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The Business Of Art Theft: Assessing Auction House Standard Of Care And The Sale of Stolen Cultural Property

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THE BUSINESS OF ART THEFT: ASSESSING AUCTION HOUSE STANDARD OF CARE AND THE SALE OF STOLEN CULTURAL PROPERTY

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Art theft is the third largest criminal enterprise in the world. New York, the center of the international art exchange and home to major auction houses, has attempted to limit the profitability of the illicit art trade. However, the nature of the art market makes this issue difficult to alleviate, let alone solve. Auction houses' customary "no questions asked" policy towards ownership, naïve buyers unaware of market practices, incomplete provenance records, and lack of a uniform due diligence standard, are all factors that make this landscape hardly navigable. This Comment addresses the special role auction houses play in the commercial exchange of stolen art and what standard of care houses should be held to.

Auction houses are in a special position of power. Established art dealer liabilities and remedies inform the fact that auction houses are better equipped than good faith purchasers to discover stolen works and rectify the problem. In appropriating an economic framework, which has been used to establish art dealer liabilities when selling stolen works, I recommend that auction houses should be held liable, and the buyer should recover the benefit of his bargain plus interest when auction houses are indifferent to a work's provenance.

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INTRODUCTION

After gun and drug trafficking, art theft is the largest criminal enterprise in the world.¹ Further, the art and cultural property trade is the leading unregulated business on the planet.² While the full extent of the illegal art market is unknown,³ across the world, 50,000-100,000 works are stolen each year,⁴ and only five to ten percent of *all* stolen art is ever recovered.⁵ Stolen art is often smuggled, traded internationally, and kept in private collections away from the public eye, only becoming public when it is sold through legitimate markets, including auction houses.⁶

New York, a major hub for international art exchange and home to auction houses including Sotheby's and Christie's,⁷ has enacted laws that

1. Kris Hollington, *After Drugs and Guns, Art Theft is the Biggest Criminal Enterprise in the World*, NEWSWEEK (July 22, 2014, 10:09 AM), <http://www.newsweek.com/2014/07/18/after-drugs-and-guns-art-theft-biggest-criminal-enterprise-world-260386.html>.

2. *Id.* But see JUDITH B. PROWDA, VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS 183 (2013) ("Paradoxically, auctions—historically one of the oldest institutions for buying and selling art—are perhaps the most stringently regulated entities in the art trade, while at the same time one of the least regulated industries in the US.").

3. Hollington, *supra* note 1.

4. *Id.* (adding that the FBI estimates that the criminal income generated from art theft is \$6-8 billion each year).

5. Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Safe Haven for Stolen Art*, 64 N.Y.U. L. REV. 909, 911 (1989); see also Hollington, *supra* note 1 ("Successful prosecution [of art thieves] occurs even less frequently.").

6. See Drum, *supra* note 5, at 910-11.

7. *Id.* at 909 (recognizing that New York City is the Mecca of the art and

attempt to resolve art-theft issues specifically.⁸ However, auction houses, art dealers, and collectors have played, and continue to play, an important role in encouraging art theft,⁹ further increasing the tension between treating art as a for-profit business opportunity and treating art as personally and culturally invaluable historical patrimony.¹⁰ For example, after World War II, auction houses and other art market players were reluctant to probe provenance—or chain of title—either out of indifference or out of real concern for how a famous work of art coincidentally made its way to market.¹¹

The two major international auction houses, Sotheby's and Christie's,¹² have combined art sales of \$11-12 billion a year.¹³ Further, it is estimated that private sales amounted to \$30 billion in 2008.¹⁴ Although many works are consigned and sold through auction houses, the supply of traditionally stolen art (i.e. impressionist and modern art) is shrinking.¹⁵ Moreover, many of these works will never return to auction or to the art market in

antiquities market).

8. Kelly Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 590 (1999) (stating that New York courts have helped the state from becoming a safe haven for stolen art by applying laches to stolen art cases. Its courts hold "that if an owner cannot prove that she has thoroughly investigated a work's history, she will be forced to hand it back, or pay the original owners or their heirs the full market value.").

9. See Hollington, *supra* note 1 (stating that there is currently no legal obligation to publicly list art sales); see also Julia McCord, Note, *The Strategic Targeting of Due Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 1007 (1995) ("Without the opportunity to transfer art and antiquities through auction houses, the illicit art trade will be less profitable for art thieves.").

10. See Anna Dempster, *Trust, but verify, as they say*, ART NEWSPAPER (July 11, 2013), <http://old.theartnewspaper.com/articles/Trust-but-verify-as-they-say/30096> ("The art world is riddled with tensions: between the rational and the emotional, commerce and culture, public and private, collectors and investors, amateurs and connoisseurs—and between trust and transparency in the art market.").

11. Walton, *supra* note 8, at 551.

12. See SARAH THORNTON, SEVEN DAYS IN THE ART WORLD 5 (2008) (maintaining that together, Sotheby's and Christie's account for "98 percent of the global auction market for art").

13. Hollington, *supra* note 1; see also DON THOMPSON, THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART 95 (2008) ("Christie's and Sotheby's form a duopoly, the name an economist gives a competitive paring that dominates a market: Coke and Pepsi, McDonald's and Burger King, or Boeing and Airbus.").

14. Hollington, *supra* note 1.

15. THOMPSON, *supra* note 13, at 54; see also THORNTON, *supra* note 12, at 6 (quoting Christie's head auctioneer, "We are running out of earlier material, so our market is being pushed closer to the present day The shortage of older goods is thrusting newer work into the limelight [.]").

general.¹⁶ Perhaps, more importantly, most of these artworks will never have the opportunity to be seen in public again.

This Comment will address the role auction houses play in the commercial exchange of stolen art and what duty of care auction houses owe purchasers in regard to researching provenance and discovering stolen artworks in their possession. There are examples of stolen works that have been sold through major auction houses, such as Sotheby's and Christie's, and it is important to note that these auction houses have profited from these sales.¹⁷ However, it is not yet clear what standard of care auction houses should be held to because there is no legal precedent; all cases have resulted in settlements before any auction house liability could be assessed. This Comment recommends that auction houses should be held liable, and the buyer should be able to recover the benefit of his bargain when auction houses are merely or blatantly indifferent to a work's provenance.

I. METHODOLOGY

Appropriating a law and economics framework that has been previously used when assessing art dealer standards of care owed to unwitting buyers of stolen artwork, it is necessary that an auction house has a legal obligation to a buyer, and the buyer should be made whole when stolen works make their way through auction. Using established art dealer liabilities and their economic justifications, I propose that these standards of care and their remedies should be extended to situations where auction houses facilitate the sale of stolen art.

I will first provide a brief overview of the current and complex art market landscape, which informs a need to apply an economic framework to the issue. Although there is an important legal distinction between auction houses and art dealers—a distinction that triggers a legal obligation for dealers to sell a work with good title—there are noteworthy instances in which auction houses have acted in bad faith and have been less than diligent but have escaped liability. These instances, as well as buyers' and art market participants' sophistication, provenance reliability, due diligence issues, the international aspect of the trade, and established art dealer liabilities, serve as evidence that the auction house standard of care when facilitating the sale of stolen works of art is an unresolved issue.

Second, I will analyze and provide an understanding of the economic justifications for current art dealer duty of care owed to purchasers.

