

AN AVENUE FOR FAIRNESS: DISCLOSURE-BASED COMPENSATION SCHEMES FOR GOOD FAITH PURCHASERS OF STOLEN ART

*Caroline Harvey**

Art theft occurs regularly around the world, and each year stolen works of art are funneled into the international art market. While the United States boasts the world's largest art market, it is also home to the biggest market of illegal art. Longstanding principles of property law are unfavorable to unwitting good faith purchasers of stolen art, who are often forced to return works to true owners at great financial loss. This Note explores the legal implications of purchasing a stolen work of art in the United States and the equities associated with defenses available to good faith purchasers. In principal, this Note proposes a new—and more equitable—approach in art replevin actions where purchasers are rewarded for performance of due diligence in the event of forfeiture.

* J.D. Candidate, 2020, University of Georgia School of Law; B.A., 2016, University of Georgia. I would like to thank Professor Lisa Milot for her helpful input, Graham Goldberg and Amy Elizabeth Shehan for their meticulous edits, and the Editorial Board of the *Georgia Law Review*. I would also like to thank Professors Shelley Zuraw and Isabelle Wallace for instilling in me a profound respect for art and its contribution to our shared global heritage.

TABLE OF CONTENTS

I. INTRODUCTION.....	1017
II. ART THEFT GENERALLY	1019
III. THE UNITED STATES ART MARKET	1020
IV. THE LAW APPLICATION TO GOOD FAITH PURCHASERS OF STOLEN ART	1021
A. VOID TITLE.....	1021
B. DEFENSES.....	1022
1. <i>New York: Demand and Refusal.</i>	1023
2. <i>The Discovery Rule.</i>	1025
C. EXEMPLARY CASES	1026
1. <i>Diligence on the Part of the True Owner.</i>	1026
2. <i>Diligence on the Part of the Good Faith Purchaser.</i>	1028
V. ART TITLE INSURANCE.....	1028
VI. ADDITIONAL REWARD FOR DISCLOSURE.....	1030
VII. FRAMEWORK FOR APPLICATION	1032
A. TRUE OWNER ANALYSIS	1032
B. GOOD FAITH PURCHASER ANALYSIS	1033
VIII. CONCLUSION	1034

I. INTRODUCTION

The global art market, a nearly sixty-five billion dollar industry,¹ has been called “the only sector of economic life in which one runs a ninety percent risk of receiving stolen property.”² In the United States, under the common law and the Uniform Commercial Code (UCC),³ a thief conveys no title and good faith purchasers of stolen art are often forced to surrender art assets to true owners at great financial loss.⁴ Current equitable defenses available to good faith purchasers facing impending forfeiture are difficult to mount and practically unavailing, with innocent possessors often suffering total loss of assets in excess of a million dollars.⁵ Both equitable defenses available to good faith purchasers in such cases consist of statute of limitations defenses: the “discovery rule” and New York’s demand and refusal rule. Each defense incorporates judicial analysis of the parties’ respective due diligence performance, taking

¹ See *Global Art Market Reaches USD 63.7 Billion in 2017, with Dealers Taking the Lion’s Share*, ART BASEL, <https://www.artbasel.com/news/global-art-market-reaches-usd-63-7-billion-in-2017--with-dealers-taking-the-lion-s-share> (last visited Jan. 7, 2020) (noting a market rebound after two years of decline, with the United States as the largest market worldwide).

² Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U.L. REV. 631, 663 (2000) (quoting Elizabeth des Portes, *The Fight Against the Illicit Traffic of Cultural Property: The Role of Museum Professionals*, in THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE (Marilyn Phelan ed., 1998)).

³ U.C.C. § 2-403(1) (AM. LAW INST. & UNIF. LAW COMM’N 1989) (“A purchaser of good acquires all title which his transferor . . . had power to transfer . . .”). All fifty states have adopted the UCC, either in whole or in part. See *Uniform Commercial Code*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/acts/ucc> (last visited Jan. 7, 2020).

⁴ Consider, for example, the case in which a good faith purchaser of Picasso’s *Femme en Blanc* settled out of court with an heir to the painting’s true owner. *Bennigson v. Alsdorf*, No. B168200, 2004 WL 803616, at *1–2 (Cal. Ct. App. Apr. 15, 2004), *dismissed*, No. S124828, 2005 Cal. LEXIS 13370 (Cal. Nov. 30, 2005) (dismissing the case pursuant to notice of settlement). Following lengthy proceedings, good faith purchaser Alsdorf paid true owner Bennigson \$6.5 million for clear title to the work, after having purchased it on the market some years earlier for \$357,000. Bob Egelko, *\$6.5M Settlement in Suit over Stolen Picasso Painting*, SFGATE (Aug. 9, 2005, 4:00 AM), <https://www.sfgate.com/bayarea/article/6-5M-settlement-in-suit-over-stolen-Picasso-2649305.php>. There is no indication that Bennigson ever knew of his claim to the painting before he was notified of his status as an heir by the Art Loss Register. *Bennigson*, 2004 WL 803616, at *2.

