew complaints from the private sector, and Congressional staff told State and Justice that Congress would not take up the measure unless the Executive could present a revised proposal that was acceptable to all parties concerned. As the State Department’s acting Deputy Legal Adviser in 1974, I was asked to coordinate that effort. Over the next two years, State and Justice attorneys held broad consultations with the private sector and some foreign governments. A revised bill was submitted to Congress on October 31, 1975, and President Ford signed the FSIA into law on October 21, 1976.

Section 1605 (a)(3) – Language and History.

The expropriation exception to immunity, Section 1605 (a) (3) of the Act, was included in the 1975 bill sent to Congress in essentially the same words and with the same section-by-section analysis as the 1973 proposal.

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Protection of American foreign investment was a major U.S. policy concern in the 1960s and 1970s. Conspiratory takeovers of American investments were widespread in that period – in Cuba, Peru, Chile, Jamaica and in Africa. Remedies in foreign courts were illusory, few countries

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No state that has codified foreign state immunity since 1976 has followed the U.S. example in disallowing immunity in cases of confiscatory takings.

Out of deference to international expectations, the first category is extraordinarily narrow. A foreign state that chooses to bring expropriated property into the United States for commercial purposes invites litigation of its title to that property including judicial review of the foreign taking under applicable principles of international law.

In drafting this part of the immunity exception, Executive Branch attorneys were mindful that Congress adopted the Second Hickenlooper Amendment\(^9\) in 1964 to require adjudication of expropriation claims notwithstanding the federal act of state doctrine established by the Supreme Court in the Sabbatino case\(^12\) and that judicial decisions as of the mid-70s had limited application of the Amendment to cases where title to property was at issue and the property was present in the U.S.\(^13\)

Given the tenets of the restrictive theory, however, and foreign policy concerns, the Executive drafters added a further requirement before disallowing a foreign state’s immunity — the property must be present in the United States in connection with a commercial activity carried on by the foreign state in the United States. At the same time, the Executive’s section-by-section analysis, adopted in the House Judiciary Committee Report, makes clear that the expropriation exception “deals solely with issues of immunity” and “in no way affects existing law on the extent to which, if at all, the ‘act of state’ doctrine may be applicable.”\(^14\) This is significant because the act of state doctrine applies in private litigation not involving foreign state parties.

Different considerations apply, however, where the foreign actor is an “agency or instrumentality” of a foreign state. As defined in the FSIA, such an entity “is a separate legal person, corporate or otherwise.”\(^15\) It is not clear that such entities are entitled to

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\(^9\) Not yet in force. See UN Doc A/55/508


\(^11\) Title 22 U.S.C. 2370(e)(2).


\(^13\) See, e.g., Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2 Cir. 1967).

\(^14\) H.Rep. 94-1487, supra.

\(^15\) 28 USC 1603(b).

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any immunity from adjudication in foreign courts under international law, and most states that have codified foreign state immunity by legislation have sharply limited the immunity accorded such entities.\(^{16}\) The FSIA defines a foreign state broadly to include such entities for some purposes, but treats them differently for other purposes, including service of process and execution of judgment.\(^{17}\)

In drafting the expropriation exception, State and Justice recognized that foreign states confiscating American investments in natural resources (including petroleum and mining properties) would likely transfer the resources to separate legal entities that might want to do business in the United States. As an element of U.S. expropriation policy, the second prong of Section 1605(a)(3) was crafted to allow actions against a foreign state (including its agencies and instrumentalities) when a government agency or instrumentality that owns or operates property taken in violation of international law is engaged in a commercial activity in the United States. Under that prong, no nexus is required between the expropriated property (presumably held abroad) and the commercial activity in the United States.

### Recent litigation – legislative intent.

With this background, I would like to present a drafter’s perspective on three issues of statutory interpretation arising under section 1605(a)(3) that were addressed in two recent cases, Cassirer v. Spain and Thyssen-Bornemisza Collection Foundation (“Cassirer”)\(^ {18}\) and Agudas Chasidei Chabad of U.S. v Russian Federation (“Chabad”)\(^ {19}\):

1. whether suits may be brought against a foreign state under the expropriation exception to recover property originally expropriated by a different state;
2. what conduct is sufficient to meet the statutory requirement that a foreign agency or instrumentality be “engaged in a commercial activity in the United States;” and
3. whether claimants must exhaust judicial remedies in a foreign state before bringing an action in a U.S. court under the expropriation exception.

### Suits Against a Foreign State Claiming Property Confiscated by a Different State

In Cassirer, plaintiff sought to recover a Pissaro painting confiscated by Germany during WWII and subsequently purchased by Spain after being traded on international art markets for decades. Among other points, Spain argued that Section 1605(a)(3) did not apply because Spain was not the foreign state that took the property. The Ninth Circuit rejected that interpretation holding that “the plain language of the statute does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law.”\(^ {20}\) While I cannot say that the drafters considered this issue, I agree with the Court’s conclusion concerning the language of the expropriation exception.

Moreover, I can say with some confidence that had the drafters pondered the question at the time, they would have elected to provide a forum for a claimant seeking to recover confiscated property that was being traded in international markets. The Cuban expropriations were still fresh at that time, and American investments were threatened in many countries. As I read the Second Hickenlooper Amendment, contrary to the dissent’s interpretation, Congress intended to set aside the act of state doctrine in litigation against private parties, or any other litigation, where the claim was made that the taking state’s action was contrary to international law. Moreover, Congress addressed the Cuba question again in 1996 when it enacted the Helms-Burton Act authorizing lawsuits against persons trafficking in property expropriated in Cuba.\(^ {21}\)

I do not understand the dissent’s assumption that a foreign state can legitimately acquire formerly private property that was confiscated by another state in violation of international law and wonder about its conclusion that Congress could not have intended to allow suits against persons trafficking in property expropriated in Cuba.

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17 See 28 USC 1608 (a) and (b); 28 USC 1610 (a) and (b).
18 ... F. 3d ..., (9 Cir. August 12, 2010).
19 528 Fed 3d 934 (DC Cir 2008).
20 The Court ruled en banc with all but two judges concurring.
21 22 USC 6082(a)(6).
The text was being finalized in 1975. For better or for worse, we decided not to conform the second prong to the words of the commercial exception, because the policies underpinning the two provisions are very different, and we did not think the results should necessarily be the same.28 And we deliberately left the phrase “engaged in” a commercial activity in the United States” open to judicial interpretation, because we doubted our ability to anticipate the myriad factual circumstances that could raise serious policy issues. It was not clear then – and it is not clear now – whether the difference in wording would lead to a different result in any particular case.

Cassirer correctly states that this language does not “explicitly require any particular level of activity or conduct commensurate to that normally contemplated for general jurisdiction.” However, as Russia pointed out in the Chabad case, one of the dictionary definitions29 of “engaged in” is to “begin and carry on an enterprise.” That would imply substantial activity in the United States. At the time, we were thinking mainly of business activities such as petroleum exports to the United States and retail gasoline distribution, but we laid down no guidelines for the courts.