16. THOMPSON, *supra* note 13, at 54.

17. See PROWDA, *supra* note 2, at 186-87 (recognizing that houses receive fees from consigners including commission, and also collect fees from buyers including buyer's premium).

Because, like art dealers, auction houses occupy a special seat of power in the art market, there is an asymmetry of information between houses and purchasers, there are due diligence issues, purchasers are unable to efficiently evaluate and monitor their risk, and there are valid public policy concerns. These are justifications used to establish that art dealer liability is equally applicable to auction houses. Therefore, auction houses should owe the same duty of care to buyers, as art dealers do, when they sell stolen works of art.

II. THE CURRENT ART MARKET LANDSCAPE

Navigation in the present art market landscape is difficult for all stakeholders, including art dealers, consignors, collectors, museums, and purchasers. However, there are stakeholders, specifically auction houses, that are in social and economic positions to not only combat the illicit art trade but also help make the market more transparent and legitimate in general. The reality of the art market landscape warrants a reassessment of auction house liability when facilitating the sale of stolen works of art.

A. Art Dealers v. Auction Houses: A Legal Distinction

Although auction houses are in a position to help reduce the illicit art trade, houses are not currently legally obligated to do so. Obligation is triggered based on a business' relationship to the buyer and seller, which determines whether the Uniform Commercial Code ("U.C.C." or the "Code") applies. This triggered obligation can be explained by describing the traditional legal distinction between an art dealer and an auction house.

Traditionally, an art dealer directly purchases a work from the owner—becoming the work's owner and titleholder—and then sells the work to a third-party on his own behalf.¹⁸ Therefore, the dealer is legally accountable to both the previous owner and the buyer.¹⁹ The dealer has a direct financial stake in the work, the U.C.C. applies to his transactions, and he must be able to pass good title onto a subsequent purchaser.²⁰ An auction house, on the other hand, does not traditionally purchase the work itself from the owner. Instead, a house acts as an intermediary between the consignor and the third-party buyer.²¹ When a work is sold, an auction

18. See Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 554 (1988).

19. See *id.* at 554-55.

20. U.C.C. § 2-312(1)(a) (1999) (stating that a seller is required to ensure that "the title conveyed shall be good, and its transfer rightful").

21. See PROWDA, *supra* note 2, at 184 ("The job of the auction house is twofold: to attract consignments and to conduct the sale, both in a responsible manner"); see also

house collects commission from the consignor as well as fees from the buyer.²² The house, therefore, is not subject to the U.C.C. and, unlike an art dealer, has no direct financial stake in the work.²³

An auction house, as an agent of the consignor, has both an agency and fiduciary relationship with the consignor.²⁴ However, houses have no such relationship to the purchaser, even though buyers pay a special house fee (“buyer’s premium”) when their bid is successful.²⁵ Therefore, the buyer has little legal protection and recourse against the house if something goes wrong with the sale.²⁶

This traditional distinction between art dealers and auction houses is diminishing, for dealers and houses have expanded their services and practices.²⁷ Most notably, houses can function as dealers and purchase works to then sell on their own behalf.²⁸ Because auction houses buy the work itself, they are not merely acting as agents of the seller. They have a

Glossary, INT’L FOUND. FOR ART RESEARCH, <https://www.ifar.org/glossary.php> (last visited Mar. 20, 2015) (defining ‘consignment’ as “[t]he act of conveying goods to one [including auction houses] who will sell them for the owner or transport them for the owner”).

22. See THOMPSON, *supra* note 13, at 102 (“The auction house performs a great many other functions in return for its seller’s commission and buyer’s premium. After obtaining the consignment, it stores and transports the art, researches authenticity and provenance Each function is taken for granted by consignors who assume that such prestigious firms will perform each competently.”).

23. See Gerstenblith, *supra* note 18, at 555.

24. *Id.* at 553; see also PROWDA, *supra* note 2, at 184, 186 (“The auction house must act in the utmost good faith and in the best interest of the principal, the consignor, at all times. A breach of fiduciary duty could give rise to liability on the part of the auction house as agent for the consignor as principal, whether the cause of action is based in contract or negligence.” Further, “[t]he auction house is also responsible for the safekeeping of the [consigned] work for sale and the collection and distribution of the auction proceeds”).

25. See Valerie Medelyan, *Says Who?: The Futility of Authenticating Art in the Courtroom*, 36 HASTINGS COMM. & ENT. L.J. 1, 6-7 (2014); see also THOMPSON, *supra* note 13, at 101 (finding that the term “buyer’s premium” implies that an “auction house has no duty to the buyer. The terminology mirrors the legal reality that the auction house’s fiduciary duty is only to the seller; otherwise there would be a conflict of interest”).

26. See Gerstenblith, *supra* note 18, at 554; see also PROWDA, *supra* note 2, at 187 (noting that purchasers have limited recourse against auction houses in the event that the purchased work is inauthentic. “The buyer relies on the credibility and expertise of the auction house and on the representations about the property that are contained in the auction catalog. Therefore, if an auction house represents to the buyer that the work is authentic, the buyer has a right to rely on that information. Later, if questions arise concerning the authenticity of the work, the buyer will seek recourse from the auction house Both Sotheby’s and Christie’s provide limited warranties guaranteeing for five years from the date of sale”).

27. Gerstenblith, *supra* note 18, at 555-56.

28. *Id.* at 556.

direct financial interest in the work, and they are responsible to subsequent purchasers if the title to the work is less than whole.

B. Auction House Standard of Care: An Unresolved Issue

Auction houses, including Christie's and Sotheby's, have been sued for facilitating the sale of stolen works of art. However, auction houses have thus far been able to escape court-established liability, either through direct settlement with the buyer or by facilitating settlements between the seller and the original owner.²⁹ Although some cases suggest that the auction house in question—when selling stolen works of art—did act in good faith and performed extensive due diligence investigations, there are many instances when it appears that auction houses were either less than diligent or even acted in blatant bad faith by turning a blind eye to numerous red flags and suspicious provenance.

Abrams v. Sotheby Park-Bernet Inc. discussed, but did not resolve, the issues of auction house liability and the responsibility to investigate provenance of works offered for sale at auction.³⁰ In 1984, Sotheby's proffered a collection of Renaissance-era Hebrew books and manuscripts, originally belonging to a library in East Berlin, for sale.³¹ Although the house was ultimately satisfied that the consignor was the true owner, Sotheby's misrepresented aspects of the works' chain of title.³² Sotheby's thus failed to adequately disclose the works' questionable provenance to prospective buyers.³³ The court granted a temporary restraining order, preventing the distribution of the auctioned works, and it found that Sotheby's internal due diligence procedures may have been inadequate.³⁴

29. See generally Hanoch Sheps, *Lessons on Auction Houses from Sotheby's and the Case of the Stolen Renoir*, CENTER FOR ART LAW (Oct. 28, 2013), <http://itsartlaw.com/2013/10/28/lessons-on-auction-houses-from-sothebys-and-the-case-of-the-stolen-renoir/> (explaining that there is sparse legal precedent guiding auction house liability when there is a sale of stolen art. Further, "any liability incurred by the auction house—if it denies the request to return the piece—remains unclear."); see also Gerstenblith, *supra* note 18, at 528-29 ("Customary practice, according to the president of Christie's, is to refund the entire purchase price to the buyer [rescind the sale] and return the object to the rightful owner.").