⁵ See *US Couple Forced to Give Up Their \$1.75M Picasso*, NEWSER (Nov. 11, 2017, 1:56 PM), <http://www.newser.com/story/251295/us-couple-forced-to-give-up-their-175m-pissarro.html> (quoting an American collector’s attorney who deemed his client’s forfeiture of a \$1.75 million Picasso painting to its true owner a “total loss”).

into account actions by the true owner *after loss* and by the good faith possessor *before and after purchase*.⁶

To more fairly balance the equities between the parties and avoid total loss to the good faith purchaser, this Note proposes that courts take an additional step in their due diligence analyses in art replevin actions:⁷ courts should determine whether a good faith purchaser of stolen artwork should be entitled to compensation after forfeiting artwork to the true owner. To do this, courts should analyze both the *quality* and *quantity* of due diligence performed by both the true owner and current possessor and the relative potential losses between the parties. This sliding scale judicial analysis, in which good faith purchasers are rewarded for due diligence and disclosure, creates a solution in which neither party is made entirely whole—in accordance with the underlying notion that neither party can be denominated a “wrongdoer.”⁸ Rather, each party has his or her loss mitigated based on the equities of the particular situation.

Parts II and III of this Note will explain the problem of art theft and its influence on the U.S. art market through a discussion of both systematic wartime looting and private theft. Part IV will then present the law applicable to good faith purchasers of stolen art, the defenses available to them in replevin actions, and the problems associated with those defenses. Next, Parts V and VI will discuss art title insurance and application of patent and salvage law concepts to equitable considerations in art replevin actions. Finally, in Part VII, this Note will propose a new sliding scale framework for equitable analysis in art replevin cases, in which courts award compensation to good faith purchasers who affirmatively attempt to protect their investment by conforming with market standards of due diligence.

⁶ Steven A. Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2444–48 (1994) (discussing application of the demand and refusal and discovery rules).

⁷ Actions in replevin are demands for the repossession of personal property “wrongfully taken or detained by the defendant.” *Replevin*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁸ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982).

II. ART THEFT GENERALLY

Art plunder is a hallmark of wartime.⁹ Recent history provides one of the most devastating examples. To Adolf Hitler, art meant power. In May 1938, Hitler visited the Uffizi Gallery in Florence, Italy while meeting with Italian dictator Benito Mussolini.¹⁰ The gallery, with its vast collection of Italian Renaissance art attesting Italy's place in history, made Hitler feel envious. He had long dreamed of amassing a collection of art to create the "world's greatest museum" in Linz, Germany.¹¹ The *Anschluss*—Germany's annexation of Austria in March 1938—allowed him to begin to realize this dream, and widespread targeted looting of Jewish art collections became the immediate norm as German forces invaded Europe.¹² At the end of World War II, the Nazi Party had amassed 8,000 works intended for the museum in Linz.¹³ As large as that collection was, it was only a fraction of the total volume of art looted throughout World War II. Up to 200,000 works of art are thought to have been uprooted, with the works surviving the war's devastation appearing on the art market during the ensuing decades.¹⁴

Art theft did not end in 1945, and it continues to occur with startling regularity.¹⁵ Private art theft, as opposed to military-sponsored theft, leads to further funneling of stolen works into the art market.¹⁶ The FBI regards art crime as a "looming

⁹ See ARTHUR TOMPKINS, *PLUNDERING BEAUTY: A HISTORY OF ART CRIME DURING WAR 9* (Lund Humphries ed., 2018) ("The sad roll call of humankind's wars down the centuries could equally serve as an unending catalogue of the theft, destruction, displacement and defilement of some of the world's greatest works of art . . .").

¹⁰ *Id.* at 99.

¹¹ *Id.* (detailing Hitler's plans for the museum in Linz).

¹² See *id.* at 93–126 (discussing art plunder in Western and Eastern Europe during World War II).

¹³ See *id.* at 102 (noting, for comparison, that "Washington's National Gallery currently has around 3,000 paintings, and the United Kingdom's Royal Collection about 7,000").

¹⁴ See Kharunya Paramaguru, *The Top 10 Most Wanted Missing Art Works from World War II*, TIME (Nov. 7, 2013), <http://world.time.com/2013/11/07/the-top-10-most-wanted-missing-art-works-from-world-war-ii/> (discussing the volume of artwork lost during World War II with the client development manager at the Art Loss Register, which is currently "on the hunt for 30,000 items listed as looted or missing from this era").

¹⁵ See Phelan, *supra* note 2, at 633 n.2 ("Law enforcement officials, legal commentators, and journalists consistently report that art objects collectively worth billions of dollars are stolen annually" (citing Peter Spero, *Asset Protection Aspects of Art*, 3 J. ASSET PROTECTION 58, 60 (1998))).

¹⁶ See Adina Kurjatko, *Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. INT'L L.

criminal enterprise with estimated losses in the billions of dollars annually.”¹⁷ These works, too, make their way into the open market, creating more potential for good faith purchasers to unwittingly acquire void title in exchange for thousands, or millions, of dollars.

III. THE UNITED STATES ART MARKET

The United States boasts the largest legal art market in the world,¹⁸ yet “[s]ince World War II, the United States has [also] been the biggest market of illegal art.”¹⁹ Each year, hammers fall at auctions and millions of dollars change hands between private collectors, galleries, and auction houses²⁰—sending poorly provenanced²¹ works of art into homes of American collectors.²² The market in the United States is essentially a danger zone for collectors who face the difficulty of ascertaining whether the work they have just purchased at high cost and personal financial risk has defective title.²³ To make matters worse, the risk of acquiring a stolen work is often compounded by the customs and traditions of the international art market, in which transactions are

& POL’Y 59, 64 (1999) (discussing sophisticated crime rings associated with art theft and that collectors commission thieves to steal works for their own private collections).

¹⁷ *Art Theft*, FBI, <https://www.fbi.gov/investigate/violent-crime/art-theft> (last visited Jan. 7, 2020).

¹⁸ RACHEL A.J. POWNALL, THE EUROPEAN FINE ART FOUND., TEFAF ART MARKET REPORT 46 (2017) (“In the art trade, the U.S. is by far the predominate country in the world, accounting for 41.5% of world trade in imports, and 38% of exports, and 96% of trade to and from the Americas.”).

