Jeanneret v. Vichey: Sales of Illegally Exported Art under the Uniform Commercial Code

William Pearlstein

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NOTE

*Jeanneret v. Vichy*: Sales of Illegally Exported Art Under The Uniform Commercial Code

"As I understand it, Queen Hatshepsut had this made in upper Egypt, to dedicate it to the god Amun Ra. Then it was carried off from the Valley of the Kings by adventurers, and Lester picked it up at Altman's for my birthday."

INTRODUCTION

The provenance of and title to an object of art are important questions to individuals and institutions collecting or dealing in art. Buyers insist that a work of art be what the seller purports it to be and that the seller pass good title to the work. \(^1\) Reflecting this concern with provenance, cautious dealers and collectors use contracts containing carefully drafted warranty provisions. \(^2\) As the Court of Appeals for the Fifth Circuit has noted in a leading case, a "number of leading museums have adopted a voluntary policy of purchasing no art or archeological objects unless they are accompanied by a pedigree." \(^3\) Certain states have enacted legislation specially tailored to the warranty and disclaimer problems of the art trade. \(^4\) An acceptable record of provenance and title is thus the *sine qua non* of an object's marketability and, hence, an important factor in determining its value on the legitimate art market. \(^5\)

Unfortunately, confusion and uncertainty about the legal status of illegally exported art is common among those who deal in art and among their legal counsel. \(^6\) The rule has historically been that the importation of an object into one country is not illegal simply because it was illegally

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1. Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 325 N.Y.S.2d 555 (1971), rev'd, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (1974) (Plaintiff bought a painting that defendant's auction catalogue attributed to Raoul Dufy. The painting was a forgery. Plaintiff sued for rescission, claiming that the catalogue description amounted to an express warranty. Defendants claimed that a disclaimer in the "Conditions of Sale" contained in the catalogue negated any warranty. Plaintiff won at trial, lost on appeal); Dawson v. G. Malina, Inc., 463 F. Supp. 461 (S.D.N.Y. 1978) (Plaintiff sued to rescind a purchase of certain items of Chinese art which defendant had represented to be of the Sung dynasty under § 219c of the New York General Business Law, concerning express warranties, which was enacted in part to eliminate questions as to whether art dealers' representations with respect to authorship of particular works of art were to be considered affirmations of fact or merely expressions of a dealer's opinion. The proper standard to determine whether a dealer is liable for breach of warranty is whether his representations with respect to an object have a reasonable basis in fact when they are made. Under this standard, plaintiff was allowed to rescind only part of the contract.). For a discussion of the warranty provisions of the Uniform Commercial Code as they apply to art transactions see Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409, 420-22 (1972); L. Duboff, *The Deskbook of Art Law* 446-64 (1977).


4. United States v. McClain, 545 F.2d 988, 997 n.14 (5th Cir. 1977). These are: The University of Pennsylvania Museum, the Harvard University Museums, the Brooklyn Museum, the University of California Museum at Berkeley, the Arizona State Museum, the Smithsonian Institution, and the Chicago Field Museum of Natural History. See Duboff, *supra* note 1, App. 34-39, at 1175-87.


6. See infra note 80.

7. See infra note 80, testimony of Graham Leader.
exported from another. The outflow of art and artifacts from countries where supply is great to countries where demand is strong has, however, often encouraged the exporting nations to enact legal restrictions on the exportation of art. Moreover, the United States government has recently relied on the National Stolen Property Act ("NSPA") to obtain criminal convictions of those who knowingly deal in art stolen from foreign nations, and has used diplomacy to negotiate the return of other illegally exported works. United States art dealers and collectors are therefore concerned by any legal development that might allow foreign governments to cloud the title to or impair the marketability of objects of art purchased in good faith by United States buyers. "Jeanneret v. Vichey" reveals such a development. Depending on its final disposition, it may be of great consequence to the United States art market. The narrow legal question in "Jeanneret" is whether the Italian art was stolen.


9 See generally Bator, supra note 8; McAlee, supra note 8. See infra text accompanying notes 234-46.


11 In United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974), defendant was successfully prosecuted under the NSPA for transporting into the United States a famous pre-Columbian stela. Because Guatemalan law vests ownership of all such objects in the State, illegal exportation was tantamount to stealing. In U.S. v. McClain, supra note 4, the issue was whether clandestine exportation from Mexico under a similar law also amounted to stealing under the National Stolen Property Act (hereinafter referred to as NSPA). See infra notes 261-81 and accompanying text.