Not having a definition, the courts have generally found commercial activities in the United States sufficient to sustain jurisdiction without seeking to define “engaged in.” In the Chabad case, a prominent ultra-Orthodox Jewish movement sued the Russian Federation and other entities under the second prong of 1605(a)(3) to recover two large collections of important religious books, manuscripts and documents seized by the Soviet Union and the Russian Federation: (1) an Archive held by the Russian State Military Archive (“RSMA”) and (2) a Library held by the Russian State Library (“RSL”).30 The

28 Section 1603(e) defining “commercial activity carried on in the United States” to include such activity “having substantial contact with the United States” was added in the 1975 bill to clarify the reach of the commercial activity exception. It deals more with the nexus to the United States than with the extent of the activity and, arguably, could include activity abroad having substantial contact with the U.S. This definition does not apply as such to section 1605(a)(3).
29 Webster’s Third International
30 Russia conceded that each of these institutions qualifies as an agency or instrumentality for purposes of the expropriation exemption and apparently did not contest that the

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mmercial contacts with the United States were not that strong, but the D.C. Circuit deemed them sufficient to satisfy the second prong: RSMA had contracted with two U.S. entities for publication of archival documents, and RSL had licensed a U.S. firm to distribute microcopies of RSL materials. In Cassirer, the commercial contacts were somewhat more extensive.

Russia argued that the phrase “engaged in” equates with the words “carried on in” used in the first prong of Section 1605(a) (3) and should be read to require substantial contacts with the United States as stipulated in the definition of “carried on in” set out in Section 1603(e). That point has some force, but I have to agree with the Court that Congress deliberately used different language in the two prongs opening the way to different results. On the other hand, I would not agree with the Court’s conclusion that Congress necessarily approved less than “substantial contacts with the United States” under the second prong. Given the complexities of the statute, this confusion is understandable. In my view, however, this is not what the drafters intended.

Section 1603(d) contains a broad definition of “commercial activity,” but does not attempt to quantify the level of activity or to define the contacts with the United States required to establish subject matter jurisdiction over the foreign state defendant. The contact requirements are provided in section 1605(a)(2) -- read together with section 1603(e) -- and in section 1605(a)(3). In my view, the statute does not stipulate a quantum requirement for “commercial activity,” but it does require contacts with the United States. The operative phrase in the second prong is not “commercial activity” alone, but the whole phrase -- “is engaged in a commercial activity in the United States.” The words “engaged in” are not defined, but certainly suppose activity having more than minimum contacts with the United States.

Exhaustion of Local Judicial Remedies

As one of the drafters of the FSIA, to me the most disturbing issue in these cases is the suggestion that exhaustion of foreign judicial remedies might be a precondition for access to the U.S. courts under the expropriation exception. The courts rejected the argument in both Cassirer and Chabad in the circumstances before them, but did not put the question firmly to rest. On this point, I can state categorically that the FSIA in general and the expropriation exception in particular were intended by Congress and the Executive to provide a domestic judicial remedy for claimants. To require claimants to resort to foreign courts would subvert the basic purpose of the statute. This is especially true in expropriation cases where the foreign state would then be claimant’s adversary in the proceedings and judge of its own actions.

In my years as a State Department attorney, I learned that few foreign states have a truly independent judiciary in cases where the foreign state has a strong interest. Our courts may have a national bias in certain cases, but they do not take guidance from the government, public or private. That is not often true in other countries including, sometimes, countries with advanced legal systems. Moreover, in Latin America in the 1960s and 70s, expropriation of foreign interests was frequently associated with military coups, violent revolution, or restructuring of society on Marxist lines where the possibility of local judicial redress was ludicrous. In other situations, where the State Department naively encouraged recourse to local judicial remedies, the cases turned out badly. That is why the United States promoted impartial international arbitration to resolve investment disputes, stopped referring victims of expropriation to local remedies, and wrote the expropriation exception into the FSIA.

The idea that exhaustion of local judicial remedies may be required in these cases stems from an unfortunate comment by Justice Breyer, concurring in Altman that a plaintiff “may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.” This suggestion was included in a long list of potential obstacles to expropriation claims put forward to allay concerns that retroactive application of the FSIA would open the floodgates to a wide range of historic claims that would trouble U.S. relations with friendly foreign governments. The exhaustion of remedies question was not before the Supreme Court in Altman, and this casual comment should not be taken as guidance by lower courts. It should also be noted that U.S. government suggestions that the exhaustion doctrine might be applied to limit human rights litigation in U.S. courts under the Alien Tort Statute, do not apply to the FSIA or to expropriation issues more broadly.

This is not the forum to discuss in detail the international law doctrine of exhaustion of local remedies. It should be noted, however, that the doctrine arose in the 19th and early 20th century at a time when most international claims were presented diplomatically on grounds of denial of justice. Even in that context, it was recognized that exhaustion is not required and would be futile, absent effective judicial remedies. In the expropriation context, there is an inherent conflict of interest between the dispossessed claimant and the foreign state defendant that seized or holds the claimant’s property. I am not saying that the Spanish courts could not have decided the Cassirer case fairly. I do not know. But I am saying that the Executive drafters of the FSIA and Congress would never have dreamed of allowing any such defense in an action brought under Section 1605(a) (3).

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31 Altman at 774.

Civil Litigation to Secure Cultural Property as a Human Right

ALLAN GERSON

It would be nice if there were another way to secure cultural property as a human right beyond resort to civil litigation. Surely, we are not going to get there through military action. Nor is reliance on criminal remedies a panacea, given the enormous burden of proof needed to carry the day. Civil litigation thus by default becomes the medium of choice on which we place our hopes.

In civil litigation, it is good to begin by looking at the other side of the ledger. If cultural property is not secured as a human right, as a compensable right, it will be because courts have seen fit in this sphere to elevate state rights above human rights. In turn, what the state does would carry no measure of accountability, despite the ostensible restraints of customary and conventional international law. Or, for that matter, ostensible restraints of museum guidelines: these would be narrowly construed, limited, for example, to Nazi looted art.

One would like to think that more generalized restraints on state rights in the confiscation of cultural property is an issue that had been resolved long ago. In contemporary terms, we have the drafting of the Lieber Code during the Civil War and the 1907 Hague Regulations that explicitly prohibit expropriation of any property—especially cultural property—during war if not tied to “military necessity.” Presumably, what is not permitted in time of war or civil conflict where general restraints give way to the exigencies of conflict would be deemed impermissible as well in time of peace. And, more recently, the 1954 Hague Convention for the Protection of Cultural Property and other conventions on cultural property have in many respects further codified and applied more generally what the community of nations had a century ago codified in the context of armed conflict. Thus, the definition of cultural property in the 1954 Convention is broad based:

Chapter 1, Article 1: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; and includes privately held works of art.

Yet, debate continues over whether there exists, in fact, a recognized human right to secure retention of cultural property entitling the victim of such deprivation to just compensation.Offsetting recognition of such an individual or public right is the countervailing idea that—except for the specific instance of confiscation by the Third Reich—expropriation of cultural property, including privately held works of art, remains an un fettered state right. This debate is dramatized in two cases in which I am currently involved with co-counsel in Boston and New York, which serve to illustrate better than any hypothetical cases what is at stake. One is against Yale University for its retention since 1962 of a bequest of Van Gogh’s The Night Café. The other is against the MET for its retention in a similar bequest by the same benefactor of Cézanne’s Madame Cézanne in the Conservatory. Collectively, these paintings have an evaluation of approximately $300 million. Filings in each case illustrate the battle lines that have been drawn between individual versus state rights.