30. Gerstenblith, *supra* note 18, at 526-27.

31. *Id.* at 526; see also McCord, *supra* note 9, at 1007 (describing the house's provenance investigation process. The house inquired with the FBI, studied stolen property lists and bills of sale, and assessed general public knowledge about the history of the objects. Sotheby's also consulted with a German law firm to research German and postwar restitution law).

32. Gerstenblith, *supra* note 18, at 526 (stating that the house made misrepresentations about which collections the works originated from in its catalogue prepared for the sale).

33. *Id.* at 526-527.

34. McCord, *supra* note 9, at 1007.

However, this suit never went to trial and was instead settled without any finding of fault or liability.³⁵

Another example includes the Schloss family heirs.³⁶ The family has had numerous suits against the major auction houses for facilitating the sale of stolen art, including one suit regarding a Hals painting. The painting was stolen by the Nazis from the family in Paris, and on several occasions, it made its way through auction.³⁷ Christie's listed the painting for sale in a 1972 auction but failed to mention that it was stolen in its historical description.³⁸ Sotheby's listed the painting for sale in 1979 and noted in its description that the painting had been stolen.³⁹ Although Sotheby's performed a provenance investigation and uncovered the painting's tainted history, the house neither stopped the sale nor attempted to contact the work's true owners.⁴⁰

The Hals painting was then offered for sale again at Christie's in 1989 without mention of its status as a stolen work of art.⁴¹ The police seized the painting after a New York gallery owner bought and offered the painting for sale in 1990.⁴² Christie's reimbursed the gallery owner, but Christie's and the Schloss heirs have been in various legal disputes ever since.⁴³

Bad faith continues to be an issue, even though auction houses have internal policies regarding due diligence and provenance investigation.⁴⁴

35. Gerstenblith, *supra* note 18, at 527.

36. Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 467 (1999) ("The Schloss collection was one of the most expansive collections in Paris before it was looted by the Nazis.").

37. Walton, *supra* note 8, at 569.

38. *Id.*

39. *Id.* (showing that the description noted that the painting was listed in the official "Catalog of French Property Stolen between 1939-1945").

40. *Id.*

41. *Id.* (suggesting that Sotheby's catalogue was either not read or it was ignored); see also Souren Melikian, *Buyer Beware: An Art World Nightmare Worthy of Kafka: The Mystery of a Looted Portrait*, N.Y. TIMES (2001), http://www.nytimes.com/2001/09/01/news/01iht-melik_ed3_.html (adding that when Christie's failed to find a buyer, a salesroom notice was even posted to dispel the rumor that the painting had been stolen).

42. Walton, *supra* note 8, at 569.

43. *Id.*

44. Gerstenblith, *supra* note 18, at 527-28 (discussing Sotheby's routine procedure, which includes checks with the FBI and studies of stolen property lists and bills of sale). *But see* Deborah DePorter Hoover, Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 457 n.108 (1983) ("Ordinarily, auction houses do not make extensive inquiries into the consignor's possession of title. Rather, they tend to rely on the openness of their sale techniques and the fact that their catalogues are published.").

For example, Sotheby's has been caught many times auctioning looted antiquities.⁴⁵ In 1997, journalist Peter Watson uncovered that, on at least two occasions, sculptures from Angkor Wat, Cambodia had been smuggled directly into Sotheby's London offices.⁴⁶

Strikingly, between 1988 and 2010, Sotheby's offered 377 Khmer antiquities for auction,⁴⁷ and seventy-one percent of the 377 antiquities had no listed provenance.⁴⁸ Although auction houses are not required to disclose provenance information,⁴⁹ the information that was offered was suspect and created an illusion of legitimacy.⁵⁰ Since the works' suspect provenances suggest an illegal origin for much of the Khmer objects offered for auction, many organizations, scholars, and foreign governments have requested that Sotheby's provide information about these works' true origins, but the house has thus far refused.⁵¹

1. Buyer Sophistication and other Art Market Participants

The art market has evolved from one comprising experienced dealers and professional agents, acting on behalf of museums and collectors, to one with many novice and naïve participants bidding on their own behalf.⁵² This developing class of auction bidders is rather ignorant about the objects on which it is bidding and unaware of the need to consult third-party evaluations of works offered at auction.⁵³ As a result, buyers, who are all too trusting, are susceptible to deception and manipulation in the auction

45. Tess Davis, *Supply and Demand: Exposing the Illicit Trade in Cambodian Antiquities Through a Study of Sotheby's Auction House*, CRIME LAW & SOC. CHANGE 155, 159 (2011).

46. *Id.* at 160.

47. *Id.* at 162.

48. *Id.* at 163.

49. Walton, *supra* note 8, at 567.

50. Davis, *supra* note 45, at 166 (commenting that seventy-seven percent of the antiquities that had listed provenances were sourced to private collections. Twenty-five of the objects had been previously placed for auction. Of those twenty-five objects, twenty of them were previously offered for sale at Sotheby's. Moreover, none of the 337 works included provenance from an official scientific excavation even though the majority of them came from archeological sites. More notably, none of the works demonstrated that they were sold by or with permission of Cambodia even though Cambodia's law dictates that the country owns its archeological, cultural, and historical property. Furthermore, export permits for all Cambodian art and antiquities have been required since 1925, and there is no evidence that these works were removed from the country before that time).

51. *Id.* at 171 (arguing that this refusal is "hardly a testament to [Sotheby's] innocence.").

52. William Stuart, *Authenticity of Authorship and the Auction Market*, 54 ME. L. REV. 71, 72 (2002).

53. *Id.* at 72-73.

environment.⁵⁴

Although novice buyers may fail to act in their best interest, sophisticated art market participants also have a history of acting irrationally and getting swept up in the auction process. This irrational behavior may be in part because there is a shrinking supply of traditional art as a result of widespread expansion of both museums and private collections.⁵⁵

2. Provenance Reliability

The only chain of title that exists in art is the concept of provenance, or ownership history.⁵⁶ Although provenance can serve as proof of ownership if an artwork's legal title is contested, provenance records are notorious for being forged and inaccurate.⁵⁷ Moreover, complete records of ownership are rarely found,⁵⁸ especially for works produced before the 20th century.⁵⁹ Therefore, researching and tracing a work's provenance does not

54. *Id.* at 72 (maintaining that buyers are specifically susceptible to misrepresentations of goods as well as general “manipulative practices devised to raise the ultimate price paid for those goods”); *see also* THOMPSON, *supra* note 13, at 117-18 (“Inexperienced buyers find the auction process itself to be reassuring: the catalogue entries written with great authority, references to auction house ‘specialists,’ and the fact that other sophisticated people are lusting after the same works.” Further, many potential bidders “rely on auction specialists, who come to be perceived as art consultants rather than salespeople . . .”).

55. THOMPSON, *supra* note 13, at 54 (“The past twenty-five years have seen a hundred new museums around the world, each intent on acquiring, on average, two thousand works of art.” Further, as sophisticated art market participants, including museums and private collectors, become aware of the fact that the traditional art supply is shrinking, these participants accordingly approach art deals as “last chance” situations. These players often purchase works without importantly considering past prices—even in periods where there are no shortages of work, i.e. contemporary art).