12 An example of government involvement in the return of an illegally exported painting is described by Bator, supra note 8, at 280:

In December 1969, the Boston Museum of Fine Arts announced the acquisition of an unknown Raphael portrait as part of the museum's centenary celebration. The Director of the museum stated that the portrait was purchased from a European private collection in Switzerland. Italian authorities investigated and revealed a different story. The museum apparently purchased the portrait in Genoa, Italy, not in Switzerland; it was removed from Italy in secret. The seller was identified as an art dealer with several criminal convictions for smuggling antiques who was barred under Italian law from dealing in art. The U.S. Custom Service also discovered that a museum curator had brought the painting into the United States without declaring it. This provided the basis for its seizure by customs. The painting was quietly returned to Italy. The museum was left without the Raphael and without a substantial portion of the purchase price, since the seller died with his estate in a courtroom tangle. See also McAlee, supra note 8, at 577.

In 1966, a wood carving known as the Afo-A-Kom was taken from Cameroon and offered for sale in New York. Because of the piece's ostensible cultural and spiritual importance to the people of Cameroon, a public outcry in the United States resulted in the piece's return. Duboff, supra note 1, at 71-72; J. Merryman & A. Elsen, Law, Ethics and the Visual Arts, 2-27 to 2-30 (1979) [hereinafter cited as Merryman & Elsen].

government's threats to confiscate an illegally exported work of art or to fine its owner constitute a sufficiently substantial cloud on title to support a buyer's claim of breach of the warranty of title provided by Uniform Commercial Code (UCC) § 2-312.14 The broader underlying issue is whether any exporting nation, by threatening actual or potential owners with fines or confiscation, can cloud the title to or impair the marketability of a work exported without the approval of the exporting nation. Neither the trial nor the appellate courts satisfactorily analyzed or answered these questions.

Part I of this Note will discuss the facts and evidence presented at trial in Jeanneret. In brief, Jeanneret involves the export of a valuable painting by Henri Matisse from Italy to Switzerland.15 Although the exporters rightfully owned the painting, they did not present it to Italian customs authorities and thus failed to obtain the documentation signifying legal and approved export.16 Depending on the painting's age when taken from Italy, its exportation may have violated either or both of two Italian laws governing art exports from Italy;17 on the other hand documentation of legal and approved export may have been unnecessary.18 After Marie Louise Jeanneret, a Swiss art dealer, bought the painting from Anna and Luben Vichey, United States citizens, Jeanneret learned that the Italian government wanted to retrieve the painting because of its suspected illegal exportation.19 Thereafter, the painting was unmarketable; no buyer would consider purchasing it from Jeanneret.20 In 1977, she sued the Vicheys for breach of contract.21 Two years later, the Italian government "notified"22 the Vicheys that the export of the painting was a tremendous loss to Italy's national heritage and that they were therefore subject to penalties provided by Italian law for illegal export of artwork.23

The District Court for the Southern District of New York ruled in Jeanneret's favor, finding that the Italian government had cast a sufficiently substantial cloud on the painting's title to breach the warranty of title supplied by UCC § 2-312.24 The court found it unnecessary to ana-

14 Jeanneret, 541 F. Supp. at 83, 693 F.2d at 265.
15 Jeanneret, 693 F.2d at 260.
16 Id.
17 Id. at 261; see infra notes 74-79 and accompanying text.
18 Jeanneret, 541 F. Supp. at 84; see infra notes 77-79, 95 and accompanying text.
19 Jeanneret, 693 F.2d at 261, 263-64.
20 Id. at 261; see infra text accompanying notes 65-68.
21 Id.
22 Id. at 263; see infra notes 81-85 and accompanying text.
23 Id.
24 Jeanneret, 541 F. Supp. at 83.
lyze the substantiality of Italy's claim because it determined that a warranty of title would be breached merely upon the buyer's notice of an adverse claim, regardless of the claim's ultimate validity. Part II of this Note will present the possible applications of the warranty of title and will argue that an obviously insubstantial adverse claim should not render a seller liable under 2-312.

Part III of this Note will observe that the Court of Appeals for the Second Circuit reversed and held that a possible violation of Italian export laws was an insufficiently substantial cloud on title to breach 2-312. But although the court found no cloud on Jeanneret's title, it noted that she, a bona fide purchaser, nonetheless possessed an unmarketable painting. Curiously, the court emphasized the existence of evidence the defense failed to offer that would have established the painting's age and the legality of its exportation, and then remanded the case to determine whether the painting was in fact legally exported. Because the court could not discern the true cause of Jeanneret's injury, it achieved the perverse and unjust result of acknowledging her injury while striking down her cause of action and ensuring the Vicheys' victory on remand. Moreover, by focusing on the painting's age and on whether the Vicheys had violated Italian export law, the court avoided analyzing the larger issue of whether an "exporting" nation can cloud title to or impair the marketability of an illegally exported work of art.

