WHAT EFFECT WILL THE AAMD GUIDELINES HAVE ON THE ANTIQUITIES MARKETS?
By Erin Thompson, New York

In 2004, an Italian court convicted Giacomo Medici, an Italian citizen, of dealing in illicitly excavated antiquities. The fascinating story of Italy’s investigation into Medici and his antiquities smuggling ring is detailed in The Medici Conspiracy, a book by Peter Watson and Cecilia Todeschini.

Medici and his accomplices kept meticulous records of the illicit antiquities which passed through their hands. Thanks to these records, Italy has recently successfully demanded the return of illegally-exported Italian antiquities from the collections of American museums, including the Getty Museum, Boston Museum of Fine Arts, and Metropolitan Museum of Art.

In 2008, the American Association of Museum Directors (“AAMD”), an influential professional organization, reacted to Italy’s aggressive repatriation demands by formulating a new set of guidelines for the purchase of antiquities (available at www.aamd.org). The guidelines are not binding on member museums, but several museums have released statements indicating that they will follow the AAMD’s recommendations.

The guidelines recommend that AAMD member museums should not normally acquire an antiquity unless the museum’s own research shows that the object left its country of origin before 1970, the date of the relevant UNESCO Convention. This is an admirable change from the previous practice of relying on antiquities dealers to provide information about the provenance and history of the objects they sold.

However, the guidelines contain an exception that swallows the rule: museums are able to acquire antiquities about whose ownership history they can discover no information, if the museum is satisfied that the benefit of preserving the object outweighs the reputational harm of a possible future repatriation claim.

The guidelines reflect the dilemma of collectors and museums interested in acquiring antiquities. On the one hand, purchasers want to avoid buying antiquities that may be (cont’d on page 19)
Welcome to our Third Issue!

On behalf of the Art & Cultural Heritage Law Committee, welcome to the third issue of our newsletter. Our aim is to inform art and cultural heritage law enthusiasts about recent developments in the field, to provide a forum for discussion of related issues, and to provide opportunities for interested persons to get involved. The first two issues were such a success that we now intend to move from a biannual to a quarterly format. In future issues, we hope to incorporate a calendar for art and cultural heritage law related events and announcements relating to other events and internship opportunities. We welcome your input and hope you enjoy this issue!

Cristian DeFrancia
Editor
April

The Associated Press reported that Italian authorities recovered over a dozen looted antiquities located in a boat garage near Rome. One of the pieces was the marble head of Emperor Lucius Verus, who ruled alongside Marcus Aurelius.

James Cuno, president and director of the Art Institute of Chicago and the author of this year's widely publicized book *Who Owns Antiquity? Museums and the Battle Over Our Ancient Heritage*, argued against national cultural property laws in *YaleGlobal*. He wrote:

At the core of my argument against nationalist retentionist cultural property laws . . . is their basis in nationalist-identity politics and implications for inhibiting our regard for the rich diversity of the world's culture as common legacy. They conspire against our appreciation of the nature of culture as an overlapping, dynamic force for uniting rather than dividing humankind. . . .

Sadly, the public discussion about nationalist retentionist cultural property laws focuses on their role, which foreign governments and the archaeological community promote, as a means of protecting the integrity of archaeological sites. It's argued that the laws inhibit looting and consequent illicit trade. But this is only partly true. Over the decades in which they've been in place, strengthened by international conventions and bilateral treaties, the looting of archaeological sites has continued. . . . The real purpose of such laws . . . is to preserve nation states' claims of ownership over antiquities found or presumed to have been found within their jurisdiction. . . .

The alternative to consigning the protection of our ancient heritage to national jurisdiction is the United Nations, specifically its cultural body, UNESCO. Sadly, UNESCO's Achilles' heel is its grounding in nation-state politics and its respect for nationalism.

An ancient funerary vase was returned to Greece after a Swiss antiquities dealer attempted to sell the object at auction. *ARTINFO* reported that the illegally exported lekythos was recognized from pictures seized by authorities from suspected antiquities smugglers.

The Syrian government returned 700 stolen artifacts, seized by customs authorities, to Iraq, according to *Agence France-Presse*.

The US Department of State issued a press release announcing that the Department of Homeland Security imposed import restrictions on cultural property originating from Iraq. The State Department explained that "[t]he import restriction is imposed under the Emergency Protection for Iraqi Cultural Antiquities Act of 2004, which confers upon the President the authority to make emergency determinations under the Convention on Cultural Property Implementation Act with respect to any archaeological and ethnological material of Iraq. Acting under Presidential delegated authority, the Department made the necessary statutory determinations including that the subject material is a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation that is, or threatens to be, of crisis proportions. The depredation to the national patrimony of Iraq due to pillage and the unauthorized export of that country's cultural
property has been extensively documented.

**May**

*Press TV* reported that Dr. Bahaa Mayah, a special adviser to Iraq's Minister of Tourism and Antiquities, called for a ban on the sale of artifacts that have been stolen from Iraq since 2003. Dr. Mayah spoke at the British Museum and explained that such a ban would mitigate the smuggling of antiquities outside Iraq's borders.

Yemeni officials called on oil companies in that country to exercise more control over their workers after arresting a French oil employee at Sana'a International Airport for smuggling bronze statues and antique coins. Hisham al-Thawr, director general of Antique Protection at the General Organization of Antiques and Museums was quoted in the *Yemen Times* as saying: "This is the third time we seized workers for this company with such crime."

Italy reached agreement with the Cleveland Museum of Art for the return of 16 ancient objects, reported the *Associated Press*. Maurizio Fiorilli, the Italian lawyer who negotiated the repatriation of antiquities from several other U.S. museums, also negotiated the agreement in principle with the Cleveland Museum.

A grand jury handed down charges against Phillip Fields for removing archaeological resources from federal lands of Deschutes National Forest in Oregon. *The Oregonian* stated that Fields served a term in federal prison thirteen years ago for illegally excavating artifacts.