To give context to this struggle, I refer to my involvement in an analogous battle of individual versus state rights as concerns state-sponsored terrorism. In 1992 I filed the first lawsuit for damages against a state sponsor of terrorism: Libya. I represented Bruce Smith, who had lost his wife on Pan Am 103. He had read my Op-Ed piece in The New York Times published in July 1992 contending that international human rights law had evolved to the point where victims of state-sponsored terrorism could hold their tormentors accountable in U.S. courts. He wanted to test that theory by hiring me. Libya responded by contending that Smith could not sue for damages—even assuming the truth of his allegations—because Libya like every other state had sovereign immunity from suit under the 1976 Foreign Sovereign Immunities Act (FSIA). I argued that the 1976 FSIA made reference to waiver, which included, I contended, implicit waiver where one state deliberately blows up the airplane of another killing hundreds of civilians. Thus the issue was joined: the conventional state rights view that sovereign immunity was sacrosanct absent an explicit waiver versus the view that human rights law had evolved to the point where waiver could be deemed implicit, much as Justice Cardozo in the famous Lady Duff Gordon case had found that warranties for malfunctioning products could be implicit as well as explicit. Unfortunately, that argument was rejected by the district and appellate courts in favor of the traditional protection of state rights. It took legislation—the 1996 Anti-Terrorism and Effective Death Penalty Act—to override the courts and allow for damages against state sponsors of terrorism as a human right—providing the State Department, not the courts, made the determination of who was or was not a state sponsor of terrorism.

Today, the Yale and MET cases present the analogous assertion of the conventional view of state rights as if mandating that U.S. courts in essence validate state sponsored confiscation of cultural property by putting such state actions beyond the reach of judicial inquiry. The substantive arguments Yale and the MET employ are variations of the themes espoused by Libya in the Pan Am 103 context: There, Libya argued that it was protected from suit by foreign sovereign immunity laws, which
The opposing position is that the Act of State doctrine has been severely attenuated over the years...

had to be strictly construed. Today, the MET argues in its Memorandum of Law filed on February 28, 2011 in support of its Motion to Dismiss, that dismissal is warranted by three counterparts to the foreign immunity doctrine: (1) Act of State, (2) the political question doctrine, and (3) international comity. Thus, the MET contends:

The Act of State Doctrine requires dismissal because the 1918 Nationalization Decree [ordering the confiscation of over 200 masterpieces of Impressionist and Post-Impressionist art owned Morozov estate to which the plaintiff in the Yale and MET cases is the heir] was a valid Act of State that vested ownership of the painting in the Soviet Government.

The MET further contends that: In decisions that are directly on point and decisive here, the US Supreme Court, this court, and the New York Court of Appeals have uniformly applied the Act of State doctrine to validate and give effect to Soviet nationalization decrees similar to the 1918 Nationalization Decrees.

The opposing position is that the Act of State doctrine has been severely attenuated over the years, and that the 1937 U.S. Supreme Court decision in U.S. v. Belmont, to which the MET refers is limited to its particular facts: an assignment of Russian nationalized property to the federal government pursuant to an Executive Agreement that did not involve cultural property. Moreover, it could be argued that applying Act of State to validate Bolshevik nationalization decrees cannot be validated by U.S. courts as extending to cultural property located in the United States would violate the public policy of the states where such property resides.

Secondly, the MET argues, “the political question doctrine requires dismissal because plaintiff’s claims raise foreign issues that the Constitution commits solely to the President … Given the President’s exclusive authority, no court in this country has the power to question the validity of a Soviet nationalization decree.” The position of plaintiff is that the political question doctrine, like the act of state doctrine, has been severely eroded over the last few decades as a more balanced approach to human versus state rights has evolved.

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Thirdly, the MET argues, “[D]ismissal is proper as a matter of international comity because the United States, the Russian Federation, and the community of nations share an interest in upholding the 1918 nationalization decree.” Here again the plaintiff’s position is likely to be that international comity is a policy that has become shopworn over the years and, like sovereign immunity, has failed to stand the test of time as an absolute doctrine.

In this regard it is of interest to note that ancillary principles of state rights are being challenged in the current allied military confrontation with Libya. Traditional guarantees of state rights imbedded in the UN Charter—sovereign equality (Article 1.1), non-interference in internal affairs (Article 2.7), and non-use of force except in self-defense against an imminent attack (Article 2.4), are being pitted against the human right to liberty and to freedom from indiscriminate attacks against civilians. Surely, “international comity” as a principle ostensibly requiring validation of repugnant nationalization decrees, is not removed from the pace of contemporary events further redressing the balance between state and human rights.

Of course, no one can say how the courts will decide the Yale and MET cases. I can only say that whether civil litigation to secure cultural property as a human right is advanced or not, will undoubtedly be affected by the outcome of these two pending cases.

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...whether civil litigation to secure cultural property as a human right is advanced or not, will undoubtedly be affected by the outcome of these two pending cases.
The main question at issue in Rubin v. Iran, a case pending in both the U.S. District Court for the Northern District of Illinois in Chicago and the U.S. District Court for the District of Massachusetts, is whether national treasures of cultural heritage should be – or legally can be – subjected to a court-ordered auction to satisfy judgments. In that case, a group of plaintiffs who won a default judgment against Iran have asked the Chicago court to seize collections of Iranian national treasures to be auctioned off – with no guarantee that they will be auctioned off as collections – so that the proceeds can be used to satisfy part or all of the judgment.

The background facts of the litigation are as follows:

On September 4, 1997, a suicide bomber in Israel injured more than 200 people and killed five. Some of the victims and their families sued in 2001 in U.S. federal court in Washington, D.C. Hamas publicly took credit for the bombing. The plaintiffs sued Iran and certain Iranian officials, pursuant to the “terrorism” exception, in the Foreign Sovereign Immunities Act ("FSIA"), claiming that Iran provided material support and funding to Hamas and hence should be held liable for the bombing. Iran did not appear in that suit. So, following a one-sided trial, the court entered default judgment against Iran in the amount of approximately $71 million. The court also awarded $300 million in punitive damages against the other non-sovereign defendants. See id. At the time, under the FSIA, punitive damages against a foreign sovereign such as Iran would not have been permitted.

The plaintiffs had their judgment in hand but Iran would not pay. The problem for the plaintiffs then became how to collect their $71 million judgment. Since judgment in 2003, they have in fact made several efforts to collect, including seeking to attach various bank accounts and the former residence of the Iranian crown prince in Lubbock, Texas. The plaintiffs were successful in attaching the crown prince’s residence and recovered $400,000 as a result.

And now we come to the national treasures. In the early to mid-2000s, the Rubin plaintiffs – frustrated with collecting just $400,000 out of a $71 million judgment – filed two cases against several museums. In Boston, they sued the Museum of Fine Arts and various museums of Harvard University. In Chicago, they sued the Field Museum and the Oriental Institute at the University of Chicago. Their main argument in both the Boston and Chicago suits is that those museums have in their possession antiquities that are owned by Iran. As Iranian-owned assets, they argue, the artifacts may be taken by the courts and sold at auction so that the plaintiffs may collect the proceeds to satisfy their default judgment against Iran. The legal theories in the Boston and the Chicago cases as to why the various artifacts are owned by Iran and are attachable have some crossover, but in all events, the core issue in both cases is the same – can Persian antiquities be awarded as commercial assets to satisfy a judgment which has nothing to do with such antiquities? That is, the judgment is attempting to compensate the plaintiffs for an act of terrorism, but the antiquities have been in museums in the United States for decades and have not in any way been used for terrorism purposes. Rather, the artifacts have been used only for scholarship, academic, or display purposes.