¹⁹ Phelan, *supra* note 2, at 660 (quoting Alan Riding, *French Museum Chief vs. Art Thieves*, N.Y. TIMES, June 15, 1991, at 13).

²⁰ See POWNALL, *supra* note 18, at 28–29. Astronomical art prices are the norm. For example, Claude Monet’s *Meule* sold at Christie’s for over \$81.5 million in November 2016. *Id.*

²¹ Provenance means “the history or ownership of a work of art . . . used as a guide to authenticity or quality.” *Provenance*, OXFORD ENGLISH DICTIONARY (3d ed. 2007).

²² *A Responsible Art Market in Practice*, ANTIQUITIES COALITION (Feb. 5, 2019), <https://theantiquitiescoalition.org/a-responsible-art-market-in-practice/> (“Those working in the arts have already been exposed to issues surrounding provenance, including Nazi-looted art and antiquities trafficking, both of which remain major problems in the field.”).

²³ Kanishk Tharoor, *Museums and Looted Art: The Ethical Dilemma of Preserving World Cultures*, GUARDIAN (June 29, 2015, 1:03 PM), <https://www.theguardian.com/culture/2015/jun/29/museums-looting-art-artefacts-world-culture> (noting that art collectors in the United States must be careful about a work’s authenticity and the legality of a transaction).

presumptively secret and assured conveyance of good title is “completed on a handshake and an exchange of invoice.”²⁴

IV. THE LAW APPLICABLE TO GOOD FAITH PURCHASERS OF STOLEN ART

A. VOID TITLE

The *nemo dat* rule, under the U.S. common law and expressed in the UCC, represents the baseline principle that one cannot convey greater title to a chattel than one has.²⁵ Accordingly, even if one purchases innocently and without notice from a thief, title to the purchased artwork is void as against the true owner.²⁶ This strict rule provides that title always remains with the true owner, no matter how attenuated the chain of title might be or how many good faith purchasers stand between the true owner and the current possessor.²⁷ The risk of innocently purchasing a stolen work is particularly great in the United States, considering the country’s status as the “biggest market of illegal art” since World War II.²⁸ And notably, good faith purchasers of stolen artworks in the United States are granted even fewer protections than their counterparts in civil law countries, who *can* obtain title from a thief superior even to the title of the true owner.²⁹

²⁴ See *Lindholm v. Brant*, 925 A.2d 1048, 1057 (Conn. 2007) (quoting expert testimony presented to the trial court regarding the lackadaisical and secretive nature of art market transactions).

²⁵ See U.C.C. § 2-403(1) (AM. LAW INST. & UNIF. LAW COMM’N 1989) (“[A] purchaser of a limited interest acquires rights only to the extent of the interest purchased.”); see also Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L. REV. 611, 625 (2011).

²⁶ Phelan, *supra* note 2, at 634.

²⁷ *Id.*

²⁸ See POWNALL, *supra* note 18, at 46. One scholar noted that the problem shows no signs of stopping soon: “It is little wonder that smugglers favor art and antiquities. They are high-value, low-volume items with a ready market. They are valuable, easily hidden, and easily transported.” Tucker, *supra* note 25, at 613 (footnotes omitted).

²⁹ Compare Tucker, *supra* note 25, at 613 (“[Stolen artwork] can be ‘laundered’ or legitimized because of the absence of controlling international law and the favorable treatment accorded to bona fide purchasers in civil-law countries.”), with U.C.C. § 2-403(1) (“A purchaser of goods acquires all title which his transferor had or had power to transfer . . .”).

B. DEFENSES

Good faith purchasers of stolen works of art face an uphill battle in mounting a successful defense to replevin actions brought by true owners or their heirs. Actions in replevin are demands for the repossession of personal property “wrongfully taken or detained by the defendant.”³⁰ Because the good faith of the purchaser is irrelevant to the question of title in the United States, the only recourses typically available to purchasers are statute of limitations defenses or the doctrine of laches.³¹ These defenses often fail due to courts’ unwillingness to implicitly encourage trafficking in illicit art by placing the burden of locating stolen artwork on the true owner.³²

Defenses in art replevin actions incorporate the discovery rule and New York’s demand and refusal rule.³³ In applying the discovery rule, courts “weigh the owner’s diligence and delay [in locating the stolen work], the buyer’s innocence and reliance, the existence of prejudice, and other equitable factors” when assessing the rights of the parties.³⁴ Under the demand and refusal rule, the true owner’s cause of action does not accrue until he or she makes a demand for property and the possessor refuses to return it.³⁵

Equitable considerations in replevin actions for stolen artworks are fact intensive and must be considered on a case by case basis.³⁶ Due to often forged provenance records and an attenuated chain of title, determining the strength of a party’s claim to a specific

³⁰ *Replevin*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³¹ See 77 AM. JUR. 3D *Proof of a Claim Involving Stolen Art or Antiquities* §§ 29–32 (2004).

³² See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (concluding that placing the burden of locating stolen artwork on the true owner under New York law would “encourage illicit trafficking in stolen art” and would permit “any purchaser, good faith or not[,] . . . to hold onto stolen artwork” after the three-year statute of limitations expired).

³³ See *Bibas*, *supra* note 6, at 2444–48 (discussing generally the application of the discovery and demand and refusal rules in art cases).

³⁴ *Id.* at 2448.

³⁵ See *id.* at 2445 (noting that the “rationale for demand and refusal . . . is that the [good faith purchaser] . . . does no intentional wrong by holding the property and therefore should not be liable until made aware of the owner’s claim”).