56. Hollington, *supra* note 1.

57. *Provenance Guide*, INT’L FOUND. FOR ART RESEARCH, http://www.ifar.org/provenance_guide.php (last visited Mar. 19, 2015) (stating that art forgers “often falsify information establishing the provenance of a work of art—forging receipts of sale, ownership marks, dealers’ records, exhibition labels, and collectors’ stamps. For this reason, provenance history is seldom accepted as the sole proof of authenticity for a work of art.”); *see also* Patty Gerstenblith, *Cultural, Aesthetic and Legal Perspectives on Authenticity*, 35 COLUM. L.J. & ARTS 321, 322-23, 338 (2011-2012) (discussing that there are forgery schemes involving the manufacture of fake provenance information and fake authenticity certificates to convince the art world of a work’s legitimacy).

58. *See Provenance Guide*, *supra* note 57 (“An ideal provenance history would include the following information: a documentary record of owners’ names; dates of ownership, and means of transference, i.e., inheritance, or sale through a dealer or auction; and locations where the work was kept, from the time of its creation by the artist until the present day.”).

59. *Id.*

necessarily diminish the risk that the work was once stolen.⁶⁰ Furthermore, auction houses are not required to disclose provenance information to a prospective purchaser, which hinders the individual's ability to perform a provenance investigation before the sale occurs.⁶¹

3. Due Diligence Considerations

Most art is housed in private collections, unlikely to be found by happenstance, and can effectively be found only through investigation.⁶² However, there is an issue regarding who needs to perform, and what will satisfy, a due diligence investigation in any court because there is no set standard for any art market stakeholder.⁶³ Further, it is not necessarily clear to an original owner whether he will be able to legally recover his patrimony. Specifically, there is inconsistency among the courts for when the prescribed limitation period begins to run against an original owner to make a claim for an object's return.⁶⁴ This complicates a buyer's ability to understand whether he is buying an artwork with clear title—because the statute has tolled—or if he is buying an artwork that can be claimed by the original owner at any unknown and hypothetical point in the future.⁶⁵

60. Marilyn Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 688-89 (2000); see also Constance Lowenthal & Stephen E. Weil, *A Dialogue on Provenance and Due Diligence*, 3 IFAR J. 10, 14 (2000) (explaining that provenance information is generally easier to find once one is in the middle of a lawsuit, when there is a cause of action and the information is importantly needed).

61. Davis, *supra* note 45, at 165 (outlining three situations in which a house may decide to conceal a work's provenance. First, the provenance is legitimate, but the consignor does not want the information to be published; second, the provenance is known but is incriminating, i.e., stolen; or, third, the provenance is unknown).

62. Drum, *supra* note 5, at 931.

63. See Walton, *supra* note 8, at 599-601 (suggesting that when a work is acquired from suspicious circumstances, the following actions should be encouraged: reporting the theft to the police, FBI, Interpol, UNESCO, IFAR; consulting international auction houses; and contacting individuals from museums and galleries).

64. Herbert Hirsch, *Provenance and Legal Responsibility: What Constitutes Due Diligence?*, 3 IFAR J. 53, 53 (2000) (discussing that most states follow the 'discovery rule,' whereby "the limitation period starts when the theft victim discovers, or most likely would have discovered through a diligent search, the possessor of her stolen property . . ." New York, the center of the international art exchange, is an outlier because its courts follow the 'demand-and-refusal rule.' "[T]he three-year limitation period to recover stolen property begins to run only after the theft victim demands that the good faith purchaser return her property and the purchaser refuses . . .")

65. See *id.* at 57 ("New York is a desirable state for an art theft victim to bring a recovery action because, effectively, there is no Statute of Limitations. The burden is on the good faith purchaser to show prejudice resulting from the delay in filing the lawsuit.").

4. *The International Aspect of the Market*

The art market is an international market, and each country has different standards that determine whether good title to the work has passed or not, even if the work was originally stolen.⁶⁶ Because artworks cross national boundaries, prospective art purchasers would need to know that they cannot assume that the work has clear title simply because there is an established chain of owners. In all, one author accurately asserts, “[e]ven the most diligent art consumer cannot typically access enough reliable information to determine with confidence whether a proposed art deal is a wise investment.”⁶⁷

5. *Art Dealer Liability When Selling Stolen Works of Art*

Although courts have not yet established a standard of care for auction houses facilitating the sale of stolen works, New York courts have placed an affirmative duty to investigate an artwork’s title on art dealers,⁶⁸ as exemplified in the cases *Menzel v. List* and *Porter v. Wertz*. Together, these cases propose that an art dealer is strictly liable to a subsequent good faith purchaser, and the buyer is entitled to recover the benefit of his bargain if the dealer is merely indifferent to a work’s provenance and the work was stolen.

In the leading 1969 case, *Menzel v. List*, Erna Menzel and her husband, the original owners of a Chagall painting, left their painting behind after fleeing Brussels during the Nazi invasion in 1941.⁶⁹ The painting made its way to a gallery in Paris and was subsequently purchased by Klaus Perls, an art dealer in New York, without inquiring into the painting’s provenance.⁷⁰ Perls later sold the painting to a well-known art collector and good faith purchaser, Albert List, and the Menzels, after years of diligently searching and eventually learning of the painting’s location,

66. Arabella Yip, *Stolen Art: Who Owns it Often Depends on Whose Law Applies*, 1 SPENCER’S ART L.J. (July 2010), <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal7-26-10.asp#yip> (noting that in the United States, a thief cannot, under any circumstances, pass good title. Therefore, a good faith purchaser can rarely acquire superior title to the original owner. However, under Swiss law, a good faith purchaser can more easily acquire superior title to a stolen work of art. This suggests that just because an artwork can be freely bought and sold in Switzerland does not mean that it can be legitimately bought and sold in the United States).

67. Gregory Day, *Explaining the Art Market’s Thefts, Frauds, and Forgeries (and Why the Art Market Does not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. 457, 461 (2014).

68. See Hoover, *supra* note 44, at 444.

69. *Menzel v. List*, 267 N.Y.S.2d 804, 806 (App. Div. 1966).

70. *Id.* at 808.

demanded the painting's return.⁷¹ Perls relied on industry custom and assumed, without performing his own investigations, that by buying a work from a reputable gallery, the gallery effectively represented that the work had clear title.⁷²

The New York Court of Appeals criticized art dealer custom of not inquiring into the source of its artwork and held the art dealer liable for breach of implied warranty of title.⁷³ List was ordered to return the painting to the Menzels, but he was not without remedy.⁷⁴ The good faith buyer became whole by recovering the then-present value of the painting, which was valued at the date of the trial.⁷⁵ The court provided an important caveat and noted that had the gallery articulated the fact that the work had questionable title, the gallery would not have been held liable in this case.⁷⁶ In sum, the highest New York court established art dealer liability when selling stolen works of art, and it encouraged those in the art market to perform title searches.⁷⁷

The New York Court of Appeals again encouraged art merchants to perform title searches in the 1981 case *Porter v. Wertz*.⁷⁸ In *Porter*, the court held that an art dealer's indifference to a work's provenance is inconsistent with both exercising good faith and observing reasonable commercial standards of fair dealing under the U.C.C.⁷⁹ By exhibiting indifference to the work's provenance, a dealer is subsequently liable to a good faith purchaser. Further, an art dealer can only become a good faith purchaser if he, prior to buying the work, has investigated the work's title.⁸⁰

Samuel Porter, the original owner of a Utrillo painting, loaned his painting to a man using the alias of Peter Wertz.⁸¹ Wertz, in turn, sold the painting to the Feigen gallery, and the gallery sold the work to a buyer in

71. *Id.* at 806-07.

