

The Current Fight Against Contraband Art And Antiquities

By **Stephen Juris and Brian Remondino**

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On July 24, 2017, the New York County District Attorney's Office demanded that the Metropolitan Museum of Art turn over a 2,300-year-old vase, claiming that it had been looted by Italian tomb raiders in the 1970s. Although the Metropolitan Museum of Art had displayed the Greek bell krater in its Greco-Roman galleries for decades, the very next day it delivered the vase to local prosecutors, anticipating its likely return to Italy.[1] This seizure came only a few weeks after the U.S. Attorney's Office for the Eastern District of New York announced a significant settlement with Hobby Lobby requiring forfeiture of thousands of ancient Mesopotamian artifacts smuggled into the U.S. through sources in Israel and the United Arab Emirates.[2] Although prosecutions, forfeiture proceedings, and private litigation involving contraband art and antiquities are by no means a new phenomenon, this basic fact pattern has become increasingly common as museums, dealers, and collectors are being held to account for the artifacts and fine art in their collections.[3]

The art and antiquities trade is now believed to be the world's third-largest illicit market, behind drugs and arms, with an estimated value of \$6 to \$8 billion per year.[4] Whether this reflects a recent development or simply the application of new standards and stricter scrutiny to a market that has always been opaque, federal and state authorities' increased focus presents significant challenges for both legitimate and less scrupulous dealers and collectors alike. The Archaeological Institute of America has estimated that as many as 90 percent of classical artifacts in collections originally were stolen.[5] More recent looting also has been happening on a massive scale in Syria and Iraq, providing a fundraising source for terrorist groups as well as threatening those countries' cultural heritage.[6]

Since 2007, U.S. Immigration and Customs Enforcement has returned over 8,000 artifacts to more than 30 countries.[7] In 2016, ICE conducted 238 domestic and 79 international cultural property investigations.[8] And while most proceedings involving contraband art and antiquities have consisted of civil forfeiture proceedings or civil actions by private claimants, criminal prosecutions involving cultural property have become a staple of law enforcement and that trend is likely to continue.[9]

Cultural Property: An Enforcement Framework



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In light of authorities' focus on the art and antiquities markets, the legal standards that apply to cultural property are increasingly relevant. Most forfeiture actions or criminal prosecutions involving stolen art or antiquities involve one or more alleged violations of the following: (1) the National Stolen Property Act or analogous state stolen property laws; (2) general customs laws, including laws prohibiting false statements in connection with imports or exports; and (3) the Convention on Cultural Property Implementation Act. Terror financing laws present another potential enforcement mechanism. This list is not exclusive, as a series of other laws protect U.S. domestic cultural heritage, including the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act.[10] The mail and wire fraud statutes also have been used to prosecute defendants accused of trafficking in contraband art and antiquities.[11]

The National Stolen Property Act

One of the principal statutes used to counter antiquities trafficking is the NSPA, which penalizes the possession, concealment, sale or disposal of items that have crossed a state or U.S. border after being stolen, unlawfully converted, or taken.[12] The NSPA may be used to support criminal prosecutions or in conjunction with customs laws to seek civil forfeiture. Analogous state stolen property laws have been used by state and local prosecutors to similar effect.

In antiquities trafficking cases, the NSPA frequently is used in conjunction with foreign "patrimony laws" restricting the ownership or transfer of cultural property. Beginning in the mid-19th century, many nations enacted such laws, vesting ownership of archaeological resources in the state.[13] For example, under Iraq's Antiquities Law, as amended, all antiquities found in Iraq are considered property of the state.[14] The laws of Greece, Turkey, China, Egypt, Italy and various other nations with a rich artistic and archeological heritage similarly limit the transfer and ownership of cultural property in varying degrees.[15]

Violations of such laws or more particularized evidence of theft are a critical prerequisite to charges under the NSPA, which requires a predicate showing of unlawful conversion to support liability. In *United States v. McClain*, a case involving pre-Columbian artifacts taken from Mexico, the Fifth Circuit explained that archaeological objects removed in violation of a nation's patrimony laws continue to constitute stolen property even after they are imported into the U.S., thereby supporting prosecution under the NSPA.[16] The Second Circuit reached the same conclusion in *United States v. Schultz*, upholding a conviction under the NSPA for conspiring to receive antiquities acquired in violation of Egypt's Law on the Protection of Antiquities, which provides that all antiquities found in Egypt after 1983 are considered public property.[17] The defendant in that case — a successful New York art dealer who was accused of smuggling ancient artifacts out of Egypt disguised as cheap souvenirs, assigning a false provenance to them, and then reselling them in the U.S. — was sentenced to 33 months in prison.[18]