³⁶ See Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 68 (1995) (discussing how the equitable defense of laches is “generally not resolvable without trial” due to the claim’s “particularly fact sensitive” nature and the general lack of “any objective standard” under which to analyze a laches claim (quoting *DeWeerth v. Baldinger*, 804 F. Supp. 539, 553 (S.D.N.Y. 1992), *rev’d* 38 F.3d 1266 (2d Cir. 1994))).

artwork can be difficult or nearly impossible.³⁷ In such cases, courts mainly consider the strength of the factual evidence regarding the claimant's ownership, the extent of the claimant's efforts to find or publish notification about their alleged superior claim to the work, the circumstances of the good faith possessor's purchase, and the purchaser's accordance with due diligence standards currently in place on the art market.³⁸

1. New York: Demand and Refusal.

In New York, the hub of the United States art market,³⁹ “an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return. Until the refusal[,] the purchaser is considered to be in lawful possession.”⁴⁰ Because demand is an essential element of the plaintiff's cause of action, and no legal wrong has occurred until refusal, the good faith purchaser of stolen property is given “an opportunity to rectify [his or her] good-faith mistakes before [he or she] incur[s] legal liability.”⁴¹ Application of the objective demand and refusal rule in New York requires no judicial analysis of the parties' respective due diligence actions, in part because of the belief that placing a burden of due diligence on the true owner would encourage art trafficking.⁴²

In *Solomon R. Guggenheim Foundation v. Lubell*, the Guggenheim Museum brought an action in replevin against Rachel Lubell for a Mark Chagall painting (worth an estimated \$200,000) that was stolen from the museum sometime in the 1960s.⁴³ In 1967,

³⁷ See Tucker, *supra* note 25, at 642–47 (advocating for artwork purchasers to own art title insurance as protection against title disputes and uncertain purchases).

³⁸ See, e.g., O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991); see also Jennifer A. Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 207 (2007). For her proposal of an international tribunal to settle art replevin disputes, Kreder also discusses the importance of analyzing the extent to which publication of loss on the part of the true owner “would avoid prejudicing bona fide purchasers who had conducted provenance research before purchase.” *Id.*

³⁹ See *Lubell*, 569 N.E.2d at 431 (“New York enjoys a worldwide reputation as a preeminent cultural center.”).

⁴⁰ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982).

⁴¹ See Phelan, *supra* note 2, at 641 (discussing foundations of New York's demand and refusal rule and its special application in cases of stolen artworks).

⁴² See *Lubell*, 569 N.E.2d at 431 (“To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner . . . would . . . encourage illicit trafficking in stolen art.”).

⁴³ *Id.* at 427.

Lubell purchased the painting from a New York gallery in good faith for \$17,000.⁴⁴ The New York Court of Appeals mainly inquired into whether the museum's due diligence conduct after the painting was stolen was relevant to applying the demand and refusal rule.⁴⁵ Lubell argued that the museum's failure to investigate the work's disappearance breached its duty to use reasonable diligence to recover the painting, therefore barring its action in replevin by way of the statute of limitations.⁴⁶ In analyzing the museum's actions, the court noted that it took some time for the museum to even notice that the painting "was not where it should be."⁴⁷ Subsequently, the court noted that it was "undisputed . . . that the Guggenheim did not inform other museums, galleries[,] or artistic organizations of the theft" and did not contact other law enforcement authorities such as the FBI, the New York Police, or Interpol.⁴⁸ In fact, the museum's board voted to officially remove the painting from its list of holdings in 1974 after concluding that "all efforts to recover [it] had been exhausted."⁴⁹

Because the museum had done little to locate the work in the twenty years after its disappearance other than a "search [of] its own premises," the trial court concluded that the museum's conduct was "unreasonable as a matter of law" and granted Lubell's summary judgment motion on the basis that the museum's action was time barred.⁵⁰ The Appellate Division then modified and dismissed the statute of limitations defense.⁵¹ The Court of Appeals, New York's highest court, affirmed, reiterating that the *only* relevant factors in the statute of limitations defense were the museum's demand for the painting and Lubell's refusal to return it.⁵² The Court refused to "carv[e] out an exception where the chattel to be returned is a valuable piece of art" but nevertheless stated that the museum's apparent failure to undertake reasonable due

⁴⁴ *Id.* at 428.

⁴⁵ *Id.* at 427.

⁴⁶ *Id.*

⁴⁷ *Id.* at 428. The Guggenheim Museum defended its decision not to disclose that the painting was missing based on the assumption that publicizing the theft "would succeed only in driving [the painting] further underground." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 429.

⁵¹ *Id.* (outlining the Appellate Division's decision which held that the trial court erred in finding that delay alone could make a replevin action untimely).

⁵² *Id.* at 427.

diligence would be relevant to Lubell's laches defense, which remained viable.⁵³

The Court of Appeals' decision in *Guggenheim* demonstrates the weaknesses associated with the demand and refusal rule. Arguably, the museum effectively abandoned the work when it refused to thoroughly investigate its loss and later voted to simply remove it from its list of holdings. In contrast, Lubell dutifully investigated the painting's provenance by contacting the artist and the artist's son-in-law directly. Nevertheless, the Court of Appeals arrived at the conclusion that "there [was] no indication that the equities favor[ed] either party."⁵⁴