72. *Id.* at 808.

73. *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969).

74. Hoover, *supra* note 44, at 452 n.68.

75. *Menzel*, 246 N.E.2d at 745; *see also* Walton, *supra* note 8, at 586 (suggesting that the court-ordered remedy is the same amount List would have been able to sell the painting for had Perls conveyed good title to the work).

76. *Menzel*, 246 N.E.2d at 745 ("Had the Perls taken the trouble to inquire as to title, they could have sold to List subject to any existing lawful claims unknown to them at the time of the sale.").

77. *See* Walton, *supra* note 8, at 586-87.

78. Hoover, *supra* note 44, at 449 (recognizing that *Porter* is the "most extensive judicial statement on an art dealer's duty to investigate title").

79. *Id.* at 447.

80. *See id.* at 444-45.

81. *Porter v. Wertz*, 416 N.Y.S.2d 254, 255 (App. Div. 1979).

Venezuela.⁸² Feigen gallery did not inquire whether Wertz could pass good title, even though the gallery had reason to believe that the seller was using a false identify, and the real Peter Wertz was in fact a delicatessen employee.⁸³ The court did not resolve the issue of whether the gallery failed to act in good faith when it did not inquire into the ownership of the Utrillo painting.⁸⁴ However, had the court found a lack of good faith, the buyer, under the U.C.C., would be entitled to recover the benefit of his bargain.⁸⁵

III. AUCTION HOUSE POWER: A PRACTICAL AND ECONOMIC PERSPECTIVE

Because auction houses do not convey a work of art's title onto a subsequent purchaser and are treated merely as transactional facilitators, houses are not currently subject to the same court-established standards of care as art dealers when they sell stolen works. However, an economic analysis of art dealer cases, including *Menzel* and *Porter*, as well as an economic understanding of the art market's landscape, indicates a need to apply established art dealer standards of care and remedies equally to auction houses.⁸⁶

Considerations include that auction houses, like art dealers, hold a special seat of power in the art market—a seat that allows them to better absorb costs in the event clear title is not passed onto a subsequent good faith purchaser. Additionally, there is an asymmetry of information that benefits houses by perpetuating secrecy, which is a further major disadvantage to buyers. Moreover, realistic due diligence considerations suggest that original owners and buyers have valid concerns for not performing legally required investigations—investigations that auction houses are capable of performing. Further, buyers are currently unable to accurately and effectively monitor their risk, resulting in art market inefficiencies and disruption. Lastly, in conjunction with establishing and furthering effective public policy, establishing a new standard of care in a largely unregulated business can help to combat—and lessen the

82. *Id.* at 256.

83. *Porter v. Wertz*, 421 N.E.2d. 500, 501 (N.Y. 1981).

84. *Id.* at 502.

85. *See Hoover*, *supra* note 44, at 452 n.68 (stating that under the U.C.C., the buyer is remedied with “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been warranted” Furthermore, if *Menzel* had been “decided under the U.C.C. the [remedy] would probably be the same”).

86. *See generally Dempster*, *supra* note 10 (explaining that the art market deals are made based on trust. Although trust-based relationships can be beneficial—“[t]hey can reduce the costs of transacting and encourage exchange”—trust-based relationships have a dark side too).

profitability of—the illicit art and cultural property trade.

A. Understanding Art Dealer Liability: A Menzel and Porter Analysis

In *Menzel*, the court, for the first time, determined that art dealers should be subject to a standard of care when selling stolen works of art in part because of economic reasoning and justifications. An art dealer—an established merchant in a specialized field—is generally in a better position to assume the risk of inadequate title than a non-merchant purchaser.⁸⁷ The court proposed an economic efficiency argument when it suggested that art dealers, compared with good faith purchasers, are least-cost avoiders.⁸⁸ More specifically, dealers are in a better position to spread the costs associated with the mistake in title among all other purchasers (thereby recouping its costs), rather than heavily burdening a single, good faith buyer.⁸⁹

Moreover, when assessing and establishing an appropriate remedy, the court further employed and relied on economic reasoning and justifications. List was awarded compensatory damages, allowing him to recover the benefit of his bargain.⁹⁰ Specifically, the New York Court of Appeals suggested that awarding List only the purchase price of the painting plus interest is insufficient when it stated, “an injured buyer is not compensated when he recovers only so much as placed him in *status quo ante*”⁹¹ This remedy would not only place List in the same position he would have occupied had the sale never been made, but “such a recovery implicitly denies that he had suffered any damage.”⁹² The court acknowledged that, when determining a remedy, the amount must adequately reflect the fact that the buyer has suffered as a result of the merchant’s bad business practice.⁹³ As a result, it is suggested that the remedy act not only to make the buyer whole but also to act as a deterrent for bad market practices.⁹⁴ Courts, including the *Menzel* court, seek to curb bad market practices such

87. See Gerstenblith, *supra* note 18, at 562.

88. See *id.*

89. See *id.*

90. See *Menzel v. List*, 246 N.E.2d. 742, 745 (N.Y. 1969).

91. *Id.*

92. *Id.*; see also McCord, *supra* note 9, at 1006 n.126 (suggesting that although present custom guiding the major international auction houses when settling a stolen art suit is to refund the purchase price to the buyer when an original owner successfully reclaims the stolen work, this remedy is neither a sufficient deterrent nor an ideal remedy for the good faith purchaser. With the constant increase in value of artworks and cultural property, this remedy may be far smaller than the fair market value at the time the work is returned.).

93. See *Menzel*, 246 N.E.2d. at 745.

94. See *id.*

as instances when art dealers fail to thoroughly research a work's provenance.⁹⁵

Significantly, the *Menzel* court acknowledged the art dealer's special role in the art market, the dealer's seat of power, and the buyer's general lack of market influence when establishing and justifying List's remedy.⁹⁶ Simply, an art dealer is in a position to know whether his goods are legitimate or not, and a buyer is in a position to trust the dealer's judgment.⁹⁷ Although the art dealer in this case argued that the court's measure of damages would expose an "innocent seller to potentially ruinous liability" in instances where the object sold substantially appreciates in value, the court stated that this "potential ruin" is well within the seller's control.⁹⁸ This is because the dealer is in a special position, unlike a prospective purchaser, to take the necessary steps to research an artwork's provenance and ensure that the artwork has whole and transferable title.⁹⁹

Furthermore, the court explained that, regardless of art market custom of not fully investigating a work's title, "it is not requiring too much to expect that, as a reasonable businessman, the dealer would himself either refuse to buy, or, having bought, inform his vendee of the uncertain status of title."¹⁰⁰ The court was willing to establish an art dealer standard of care, an area that had not been largely regulated before, in an attempt to create good business and economical practices in a market that heavily favors merchants at the expense of buyers.