Part IV will argue that the title to Jeanneret's painting is under no cloud at all. Under conflicts of law principles, not only is the validity of a transfer of property determined by the lex situs of the property at the time of transfer, but title validly acquired under the lex situs is good the world over. Furthermore, New York, Swiss and Italian law all provide protection for a bona fide purchaser's title to illegally exported art. In short, Italy's threatened sanctions were not a substantial cloud on Jeanneret's title; her suit for breach of warranty of title should fail.

Part V will note that although the Vicheys did pass good title to Jeanneret, they failed to provide her with documentation of the painting's legal and approved export. This rendered the painting unmarket-

25 Id.
26 See infra text accompanying notes 118-42.
27 Jeanneret, 693 F.2d at 269.
28 See infra text accompanying notes 142-71.
29 Id., 693 F.2d at 268.
30 Id. at 269.
31 See infra text accompanying notes 180-221.
32 See supra text accompanying note 16.
able in the eyes of reputable dealers. She or any similarly situated buyer should therefore have a cause of action for breach of the implied warranty of merchantability under UCC § 2-314, regardless of whether the Vicheys or any similarly situated sellers are considered casual sellers or are held to the higher standards of merchants. This Note will also argue that UCC § 2-714 damages for breach of warranty are to be measured at the time and place of breach, not at the time of trial, as was the rule of the cases cited by the district court.

Part VI will place Jeanneret in the context of recent legislation and case law affecting the importation of illegally exported art into the United States. Market forces have created tensions between poor, art-rich nations that seek to control the outflow of their cultural patrimony by erecting over-inclusive and unenforceable export barriers, and richer nations that seek to foster the process of cultural exchange by encouraging the importation of art. For example, United States opponents of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer Of Ownership of Cultural Property, adopted by the United Nations Educational, Scientific, and Cultural Organization, forced Congress to amend the Convention’s enabling legislation because they feared the Convention would allow foreign nations to control the flow of art into the United States. Similarly, in United States v. McClain, a group of art dealers and collectors objected to a series of federal court decisions implying that with proper drafting a foreign nation could convert a violation of its export laws into a violation of United States criminal law. This would, in effect, hand foreign nations a “blank check” to determine United States art import policy.

A group of amici curiae, composed of major commercial art dealers, intervened on behalf of the Vicheys in Jeanneret. They argued that

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33 See supra note 20 and accompanying text.
34 See infra notes 222-27 and accompanying text.
35 See infra notes 228-33 and accompanying text.
36 See infra text accompanying notes 234-84.
37 See infra text accompanying notes 234-46.
39 See infra notes 247-60 and accompanying text.
40 See infra notes 261-83 and accompanying text.
41 Id.
42 See infra note 281 and accompanying text. In 1983, amendments to the NSPA supra note 11, were proposed which would undo the unsettling effects of United States v. McClain, 545 F.2d 988 (5th Cir. 1977). See infra notes 281-83 and accompanying text.
43 These consisted of the auction houses of Sotheby Parke Bernet, Christie Manson and Woods, and Phillips, Sonn & Neals, who together dominate the Anglo-American art auction market, and the Art Dealers Association of America.
Congress' policy was to discourage the importation of art in the United States only when an exporting nation's cultural patrimony is "in jeopardy of pillage."\textsuperscript{44} A victory for Jeanneret would impose liability upon every seller of art that had been legally imported into the United States but illegally exported from another country.\textsuperscript{45} To allow a violation of foreign export law to breach a warranty implied by a domestic commercial statute would let vindictive foreign governments render much of the art collected in the United States unmarketable and hence commercially, if not aesthetically, worthless.\textsuperscript{46} This, the \textit{amici} argued, would discourage the flow of art into the United States in contravention of Congressional policy and would slow the desirable process of transnational cultural exchange—a process facilitated by the legitimate art market.

The \textit{amici} are rightly concerned. Because a seller's failure to comply with foreign export regulations can render a buyer's purchase unmarketable, it is clear that \textit{Jeanneret} may allow a buyer or a foreign government to convert a violation of foreign law into a violation of domestic law, to the detriment of the United States art market. Part VII will propose two solutions to this danger. First, the art trade can alter or forego the "usage of trade"\textsuperscript{47} that requires a seller to document provenance. This would eliminate problems with marketability such as Jeanneret encountered. It would also bring the usage of trade into conformity with the legal non-consequences of illegal exportation. A bona fide purchaser should be able to market an illegally exported work of art the world over. The trade usage that reputable art dealers must document title and provenance in order to sell on the legitimate market is therefore legally superfluous—a self-imposed restriction that does not re-

\textsuperscript{44} Brief of Amici Curiae at 5-6, \textit{Jeanneret}, 693 F.2d 259 (2d Cir. 1982).