**June**

The participants at the 7th International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques in Lyon, France adopted the following recommendations, quoted here:

**RECOMMEND that member countries:**

1. Regularly add updated information to the General Secretariat's Works of Art Database;
2. Send to the General Secretariat all information necessary to carry out crime analyses on international cultural property traffickers;
3. Circulate as widely as possible the INTERPOL-UNESCO-ICOM joint letter on Basic Actions concerning cultural objects being offered for sale over the Internet so that these actions can be implemented, and conclude agreements with auction platforms in order to reduce illegal sales and to monitor this type of trade as effectively as possible;
4. Monitor land and underwater archaeological sites and tackle the illegal traffic which follows looting by adopting appropriate legislation in compliance with existing international instruments;
5. In the event of a seizure of Iraqi cultural property, contact the experts on the list drawn up by UNESCO, available on the General Secretariat's secure website;
6. Make the owners of cultural property aware of the need to draw up inventories of the property and make arrangements for its protection;

**RECOMMEND that the General Secretariat:**

Pursue the initiative of granting the widest possible access to INTERPOL's Stolen Works of Art Database via the website;

**RECOMMEND that INTERPOL, UNESCO and ICOM:**

Jointly seek ways of raising awareness among law-enforcement services, those responsible for
ART & ANTIQUITIES TRAFFICKING NEWS NOTES  

(cont’d)

safeguarding religious heritage, the major players in the art market and the conservation world, and the general public, with regard to protecting cultural property and combating illegal trafficking.

The antiquities department in Iraq issued over 10,000 identification cards to Interpol, which describe the artifacts stolen from the Iraq Museum in 2003. The cards, reported Azzaman, show pictures and the museum identification numbers of the objects.

The International Council of Museums announced that it will publish a Red List of Khmer antiquities. The list is expected to help dealers, collectors, and authorities identify artifacts smuggled from Cambodia.

Hungarian authorities arrested five individuals on theft charges following an investigation that recovered jewels looted from archaeological sites. The jewels were intended to be smuggled out of Hungary, reported Caboodle.hu.

The Associated Press reported that a judge in Indonesia jailed a 70 year old museum curator from the Radya Pustaka Museum for his role in stealing six ancient Buddhist statues and selling them to a Dutch dealer for $3,500 to $20,000 apiece. Fakes were set in place of the stolen statues to cover up the thefts.

The FBI returned American Indian artifacts stolen from a California museum following a three year investigation. The objects included nine Zuni and Hopi pots and eight reed baskets made by Cahuilla Indians, said the Los Angeles Times.

July

A new web site, stolen-and-wanted.com, was initiated to help recover stolen art works.

The Greek culture ministry reached agreement with private U.S. collector Shelby White for the return of a marble sculpture and a bronze vase. According to the Associated Press, the ancient objects were reportedly illegally excavated and smuggled out of Greece.

The Times of India reported that police arrested two individuals caught in the act of selling an allegedly stolen gold Buddha.

A Kentucky grand jury indicted an Ohio historian for removing an Indian Head Rock from the Ohio River. WSAZ in Kentucky reported that Steve Shaffer pleaded not guilty to the charge, asserting that he saved the rock from damage or loss.

An inspection by customs officials at the Miami National Airport revealed pre-Columbian gold, emeralds, and artifacts being smuggled by an Italian citizen living in Florida. The Associated Press reported that the objects were scheduled for return to Ecuador.

Dinosaur bones and other fossils smuggled from Argentina were returned by US authorities. The objects were recovered in 2006 in Arizona at a mineral fair after a report was made to Interpol, explained BBC News.

-Ricardo A. St. Hilaire
Introduction
Following Patty Gerstenblith’s timely report on the highly significant Barakat decision handed down by the English Court of Appeal on 21 December 2007 ([2007] EWCA Civ 1374), published in the last issue of this newsletter, this article will review the judgment, the applicable legal principles, judicial reasoning and consequences of the decision for the international art market, in some more detail. By way of reminder, with its action, the Islamic Republic of Iran successfully sought to recover antiquities present in London and said to form part of its national heritage.

The Facts
The facts of the case are quickly summarised. Barakat Gallery, an international dealer in ancient art and antiquities, had in its possession in London eighteen carved jars, bowls and cups made from chlorite and said to date from the period 3000 BC to 2000 BC. Iran sought to assert its ownership of the antiquities which it alleged formed part of its national heritage and originated from recent excavations in the Jiroft region in the Kerman province of southern Iran, which were unlicensed and unlawful under the laws of Iran. Barakat denied the origin of the antiquities and claimed to have purchased them legally on the open market in France, Germany and Switzerland for about £250,000 (US $500,000) and to have acquired good title to them. However, for the purposes of the court’s determination, Iran’s allegations were assumed to be correct.

The Issues to be Decided
The Court of Appeal, as the High Court at first instance before it, was in fact concerned with two preliminary questions, namely:

1. Whether under the provisions of Iranian law pleaded in the amended particulars of claim, Iran could show that it had obtained title to the objects as a matter of Iranian law and, if so, by what means.
2. If Iran could show that it had obtained such title under Iranian law, whether the court should recognise and/or enforce that title.

The Applicable Law
In relation to the first issue, it was common ground between the parties that the question of title to the antiquities fell to be determined according to Iranian law as the lex situs of the antiquities at the time when title was derived. Under English law, the determination of Iranian law was a question of fact. Iran relied extensively on its internal laws and regulations in relation to antiquities, in particular, on the National Heritage Protection Act 1930, and the Legal Bill of 1979 Regarding Prevention of Unauthorised Excavations, etc.

Iran’s legislation is by no means unusual in this regard since many source nations have enacted legislation intended to protect their cultural heritage against looting, illegal excavation and trafficking of antiquities, often by vesting property in undiscovered antiquities in the State.