The *Porter* court reinforced and expanded the *Menzel* court's economic reasoning and justifications for establishing a new duty of care. Further, the court moved beyond this economic framework and proposed an important public policy argument. In *Porter*, the court relied on the U.C.C., the Code's specific economic justifications as well as other economic considerations, when establishing and developing art dealer standard of care when dealing with stolen works of art. When discussing the U.C.C., the court noted that the Code facilitates and eases commercial transactions by "alleviating purchasers' 'need to inquire into sellers' ability to transfer title."¹⁰¹ The Code accomplishes this in part because society recognizes and accepts that a purchaser has a reasonable expectation that he

95. *See id.*

96. *See id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *Id.*

101. Hoover, *supra* note 44, at 445.

acquires good title from established merchants.¹⁰² Moreover, the U.C.C. importantly shifts the risk from good faith purchasers to owners—in this case, art dealers—who are theoretically in a position to prevent wrongdoing.¹⁰³

Additionally, the court noted that the Code requires that a merchant act in good faith in performing and enforcing every commercial contract¹⁰⁴ and that good faith entails observance of “reasonable commercial standards of fair dealing in the trade.”¹⁰⁵ Although it is customary for art market participants to assume that a work had good title, the court explained that this was not a reasonable standard of fair dealing, given the good faith purchaser’s vulnerable position within the art market.¹⁰⁶

The Supreme Court of New York specifically alluded to the public’s interest in reducing the illicit art market, and it discussed the reputational harm to art market stakeholders if liability were not established.¹⁰⁷ Specifically, the court stated that Feigen’s failure to research the work’s provenance, and its “failure to look into Wertz’ authority to sell the painting,” is inexcusable.¹⁰⁸ Even though Feigen was acting consistent with the practice of the art trade and assumed that the work had whole title regardless of numerous red flags suggesting otherwise (similar to the art dealer in *Menzel*), the court explained that this practice both “facilitates traffic in stolen works of art,” which conflicts with public policy and diminishes the merchant’s integrity.¹⁰⁹

On appeal to the New York Court of Appeals, the court continued to expand its economic justifications and presented public policy arguments for establishing a new standard of care.¹¹⁰ For example, the Attorney General argued, and the court agreed, that the dealer, rather than the purchaser, is in a better and more efficient position to determine whether further provenance investigation is necessary.¹¹¹ Further, the court

102. *See id.*

103. *See id.*

104. *Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (N.Y. App. Div. 1979); *see also* Hoover, *supra* note 44, at 444.

105. *Porter*, 416 N.Y.S.2d at 257.

106. *See id.*

107. *See id.* at 259.

108. *Id.*

109. *Id.*

110. *See* Hoover, *supra* note 44, at 447.

111. *Id.* at 447-48 n.39 (adding that the Art Dealers Association of America (“ADAA”), on the other hand, argued that it is not customary for art dealers, or art merchants in general, to investigate works’ title, and that the art business would be crippled if this duty were imposed. In its amicus brief, the ADAA asserted that the lack of amount of published and accessible information about the provenance of many

suggested that art dealers hold a special seat of power in the art trade, and it specifically reasoned that “[b]y holding himself out to the public as having special expertise in art and art sales, a dealer invites liability if he fails to exercise that expertise.”¹¹² The court recognized that because purchasers are significantly disadvantaged members of the art market, they appropriately rely on and trust art dealers—as well as other art market stakeholders—to make good decisions on their behalf.

In all, case law concerning art dealers when they sell stolen property reveals that courts are appropriating economic frameworks to establish new art market standards of care. From analyzing *Menzel* and *Porter*, it appears that courts focus on the art dealer’s special role and power within the art market. Additionally, courts are also concerned with creating good public policy. This is especially apparent when considering that courts are willing to create new and potentially great liabilities for art dealers specifically because courts are concerned about the creation of safe haven jurisdictions for illicit art.

The law, in special instances, can and does serve the purpose of both promoting public interest and cultural and historical values, even where these values may diverge from market purposes.¹¹³ Even though the art market may suffer as a result of this new obligation and may not be as profitable as it once was, courts have recognized that society’s value in cultural property outweighs, to a certain extent, the financial harm to the market.¹¹⁴

B. Auction House Seat of Power

Art dealer case law, including *Menzel* and *Porter*, recognizes that art dealers are in a better position than prospective purchasers to navigate the art market in general. Furthermore, art dealers are in a better position to discern which works have been stolen and which works are legitimate. These notions are equally applicable to auction houses. Not only have auction houses assumed a preeminent role in today’s art market, but also houses have so much power as a business that the “auction [house] both mirrors and influences the actual market.”¹¹⁵

Additionally, auction houses have the specialized knowledge, experience, contacts, paid personnel (including art experts), and other

works of art make title verification effectively impractical. However, the court found the ADA’s arguments unpersuasive.)

112. *Id.* at 449.

113. See Gerstenblith, *supra* note 57, at 351.

114. See *id.*

115. McCord, *supra* note 9, at 987, 1002.

resources that individuals—even experienced buyers—do not have.¹¹⁶ More specifically, auction houses are in a position to both investigate materials consigned for sale and receive information from cultural institutions, collectors, governments, and other art market participants about works that have been stolen.¹¹⁷ Further, like art dealers, and as articulated in *Menzel*, auction houses are able to recoup a loss by spreading the cost across many transactions.¹¹⁸ Moreover, auction houses can more thoroughly investigate provenance through insurance.¹¹⁹

Importantly, auction houses, as well as art dealers, are also in a position to develop new standards and policies to avoid art theft issues and help combat the illicit art trade. For example, as stakeholders that present themselves to prospective buyers and consigners as experts in the art market,¹²⁰ auction houses and dealers arguably know which methods and types of investigations are most effective in uncovering and discovering stolen works of art. Therefore, they are in a position to know what kind of due diligence standard should be legally required since there is currently no uniform legal standard. Moreover, auction houses are in a position to know and decide whether the art market should reevaluate its present dependence on provenance as a valid and effective method of tracing a work's chain of title.

C. Asymmetry of Information

Auction houses, like art dealers, are also in a better position than prospective purchasers to navigate the art market because there is a current and perpetuated asymmetry of information.¹²¹ This asymmetry of

116. Drum, *supra* note 5, at 943.

117. Phelan, *supra* note 60, at 721; see also Stephen A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2463 (1994) (“One might argue that checking title in all circumstances would be unduly burdensome and costly. However, there is little reason to believe that this is true, given that The Art Loss Register automatically checks every item offered for sale at major galleries and auction houses.”).

118. Gerstenblith, *supra* note 57, at 353.

119. Walton, *supra* note 8, at 608; see also Day, *supra* note 67, at 493 (commenting that acquiring title insurance is slowly gaining general acceptance in the art market. Insurance is beneficial within the stolen art context because underwriting decisions are based on provenance research. Therefore, insurance encourages art market participants, including auction houses, to perform due diligence investigations. In addition, insurance agencies “could share information about the works that they have determined to be forgeries or stolen.” In theory, this system should help market stakeholders determine more easily which works are problematic and which works have good title.).

120. See THOMPSON, *supra* note 13, at 107 (“Auction houses also compete for consignors by emphasizing the role of their specialists.”).