To support a violation of the NSPA, the the government must establish three elements: "(1) the transportation in interstate or foreign commerce of property, (2) valued at \$5,000 or more, (3) with knowledge that the property was stolen, converted, or taken by fraud." [19] This last knowledge requirement is intended to protect innocent dealers and collectors who unwittingly receive stolen goods.[20] In practice, however, because knowledge may be established using circumstantial evidence, even defendants who believed that they were acting in good faith may find themselves forced to account for their conduct and due diligence with respect to their acquisitions.[21]

Customs Laws

More general customs laws also are routinely used in art and antiquities trafficking cases. Under 19 U.S.C. § 1595a(c)(1)(A), items that are introduced or attempted to be introduced into the U.S. are subject to forfeiture where they are “stolen, smuggled, or clandestinely imported or introduced.” Under Section 1595a, the government bears the initial burden of establishing probable cause that a predicate offense occurred. The burden thereafter shifts to the claimant to show, by a preponderance of the evidence, that the property is not subject to forfeiture based on its legitimate provenance, a flaw in the government’s alleged predicate offense, or other grounds.[22]

One way in which art or antiquities may be introduced “contrary to law” is if there is a predicate violation of 18 U.S.C. § 542, which makes it unlawful to import any merchandise “by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal ... as to any matter material thereto without reasonable cause to believe the truth of such statement.” If the government can prove that customs paperwork was false, understated the value of imported items, or did not identify the correct country of origin, the property is thus subject to forfeiture.[23] For example, in connection with Hobby Lobby’s much-publicized forfeiture of a large collection of ancient Mesopotamian tablets and cylinder seals this past July, the government relied on Sections 1595a and 542, alleging that Hobby Lobby and its representatives had submitted inaccurate artifact descriptions, falsely declared artifacts’ country of origin, and dramatically understated the artifacts’ value to facilitate their acquisition.[24] Hobby Lobby’s settlement required forfeiture of the artifacts, forfeiture of \$3 million, and various other preventative and self-reporting measures — including quarterly reports to the government regarding any new cultural property acquisitions.[25]

Forfeiture proceedings under Section 1595a also may be brought in conjunction with the NSPA. For example, in *United States v. Portrait of Wally*, a case involving an Egon Schiele painting alleged to have been stolen from the Jewish owner of a Viennese art gallery by a Nazi party member, the government argued that the painting was forfeit under Section 1595a and 18 U.S.C. § 545 because it had been imported in violation of the NSPA.[26] While there is no innocent owner defense under Section 1595a, the government’s reliance on a predicate violation of the NSPA required it to establish that the importer knew the property was stolen when it was first brought into the US.[27]

18 U.S.C. § 545 offers federal authorities yet another enforcement alternative. Section 545 makes it illegal to “fraudulently or knowingly import[] ... any merchandise contrary to law, or [to] receive[], conceal[], buy[], sell[], or in any manner facilitate[] the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the [US] contrary to law.” And, like Section 1595a, federal authorities often use Section 545 in conjunction with Section 542 and the NSPA.[28]

However, unlike forfeiture proceedings under Section 1595a, there is no burden shifting under Section 545, and the burden of proof remains on the government to establish that the property is subject to forfeiture by a preponderance of the evidence.[29] An innocent owner defense also is available.[30] Under the Civil Asset Forfeiture Reform Act of 2000, innocent owners must establish this defense by a preponderance of the evidence.[31] Although the success of such defenses are fact-specific, claimants may avoid forfeiture where they “did not know of the conduct giving rise to forfeiture” or “upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate [their] use of the property.”[32] For items acquired after the original conduct giving rise to forfeiture, claimants may assert innocent owner defenses where they were “bona fide purchaser[s] or seller[s] for value” and “did not know and [were] reasonably without cause to believe that the property was subject to forfeiture.”[33]

Finally, 19 U.S.C. § 1497 authorizes forfeiture of any items that are not properly declared upon entry to the

US. Under Section 1497, the government need only prove that the property was imported without the required declaration.[34] For example, in *United States v. Various Ukrainian Artifacts*, the court granted the government's motion for summary judgment in a forfeiture proceeding involving a flight attendant's smuggling of undeclared religious artifacts into the U.S., notwithstanding the defending party's assertion that he was an "innocent owner" who did not arrange for shipment of the items into the United States.[35] Notably, no innocent owner defense is available under this provision.