Iran’s primary case was that Iranian law vested in Iran a proprietary title to the antiquities that enabled it to recover them in proceedings in England. Iran’s alternative case was that Iranian law gave Iran an immediate right to possession of the antiquities that enabled it to recover the antiquities in England based on a claim in tort for conversion or wrongful interference with goods.

A claim for conversion under English law is based on the provisions of the Torts (Interference with Goods) Act 1977 (the “Act”). The Act recognises the possible existence of different
interests in goods, namely, possessory title and proprietary title, but does not define those concepts. The Court of Appeal reviewed the law as it stands and held that, in order to sue in conversion, a claimant must show that he had either possession, or an immediate right to possession, of the chattel at the time when the wrongful interference with his right took place. Both possession or an immediate right to possession will afford the possessory title required in order to succeed with a claim in conversion. There is some uncertainty in English law, however, as to whether the claimant’s claim to possession must be proprietary.

In relation to the second issue, the underlying principle is that there is no jurisdiction for the English courts to entertain an action for the enforcement, directly or indirectly, of a penal, revenue or other public law of a foreign state. However, it is not the label which the foreign law gives to the legal relationship, but its substance, which is relevant.

The Decision at First Instance

In his judgment dated 29 March 2007 ([2007] EWHC 705 (QB)) following the trial of the preliminary issues in the High Court at first instance, Mr Justice Gray held that the Iranian antiquities laws were insufficient, or at least insufficiently clear, to give Iran a proprietary claim to the antiquities, or an immediate right to possession of the antiquities sufficient to found a claim in conversion. The Judge therefore answered the first question in the negative. In relation to the second question, the Judge concluded obiter that the relevant Iranian law relied upon by the claimant was both penal and public in character and could therefore not be enforced in England or relied upon to found Iran’s claim. The Judge described both conclusions as regrettable.

The Court of Appeal Judgment

The unanimous judgment of the Court of Appeal was delivered by the Lord Chief Justice, allowing Iran’s appeal and reversing the earlier decision of the trial Judge at first instance.

Iran’s Interest in the Antiquities under Iranian Law

In analysing the Iranian legislation in connection with the first issue, the Court of Appeal reviewed the substance of the Iranian law on the basis that if the rights conferred on Iran by Iranian law were equivalent to ownership in English law, then English law would treat that as ownership for the purposes of conflict of laws. Under the relevant Iranian law, there was no clear declaration of ownership, or express vesting of title to the antiquities in issue in Iran, but a finder did and could not acquire title to newly discovered antiquities found accidentally or as a result of illegal excavation, and Iran’s personal rights in relation to such antiquities were so extensive and exclusive that Iran was properly to be considered the owner of the artefacts found. The Court of Appeal found that the sum of the rights enjoyed by Iran were essentially the rights of ownership under English law, and further stated (obiter) that, had their Lordships not reached this conclusion, they would have found that, under Iranian law, Iran enjoyed an immediate right to possession of the antiquities that would vest ownership on taking possession. The Court of Appeal therefore answered the first question in the affirmative.

Cause of Action in Conversion

The Court of Appeal sub-divided the question as to whether Iran’s interest in the antiquities was sufficient to found a cause of action in conversion into two issues:

1. Whether Iran’s interest in the antiquities was of such a kind as to found a claim in conversion? If so
2. Whether Iran’s claim was nonetheless not justiciable in England because it is founded on a penal or public law?

As explained above, the Court of Appeal had concluded that Iran enjoyed both a proprietary...
IRAN v. BARAKAT (cont’d)

The Court of Appeal distinguished this case from earlier decisions, such as *Att-Gen of New Zealand v. Ortiz* [1984] AC 1 (CA and HL), where cultural objects were liable to confiscation under foreign law, and enforcement of title, or of a right to immediate possession under foreign law, depended on the State having taken actual possession of the object it seeks to recover. A refusal to recognise the title of a foreign State, conferred by its national law, to antiquities unless they had come into the possession of that state would in most cases render it impossible for the UK to recognise any claim by such a State for the recovery of antiquities illegally exported to the UK. In distinguishing this claim, the Court of Appeal also referred to the US case of *United States v. Schultz*, 333 F3rd 393 (2d Cir. 2003), in which the Second Circuit had recognised a claim under Egyptian patrimony law even though Egypt had never reduced the artefacts in issue into its possession.

However, importantly, the Court of Appeal continued to note *obiter* that, even if it was wrong in its view that Iran’s claim was not a claim for enforcement of a foreign public law, such a claim should not be precluded by any general principle that the English courts would not entertain an action whose object it was to enforce the public law of another State, unless such enforcement was contrary to English public policy. The Court of Appeal effectively endorsed the approach taken in the Australian *Spycatcher* case (*Att-Gen (UK) v. Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30), which the Privy Council had previously all but approved *obiter* in *President of the State of Equatorial Guinea v. Royal Bank of Scotland* ([2006] UKPC 7), and which the Court of Appeal described as laying down a “helpful and practical” test. That test was effectively to ascertain whether the central interest of the
foreign State in bringing the action was governmental in nature.

The Court of Appeal further found that there were positive reasons of policy why a claim by a State for recovery of antiquities which formed part of its national heritage, and which otherwise complied with the principles of private international law, should not be precluded by any such general principle. Conversely, it was contrary to public policy for such claims to be shut out. There was international recognition that States should assist one another to prevent the wrongful removal of cultural property. The UK was a party to international instruments which had the aim of preventing the unlawful dealing in property which formed part of the cultural heritage of States. The Court of Appeal specifically referred to the 1970 UNESCO Convention, the 1995 Unidroit Convention, EU Council Directives, and the Commonwealth scheme in this respect. Those instruments illustrated the international acceptance of the desirability of protection of national heritage (and are an expression of UK public policy even though they are not otherwise of direct relevance in this case). The Court of Appeal therefore answered the second issue in the affirmative, too.