Before turning to the particular legal theories in each case, it is important to keep in mind that, in order for plaintiffs to win the right to a judicial auction of the artifacts, the plaintiffs have to show first that the objects are owned by Iran and not the museums, and second if they

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One implication is that museums and foreign nations may be afraid to loan items for study or display out of fear that they'll be taken by a court and sold.
under U.S. or international law. With regard to the Persepolis Collection, they’ve crossed the first bridge because Iran and the University admit that Iran owns the artifacts. The court will have to answer the question whether plaintiffs should be permitted to cross the second bridge – that is, whether, just because the University of Chicago has published books about the clay tablets, Iran has been – through the University – acting as a commercial party and not as a sovereign.

II. CHOGLA MISH
The Cho gala Mish Collection is a grouping of artifacts also on loan by Iran to the University for study. They were discovered in the Cho gala Mish region of Iran by the University of Chicago in the 1960s. From the perspectives of Iran and the University of Chicago, there is also no dispute that Iran owns this collection.

Ironically, the plaintiffs disagree. Their theory is that there is a secret title dispute over the Cho gala Mish Collection and that there is evidence of the dispute before the Iran-U.S. Claims Tribunal in the Netherlands. They claim that, in a case pending before that Tribunal between Iran and the United States, the University has claimed title to the Collection. But as Iran has said in its public filings in the Chicago court, the issue before the Tribunal is not who owns the collection, but whether the United States has not done enough to ensure its return to Iran.

Plaintiffs’ legal theory of attachment with regard to this collection is based on the Terrorism Risk Insurance Act (“TRIA”), which permits attachment of Iranian “blocked” assets. According to the plaintiffs’ interpretation of the TRIA and various regulations of Iranian assets, if there is a title dispute, then an asset may be subject to attachment because it is still “blocked.” To Iran, plaintiffs’ argument makes no logical sense. But the important things, from Iran’s perspective are that (a) Iran and the University agree that Iran owns the artifacts, (b) the artifacts have been on loan to the University and should be returned, and (c) the Tribunal is adjudicating whether the United States should ensure the return of the Cho gala Mish Collection. Notably, according to the University, in 2005, the University completed its study of that Collection and is ready to be returned to Iran.

Here, then, the plaintiffs are saying that it does not matter what Iran and the University say as to ownership, nor does it matter that the Tribunal is currently adjudicating the fate of the artifacts. All that matters to plaintiffs is that there is a secret title dispute. What happens then if the plaintiffs win the right to attach this collection? Might the judges on the Tribunal wonder if the United States is taking the Tribunal seriously enough if it is willing to ignore the Tribunal’s proceedings and issue rulings that may be contrary to its findings? Under international law, an act of a nation’s judiciary is an act of the state itself. So, if a U.S. court takes the Cho gala Mish Collection from the University and sells it, might the United States be liable to Iran for the value of the Collection? And could Iran sue the University of Chicago for failure to return objects that Iran loaned to it several decades ago?

III. HERZFELD COLLECTION
The Herzfeld Collection is not truly a “collection,” but the name this group of artifacts has been assigned for purposes of this litigation. In the early part of the 20th Century, a man named Ernst Herzfeld, an archaeologist, allegedly stole all of these artifacts during the course of certain excavations of Iranian sites and sold the artifacts surreptitiously to the University of Chicago and the Field Museum. This collection is different than the Persepolis and Cho gala Mish Collections because plaintiffs have not yet crossed their first bridge. That is, the museums concede that they hold antiquities that originated

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...the museums concede that they hold antiquities that originated from territories that are today Iranian, but vehemently dispute that Herzfeld sold them stolen goods.

from territories that are today Iranian, but vehemently dispute that Herzfeld sold them stolen goods. They claim that they have good title to all of the artifacts. Plaintiffs argue, however, that the assets are Iranian-owned by operation of Iranian patrimony law. They claim that, under Iranian law, anything unearthed in Iran is Iran’s property.

They argue that the museums do not have good title based on that law because, they claim, Iran owns them. Because they are Iran-owned but the museums claim otherwise, plaintiffs argue, plaintiffs have a legal right to attach them for judicial auction. This is the same theory that plaintiffs are using in the Boston case – in which Iran has not appeared.

The museums’ position is that the plaintiffs are creating a title contest where none existed before by raising this Iranian law even though Iran itself is not claiming ownership. Indeed, it is plaintiffs – not Iran – who are claiming that Iranian law makes the objects Iranian owned. Should courts permit third parties to argue ownership by the sovereign when the sovereign itself has made no claim?

IV. OTHER ISSUES

Beyond the three collections, this case has raised a host of other problems for museums and sovereigns, too. When this litigation first began, the plaintiffs were litigating in Chicago against the museums and not against Iran. Hence, the museums raised all immunity defenses that might normally be raised by the sovereign. But the museums were not alone. It is rare for the United States Government to take a position in pending litigation in which it is not a party. But here, it did. The United States filed two Statements of Interest expressing its position first that the artifacts were immune and/or not subject to attachment under the TRIA and second that the museums should be permitted to raise all of these arguments on behalf of the then-absent Iran.

The plaintiffs however asked the court to forbid the museums from raising defenses that they claimed belong to the sovereign. The court agreed with the plaintiffs, and so, in July 2006, Iran appeared in the case and began defending the immunities of artifacts that it owns.

When Iran asked the court to rule that the artifacts be declared immune, however, the plaintiffs protested that they were entitled to take discovery to support their legal theories. Essentially, the plaintiffs asked Iran for documents and for depositions of one or more Iranian government officials. One of the questions that plaintiffs wanted to ask Iranian officials was – tell us what other assets you have in the United States. Iran argued to the court that it did not have to submit to such questioning because it is a sovereign and as such is entitled to immunity from having to submit what we called “general assets discovery.” The United States then filed a third Statement of Interest arguing that, in effect, Iran was right – that Iran is immune from having to produce general assets discovery. The United States’ concern here is that, if this case becomes precedent for taking general assets discovery against foreign sovereigns in the United States, might foreign sovereigns start subjecting the United States to the same practices abroad?

The Court nonetheless ruled against Iran and ruled that Iran had to disclose all of its assets in the United States. Iran appealed that decision as well as the decision that caused it to have to appear in the first place. Iran, the United States, and the museums argued that appeal to the U.S. Court of Appeals for the Seventh Circuit in October 2009, and in March 2011, that Court issued its decision ruling in Iran’s favor on all issues.

Even though the Seventh Circuit has ruled, the core issue still is not resolved. That is, the district court will now have to answer the main question – can the antiquities be seized and sold at judicial auction?

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In 1938, Yulia Komarova fled the Nazi invasion of Austria and moved to the United States. Before leaving, she placed her art collection, including a work entitled Casas en los Cerros II (“Casas” or the “Painting”), in a warehouse in Austria. Sometime between 1938 and 1950, when Mrs. Komarova inquired about the works, the warehouse was looted. Mrs. Komarova did not report the works as stolen or list them with any database or registry. Some of Mrs. Komarova’s paintings, including Casas, were sold to an American soldier in 1946. He, in turn, sold them to an Argentinean art collector in 1965. The collector did not check any registries at the time of the sale for claims against the painting or inquire after its history. Casas was lent to several museums between 1980 and 2001, and was included in a catalogue raisonné of the artist’s work, with the current owner listed as the collector. The work eventually became part of a bequest to establish the Museo de Arte Latinoamericano de Valentin Alsina (the “Museum”).