2. *The Discovery Rule.*

Under the discovery rule, the statute of limitations in an action for replevin begins running when an owner knows or reasonably should know of his cause of action and the identity of the chattel's current possessor.⁵⁵ The discovery rule arose in the context of stolen art in a suit brought by famed and eccentric American artist, Georgia O'Keeffe, against a good faith purchaser.⁵⁶ O'Keeffe alleged that the defendant was in wrongful possession of three of her paintings that had been stolen in 1946 from an art gallery run by O'Keeffe's husband.⁵⁷ In 1975, nearly thirty years later, O'Keeffe learned that the paintings were on consignment in a New York gallery, where they were sold to a man named Barry Snyder.⁵⁸ O'Keeffe sued Snyder in replevin for return of the paintings in 1976.⁵⁹

In applications of the discovery rule, a fact forming the basis of a cause of action includes knowledge of the identity of the current possessor.⁶⁰ Based in equity, the rule shifts the focus from the "conduct of the [current] possessor" to "whether the owner has acted

⁵³ *Id.* Lubell had raised both a statute of limitations defense and the affirmative defense of laches, but the issue on appeal was her statute of limitations defense. *Id.*

⁵⁴ *Id.* at 431 (noting also that the Lubells had "no reason to suspect that [the painting] was not legally theirs").

⁵⁵ *O'Keeffe v. Snyder*, 416 A.2d 862, 874 (N.J. 1980).

⁵⁶ *Id.* at 864.

⁵⁷ *Id.* at 865.

⁵⁸ *Id.* at 866.

⁵⁹ *Id.*

⁶⁰ *See id.* at 870 ("O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence . . . the identity of the possessor of the paintings.").

with due diligence in pursuing his or her personal property.”⁶¹ By placing the burden of due diligence on the true owner, the rule treats the good faith purchaser slightly more favorably than New York’s demand and refusal rule because it “functions as a balancing test between the [good faith purchaser’s] legitimate aims of repose and hardship to the [true owner].”⁶²

One court aptly noted that application of the discovery rule in stolen art cases is “not unlike the process of examining a work of art: the view of the beholder varies depending upon the distance from the subject.”⁶³ Application of the discovery rule is fact intensive and subject to much judicial discretion, but the focus remains on the actions of the theft victim in locating a stolen work. In *O’Keeffe*, the court discussed this fact intensive analysis by stating that the meaning of “due diligence” might depend on the “nature and value of the personal property.”⁶⁴ For example, the court stated that with respect to jewelry of moderate value, an owner might be permitted to investigate less than an owner of an artwork of greater value.⁶⁵

The discovery rule does not require owners of stolen art to perform the *utmost* diligence but rather diligence that is reasonable under the circumstances.⁶⁶ In other words, it matters not whether the artwork was in fact discoverable or might have been discovered with a little more effort;⁶⁷ instead, the efforts must simply be reasonable “given the facts of the case.”⁶⁸

C. EXEMPLARY CASES

1. *Diligence on the Part of the True Owner.*

A recent battle between two families over Camille Pissarro’s “Picking Peas” painting—litigated in a foreign court but indicative of an American problem—is illustrative of situations in which true owners actively seek out and enforce superior claims of title to

⁶¹ *Id.* at 872.

⁶² Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1081 (1991).

⁶³ *Erisoty v. Rizik*, No. 93-6215, 1995 WL 91406, at *10 (E.D. Pa. Feb. 23, 1995).

⁶⁴ *O’Keeffe*, 416 A.2d at 873.

⁶⁵ *Id.*

⁶⁶ See Phelan, *supra* note 2, at 650 (stating owners of stolen art must merely make reasonable due diligence efforts to “locate and reclaim their stolen property”).

⁶⁷ *Id.*

⁶⁸ *Erisoty*, 1995 WL 91406, at *14.

stolen artworks.⁶⁹ The painting was one of ninety-three works stolen from Simon Bauer, a Jewish businessman and collector, during the French World War II era Vichy regime—in lockstep behind the Nazi Party’s obsession with obtaining remarkable works of art for Hitler’s perusal and collection.⁷⁰ In 1995, Bruce and Robbi Toll, well-known Philadelphia art collectors, purchased the Pissarro at a Christie’s auction in New York for \$800,000.⁷¹ As of 2018, the painting’s estimated worth was \$1.75 million.⁷² Willing to share their investment with the world, the Tolls loaned the work to the Marmottan Museum in Paris in 2017.⁷³ Shortly thereafter, Bauer’s grandson spotted the painting and took legal action to have it seized by the French government pending litigation over title to the work.⁷⁴ In November 2017, a French judge ordered the Tolls to return the work to Bauer’s descendants, even though he affirmed them as good faith purchasers who took without notice.⁷⁵ In October 2018, a Paris appeals court upheld that order.⁷⁶ However, the court did not order compensation for the Tolls, whose attorney stated the couple had suffered a total loss and that “[i]t [was] not [the Tolls] . . . who should pay for the crimes of Vichy.”⁷⁷

⁶⁹ Annalisa Quinn, *French Court Orders Return of Pissarro Looted by Vichy Government*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html> (discussing a recent ruling by a French court demanding the painting be returned to the descendants of the Jewish art collector whose collection was looted by the Vichy regime).

⁷⁰ See *id.* (describing the history behind the “Picking Peas” painting); see also Eleanor Beardsley, *France Hopes Exhibit of Nazi-Stolen Art Can Aid Stalled Search for Owners*, NPR (Feb. 23, 2018, 4:35 PM), <https://www.npr.org/sections/parallels/2018/02/23/588374670/france-hopes-exhibit-of-nazi-stolen-art-can-aid-stalled-search-for-owners> (discussing the “[Nazi] collaborationist Vichy regime” operating in France during World War II).

⁷¹ *Pissarro’s Picking Peas Returned to Jewish Owners*, BBC NEWS (Nov. 7, 2017), <https://www.bbc.com/news/world-europe-41906302> (providing background as to the Tolls and how much they paid for the painting at an auction).