121. See Dempster, *supra* note 10; see also Day, *supra* note 67, at 460 (“[A]rt

information is necessarily a disadvantage to the vulnerable good faith buyer.¹²² For example, auction houses naturally know more about both the work and the consignor than the buyer does.¹²³ To a prospective purchaser, the art market is largely opaque and littered with unverifiable information, specifically in terms of price and provenance.¹²⁴ Regarding price and quality, in other market contexts, consumers and prospective purchasers are able to gain the necessary knowledge to effectively evaluate goods and determine a “good ‘price’ for a good such as a TV or car.”¹²⁵ However, when evaluating a work of art’s price, prospective purchasers are not in a position to effectively appraise the work and are therefore at the mercy of the auction house or dealer.¹²⁶

The current nature of the art market perpetuates secrecy,¹²⁷ is a

dealers and sellers often withhold most product and sales data in order to drive up prices artificially.” This becomes extremely “troublesome when taking into account the legal pitfalls facing an uninformed buyer.”).

122. See Day, *supra* note 67, at 463 (“[M]arket failure’ refers to a process by which information asymmetries cause buyers and sellers to misallocate resources, resulting in systematic inefficiencies. Consumers who continuously spend too much on a good, for instance, will have fewer resources to purchase other products and services, harming both themselves and alternative vendors.”).

123. Dempster, *supra* note 10.

124. *Id.*; see also THOMPSON, *supra* note 13, at 107-108 (“The potential bidder’s next step after seeing the catalogue is likely a meeting with the auction house specialist, who tries to play up the historical and cultural importance of a work, the distinction of its provenance, its iconic nature, how well this artist (or period) is doing in the resale market, other famous collectors known to own the artist’s work, or the investment potential”); Day, *supra* note 67, at 467 (“A work’s estimated value really is a black box, wherein the process used by experts to appraise a painting’s value is largely unavailable to the common consumer.”).

125. Day, *supra* note 67, at 467 (listing three factors that have no inherent value, but could help a prospective purchaser evaluate an artwork’s worth, including the work’s aesthetic value, its authorship, and its significance. However, unlike in other market contexts, buyers cannot determine a fair market price by simply adding up the value of a painting’s component parts. Additionally, since “most works of art are unique, singular commodities, buyers cannot rely upon the aggregation of a thousand sales to inform the transaction.” In all, the art business is unique because art purchasers have little reference guide as to what is a reasonable price to pay).

126. *Id.* (arguing that because buyers are not in a position to evaluate an artwork’s price, purchasers “must depend upon an expert’s subjective determination of a work’s beauty, influenced by the reputation of the artist who created it, to determine its value.” It is important to note that these experts work for auction houses); see also McCord, *supra* note 9, at 1003 (stating that new buyers, who see art as merely a speculative commodity, to their disadvantage, put their trust in auction houses to determine a work’s fair market value).

127. See Day, *supra* note 67, at 469 (“[T]he art market has fostered a cultural of secrecy, conducting deals under the strictest confidentiality. These norms make it taboo for buyers to ask sellers questions about a work’s purchase history, prior owners, and place of origin.”).

roadblock for stakeholders to make informed decisions, and encourages participants to act irrationally.¹²⁸ There is no other business in the world in which its customers would spend large amounts of money, gambling on the fact that what they have bought has good title. In sum, basic legal regulation—as well as efficient economic and business principles—is generally lacking in the art market.¹²⁹

D. Due Diligence

Regarding due diligence, and what is legally required of buyers and consignors to perform adequate investigations, current legal requirements often conflict with these art market participants' valid desire to remain secret.¹³⁰ For example, art theft victims often decide not to contact the police or pursue recovery actions out of an understandable concern that “publicizing the crime will signal to other criminals that they possess vulnerable art.”¹³¹

Even sophisticated institutional purchasers, including museums, may be deterred from reporting theft and may even “prefer to operate quietly without insuring valuable paintings from theft.”¹³² In addition, owners do not typically raise or fight a claim if they discover that a work is fake or stolen out of personal embarrassment.¹³³ Based on the current legal system and the nature of the art market, buyers are often discouraged from challenging merchants and inefficient, harmful art market practices.¹³⁴ This is problematic because, as one author notes, “[i]n the [U.S.], most of the recent changes that have occurred in auction house practice are the result of

128. *Id.* at 464 (noting that the “foundation of an efficient market lies in its ability to provide reliable information at a reasonable cost to that buyers and sellers can dedicate resources to their wisest, most efficient uses.” Additionally, “[m]ost developed legal systems . . . encourage efficiency by either requiring those with reliable information to disseminate it or forbidding them from concealing it.” Moreover, “[e]fficient legal systems . . . encourage the proper distribution of resources, usually by increasing the volume and quality of market information.”).

129. *See id.* at 462 (“[M]arket failure persists in the art world even though sophisticated parties appear to have both the motivation and ability to demand efficiency.”).

130. *Id.* at 470.

131. *Id.* (recognizing that reporting instances of art theft can have the effect of driving the work further underground, thus making it more difficult to retrieve the stolen work); *see also* Bibas, *supra* note 117, at 2459 (“[P]ublicizing a theft makes a stolen artwork dangerous to try to sell. This danger keeps the art in the thief’s hands for a long time until the ‘hot’ art cools down, thus delaying the owner’s recovery.”).

132. Day, *supra* note 67, at 470.

133. *Id.* at 486; *see also* Bibas, *supra* note 117, at 2455 (arguing that not publicizing instances of art theft “has the ex ante effect of encouraging future thefts.”).

134. *See* Day, *supra* note 67, at 486-87.

a scandal or lawsuit . . . ” against Christie’s and/or Sotheby’s.¹³⁵

It is important to note that, although victims of art theft and good faith purchasers occasionally pursue legal action, as previously mentioned, there is no unified due diligence standard. Because due diligence is decided on a case-by-case basis, owners and purchasers (without established legal teams and institutional resources) have only a limited and clouded idea of what is expected of them in performing such an investigation.¹³⁶

E. Monitoring Risk

Buyers have been willing, so far, to work with this landscape, but why?¹³⁷ One author sheds light on the answer and notes, “the nature of the art market resembles few other industries,” specifically because there is a probability and belief that the artwork will appreciate, rather than depreciate, in value.¹³⁸ Purchasers often treat art as an investment, and accordingly, they see themselves not as current prospective buyers but rather as future sellers.¹³⁹ Although the purchaser may not receive adequate protection now, he reasons that he will receive the benefits and protections afforded a seller in the future.¹⁴⁰ Believing that they will one-day benefit from being a seller, prospective purchasers are unable to appropriately monitor their current risk.¹⁴¹ In sum, the nature of the art market makes it difficult for prospective purchasers to make good decisions and act in their best interest.¹⁴²

F. Public Policy

Courts, especially New York courts, attempt to prevent the United States

135. See PROWDA, *supra* note 2, at 183.

136. See Sheps, *supra* note 29 (“Unfortunately the lack of transparency in art transactions further complicates due diligence efforts, yet the expectation of thoroughness by the prospective purchaser remains high”); see also Bibas, *supra* note 117, at 2458 (“For deterrence to work, sanctions must be predictable and certain.”).

137. See Day, *supra* note 67, at 459 (“[M]ost markets participants should prefer remedial laws and economic regulations over a suboptimal status quo.”).

138. *Id.* at 484, 487.

139. See *id.* at 487.

140. See *id.*; see generally Dempster, *supra* note 10 (“[T]he private nature of transactions and a focus on client confidentiality and discretion are at the heart of a highly personalised [*sic*] service.”).