In 2007, the Museum agreed to loan Casas to an exhibition in the United States. After receiving a grant of immunity from seizure by the U.S. Department of State under the Immunity from Seizure Act (“ISA”), the Painting was displayed in the United States beginning on February 1, 2010. In March 2010, Amy Goodman, Mrs. Komarova’s sole surviving heir, filed a suit for damages for the conversion of the painting by the Museum after the Museum rejected her demands for the return of the Painting.

This scenario, featuring factual similarities to other cases involving art stolen during World War II, formed the problem for the Second Annual National Cultural Heritage Law Moot Court Competition held at DePaul University College of Law.

This year’s competition featured seventeen teams from around the country competing over two days in front of over seventy-five attorney judges, including many nationally renowned cultural heritage experts and DePaul University College of Law faculty. The competition was honored to have the Honorable William J. Bauer and the Honorable David F. Hamilton of the United States Court of Appeals for the Seventh Circuit, the Honorable Mary L. Mikva of the Circuit Court of Cook County, Chancery Division, and former Illinois Appellate Judge and DePaul University College of Law Dean Warren Wolfson judge the final round. The overall Champion of the competition was the Chicago Kent School of Law team, consisting of Bryan Bienias, Stephen Gardner, and Caitlyn Jones. Chicago Kent also won the Best Brief, and Bryan Bienias was named the Best Oralist Runner-Up. South Texas School of Law was named the Runner-Up of the overall Competition, as well as the Best Brief Runner-Up. Jennifer Bloom of John Marshall Law School was named the Best Oralist.

In the Competition’s problem, the Supreme Court considered two questions: (1) whether the Immunity from Seizure Act barred Ms. Goodman’s claim for damages; and (2) whether the Museum’s equitable defense of laches provided a complete bar to liability in this case. The first issue required the participants and judges to apply principles of statutory interpretation, while the second issue presented a very fact-intensive inquiry requiring a close study of comparable fact patterns in various jurisdictions. Competition participants were asked to brief and argue these issues as if the Supreme Court had granted certiorari on these two questions on appeal from a fictional circuit court, the 12th Circuit.

For the first issue, the Court was asked to determine whether ISA precluded a claim for damages arising from the conversion of an artistic or cultural object. The ISA was enacted in 1965 for the purpose of facilitating and encouraging the exchange of cultural materials for temporary exhibit in the United States. It provides the lend-
Although the State Department has granted immunity to many artistic and cultural works, courts have not often had occasion to interpret this statute.

Although the State Department has granted immunity to many artistic and cultural works, courts have not often had occasion to interpret this statute. In one such instance, the District Court of the District of Columbia addressed a similar claim for damages against a lending institution for the alleged conversion of paintings in the institution's collections. The District Court in Malewicz v. City of Amsterdam rejected the defendant's argument that the ISA protected it from suit, reasoning that "[i]mmunity from seizure is not immunity from suit for a declaration of rights or for damages arising from an alleged conversion . . . ." However, the Malewicz case was ultimately settled out of court, and, therefore, this issue is a matter of first impression.

The fictional circuit court in this problem, the 12th Circuit, adopted the Malewicz reasoning and held that the ISA did not bar a suit for damages for the conversion of an artistic or cultural work.

The Petitioner, the defendant museum MALVA, argued that the 12th Circuit erred in deciding that the ISA did not bar Ms. Goodman's claim for damages because: (1) the statutory language is ambiguous, and the legislative history indicates an intent to bar all suits; and (2) allowing a suit for damages despite immunity undermines U.S. policy, because it discourages the temporary art loans from foreign institutions. MALVA argued that the statute was ambiguous because, although it is not a seizure, a suit for damages has the ability to interfere with the borrowing institution's control or custody of the cultural object in question. MALVA further argued that the legislative history indicated that Congress intended to protect foreign artistic and cultural works from lawsuits and from attachments in the United States.

MALVA further argued that allowing a suit for damages despite a cultural object's immunity under the ISA undermines the United States' policy of granting protection for these works, because it would have a chilling effect on the lending of important foreign artistic and cultural works to U.S. institutions. MALVA argued that the entire legislative history of the ISA reveals the legislature's recognition of the importance of exposing the American public to important works of art and culture as a matter of policy and that the enactment of the ISA itself demonstrates that Congress felt the importance of such exposure outweighed even personal property interests. MALVA argued that the 12th Circuit read the ISA too narrowly, resulting in a holding which contradicts the policy underlying the ISA's enactment. MALVA also referenced the Magness v. Russian Federation case in which jewels protected by the ISA were returned to Russia, but a $234 million judgment was awarded to the plaintiffs. As a result, Russia threatened to cease all loans to the United States, and caused two other museums to postpone exhibitions of Russian artwork. MALVA argued that this case is evidence of the chilling effect that Ms. Goodman's interpretation of the ISA would have on such loans.

Ms. Goodman argued in favor of the 12th Circuit's interpretation of the ISA, arguing: (1) the statute is unambiguous and explicitly only refers to judicial seizures; and (2) as a matter of policy, the United States should not encourage American institutions to borrow stolen artistic or cultural works. The ISA prevents any court of the U.S. from "enforce[ing] any judicial process, or enter[ing] any judgment, decree, or order, for the purpose or having the effect of depriving such institution . . . . of custody or control of such object." Ms. Goodman argued that this language is unambiguous. On its face the statute applies only to actions which seek seizure of the artistic or cultural object, and not to actions for damages.

Ms. Goodman also rebutted MALVA's policy argument, insisting that the 12th Circuit's interpretation of the ISA would only have a chilling effect on the lending of stolen artistic or cultural objects to American institutions. Ms. Goodman argued that the United States should not
encourage its institutions to borrow stolen artwork because the United States has a strong policy against importing stolen artistic or cultural objects into the country. In support of this policy, Ms. Goodman cited the United States' ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and the 1907 Hague Convention. Ms. Goodman also pointed out that the United States has joined other international efforts, including the 1998 Washington Conference Principles on Nazi-Confiscated Art and the Terezin Declaration of 2009, which espouse a policy in favor of returning artwork stolen during World War II to their proper owners.

For the second issue, the Court was asked to determine whether or not the Twelfth Circuit was correct in barring MALVA's assertion of the equitable defense of laches against Goodman's claims. In analyzing the equitable defense of laches, the courts enter into a fact based inquiry as to whether "a plaintiff unreasonably delayed in initiating an action and a defendant was unfairly prejudiced by the delay." The laches defense therefore consists of two prongs, the first focusing on the plaintiff's conduct and the second focusing on the effect of that conduct on the defendant.

In analyzing the first prong, there has been no consistent judicial direction regarding what constitutes due diligence or unreasonable delay. While courts essentially apply these concepts retroactively, it is unclear exactly what steps a potential claimant is supposed to take in searching for the stolen property. The length of time that passes before a claimant files suit is not dispositive; rather, the analysis focuses on whether the steps taken were reasonable considering the facts and resources available at the time and later.

For the second prong, prejudice may be couched in terms of a detrimental change of position on the part of the defendant, or it may be occasioned by loss of evidence, death of witnesses, or other circumstances arising during the period of delay that affects the defendant's ability to defend itself. The First Circuit, in Vineberg v. Bissonnette, a case involving artworks taken by the Nazis in a forced sale, gave an extensive discussion of the second prong of the laches defense. The court stated that prejudice that will support a defense of laches arises out of: "a loss of evidence, the unavailability of important witnesses, the conveyance of the property in dispute for fair market value to a bona fide purchaser, or the expenditure of resources in reliance upon the status quo ante." The lower court held that Goodman's claim was not barred by the defense of laches by applying the demand and refusal rule, finding that her claim was filed within ten days of MALVA's refusal to return the work, and thus within the three year statute of limitation period. Additionally, the court held that MALVA had failed to demonstrate that Goodman's delay had been the cause of any prejudice to the museum.