⁷² Kim Willsher, *American Couple Lose Bid in French Court to Keep Pissarro Painting Looted During World War II*, L.A. TIMES (Oct. 2, 2018, 4:15 PM), <http://www.latimes.com/world/europe/la-fg-france-looted-painting-20181002-story.html> (explaining that the Bauer family’s attorney based this estimate on the value at which the Tolls had insured the work).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* This is especially surprising given that the painting was on a list of works looted during World War II. *Id.*

⁷⁶ *Id.*

⁷⁷ Michael Daventry, *French Legal Landmark as Court Awards Family Vichy-Looted Pissarro Worth €1.75M*, JC (Oct. 5, 2018, 5:25 PM), <https://www.thejc.com/news/world/french-legal-landmark-as-court-awards-family-vichy-looted-pissarro-worth-1-75m-1.470616>.

2. Diligence on the Part of the Good Faith Purchaser.

On the opposite end of the litigation spectrum, good faith purchasers of stolen art sometimes actively seek out true owners, even when a true owner's heirs have done little to ascertain a specific work's location or demand its return. In 2002, an American professor began to doubt the provenance of an Old Master⁷⁸ drawing she had previously inherited from her father.⁷⁹ Fearing that she might be in possession of "a drawing with such a painful history," the professor contacted the International Foundation for Art Research (IFAR) to conduct an independent analysis of the drawing's provenance.⁸⁰ IFAR concluded that the drawing, entitled *The Liberation of Saint Peter from Prison* and drawn by one of Rembrandt's pupils, had been owned by Arthur Feldmann and was stolen along with the majority of his collection during World War II.⁸¹ In 2004, the professor returned the drawing to the Feldmann heirs in an exercise of what IFAR regarded as an "unprecedented" initiative on the part of a good faith purchaser.⁸² In exchange for her efforts, and what one might deem a total loss to her, the professor asked only for anonymity.⁸³

V. ART TITLE INSURANCE

Art title insurance for individual collectors is a relatively new phenomenon. It became an option for collectors, museums, and non-profits in 2006, when ARIS Title Insurance Corporation first

⁷⁸ "The term 'Old Masters' generally refers to the most recognized European artists . . . working between the Renaissance and 1800." *Old Masters*, ARTSY, <https://www.artsy.net/gene/old-masters> (last visited Jan. 9, 2020).

⁷⁹ See ANNE LAURE BUNDLE, ALESSANDRO CHECHI & MARC-ANDRÉ RENOLD, ARTHEMIS, CASE LIBERATION OF SAINT PETER FROM PRISON – FELDMANN HEIRS AND PRIVATE PERSON 2 (May 2012), <https://plone.unige.ch/art-adr/cases-affaires/liberation-of-saint-peter-from-prison-2013-feldmann-heirs-and-private-person/case-note-liberation-of-saint-peter-from-prison> (summarizing a case involving the return of stolen artwork from a good faith purchaser's heir).

⁸⁰ See *id.* (noting that the "professor sought [IFAR as] an 'objective and scholarly intermediary' to verify her doubts").

⁸¹ See *id.* (discussing the stolen painting's history).

⁸² See Dalya Alberge, *Gift of Art to Atone for Looting by Nazis*, TIMES (Dec. 2, 2004, 12:00 AM), <https://www.thetimes.co.uk/article/gift-of-art-to-atone-for-looting-by-nazis-dtc87fz6g6t>.

⁸³ See BUNDLE, CHECHI & RENOLD, *supra* note 79, at 3 (discussing, however, that the professor may have been able to establish clear title to the painting under Dutch law if she had chosen to litigate rather than return the painting on moral grounds).

started selling the product.⁸⁴ Today, ARIS describes itself as the “leading global authority on legal title risks” in the international fine art market.⁸⁵ In ownership litigation with a purported true owner, individual collectors who purchase an ARIS policy are covered for defense costs and indemnified for the purchase price of the artwork in the event they must surrender the work.⁸⁶

Given the increasing amount of litigation over title to artwork and the difficulty of mounting a successful defense in replevin actions, collectors may make the understandable choice to purchase art title insurance. Defense costs and indemnification for the purchase price of the artwork provide *some* relief in the event of forfeiture but still not much considering the reality that “purchase price” coverage reflects neither appreciation of value nor the value of potential restoration and conservation efforts after purchase.⁸⁷ Art title insurance is also expensive, more so than real estate title insurance.⁸⁸ Though insurers justify high rates by citing the “non-transparent nature of the art market,”⁸⁹ the high cost of premiums and low indemnity assurance sets good faith purchasers up for disappointment, as they will still be forced to forfeit artwork that has most often appreciated in value.⁹⁰

Courts should offer good faith purchasers of art what might be deemed an additional insurance payout through compensation after forfeiture—although amounts might be smaller or larger than the art insurance payouts depending on the level of the purchaser’s diligence investigation. By searching relevant databases and attempting to establish a definitive history of provenance and chain of title (even if proven too difficult), the good faith purchaser should

⁸⁴ Tucker, *supra* note 25, at 644, 645 (noting that ARIS “claimed to be offering ‘the world’s first transfer of legal ownership risk for art’” (quoting Steve Yahn, *Securing the Chain: Art Title Insurance Offers Buyers of Artworks Coverage for the Chain of Title and Lien Risks Inherent in Art as a Form of Property*, RISK & INS. (Dec. 1, 2006), available at <https://www.thefreelibrary.com/Securing+the+chain%3A+art+title+insurance+offers+buyer+s+of+artworks+...-a0155567138>)).