Analysis

The Court of Appeal judgment is a landmark decision. The Judge at first instance had expressed regret at the conclusions which he had reached and the Court of Appeal’s reversal of that decision has been widely welcomed. The Court of Appeal understandably did not let the Judge’s somewhat superficial and literal interpretation of Iranian law stand and the underlying policy reasons for a rather more sophisticated analysis of Iran’s proprietary claim are clearly evident throughout.

The decision furthers the spirit of international cooperation and the aim of effective world-wide protection of source nations’ heritage from the unlawful removal of cultural objects. A ruling against Iran would certainly have had a big impact on the black market trade in illegally excavated antiquities and the decision is therefore a tremendous success for source nations. The position under US law following the Schultz decision and the position under English law following the Court of Appeal’s decision in Barakat are now harmonised, which will contribute to legal certainty in the international art market, and strengthen the international fight against dealings with illegally excavated antiquities.

Gregor Kleinknecht is the managing director of Klein Solicitors, a successful independent legal boutique in London, England. Art and cultural heritage law is one of his firm’s core practice areas.

Vision of the Throne of the Lord (The Paris Apocalypse)
c. 1400
Bibliothèque Nationale, Paris
On May 15, 2008, the Orphans' Court of Montgomery County, Pennsylvania dismissed the most recent legal challenge to the Court's order and opinion of December 13, 2004, granting permission to the Trustees of The Barnes Foundation to relocate its art gallery from Montgomery County, Pennsylvania to Philadelphia, contrary to the terms of Dr. Albert C. Barnes' Trust Indenture. Under Pennsylvania law, any deviation from Dr. Barnes' instructions must be approved by Orphans Court in Montgomery County, the court responsible for charitable trusts located within the County. In addition, the Attorney General of Pennsylvania plays a significant role, arising from his representation of the public interest in charitable trust issues, often referred to as the doctrine of parens patriae. As with several past decisions involving the Barnes, the decision turned on the issue of standing.

By way of background, Dr. Barnes' Indenture specified that the paintings were to be kept “in exactly the places” they were at time of his death. Dr. Barnes personally arranged the art in the mansion he commissioned Paul Credit, architect of the Rodin Museum, to design to house the collection. The collection, now valued in excess of $6 billion, is one of the world's largest collections of Impressionist, Post-Impressionist and early Modern paintings.

In December 2004, the Court granted permission to relocate the art gallery to Philadelphia after finding that the Barnes, on the brink of financial collapse, clearly and convincingly showed the need to deviate from the terms of the Indenture, and that the relocation was "the least drastic modification necessary to preserve the organization." In re The Barnes Foundation, 2004 Pa. Dist. & Cnty. Dec. LEXIS 344; 69 Pa. D. & C.4th 129, 172 (C.C.P. Mont. 2004). In October of 2006, the Friends of the Barnes, a group consisting of art students, alumni and neighbors of the Barnes, requested the Pennsylvania Attorney General to reexamine the decision to relocate the gallery, based upon what the Friends characterized as changed circumstances and facts unknown at the time of the decision in December of 2004. Local government representatives of Montgomery County also asked the Attorney General to re-open the proceedings pertaining to The Barnes. The Attorney General declined both requests, consistent with the Attorney General's long-standing support of the relocation of the gallery to Philadelphia. Thereafter, the Friends and Montgomery County, again citing new information and changed circumstances, each filed a petition to re-open the proceedings that had resulted in the Court's decision to permit the relocation. The new information consisted of knowledge that a state budget bill, passed by the state legislature and the Governor in 2002, "contained a line item for approximately one hundred million dollars for the purpose of building a new facility to house The Foundation's art collection." In re The Barnes Foundation, No. 58,788, slip op. at 2 (C.C.P. Mont., May 15, 2008). Neither the Court nor the public had been aware of this information during the underlying proceedings, leading to "a flurry of speculation" that the Barnes' Trustees knew of the budget item, but had concealed it from the Court during the hearings on the petition to move the gallery and its art program to Philadelphia.

The petitioners also requested re-opening on the basis of a proposal by Montgomery County to purchase the Barnes' land and buildings for about $50 million, to be raised from the sale of tax-
exempt County-backed bonds, and to lease the property back to the Barnes. In response to both challenges, the Barnes, joined by the Attorney General, requested dismissal of the petitions on the ground that the petitioners lacked standing.

The Court concluded, consistent with past decisions relating to the Barnes, that the Friends of the Barnes lacked standing because "they had no interest beyond that of the general public." In so ruling, the Court rejected the Friends' argument that the question of standing was so "enmeshed" with the merits that dismissal was inappropriate, an argument based on several decisions of the U.S. Circuit Courts of Appeals. The Court, despite characterizing the possibility of exploring the merits of this argument "as tempting," stated that it was bound by the recent holding of the Pennsylvania Supreme Court in Milton Hershey School, 590 Pa. 35, 911 A.2d 1258 (2006) ratifying "historical precepts" of standing under Pennsylvania law, including:

- A party not negatively affected by the matter sought to be challenged is not aggrieved, "and thus, has no right to obtain judicial resolution" of the challenge;
- A litigant is aggrieved when s/he can show a substantial, direct, and immediate interest in the outcome of the litigation;
- A litigant possesses a substantial interest if there is a discernable adverse effect to an interest other than that of the "general citizenry";
- Private parties generally lack standing to enforce charitable trusts; and
- The Attorney General, a member of the charitable organization or someone having a special interest in the trust are those who may bring an action to enforce a charitable trust.

These historical precepts also formed the basis of another decision involving the Barnes in which the Pennsylvania Supreme Court held:

In the absence of statutory authority, no person whose interest is only held in common with other members of the public can compel the performance of a duty owed by the corporation to the public. Only a member of the corporation itself or someone having a special interest therein or the Commonwealth, acting through the Attorney General, is qualified to bring an action of such nature.