MALVA, in appealing the lower court's ruling, argued both that Komarova, and her successor in interest, Goodman, had (1) delayed unreasonably in bringing the suit for the return of the painting, and (2) that this delay had resulted in a loss of evidence precluding them from adequately presenting evidence of good title to the painting.

For the first prong, MALVA argued that the court should find that Goodman and her predecessors delayed unreasonably because they failed to conduct a diligent search for the painting in the sixty years after learning of the theft, to register with an art loss registry or otherwise publicize the theft at the time the loss was discovered. Relying strongly on the Guggenheim decision, MALVA argued that the suit was unreasonable in its delay because of the failure on the respondent's part to take any action to recover her artwork. Additionally, MALVA cited the multiple times the work was published in exhibition catalogues and the creation of the catalogue raisonné as evidence of the small degree of effort Mrs. Komarova could expend to discover the location of the work in the period subsequent to her loss.

MALVA argued that the second prong was present mostly in the form of costly litigation, loss of evidence, and the stigma of being associated with looted art.
Primarily, they argued that the delay prevented them from finding any evidence that might demonstrate Moreno, the soldier who had purchased the work at a flea market, had legitimately acquired title to the work.

For her part, Goodman argued that her delay was not unreasonable due to the chaos involved in the years following the Second World War, and that no clear line of action was present for Mrs. Komarova to reclaim the work. She also argued that even if there was a delay in the filing of the suit, it did not result in any prejudice to MALVA because no evidence was lost regarding the Painting’s provenance.

Goodman claimed that she and her predecessors in interest were not unreasonable in their delay in bringing the suit because the upheaval in the period following the Second World War made it very unclear how to proceed after Komarova discovered the disappearance of the painting. Citing the Southern District Court of New York case, Sotheby’s v. Shene, she argued that the delay was not unreasonable because any effort to publicize the theft of the work, either by registering the loss with an agency like the Art Loss Register or even filing a police report would not have resulted in its discovery. The Argentine art collector and the Painting’s subsequent possessors did not research the history of the work’s ownership, and thus, even if Komarova had publicized its theft, it would not have resulted in her discovery of the work. Additionally, she argued that the exhibition catalogues put out by MALVA were all in Spanish, and thus not a reasonable avenue to pursue the work.

Goodman addressed the second prong of the laches defense by asserting that no causal connection could be found between Komarova’s failure to publicize the painting’s theft and any possible prejudice to MALVA. As the court in Vineberg directed, she argued that mere delay was not sufficient to give rise to a claim of prejudice, but rather that MALVA must prove specifically what evidence has been lost and how this evidence would have related to issues that are in dispute, including “loss of evidence, change of title, intervention of equities and other causes.” Thus, she argued, MALVA had presented no alternate basis for the facts that would explain how the painting that had belonged to her grandmother had disappeared from the warehouse in Austria and ended up in their collection legitimately, and thus could not argue that any loss of evidence that could result in prejudice to the museum had occurred.

Finally, she argued that the cost of litigation was not sufficient to give rise to a claim of prejudice: Courts determining prejudice will take such costs into account, but they do not find cost alone to be dispositive on the question of prejudice. Even if MALVA had discovered the painting’s questionable status earlier, the museum, or its predecessors, would still have been subject to the cost of litigation and questions regarding title.

Both of the issues considered in this year’s problem were significant in their application to the question of art recovered from the Second World War. Many works are still being found today with gray areas in their collecting histories, and determining their proper owner is a monumental task, as the decade-long case In Re Portrait of Wally, recently decided, has demonstrated.

The third annual National Cultural Heritage Law Moot Court Competition will be held in Chicago on February 24 and 25, 2012, with all rounds taking place in courtrooms of the Everett McKinley Dirksen United States Courthouse.
innovations in telecommunications and information technology are transforming traditional sociological structures, barriers, and norms by unleashing a vast, interlinked, global network. People of diverse socio-economic backgrounds, religions, and communities freely interact, share and connect in ways that were never imagined before.

These industries also engulf and replace existing entertainment industries – thus disrupting the very industries they were meant to serve. Information and technology industries’ respective tentacles are growing and intertwining virtually unhindered by current laws and infrastructure limitations. Even now, the ordinary internet and mobile user is not able to distinguish one industry’s appendage from another’s, i.e., where one company ends and the other begins. This complex corporate matrix threatens to become ever more inscrutable.

Without the user knowing it, the entities resulting from the merged platforms and systems of the telecommunications industries and the information technology industries will reach into every area of music, entertainment and the media, changing entire traditional content industry models.

This article will confront the issues faced by music artists as they try to make their artistic mark by navigating through the increasingly complex pathways of the Internet superhighway and by adapting to the new music industry business models.

I. THE FUTURE MUSIC INDUSTRY
What will the music industry look like in the future? There is no reliable answer to that question; it is simply not possible to envision the music industry in the coming years with any certainty. At the turn of the last century, it would have been difficult to imagine the youtube.com explosion, the rapid ascendency of mobile phone “apps” usage and creation, the huge advancements in smartphones and other advanced personal computing products, and the impact these devices and sites would have on the music industry as it now stands.

But one thing is clear at this stage in music industry history: despite the traditional path the corporate music industry tries to travel in the wake of the Internet Revolution, the net value of the pre-recorded music product as a standalone sales item is rapidly approaching statistically zero. CD sales have plunged by more than half from 2003 to 2010. It is widely thought that such pre-recorded music products will never regain any discrete monetary value based on individual sales. Unfortunately, standalone music product sales have been the core revenue stream for record labels since their inception. This is no longer the case.

It was always an uphill climb for music artists to gain an audience within or without the corporate music industry structure – the new technologies haven’t altered that tenet. But the technological methods that an artist must now employ, the decline of a financial support structure, and the economic education now required for a musical artist to find her audience has created a new paradigm for both nascent and established artists’ development.

Despite these obstacles, music remains a cultural necessity. Musicians, songwriters, and other music creators will continue to exist and perhaps even thrive under new environmental conditions. But the question is: what will this new environment be?

II. PROSUMER CACOPHONY – THE CULTURAL ISSUE
The Internet has theoretically provided music artists the proverbial “level playing field” in terms of competing with other artists by lowering entry barriers into the marketplace. However, this leveling has also made it more difficult for artists to be heard through the multitude of new musical contributions that have flooded the marketplace, many of which are considered to be undistinguished and undeserving of attention, as is shown by the general public’s rejection of large numbers of inferior musical offerings on the Internet. Public acceptance of a certain recording artist’s music is evidenced not so much by measuring recording sales levels anymore, but merely by observing the numbers of “hits” (i.e., clicks, comments or “listens” by consumers posted on an artist’s site) an artist (or self-styled artist) may receive on social media or social collaboration sites such as myspace.com, youtube.com, bandcamp.com, etc. The cacophony resulting from such leveling can be blamed in part on two new developments: the need for artists to become a “jack of all trades” and the rise of the prosumer.