⁸⁵ ARIS, ARGO GROUP, <https://www.argolimited.com/aris/> (last visited Jan. 7, 2020).

⁸⁶ Tucker, *supra* note 25, at 645.

⁸⁷ Consider, for example, the defendants in *Erisoty*, who purchased a work at auction in 1989 for approximately \$30,000 and subsequently spent four years restoring the torn artwork. *Erisoty v. Rizik*, No. 93-6215, 1995 WL 91406, at *5–6 (E.D. Pa. Feb. 23, 1995). In 1993, the work was estimated to have been worth almost \$200,000. *Id.* at *5–6, *8.

⁸⁸ See Tucker, *supra* note 25, at 646 (noting that premiums for real estate title insurance are typically less than one percent of the sale price, while premiums for art title insurance can be as much as seven percent of the sale price).

⁸⁹ *Id.*

⁹⁰ See *supra* notes 4–5 and accompanying text.

be seen to have insured himself or herself again. Indeed, courts should look favorably upon a good faith purchaser who has obtained title insurance in the due diligence analysis, as companies like ARIS help investigate provenance.⁹¹ Furthermore, the fact that the purchaser has obtained an insurance policy naturally evidences his or her commitment to lawfully owning the work and protecting its value.

VI. ADDITIONAL REWARD FOR DISCLOSURE

This Note proposes that, in addition to insurance payments, good faith purchasers of stolen art who conduct appropriate due diligence and disclose their findings should be further compensated if forced to forfeit a previously stolen artwork to a true owner. Other sources of law, such as the principles underlying patent and salvage law, support the concept of providing a reward for honest disclosure.⁹² Applying these concepts to art replevin actions will more fairly balance equities between parties and mitigate losses between them.

The Patent Act rewards innovators by granting them a limited monopoly in their inventions *in exchange for disclosure*.⁹³ Because the inventor discloses his creation, he does a public good, and society affirms this by respecting the inventor's design and rewarding his candor.⁹⁴ When good faith purchasers of art conduct title searches in accordance with the customs of the art market, or, in some cases, over and above the demands of the market, their candor should be similarly rewarded when they disclose their findings and possession of the work to relevant art cataloguing databases. Applying patent law's quid pro quo outlook to good faith purchasers of art will facilitate movement of works through the art market, as a disclosure-based compensation system will bring additional security to buyers while simultaneously bringing more stolen artworks up from the underground market.

⁹¹ See *Benefits of Title Insurance*, ARGO GROUP, <https://www.argolimited.com/aris/benefits-title-insurance/> (last visited Jan. 7, 2020).

⁹² See Stephan Kinsella, *"The" Purpose of Patent Law*, CTR. FOR STUDY INNOVATIVE FREEDOM (Dec. 6, 2010), <http://c4sif.org/2010/12/the-purpose-of-patent-law/> ("[P]atent law encourages disclosure of ideas by rewarding it."); see also *infra* note 95 and accompanying text.

⁹³ See *id.* (noting that the principle of disclosure is fundamental to patent law).

⁹⁴ See *id.* (describing how, in exchange for meaningful disclosure, the public concedes to "being excluded from practicing the invention for a limited period of time"). This is the fundamental quid pro quo of the patent system. *Id.*

The concept of rewarding honest disclosure is also found in principles of salvage law. Like the justification for when innovators are rewarded for patents, salvors are generously compensated when they disclose their discoveries.⁹⁵ Compensation systems that reward salvors for their efforts encourage them to continue their endeavors not only for their own financial benefit, but also for the true owner's benefit, and for the benefit of the public as a whole. By bringing their discovery out into the open, salvors do a public good by both respecting the true owner's claim to title and the public's interest in preserving historical objects and cultural heritage.⁹⁶ In that same vein, a good faith purchaser who diligently researches an artwork's provenance and shares it with the public should be rewarded. Rewarding good faith purchasers in this manner will incentivize more art collectors to bring their works out into the open and to disclose the facts behind their provenance searches as well as help quell fears of a total loss forfeiture of a suspect work.

Using patent and salvage law concepts in a disclosure-based compensation system provides for a new framework of equity analysis in art replevin actions. For example, when determining whether a salvor deserves compensation, courts look to factors such as the "labor expended . . . in rendering salvage service[;] . . . [t]he promptitude, skill, and energy displayed in . . . saving the property[;] . . . the risk incurred[;] . . . [and t]he value of the property saved."⁹⁷ A court should use the same factors in an equitable analysis in an art replevin action. Purchasers on the art market expend labor (i.e., time and money) by conducting provenance research. Courts should also consider whether the good faith purchaser displayed promptitude and energy in conducting a timely and thorough provenance investigation before or after purchase. In determining risk incurred by good faith purchasers, courts should

⁹⁵ See, e.g., *Columbus-Am. Discovery Grp. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459 (4th Cir. 1992) ("Under . . . [salvage] law, the original owners still retain their ownership interests[, but] . . . the salvors are entitled to a very liberal salvage award.")

⁹⁶ See *Columbus-Am. Discovery Grp. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, No. 87-363-N, 1993 WL 580900, at *32 (E.D. Va. Nov. 18, 1993) (awarding a ninety percent salvage award for recovery of gold on a shipwreck), *decision rescinded on other grounds*, 56 F.3d 556 (4th Cir. 1995). But see Michael R. Nelson, *Finders, Weepers—Losers, Keepers? Florida Court Says U.S. Company Must Return Recovered Treasure to Kingdom of Spain*, 16 LAW & BUS. REV. AM. 587, 591 (2010) (noting that even though the court awarded compensation for the salvors in *Columbus America*, the victory was "moral rather than substantive," as "projected costs for exploration, recovery, and litigation . . . were \$30 million, compared with the final salvage award of roughly \$19 million").