Convention on Cultural Property Implementation Act

In addition to the above-referenced statutes, U.S. authorities also have used the CPIA to counter antiquities trafficking. Enacted in 1983, the CPIA implements two sections of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. First, under 19 U.S.C. § 2607, cultural property stolen from the inventory of museums, religious or secular public monuments, or similar institutions in any state party after April 12, 1983, or after the date of entry into force of the convention for the state party, whichever is later, cannot be imported into the U.S. and is forfeitable under 19 U.S.C. § 2609. The government need not prove that the importer had any knowledge that the property was stolen.

Second, 19 U.S.C. § 2602 facilitates bilateral agreements with other countries to restrict trade in designated archaeological or ethnological materials.[36] Property imported in violation of these restrictions, which are referenced in federal regulations, also is subject to forfeiture under Section 2609 and 19 U.S.C. § 2606. For example, in *United States v. 3 Knife-Shaped Coins*, a court partially granted the government's motion for summary judgment seeking forfeiture of ancient coins imported in violation of CPIA agreements with Cyprus and China.[37] In that case, the Ancient Coin Collectors Guild had imported 23 ancient Chinese and Cypriot coins, which, according to the invoice, had "[n]o recorded provenance" and were found in an "unknown" location.[38] The court found that the government met its burden of proving that certain coins were of a type listed on the restricted lists, granting the government's motion as to those items. For others, however, the court found that the government had failed to provide any evidence that the coins were restricted.[39]

Finally, Congress has passed legislation authorizing the president to exercise emergency authority under 19 U.S.C. § 2603, even in the absence of bilateral agreements. For example, the Emergency Protection for Iraqi Cultural Antiquities Act from late 2004 authorized the prohibition of designated imports from Iraq.[40] The Protect and Preserve International Cultural Property Act from 2016 likewise authorized the president to prohibit designated imports from Syria.[41]

Antiterrorism Laws

Finally, 18 U.S.C. § 2339A and other terrorism-specific statutes could be used where illicit art and antiques transactions are used to finance terrorist groups. The FBI has advised art collectors and dealers that Near Eastern antiquities being offered for sale may have been plundered by terrorist organizations such as ISIL.[42] The FBI also has warned that "purchasing an object looted and/or sold by the Islamic State may provide financial support to a terrorist organization and could be prosecuted under 18 U.S.C. § 2339A." [43] To date, no such cases appear to have been publicly reported. However, given the scale of the problem it is reasonable to expect that such cases eventually will be investigated and brought.

Key Challenges

Given this legal framework and recent enforcement efforts, museums, galleries and collectors face a

number of key challenges. First, because both criminal and civil forfeiture proceedings may turn on circumstantial evidence, and because various statutes only require the government to identify facial flaws in import-related paperwork, even dealers and collectors who are otherwise acting in good faith may find their conduct — and motives — subject to unwelcome scrutiny. Second, because cultural property litigation frequently turns on an ambiguous factual record or events that occurred many years in the past, establishing what actually happened and what was known can be difficult.

For example, in *United States v. One Tyrannosaurus Bataar Skeleton*, the government alleged that a commercial paleontologist had illegally excavated Mongolian dinosaur fossils and imported them into the U.S. by using false declarations.^[44] Notwithstanding the paleontologist's arguments regarding the government's failure to establish the actual origins of the fossils or his knowledge of any theft, the court found that the government's allegations that the defendant had "excavated skeletons in Mongolia before," coupled with his alleged attempts to obscure the country of origin on importation paperwork, raised an inference that he knew the dinosaur fossils were stolen from Mongolia after 1924.^[45] The defendant eventually pled guilty and was sentenced to three months in prison.^[46] The *Tyrannosaurus Bataar* fossils, valued at over \$1 million, were returned to Mongolia.

Similarly, in *United States v. Portrait of Wally*, the government's case turned on whether a Viennese art collector knew that an Egon Schiele painting had been stolen by a Nazi official when he first acquired it from an Austrian gallery in 1954. The U.S. initiated forfeiture proceedings in the 1990s when the painting was loaned to the Museum of Modern Art by the Leopold Museum. By that time, however, the painting's alleged rightful owner, the original seller, and various other key witnesses had long since passed away.^[47] The parties therefore were forced to rely on dueling interpretations of old letters and circumstantial evidence. For example, the government argued that the rushed nature of the original 1954 sale evidenced the purchaser's awareness that the painting's ownership was questionable, whereas the Leopold Museum argued that the purchaser's failure to hide its ownership reflected a good faith belief that the sale was legitimate.^[48] The case eventually settled after the court denied both parties' motions for summary judgment and the Leopold Museum agreed to pay \$19 million and recognize the original owner's family in future showings.^[49]

Although the passage of time can present evidentiary difficulties for prosecutors, on balance these are challenges that disproportionately impact defendants and claimants. Innocent mistakes, sloppy paperwork and corner-cutting by customs brokers and dealers can all create significant legal exposure, even in the absence of bad faith or criminal intent. Dealers and collectors looking to protect themselves therefore will need to undertake more effective diligence and exercise more vigilant oversight over their vendors and customs brokers if they want to avoid forfeiture and costly legal fights going forward.