First, record labels are no longer expending large or even modest funds to support the artist in her artistic endeavors unless that artist has already proven herself to be viable in the marketplace. In other words, record labels are now highly skittish about investing sums that would seem modest when compared to traditional, industry-standard investments made merely a decade ago in emerging artists’ growth and development. This creates a catch 22 for the recording artist, as they now must gain a high level of viability on their own to potentially gain a label’s financial and marketing support (which is not automatically guaranteed even when an artist is signed to a label deal; moreover, any label’s support will be less than it used to be). Therefore, artists are forced to expend their personal funds to create the music product and marketing the artist’s services. Since they must financially self-support, they often find themselves in a negative economic situation. Considering the huge upfront risk factors of releasing new music into the marketplace, this is a formidable obstacle for artists, especially emerging artists with few resources, to overcome.

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In addition to financial self-support, each artist must now create self-sustaining music industry business structures. Without record label support, they must perform all of the attendant functions previously done by music industry professionals. Changed market conditions resulting from leveling requires artists to not only create excellent music and offer audiences stellar live performances, but also become their own marketers, promoters, lawyers, web designers, graphic artists, videographers, publicists, producers, audio engineers, booking agents and publishers. However, it would be unrealistic to expect that any artist can effectively perform and juggle all of these specialized tasks while also achieving excellence in their art. This current environment has given rise to a “jack of all trades, master of none” crop of artists because artists simply don't have the time and diligence to finely hone their art.

On the positive side, recording artists now have widespread access to digital music creation and manipulation software and technologies (such as Garageband, Logic Pro Express and Pro Tools, all software-based recording and editing programs). This inexpensive and efficient software is not only pre-loaded into today's computers, but rapidly improving in sophistication and ease of use. This useful software is available literally at artists’ fingertips. Therefore, the cost of creating, i.e., engineering and producing, a decent recording has sharply declined over the past few years. Therefore, artists may not need the kind of up-front financial investment they required in the past.

Second, as the barriers between artist and consumer disintegrate because of the increasing state-of-the-art enhancements of, and concomitant widespread access to, such recording software, the infiltration of the prosumer – a consumer involved in the creation of the product – has contributed another layer of musical content on the Internet. The massive amount of constantly flowing consumer-created content on youtube.com, for example, attests to this fact. The rise of consumers-as-content producers ensure that more ordinary consumers, i.e., music users, who wish to create will now be able to have a voice, if not an audience, with the advent of this inexpensive music production software. Many consumers can now afford to be musical hobbyists, rather than serious artists. These hobbyists generally do not spend the time and effort to study market conditions to more effectively promote their music across multiple Internet-based platforms – perhaps they only utilize youtube.com and other freeware platforms – but the leveling that exists allows them equal entrance to audience access as the more serious artist. Therefore, for the casual music listener, it takes too much time and effort to sift through the hobbyist music haystack to find the serious artist needle.

For the beginner artist, the playing field is also leveled. The concept of “woodshedding” to a large part has been either forgotten or lost; it’s just too easy, and understandably irresistible, to instantaneously upload a first draft, or “demo”, of an artist’s recording. Therefore, the rash of unfinished, un-mastered “demos” that populate the uniformly-available music websites (such as myspace.com) proliferate and crowd out the more sophisticated offerings.

The removal of entry-barriers has simultaneously created a more democratic marketplace but also an arguably less-than-artistically meritorious glut of music from both the prosumer and the serious but distracted and overwhelmed artist. Traditional music filters that have checked what music was released into the market have been all but eliminated. As a result, as this author has personally witnessed, there are rumblings among trained artists that there is now a larger disparity with respect to the artistic merit of readily-available music in the market than ever before, thus diluting the market for those trained artists. The artistic result of this lack of filters, as some opine, is that the musical bar with respect to excellence has been inalterably lowered.

On the other hand, it is just as possible that these painful industry paradigm shifts will in fact eventually raise the bar of artistic merit. In this new marketplace, an artist's very survival is dependent on their ability to be heard above the noise.

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In order to do so, the artist must offer a higher level of meritorious art. Therefore, the fervent desire for recognized artists to have their music break away from the vast, discordant crowd may in fact eventually serve to elevate all music’s artistic merit. Unappealing, emotionally-unsatisfying music will eventually be quickly shunned, drifting away in the digital winds.

Additionally, as more consumers become prosumers and realize the difficulty of creating great art, these prosumers may, ironically, start to demand a higher quality art output from recognized artists, i.e., art that the prosumers’ innate artistic limitations do not allow. This will lead to a greater artistic distinction between prosumer creations and more serious art. The rise of the prosumer may therefore lead to a new kind of naturally-evolved filter that lessens the amount, if not the reach, of unmeritorious art. Of course, there will always be prosumers who will never achieve their own natural filtering system – those are the ones that will continue to clog art’s pipes; but, as the saying goes, “Ignore them and they will go away”.

In order to achieve artistic distinction in this new music environment, artists may begin to rediscover that the only way to survive is through a tried-and true-method: “practice, practice, practice” and “edit, edit”. Their art will have to further evolve and focus on the art itself to emerge from this crowded marketplace. Therefore, they will necessarily be compelled to find other, more suitable partners than record labels or publishing companies to perform the administrative and marketing work.

III. THE NEW DIGITAL MUSIC ECONOMY AND ITS IMPACT ON THE ARTIST

Those artists who do succeed in getting heard must still find a way to make at least a middle-class living from their art. However, monetizing meritorious art will take place in a radically different economic landscape than the one in which the music industry has traditionally lived.

First, the market for artists is becoming ever more fragmented into smaller and smaller audience slivers-per-artist and highly specific niche genres, causing the majority of artists to struggle to gain any kind of lucrative market share. Additionally, artists must be hyper-vigilant in maintaining a current knowledge base of all new “connect-directly-to-music fan” websites. Consequently, artists must continually update their marketing endeavors in the face of the seemingly inexhaustible
stream of new digital outlets that flood the online market. Moreover, artists must constantly pay attention to their own musical evolution in order to sustain (and ideally build upon) the slice of market share they may have strived so hard to obtain. In essence, artists must work even harder in today’s digital market for an exponentially smaller piece of the pie.

There is, however, good news for recording artists in this digital economy: new completely digitally-based marketing websites are entering the marketplace, devoted to assisting artists in their quest to gain a loyal, merchandise-and-concert ticket-buying audience. This new business model phenomenon follows in the wake of the disintegration of major labels’ powerful grasp on the music industry as a result of the Internet technologies. The music industry has seen a marked rise in these new all-digital marketing services. Some of these services are free (and are primarily advertising-supported); others are “curated” and require payment. There are others still that offer so-called “crowd-funding” services, which allow fans to contribute to an individual artist’s recording or other music-related project.

Still, music’s decline in economic value is persistent. As a result of this current music market climate driving pre-recorded music products’ devaluation, that music product must be either cobbled together with more commercially valuable products to regain its economic value or be ensconced in interactive music sites that offer literally millions of songs for the listener. Therefore, as the numbers of songs available to the consumer skyrockets, each individual song’s value has fallen precipitously; songs are not at all a scarce commodity anymore.

There is another bright side of leveling however, when applied in the context of the relationship among artists, labels and retailers; artists are now able to bundle a vast array of music-related merchandise to sell directly to their fans via the artists’ own website or via one of the afore-mentioned marketing sites. For example, in the traditional music industry, the artist had to rely on a series of “middlemen” retailers to sell each, individual item of music or music-related product. Now, instead, the artist can bundle a physical CD with a digital download “bonus track” along with a T-shirt or ticket to a show and offer that bundle directly to the consumer from the artist’s website without having to pay each, individual “middleman” retailer or distributor for each, individual product. Of course, if the artist uses a marketing website “middleman”, she will have to pay that online marketing site’s fare.