141. Dempster, *supra* note 10; see also Bibas, *supra* note 117, at 2451-52 (“Buyers often rely on a gallery’s reputation without requesting any other evidence of title”); Day, *supra* note 67, at 488 (explaining that when buyers see themselves as future sellers, rather than as adversaries, they have no incentive to demand increased efficiency).

142. Dempster, *supra* note 10.

art market from becoming a safe haven for stolen art traffickers,¹⁴³ while also attempting to protect the commercial integrity of the art market.¹⁴⁴ In attempting to resolve art theft issues, specifically stressing the need to combat stolen art traffic,¹⁴⁵ courts have made equity-based determinations, which necessarily consider public interest and public policy.¹⁴⁶ These determinations often do go beyond merely making the individual whole, specifically, in furtherance of the public interest involved.¹⁴⁷

The idea of public policy becomes important in art theft decisions, including *Porter*.¹⁴⁸ As such, a state policy seeking to limit and reduce the illicit art trade should influence determinations of whether auction houses should, too, be held liable for facilitating the sale of stolen art and what remedy is effective to make the good faith purchaser whole, further public interest, and sufficiently deter state-condoned behavior.¹⁴⁹ By establishing a standard of care and appropriate remedy, auction houses will be deterred from certain bad art market practices, and they will be encouraged to perform thorough title investigations before agreeing to consign a work of art.¹⁵⁰

More generally, as articulated in *Porter*, society values the ability to trust that when individuals buy goods from established merchants, who present themselves as knowledgeable in their trade, there is in fact an honest exchange.¹⁵¹ Specifically, both the U.C.C. and state laws “seek to encourage buyers to purchase commodities that are free of titling issues,” and, as stated in *Porter*, the laws seek to protect good faith purchasers from liability when they buy goods from reputable dealers.¹⁵² Society values the ability to purchase goods with good title from established merchants, and the law recognizes and reflects this societal value. Within the stolen art context, public policy, as articulated by the *Porter* court, can be an important factor when deciding which standard of care and remedy is most effective to discourage bad art market practices.

143. Phelan, *supra* note 60, at 665.

144. *Id.* at 666.

145. *Id.* at 665-66.

146. *Id.* at 665.

147. *Id.* at 666 (suggesting that the remedy may be molded depending upon the public interest at stake).

148. *Id.* (reiterating the court’s declaration that “commercial indifference to ownership or the right to sell facilitates in the traffic in stolen works of art”).

149. See McCord, *supra* note 9, at 1007.

150. *Id.*

151. See generally Dempster, *supra* note 10 (“There is widespread belief that trust, in all its forms, is at the heart of the art world. Individuals rely on trust-based relationships for transactions where handshake deals are the norm.”).

152. Day, *supra* note 67, at 485.

IV. AUCTION HOUSES AND ART DEALERS: DEVELOPING A UNIFIED STANDARD OF CARE IN THE CASE OF STOLEN ART

Although auction houses often settle stolen art claims when they have no current legal obligation to do so, especially after these events have become publicized and there is a heightened risk of reputational harm,¹⁵³ voluntary settlements have proved to be insufficient in combating the illicit art trade. Bad faith and instances of less than due diligence suggest that new market liabilities and general art trade regulation must be established. Auction houses should be held strictly liable when they are merely or blatantly indifferent to a stolen work of art's provenance and that work is sold through auction. Furthermore, as proposed in *Menzel* and *Porter*, the good faith purchaser should be made whole with compensatory damages allowing him to recover the benefit of his bargain. It is important to note that this solution is not in place of the already established court and legislative rules, although this analysis certainly suggests that current legal liabilities—which tilt strongly in favor of art theft victims over good faith purchasers—should change to accommodate art market realities.

This recommendation not only takes in to account the realities and limitations of the current and complex art market, but it also logically extends the economic reasoning and framework appropriated in the *Menzel* and *Porter* decisions to auction houses. A good faith purchaser's reasonable and socially accepted reliance on established merchants—as well as powerful art market institutions including auction houses—jointly with the purchaser's valid belief that he acquires good title from one who regularly deals in the art trade should be preserved and continued to be justified.¹⁵⁴

The proposed solution would hold auction houses accountable only in instances where their actions perpetuate and encourage the illegitimate art market. Therefore, this recommendation will not heavily burden or cripple the legitimate art business because it creates liability only in instances of auction house bad faith. Examples of bad faith include, but are in no means limited to, when auction houses sell works with suspiciously weak provenances, like the Khmer antiquities; instances where a house sells a work by blatantly misrepresenting aspects of the work's provenance, such as the Hebrew manuscripts in *Abrams*; and instances where houses had reason to know that the work was in fact stolen, including the Schloss family's Hals painting.

153. See generally Dempster, *supra* note 10 (“International institutions such as Sotheby’s and Christie’s build their brands on the strength of the reputations of their experts and the personal relationships they forge with long-standing clients.”).

154. Hoover, *supra* note 44, at 445.

Although the proposed solution would not eradicate the illicit art trade altogether, it would make the art market a bit more transparent and would prevent auction houses from maintaining their traditional air of secrecy. Purchasers and art theft victims have legitimate reservations about pursuing claims. More specifically, good faith purchasers are not effectively incentivized to protest bad auction house practices. Instead, buyers often prefer to settle quietly for a much smaller sum than they deserve. By devising a strict liability standard, a good faith purchaser is adequately incentivized to raise a claim. The buyer knows for certain that he will be able to recover the benefit of his bargain—rather than the mere purchase price of the artwork in question—and will importantly be able to more quickly recover without heavy litigation costs.

Because auction houses would know that they face decisive liability when they fail to adequately perform title investigations, houses would be incentivized to devise new and more efficient provenance and due diligence standards. This may include auction houses working more closely with other art market stakeholders as well as stolen art recovery organizations such as the Art Loss Register, the International Foundation for Art Recovery, and United Nations Educational, Scientific and Cultural Organization (“UNESCO”). These organizations have the resources and capacity to play an integral role in designing and implementing a uniform and digitized stolen art database. Such a registry would make it easier for auction houses to cross-reference their works offered for sale with listed stolen works of art. Furthermore, a registry would allow art theft victims to more easily and efficiently put art market stakeholders on notice of their stolen property, heightening a chance of eventual recovery. Lastly, a uniform and accessible database would place prospective purchasers in a new position of power; buyers, too, could perform their own title investigations, therefore lessening their immediate dependency on cultural institutions (including auction houses) for invaluable information.

CONCLUSION

Ultimately, it is in the best interest of art market stakeholders including art theft victims, auction houses, art collectors and purchasers, art recovery organizations, and concerned cultural institutions (namely UNESCO) to change the art market landscape to diminish the profitability of the stolen art trade. Furthermore, it is in their best interest to aim for a more uniform standard in general, from conducting provenance research to performing due diligence investigations. A small but meaningful solution to combat the illicit art trade is to establish auction house standard of care and liability when selling stolen works of art. As long as the art market remains largely unregulated, the sale of stolen artworks will continue without substantial

repercussions.

There is a great tension between treating art as cultural and personal patrimony and treating art as a business and investment opportunity, especially when that art flows through the market as a result of looting and war. Although this tension will never fully resolve, simply because there will always be a market for art, there are steps that can be taken to alleviate several of the issues. Establishing auction house liability and standard of care when facilitating the sale of stolen art is just one step towards sensitizing auctions houses and lessening this tension.