Wiegand v. The Barnes Foundation, 97 A.2d 81, 82 (Pa. 1953)(finding that plaintiff, a member of the public and an editorial writer for a local newspaper, lacked standing, even with the consent of the Attorney General, to prosecute a claim that the Barnes so drastically limited public access to the art gallery as to defeat the purposes for which it was founded). In Wiegand, the court found (1) the plaintiff's interest to be in common with the general public; (2) an absence of statutory authority permitting the plaintiff to bring suit; and (3) an absence of statutory authority allowing the Attorney General to delegate the conduct or control of the lawsuit. Id. at 83.

Expressly relying upon Hershey and implicitly upon Wiegand, the Orphans' Court concluded that the Friends' disagreement with the Attorney General's support of the relocation, notwithstanding the "intensity of concern", did not provide the Friends with the requisite interest to grant standing to re-open the proceedings. As for Montgomery County, the Court concluded that while it had "special interests" in the matter, those interests were within the purview of the Attorney General's office, and thus did not confer standing on the County.

The County's special interests consisted of "protecting historical resources and nurturing economic welfare." The Attorney General's office, however, protects the general public as parens patriae and "there is no authority for a
second sovereign to participate on behalf of a subset of the general public."  *Slip Op. at 6.* When the Attorney General "acts to protect the public interest in enforcing the terms of a charitable trust, other Public Officers cannot be permitted to intervene to perform that same function."  *Id. at 7,* citing *Philadelphia Health Care Trust,* 872 A.2d 258, 262 (Pa. Commw. 2005).

Although the Court dismissed the petitions to re-open the proceedings, it rejected the request of the Barnes and the Attorney General to award them their attorneys' fees as sanctions against the petitioners for arbitrary, vexatious or bad faith conduct. The Court ruled that the petitions were filed in good faith, the new information was of sufficient import that the attempt to re-open was not arbitrary, and the petitioners' conduct did not meet the legal definition of vexatious conduct. None of the parties appealed the decision.

While many view the most recent decision in the Barnes litigation as the last legal challenge to the relocation, that may not be the case, depending upon the outcome of elections to be held this November. On August 13, 2008, John Morganelli, the Democratic candidate for Pennsylvania Attorney General, stated that he would try to re-open the proceedings if elected this November. Meanwhile, the Barnes continues to move forward with its relocation plans, having already selected the architects and most recently the landscape architects for the new facility in Philadelphia.
Committee Lunch at the ABA Meeting in New York

For the first time at the full ABA meetings there was a luncheon for the many committees. The Art and Cultural Heritage Committee was represented by Co-Chair, Lucille A. Roussin. Steering Committee member Sharon M. Erwin came up from Philadelphia to the luncheon. First time visitors to our committee table included Lisa J. Savitt, Miriam Stern, Linda M. Brandon and Bettina L. Hollis, a law student at St. John’s University School of Law. Bettina has already joined our committee and I look forward to hearing from our other participants.

New Co-Chair Appointed

Jennifer Kreder has been appointed to take over Cristian DeFrancia’s post as Co-Chair of the Committee. Jennifer is a professor of law at Salmon P. Chase College of Law at Northern Kentucky and widely published in the area of cultural heritage law. I look forward to working with her as Co-Chair! After serving his two-year term as Co-Chair, Cristian will continue to advise the Committee and serve as Editor of the newsletter. We’d also like to congratulate Cristian on his recent appointment as a term member of the Council on Foreign Relations. Thanks for all your hard work Cristian and congratulations! We are pleased to welcome back Patty Gerstenblith, our former Chair, as a Vice Chair on the Committee. Rick St. Hilaire and Marilyn Phelan will continue to serve as Vice Chairs of the Committee along with Patty.

Holocaust Conference in Jerusalem

A conference on “Justice Matters: Restituting Holocaust-Era Art and Artifacts,” was held at the Israel Museum, Jerusalem on May 19-20, 2008. The conference was arranged to complement three outstanding exhibitions, “Orphaned Art: Looted Art from the Holocaust in the Israeli Museum” and “Looking for Owners” featured art works from France that remain unclaimed since the end of World War II. Not all objects from these repositories were on display, but the exhibition catalogues are very well illustrated and all the known information about the provenance of the works is included in the text. Among the speakers at the conference were Shlomit Steinberg, Curator of European Art at the Israel Museum, Amy Walsh, Curator of European paintings at the Los Angeles County Museum, Marc Masurovsky from the U.S. Holocaust Memorial Museum in Washington, D.C., and well know research scholars Willi Korte of Maryland and Sophie Lillie from Vienna.

The third exhibition, “Auktion 392” is a most unusual one in that it is made up entirely of reproductions of paintings sold under duress in 1937 at the Lempertz Auction House in Cologne. Only two of the paintings have been located and were the subjects of successful restitutions through negotiations. Max Stern emigrated to Montreal, where he succeeded in opening the very successful Dominion Gallery. In his Will he left a majority of his art to Concordia University and McGill Universities in Montreal and the Hebrew University, Jerusalem. The executors of his estate established the Max Stern Art Restitution Project and this exhibition was sponsored by the beneficiaries.
Declaratory judgment actions filed by U.S. museums against claimants of Nazi-looted art are at the forefront of Holocaust-era litigation in the United States. The extent of Nazi looting of art has been well-documented. Much art was aryanized in forced sales for prices significantly below market value (if any value ever actually materialized for the seller), and some was sold at the infamous “Jew auctions” now universally recognized as illegal, but quite a few sales were legitimate. Some survivors were able to voluntarily sell art on the open market, which in some instances enabled them to obtain safe passage for themselves and their families out of Nazi territory. Nonetheless, because so many were compelled to forfeit flight assets to pay for their passage, it seems likely that the European art market reflected depressed prices. Post-war restitution legislation in Western Germany presumed that all sales and transfers of property from a Jew to a non-Jew after the enactment of the Nuremberg laws in 1935 were forced sales unless the purchaser (or subsequent good faith purchaser) could demonstrate the sale was for fair market value. The declaratory actions are inviting U.S. judges to draw the line between forced and voluntary sales – and to decide who must bear the burden of proof.