Also, software technology products such as smartphone apps, interactive subscription and non-subscription services, and social network sites, along with hardware technology products, such as cellphones, digital music players, smartphones, computers, notebooks and tablets, utilize music and provide music with much-needed economic value. Yet, most of the software and hardware technology companies do not exist to sell individual music products – they are selling their own or other advertised products or services through the use of music as either a peripheral lure or a loss leader.

In the case of software-based sites, generally, the goals are either 1) to gain advertising revenue, “keyword-sales” revenue and/or click-through revenue to other product site links with which they are either affiliated or in which they may have a financial share or stake (such as corporate sponsors), much in the same way that radio sells advertising, not music; 2) to gather valuable consumer marketing data for internal use, or to sell or otherwise disseminate to other entities and organizations; or 3) to sell to the consumer a related, possibly more expensive hardware or software product or service which may or may not be related directly to music. In many cases, all three goals exist. Music owners and performing artists, in turn, generally accrue some measure of income from the music streaming uses, albeit such revenue is currently relatively miniscule in most cases.

However, a flurry of new, cloud-based online content-based music subscription and non-subscription sites are flowing continually and rapidly into the digital marketplace, some with and some without the sanctioning of the major record labels. The introduction of a plethora of such ser-
...labels have lingering fears that streaming music in a one-size-fits-all subscription service model will have a serious negative impact on the individual sale.

The major record labels, as well as other music industry corporate structures, should support and encourage these sites' existence; instead, they seem bent on creating steep barriers to entry by balking about negotiating reasonable licensing deals for the use of the labels' enormous catalogues of sound recordings, colloquially known as “masters”, which constitute the labels' most valuable assets. Songwriters' and publishers' have considerable assets in their copyrighted songs, yet they embrace the new technologies, primarily because they receive public performance royalty payments directly from their performing rights organizations, which stand in the writers' and publishers' stead to negotiate licenses with and collect payments from these online music services. So, while the songwriters and publishers embrace these new music-offering sites, the record labels stand petulantly in those services' way.

The reason this disparity exists is because two copyrightable elements inhabit any recording: 1) the underlying musical composition, whose copyright is generally owned by either the recording artist who composed the song or the recording artists' publisher, and 2) the sound recording. Major record labels generally own all of the sound recording copyrights in all of their exclusive recording artists' catalogues. So, one party – the songwriters and publishers – own the song, and another party – the record label – owns the sound recording. These two parties' interests are not always aligned, nor are the copyright laws that apply to their different copyrightable elements.

However, both of these copyrightable elements require licenses for others to use them. In the present case, these online interactive subscription and interactive non-subscription services are using these elements for public performance, or “online airplay”, and either charging the public a fee to listen or charging advertisers to display ads on their sites.

While recording artists and publishers may be amenable to licensing their songs to various websites that offer music, the website owners must receive licenses for the sound recordings as well. The labels have not been forthcoming with those licenses, as the labels have lingering fears that streaming music in a one-size-fits-all subscription service model will have a serious negative impact on the individual sale. However, as mentioned above, the major record labels must, at some point, abandon the notion of individual music product regaining its former value, as a seemingly unending river of music, both artistically meritorious and not, is readily available, even in illegal downloading form.

This problem does not exist as much, however, between the online music-offering sites and the independent artist – the independent artist owns all of her sound recording copyrights because she is not signed to a record label. Moreover, many independent artists own their own independent record labels (although, these small labels generally only promote that artist/owner's music). Therefore, the independent artist is at odds with the major labels, in that the independent artist has very little, if any, reluctance in allowing these online music sites to use her sound recordings and potentially maximize revenue for the artist.

These music sites' innovations in the areas of interoperability, content portability, and marketing music coupled with other products (either online or offline) serve independent artists' interests, as well as independent artists' interests, in maximizing exposure and revenue for their wholly-owned content. The existing sites are being constantly upgraded to offer the audience an unlimited flow of music and music-related content, completely accessible at all times and in all situations, as well as offering a fully customizable experience. Moreover, there is no need for the consumer to physically download any of this content because it will be “on-demand” on any device, and at any time.

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This generation of consumers is already addicted to having on-demand access to music, and successive generations will become more so as improvements are made across platforms and media to effectuate seamless content usage. Therefore, once the licensing issues are finally resolved, this consumer generation and those in the future will indeed pay small fees to continue the luxury of receiving such unrestricted, unlimited, borderless access and customization.

As music is rapidly migrating to the cloud via music subscription services and non-subscription services, revenue streams for content owners/creators are likely to become consolidated into one major revenue-generator based in the content owner’s right of public performance, driven by music licensing across all platforms and sites that are owned by either individual companies or the information technology megaliths like Google.

As a result of the complexities of the current licensing system and the lack of cooperation between major labels and embryonic music service sites that foil even the most sophisticated technology companies, it is not unreasonable to predict that the labels’ master catalogues (along with their affiliated publishing company song catalogues) could be either completely consumed by one of the giant information technology or telecommunications companies, or become so intertwined with and interdependent on those giants that these major content companies will become mere shadows of their former selves.

The kind of licensing construct that seems to make the most sense in the new online music industry that would allow the major content companies to remain in existence, albeit in a more streamlined form, would involve music websites paying “blanket license fees” much in the same way that the performing rights organizations charge radio stations and other public performance outlets for music usage. This blanket license fee, however, would also include mechanical (i.e., reproduction and distribution), display, and derivative rights.

Of course, the structure of this blanket license would require much conversation and mutual give-and-take among the various music industry interested parties.

Additionally, the existing collection agencies, i.e., performing rights organizations and others, including Harry Fox Agency, SoundExchange, ASCAP, BMI, and SESAC could be rolled into one all-rights-encompassing music rights organizations (“MRO”) and this MRO would then collect the fees that accrued from the blanket licenses from the online music-using and music-related sites.

Some of the factors upon which the MRO may make payment determinations could be such as:

1. What is the mode of distribution? Is the content being downloaded, publicly performed, used in podcast form (wherein the content is both downloaded, i.e., reproduced, and publicly performed) or otherwise?
2. How many times in any given period of time (e.g., monthly) has the content been consumed in some way, for example, streamed or downloaded?
3. What is the mode of use and is the content “re-tooled” in some way by users to create “user-generated content” via “mash-ups”, “remixes” or has the music been “sampled” by other creators? Will there be a flat fee paid to content creators for all of the above modes of use, or will this be calculated on a case-by-case basis?
4. Where is the content used, i.e., in which and in how many territories across the globe have consumers used the content in the various ways mentioned?

In turn, the MRO would distribute such fees to the content owners. Indeed, there is an inherent danger with having one monopolistic, powerful agency collecting and disseminating such fees, and therefore, it would have to have transparency, as well as close scrutiny and monitoring by the government, as well as by related, interested organizations.

**CONCLUSION**

It has been said that music is the soundtrack of our lives. That will never change. But the constant ebb and flow of the new music industry contours and parameters as it struggles to adjust to the digital world poses obstacles and opportunities, as well as risks and rewards, for artists and music businesses alike. As we have seen in recent years, if the music industry businesses are not supportive of the artist, the artist will find a way to get heard without them. And if the music industry businesses continue to fail to listen to the consumer, the consumer will find a way to listen to artists’ music despite them.

As the music industry landscape continues to change, the artists’ strategies must remain flexible and responsive to those changes so they can continue to live as artists, doing what they love – and, in whatever manner, mode or format, the listening audience will surely find a way to hear those artists’ voices. ☻