⁹⁷ *The Blackwall*, 77 U.S. 1, 14 (1869).

look at the value of the artwork and the potential loss to the purchaser at the time of sale regarding higher claims of title. Finally, saving an artwork can be assessed in terms of time and energy spent conserving and insuring the work, or loaning it to museums in order to share it with the public.

VII. FRAMEWORK FOR APPLICATION

This Note does not purport to create a hardline reasonable diligence requirement applicable to all true owners and good faith purchasers of stolen art, nor does it aim to displace the *nemo dat* rule. Indeed, creation of such a diligence requirement would be “difficult, if not impossible,” and could not possibly take into account the multitude of variables applicable to transactions involving fine art.⁹⁸ Nevertheless, considering the actions of the true owner and purchaser can lead courts to reach a more just outcome by tipping scales in favor of the party who more diligently attempts to protect his or her interest in an artwork.

A. TRUE OWNER ANALYSIS

In analyzing actions of the true owner’s diligence after losing its piece of artwork, the New York Court of Appeals in *Guggenheim* placed emphasis on the work’s value and the nature in which it was stolen.⁹⁹ Other relevant factors proposed by this Note include whether the true owner has tried to locate the missing work by contacting the Art Loss Register or notifying relevant national and international authorities, such as the FBI or Interpol. In the case of Nazi-looted works, a court should be more lenient toward true owners given the difficulty of finding works displaced during World War II but still might consider whether heirs have actively sought out works known to be in a relative’s collection or simply waited for works to appear on the art market before bringing a claim.

For example, in the Pissarro controversy,¹⁰⁰ a court might have considered the fact that the true owner actively sought out the painting when it was on loan to a foreign museum. Indeed, the heir

⁹⁸ Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991).

⁹⁹ *Id.* (“The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property.”).

¹⁰⁰ See discussion *supra* Section IV.C.1.

of the painting's true owner had been searching for missing pieces of his grandfather's collection for nearly fifty years.¹⁰¹ Contrasting the true owner's diligence with the relative lack of due diligence on the part of the purchaser might have led an American court to award a smaller amount of compensation to the good faith purchaser, or none at all. In contrast, a court should tip the scales in favor of the good faith purchaser in a case like *Guggenheim*, in which the true owner virtually abandoned the artwork without performing any diligence with respect to the work's whereabouts for nearly ten years.¹⁰²

B. GOOD FAITH PURCHASER ANALYSIS

Courts should take special care in analyzing the good faith actions of purchasers in replevin actions for stolen art. Between the true owner and a good faith purchaser, the purchaser will inevitably suffer the most financial harm after forfeiture, as the true owner is made virtually whole while the purchaser is not. A court should consider steps the purchaser has taken to ascertain whether he has clear title to a work, regardless of whether the purchaser was incorrect in his findings.¹⁰³ Courts should look favorably upon purchasers who consult art loss databases like the Art Loss Register, the FBI art theft database, or international databases for art lost during war time. Courts should also consider whether the purchaser has insured the work, engaged in conservation efforts, or attempted to share the work with society in the form of loans to museums.

Recall the anonymous professor in possession of the Rembrandt drawing, who actively investigated the work's chain of title without any claim brought by the true owner.¹⁰⁴ In a replevin action, a court might award a higher amount to the purchaser who actively consults databases or investigates into the provenance and title of an artwork. The case for recompense to a purchaser is even stronger

¹⁰¹ See Willsher, *supra* note 72.

¹⁰² See discussion *supra* Section IV.B.1.

¹⁰³ The purchaser should receive an uptick on the sliding diligence scale, especially considering the lackadaisical nature of provenance research on the art market as a whole. For a reason not to look unfavorably on an unsuccessful sleuth, see Tucker, *supra* note 25, at 615 ("The near-total lack of investigation and inquiry in the commercial art world means that reputable dealers and auction houses often sell stolen art, and collectors unwittingly acquire these stolen pieces.").

¹⁰⁴ See discussion *supra* Section IV.C.2.

in cases involving heirs who are *not* proactive in locating their property and simply wait for it to appear on the market. Courts should also consider whether the purchaser has insured the work or engaged in conservation efforts to maintain the work's value. For example, purchasers like the defendants in *Erisoty*, who go to great lengths to conserve and repair works of art, might be given a buffer of return on their investment in the form of compensation after forfeiture.¹⁰⁵ A court should also factor in the purchaser's willingness to share his or her investment with the world by loaning artwork to museums or other exhibitions, as Bruce and Robbie Toll did with their later forfeited Pissarro painting.¹⁰⁶

VIII. CONCLUSION

This Note proposes implementing a disclosure-based, sliding scale equitable analysis in art replevin actions in order to mitigate loss between a true owner and a good faith purchaser of stolen artwork. Because it does not propose to displace common law or statutory rules, this additional step employed in courts' analyses will be simple to apply and afford fairer outcomes to art purchasers who receive stolen property without notice. By focusing on the quality and quantity of due diligence performed by both parties, this analysis ensures that each party's actions dictate the amount of compensation that might be awarded to a good faith purchaser. On a broader scale, this approach encourages all participants in the U.S. market to safeguard their investments by actively searching for stolen works or conducting due diligence in accordance with market standards after purchase. Finally, and most importantly, this analysis's emphasis on diligence standards serves as a steppingstone toward a more responsible global art market.

¹⁰⁵ See *supra* note 87.

¹⁰⁶ See discussion *supra* Section IV.C.1.