The heirs of Margarete Mauthner, who asserted a claim to Van Gogh’s *Vue de l’Asile et de la Chapelle de Saint-Remy* against Elizabeth Taylor, attempted to broaden legal grounds for restitution to situations where it seemed that the painting would not have been sold but for the rise of the illegal Nazi regime to power. The case did not discuss whether the painting had been sold for fair market value. The court rather quickly dismissed the heirs’ complaint on statute of limitations grounds. The decision was affirmed by the Ninth Circuit Court of Appeals on May 18, 2007. The United States Supreme Court denied the claimant’s petition for a writ for certiorari on October 29, 2007. Nonetheless, the case has launched a small wave of claims attempting to increase the number of artworks subject to restitution because of their ownership histories during World War II – even if those histories would not seem to support a legal claim under current case law.

Those receiving such demands, particularly U.S. museums, have responded by filing declaratory judgment actions in U.S. courts to quash the claims and clarify legal title. First, two U.S. museums faced with claims by the heirs of Martha Nathan, the widow of Hugo Nathan, a prominent Jewish collector from Frankfurt, decided to file declaratory judgment actions to resolve ownership of two paintings. Those museums were the Toledo Museum of Art and the Detroit Institute of Arts. The claimants’ arguments were similar to those in the *Adler v. Taylor* case. This was the first time U.S. museums decided to initiate litigation when faced with demands for artwork by Holocaust survivors or their heirs. The museums won both cases on statute of limitations grounds.

Since then, more declaratory judgment actions have been filed to ward off potential claims to artworks with ownership histories showing a transfer during the Nazi era – where the transfer lacks certain indicia of looting, aryanization, or forced auction. The claims are premised on the idea that sales of paintings into the depressed art market after Hitler’s rise to power in 1933 and resulting economic oppression of Jews, should be restored because the sales would not have been made but for the Nazis’ racial persecution of Jews. According to the claimants, the concept of
an illegal “forced sale” includes sales made because of the economic pressure put on Jews by the Nuremberg laws – not just those sales made pursuant to a specific Nazi decree applicable to the painting at issue or express threat of physical harm for failing to transfer the specific painting.

First, the Museum of Modern Art and the Solomon R. Guggenheim Foundation filed a complaint for declaratory relief in the United States District Court for the Southern District of New York as to Pablo Picasso’s *Boy Leading a Horse* (1906) and *Le Moulin de la Galette* (1909) against Julius H. Schoeps. Both paintings’ ownership histories have in common original ownership by Paul Robert Ernst von Mendelssohn-Batholdy and subsequent ownership by Justin K. Thannhauser.

Mendelssohn-Batholdy was “a prominent and affluent German banker and art collector, patriarch of one branch of an extraordinarily distinguished German family of Jewish descent, representative of that branch of the family as a director of Mendelssohn & Co. Bank, and proprietor of the ancestral estate outside of Berlin, Schloss Börnicke.” In 1927, he married his second wife, Elsa Lucy Emmy Lolo von Lavergue-Peguilhen (later Countess Kesselstatt), who was not Jewish. The Museums allege that Mendelssohn-Batholdy gave the paintings to his second wife as a wedding gift in 1927, and hence the paintings were excluded from his will, which was executed by his estate in May 1935 after his death from heart problems.

Schoeps maintains that Mendelssohn-Batholdy never gifted the paintings to his second wife. Schoeps maintains that after the Nuremberg laws began to devastate Mendelssohn-Batholdy’s wealth, he secretly sent the paintings on commission to Thannhauser in Switzerland. Further, Schoeps maintains that Mendelssohn-Batholdy died unexpectedly of heart complications never having told anyone about his secret. Schoeps points to interesting documentation from the Thannhauser files to support his argument that Thannhauser either stole the paintings after Mendelssohn-Batholdy’s death or bought them for a price far below market value.

Thannhauser was a prominent Jewish art dealer in Berlin who fled Germany in 1937. He continued as a prominent art dealer and collector in Paris and then New York until his death in 1976. After the war, Thannhauser actively sought return of many artworks on behalf of himself and those who had consigned works to him. After his death, Thannhauser’s extensive records were archived to assist in future restitutions. And much of his art collection was donated to the Museum of Modern Art. Thannhauser was an active purchaser of art from European Jews at least through 1939. For example, Thannhauser was one of the three Jewish art dealers who purchased *The Diggers* (1899) and *Street Scene in Tahiti* (1891) from Ms. Nathan in 1938. Additionally, Thannhauser’s name was in the ownership history of Picasso’s *Femme en Blanc* (1922), which was recently restituted from Art Institute of Chicago benefactor Mrs. Marilynn Alsdorf to Thomas Benningson. Benningson is the grandson of Ms. Carlota Landsberg who had sent the artwork to Thannhauser in Paris for safekeeping in or around 1939. Thannhauser’s name was listed in connection with the painting in the 1947 list of wartime art losses in France, the *Repertoire des Biens Spolies En France Durant La Guerre 1939-1945*. After a prospective purchaser of the painting ran a search in the Art Loss Register in 2001, Thannhauser’s archives were then checked, and the correct owner revealed.