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DISCLOSURE: Stephen Juris was involved with matters relating to the United States v. One Tyrannosaurus Bataar Skeleton case mentioned above.

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[1] Tom Mashberg, *Ancient Vase Seized From Met Museum on Suspicion It Was Looted*, N.Y. Times, July

31, 2017.

[2] United States Files Civil Action to Forfeit Thousands of Ancient Iraqi Artifacts Imported by Hobby Lobby (July 5, 2017), <https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported> [hereinafter Hobby Lobby Press Release].

[3] See, e.g., Tom Mashberg, Met Museum Turns Over Another Relic with Disputed Past to Prosecutors, N.Y. Times, Aug. 1, 2017; Dan Duray, Top US Prosecutor Has Art Market in His Sights: Actor Nicolas Cage's Return of a Dinosaur Skull is Latest Victory in Preet Bharara's Campaign to Police the Art and Antiquities Trade, The Art Newspaper, Feb. 1, 2016, <http://arttimes.co.za/top-us-prosecutor-has-art-market-in-his-sights/>.

[4] Thomas Mulhall, Remarks at the Meeting of ICE Homeland Security Investigations: Efforts to Combat Illicit Trafficking in Stolen Art, Antiquities, and Cultural Property, U.S. Dep't of State (Sept. 6, 2013), <https://2009-2017-fpc.state.gov/213929.htm>.

[5] Loveday Morris, Islamic State Isn't Just Destroying Ancient Artifacts – It's Selling Them, Wash. Post, June 8, 2015.

[6] Estimates of ISIS' annual profits from the antiquities trade range as high as \$100 million. See Benoit Faucon, et al., The Men Who Trade ISIS Loot, Wall St. J., Aug. 6, 2017.

[7] Raymond Villanueva, Written Testimony for the Subcommittee on Terrorism and Illicit Finance Hearing Titled The Exploitation of Cultural Property: Examining Illicit Activity in the Antiquities and Art Trade, Dep't of Homeland Security (June 23, 2017), <https://www.dhs.gov/news/2017/06/23/written-testimony-ice-house-financial-services-subcommittee-terrorism-and-illicit>.

[8] Id. In addition to ICE, the FBI's Art Crime team, the State Department's Cultural Heritage Center, the Interior Department, the National Park Service, and DOJ's Environment and Natural Resources Division have focused on pursuing cultural heritage violations. As demonstrated by the Met case discussed above, state authorities like the New York County District Attorney's Office also have focused significant attention on the art and antiquities market.

[9] See Derek Fincham, An Art Dealer's Prosecution Casts a Long Shadow, Illicit Cultural Property (Mar. 31, 2017), <http://illicitculturalproperty.com/an-art-dealers-prosecution-casts-a-long-shadow/>; Walter Pavlo, Illegally Importing Tyrannosaurus Lands Man in Prison, Forbes (June 3, 2014).

[10] For a detailed account of the laws protecting US domestic cultural heritage, see Patty Gerstenblith, The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects, Cultural Property Law, 64 U.S. Attorney's Bulletin at 2 (U.S. Dep't of Justice Mar. 2016), <https://www.justice.gov/usao/file/834826/download>.

[11] See, e.g., United States v. Crawford, 239 F.3d. 1086, 1088 (9th Cir. 2001); United States v. Vitrano, 746 F.2d 766, 767-69 (11th Cir. 1984); Florida Man Pleads Guilty to Theft of Picasso and Chagall Etchings, FBI (Oct. 2, 2009), <https://archives.fbi.gov/archives/baltimore/press-releases/2009/ba100209c.htm>.

[12] 18 U.S.C. § 2315.

[13] Gerstenblith, supra note 10, at 7.

[14] Complaint, *United States v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets, et al.*, No. 17 CV 3980, at 7 (E.D.N.Y. July 5, 2017) [hereinafter Hobby Lobby Complaint].