Schoeps’ suit compels one to ask whether Thannhauser’s purchases should be viewed as benevolent acts, neutral business or immoral
profiteering. Schoeps plainly states: “Thannhauser trafficked in stolen and Nazi-looted art during his career as a dealer. Both during and after World War II, Thannhauser partnered with art dealers such as Nazi Cesar Mange de Hauke and Albert Skira, both of whom the U.S. State Department and others identified as traffickers in Nazi-looted art.” No doubt Thannhauser’s family would vehemently deny the allegation that Thannhauser acted immorally, particularly in light of his post-war efforts to assist Jews seeking restitution of works sent to him on commission. But this is not the first time accusations regarding Thannhauser’s wartime conduct have been made. Logically, Schoeps lacks any documentational evidence as to his views that Mendelssohn-Batholdy never gifted the paintings to his second wife and only secretly sent the paintings to Thannhauser on commission. Schoeps states:

The Museums’ claims that Mendelssohn-Batholdy gifted all his art collection to Elsa in 1927 at the time of their wedding is far-fetched. There is no record of such a gift any time near the wedding. Indeed, the only evidence of any Mendelssohn-Batholdy transfer of art to Elsa is Mendelssohn-Batholdy’s February 1935 Contract for the Disposition of Property, which Schoeps will establish was a mere device to protect the Paintings from Nazi predation by creating a false impression that Elsa was the owner from 1927 forward. Schoeps describes the sale as “a textbook example of a ‘fencing’ operation for stolen merchandise and a conspiracy to traffic in stolen art.” Additionally, the Art Loss Register’s letter provided to the Museum of Modern Art in the course of its provenance research, which states in part:

Paul von Mendelssohn – Bartholdy, Berlin might have been related to Francesco Mendelssohn, whose collection underwent a forced sale. The Thannhauser archives are in Geneva now, and the name generally does not mean good things. Sigfried Rosengart records are now in Lucerne, Switzerland. It might be worth checking with them to get a date of sale, as Albert Skira is a red flag list name, although it might be alright as the painting went to New York so early on. [The next 1.5 pages are redacted, but it is not stated by whom or why] [Remainder omitted by author.]

Schoeps relies, in part, on William S. Paley, As It Happened, A Memoir by William S. Paley, Founder and Chairman, CBS (1979), for the following rendition of the sale in 1936:

Thannhauser, while peering through a window outside watching the sale go down – used Swiss art dealer Albert Skira (who later developed a reputation as a notorious trafficker in Nazi-looted art) to make the sale to Paley in Switzerland, already widely known as a venue for unloading Nazi-looted art. In addition, Skira seemed desperate to make the sale. He and Thannhauser were offering Boy Leading a Horse for an artificially low price, and Skira even refused to tell Paley who the owner was. Yet, somehow the “modest” price for Boy Leading a Horse enabled Skira, Thannhauser – and possibly another dealer, Rosengart – to make enough of a profit that it was worth driving the entire length of Switzerland through the Alps to make sure the sale occurred.... Moreover, any time Thannhauser was asked about the provenance of these five significant Picasso artworks he obtained from the well-known Mendelssohn-Batholdy, Thannhauser was uncharacteristically vague and non-specific. For example, in 1964 when he sold Madame Soler to the Pinakothek der Moderne Museum in Munich, Thannhauser provided detailed information regarding the history of Madame Soler. However, when it came time to [provide] past owners (provenance), Thannhauser merely inserted “Sammlung (collection) Paul von Mendelssohn-Batholdy” without providing any dates – the only entry on the page with no dates. When Thannhauser donated Le Moulin de la Galette and Head of a Woman to the Guggenheim, he was equally vague. Thannhauser stated that he acquired Le
Moulin de la Galette from Mendelssohn-Bartholdy “ca. [around] 1935.”

As the parties have opposing views of the evidence, which party bears the burden of proof in the litigation will be extremely important. Schoeps’ Answer lays out the legal theories supporting his expansive view of the term “forced sales” and how, in his view, the applicable law requires a presumption of this classification as to all transfers of property from a Jew to a non-Jew in Nazi Germany between 1933 and 1945. Such a presumption would mean that the museums must bear the burden of proof in the litigation. The museums’ Complaint tries to head off this argument:

Even if there were such a presumption of duress, that presumption is rebutted by the evidence. The facts and circumstances establish that both von Mendelssohn-Bartholdy and his wife were free to decide whether or not to sell their artwork, were free to move artwork in and out of Germany without discrimination, were not under financial pressure to sell as the Paintings represented a negligible percentage of their net worth, and neither the German State nor the Nazi party played any role in directing, urging or otherwise threatening any adverse consequences if the Paintings were not sold to Thannhauser . . . . The allegation that the Nazi government would force von Mendelssohn-Bartholdy and his wife to sell their Paintings to the Jewish art dealer Thannhauser, whom they knew and with whom they had done business for years, is completely implausible, as is the claim that they had to sell the Paintings because Nazi persecution left them impoverished.

At this point, the case is still in its incipient stages, with the court recently having denied Schoeps’ motion to dismiss. The court likely will look at statute of limitations and laches issues next, which in light of the cases against the Ullin heirs, do not bode well for Schoeps.

Meanwhile the Museum of Fine Arts in Boston filed a declaratory judgment action in the United States District Court for the District of Massachusetts. This case concerns a preliminary claim to Oskar Kokoschka’s Two Nudes (Lovers) (1913) made by Dr. Claudia Seger-Thomschitz, and the facts seem to be ambiguous. The museum alleges that the sale by Dr. Oskar Reichel, a Jewish doctor, art collector and owner of a Viennese gallery that was Aryanized after the Anschluss of Austria into the Third Reich on March 12, 1938, was voluntary. The purchaser of the painting (and three other Kokoschka paintings) was Otto Kalir, a Viennese art dealer who had moved to Paris by the time of the sale in February 1939. The museum alleges that Reichel and Kalir had known each other for many years and often had done business together. Reichel died in Vienna of natural causes in 1943.