[15] Law No. 2002:3028 for the Protection of Antiquities and Cultural Heritage in General (2009) (Greece); Law No. 2863 on the Conservation of Cultural and Natural Property (2011) (Turkey); Law of the People's Republic of China on Protection of Cultural Relics (2007) (China); Law No. 117 of 1983, as Amended by Law No. 3 of 2010, on the Protection of Antiquities (2010) (Egypt); Legislative Decree No. 42 of 22 January 2004, Code of the Cultural and Landscape Heritage (2016) (Italy).

[16] *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

[17] *United States v. Schultz*, 333 F.3d 393, 399, 410 (2nd Cir. 2003).

[18] *Id.* at 398.

[19] *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 250 (S.D.N.Y. Sept. 30, 2009).

[20] *Schultz*, 333 F.3d at 410.

[21] See *Portrait of Wally*, 663 F. Supp. 2d at 269 (“The Government may rely on circumstantial evidence to show that Dr. Leopold had the requisite knowledge to render Wally forfeit.”); *United States v. One Tyrannosaurus Bataar Skeleton*, 12 Civ. 4760, 2012 U.S. Dist. LEXIS 165153, at *31 (S.D.N.Y. Nov. 14, 2012) (holding that circumstantial evidence, including the fact that the matter involved a commercial paleontologist who previously excavated fossils in Mongolia and allegedly attempted to obscure the property's country of origin, established “a reasonable inference” of knowledge).

[22] *Portrait of Wally*, 663 F. Supp. 2d at 250-51.

[23] *United States v. The Painting Known as “Hannibal,”* No. 08 Civ. 1511, 2010 U.S. Dist. LEXIS 50483, at *9-12 (S.D.N.Y. May 18, 2010).

[24] Hobby Lobby Complaint, *supra* note 14, at 20.

[25] Hobby Lobby Press Release, *supra* note 2.

[26] *Portrait of Wally*, 663 F. Supp. 2d at 250.

[27] *Id.* at 252.

[28] See *One Tyrannosaurus Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153, at *16.

[29] See *id.* at *10.

[30] Unless otherwise excluded, CAFRA incorporates the innocent owner defense into all civil forfeiture statutes. See 18 U.S.C. § 983(d)(1). However, CAFRA excludes all provisions of law codified in title 19. See 18 U.S.C. § 983(i)(2)(A). The innocent owner defense thus is not applicable to 19 U.S.C. §§ 1497 or 1595a. See *One Tyrannosaurus Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153, at *18-19.

[31] 18 U.S.C. § 983(d)(1).

[32] One Tyrannosaurus Bataar Skeleton, 2012 U.S. Dist. LEXIS 165153, at *13-14.

[33] *Id.* at *14.

[34] *United States v. Various Ukrainian Artifacts*, No. CV-96-3285, 1997 WL 793093, at *2 (E.D.N.Y. Nov. 21, 1997).

[35] *Id.* at *2-3.

[36] The US currently is a party to 16 bilateral agreements pursuant to the CPIA. See Bureau of Educational and Cultural Affairs, Cultural Property Protection Bilateral Agreements, U.S. Dep't of State (last visited Oct. 18, 2017), <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements>.

[37] *United States v. 3 Knife-Shaped Coins*, 246 F. Supp. 3d 1102, 1123-24 (D. Md. 2017).

[38] *Id.* at 1108.

[39] *Id.* at 1115-16.

[40] See Emergency Protection for Iraqi Cultural Antiquities Act, Pub. L. No. 108-429, tit III, § 3002, 118 Stat. 2599 (2004); see also 19 CFR § 12.104j. The Office of Foreign Assets Control also has issued sanctions related to antiquities from Iraq under the Iraq Stabilization and Insurgency Sanctions Regulations. See 31 CFR § 576.

[41] Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, § 3, 130 Stat. 369 (2016); see also 19 CFR § 12.104k.

[42] ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot, FBI (Aug. 26, 2015), <https://www.fbi.gov/news/stories/isil-and-antiquities-trafficking>.

[43] *Id.*

[44] Author Stephen Juris was involved with matters relating to this cited case.

[45] One Tyrannosaurus Bataar Skeleton, 2012 U.S. Dist. LEXIS 165153, at *31.

[46] Manhattan U.S. Attorney Announces Return to Mongolia of Fossils of Over 18 Dinosaur Skeletons (July 10, 2014), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-return-mongolia-fossils-over-18-dinosaur-skeletons>.

[47] *Portrait of Wally*, 663 F. Supp. 2d at 274-75.

[48] *Id.* at 270-72.

[49] Thomas R. Kline, *Portrait of Notoriety*, *Wall St. J.*, July 27, 2010.
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