When Reichel’s son via a Viennese lawyer asserted post-war restitution claims to Reichel’s art collection, he never sought recovery of the Kokoschka paintings. Two Nudes (Lovers) was subsequently purchased by another dealer and sold to Sarah Blodgett in late 1947 or early 1948, and she bequeathed it to the museum upon her death in 1972. It has been publicly displayed since.

Seger-Thomschitz makes factual allegations that, if proven, could provide the court with sufficient grounds to clarify the line between forced and voluntary sales, as well as refine courts’ statute of limitations and laches analysis in such cases. Seger-Thomschitz argues that because of the dispersal of the family resulting from Nazi persecution, including the murder of one of Reichel’s sons in 1940 or 1941, it is excusable that the son pursuing post-war restitution did not know of his father’s claims to the Kokoschka paintings. Another son, Hans, fled Austria by June 1938. A third son, Raimund, fled in March 1939. In November 1938, Reichel’s art gallery, including its paintings which were mostly by Romako, was liquidated because of his Jewish heritage. The family’s apartment house was liquidated in 1941.
Reichel’s wife, Malvine, was deported to Therensiestadt in January 1943 where she survived the war and eventually joined Hans in the United States.

The brothers’ post-war restitution application included a notarized statement by Raimund asserting: “A large art collection [owned by my father] was sold by force: 47 pictures by the painter Anton Romako.” No mention was made of the Kokoschka paintings. Seger-Thomschitz explains this omission as follows: Because Dr. Reichel died after his wife was deported to Therensiestadt and his sons had fled, the sons could only go by memory and did not know about the Kokoschka paintings because they lacked access to Austrian records containing the Property Declaration on which Reichel was forced to declare all of his assets in June 1938. They were made public to academics in 1993 for the first time, and Raimund died in 1997 at 94 years of age.

Significantly, Exhibit 1 of the Answer shows that Seger-Thomschitz herself was put on notice to investigate any remaining claims of Reichel’s heirs to art when the Vienna Community Council for Culture and Science contacted her upon its own more recent review of Viennese public collections. In a November 10, 2003, letter to Seger-Thomschitz expressing its conclusion that it must restitute certain Romako paintings, it noted as follows:

In January 1939, Vita Künstler, whom Otto Kallir, after his escape to the USA, had appointed as director of the “New Gallery” . . . approached the Municipal Collections with offers of “particularly high-quality pictures by Romako,” whom [sic] she “just so happened to have in the gallery.” Thereafter, the Municipal Collections acquired five paintings by Anton Romako . . .

It is certain that these paintings involved art objects from the property of Dr. Oskar Reichel and which, in connection with the power seizure by National Socialism, he had to sell due to his persecution as a Jew to the galleries mentioned . . .

The letter mentions that as to the paintings on the Property Declaration, “only small equivalent amounts were deposited in blocked accounts.” Seger-Thomschitz argues that the fact that the Romako paintings were transferred to Kallir with payment transferred into blocked accounts is evidence of what likely happened in regard to the Kokoschka paintings. But, the Answer and Counterclaim do not clearly allege that the proceeds of the sale of the Kokoschkas actually went into a blocked account.

If the allegation holds out, then the court could find in favor of the claimant without the need to adopt a new theory of recovery. The key difference between the Romako paintings and the Kokoschka paintings is that Kallir managed to get the Kokoschka paintings out of Vienna. Thus, what must be determined is whether Kallir and Reichel managed to defeat Nazi attempts to steal the Kokoschka painting and actually reached a voluntary sale for an amount close to fair market value – or whether Kallir alone or in conjunction with Viennese Nazis stole the painting.

The claimant, however, advocates for an aggressive burden of proof shift in all cases claiming art transferred during the Nazi era. Holding more than sixty years after the war that no sale by a Jew in Nazi territory could possibly be considered voluntary as a matter of law would lay the groundwork for an unmanageable caseload for courts. A less grand legal theory, such as implementing a presumption of forced sale as to transfers at significantly below market price after passage of the Nuremberg laws, might be manageable.

Should the judges deciding the new cases allow them to move beyond the statute of limitations and laches phases, these cases may lay further precedent for drawing the line between a forced
DECLARATORY JUDGMENTS (cont’d)

versus a voluntary sale in the context of Nazi persecution. The first case in the United States to do so was *Vineberg v. Bissonnette*, which is now up on appeal. The facts involved such a clear-cut forced sale, at an infamous “Jew auction” now universally recognized as illegal, such that the court found it easy enough to grant summary judgment for the plaintiff, a relatively rare occurrence in U.S. courts.

Any precedent set most likely would not favor claimants of art sold at close to fair market value when there is no evidence of looting or a direct link between the sale of the specific asset and a specific Nazi decree compelling its aryanization or auction. But, it should cause courts to look more closely to determine whether seemingly voluntary transfers were in fact forced sales engineered to look voluntary, to which Military Law 59 and parallel national restitution laws called attention immediately after the war. Whether the court also shifts the burden of proof when the evidence points to the possibility of such a sale will be a key factor in its outcome.

*Versions of this article are to be printed in the IBA Art, Cultural Institutions and Heritage Law Committee e-bulletin and the Kunstrechtspiegel e-journal of the Instituts für Kunst und Recht in Heidelberg, Germany.*

AAMD GUIDELINES (cont’d from first page)

subject to repatriation demands. On the other hand, the market for antiquities is such that the majority of available antiquities lack a satisfactory ownership history. A collector could purchase very little if he or she required evidence of pre-1970 export.

Thus, a probable result of the AAMD guidelines is that dealers will offer even less information about the provenance of the antiquities they sell than they did before. In this case, all antiquities on the market will fall into the exception, and museums can purchase them. Several studies by the archeologists David Gill and Christopher Chippendale have already shown that most antiquities in American collections lack any provenance information whatsoever – and the AAMD guidelines may help to increase this number of antiquities without context.