\textsuperscript{45} \textit{Id.} at 1. Furthermore, if the court decided for Jeanneret, the \textit{amici} argued, a buyer would be relieved of the burden of showing that the object was part of the exporting nation's cultural patrimony, that the seller knew of the exporting nation's potential claim at the time of sale, or that the claim would be upheld if brought. \textit{Reply Brief of Amici Curiae} at 3. \textit{Jeanneret}, 693 F.2d 259 (2d Cir. 1982).

\textsuperscript{46} \textit{Id.} at 2, \textit{Jeanneret}, 693 F.2d 259 (2d Cir. 1982).

\textsuperscript{47} Uniform Commercial Code [hereinafter cited as U.C.C.] § 1-205(2) states that a "usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts...." Comment 4 to § 1-205 states that "[I]t is this Act deals with 'usage of trade' as a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade." Comment 5 states that "full recognition is thus available . . . for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree."

\textsuperscript{48} \textit{See infra} text accompanying note 284; \textit{see supra} notes 1-6 and accompanying text.
reflect legal necessity.\textsuperscript{49} It is not required to protect buyers or sellers from foreign governments which, barring treaty, are unable to force the return of works from beyond their borders and should be unable to confiscate them within.\textsuperscript{50}

It is, however, unlikely that reputable members of the art trade will abandon a time honored practice that makes marketability contingent on the documentation of provenance. Therefore, if the liquidity of the art market becomes impaired by numerous suits for breach of warranty of title or merchantability, a second proposal would be for individual states to amend U.C.C. sections 2-312 and 2-314 to protect the marketability of art in the United States from interference by foreign regulation or proclamation.\textsuperscript{51} Clarifying the effect of the warranties implied by U.C.C. sections 2-312 and 2-314 on sales of illegally exported art may enhance the security of such transactions. This, in turn, may encourage nations which try unreasonably to restrict the outflow of their art to enact legislation that nations favoring the transnational exchange of art will be eager to enforce.

I. EVIDENCE PRESENTED AT TRIAL

Plaintiff Marie Louise Jeanneret, a Swiss citizen, is an art dealer in Geneva. Defendants Anna and Luben Vichey, wife and husband, are United States citizens. Anna's father, Carlo Frua DeAngeli, owned an extensive and well-known collection of paintings in Milan, Italy. One of these paintings was \textit{Portrait Sur Fond Jaune}, (Portrait), by the French post-impressionist, Henri Matisse.\textsuperscript{52} Mr. DeAngeli imported the \textit{Portrait} into Italy in 1951.\textsuperscript{53}

After Mr. DeAngeli's estate was settled, apparently after July 24, 1970, title to the painting vested in Anna Vichey.\textsuperscript{54} The painting next appeared in Switzerland, but the date and circumstances of the painting's export from Italy are unclear.\textsuperscript{55} No export license or permit was obtained from the Italian government.\textsuperscript{56}

\textsuperscript{49} See infra text accompanying note 284.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Born 1869, died 1954.
\textsuperscript{53} Joint Appendix at 813-14, Jeanneret, 693 F.2d 259 (2d Cir. 1982); Brief for Appellant at 6, Jeanneret, 693 F.2d 259 (2d Cir. 1982).
\textsuperscript{54} Jeanneret, 693 F.2d at 260.
\textsuperscript{55} "A letter from the Bank Gut Streiff in Zurich, Switzerland, dated July 24, 1970, acknowledged Mrs. Vichey's one-third interest in various works of art on deposit at the bank." Id. The record points "to the painting's possible arrival in the spring or early summer of that year." Id.
\textsuperscript{56} Id.
Later in 1970 the Vicheys brought the painting from Switzerland to New York City. In January 1973, Jeanneret began negotiations for the purchase of the painting. The parties agreed to a price of 700,000 Swiss francs, then equivalent to approximately $230,000. Luben Vichey delivered the painting to Jeanneret in Geneva in March 1973, and Jeanneret paid the Vicheys in June 1973, using money borrowed from a bank at a 10% interest rate. There was no written sales contract.

Jeanneret exhibited the Portrait at her gallery in Geneva, as well as in Paris and Basel. The catalogue for the Basel show listed the painting as having been executed "vers 1924," and listed its provenance as the former collection of Mr. DeAngeli in Milan and a private collection in New York. Jeanneret received three offers to buy the Portrait for 900,000, 1,000,000 and 1,100,000 Swiss francs; the painting remained unsold, however, at her asking price of 1,300,000 Swiss francs.

In November, 1974, Jeanneret went to Rome, where she spoke with Signora Bucarelli, Director of the National Gallery of Modern Art in Rome. Jeanneret thereafter telephoned Anna Vichey to determine how the painting left Italy. Jeanneret's numerous inquiries uncovered nothing, so she proposed that the contract be rescinded because she could not "sell it anymore nor show it." In December 1974, Jeanneret con-

57 Id.
58 Id. Jeanneret had previously received other paintings on consignment from the Vicheys. Jeanneret, 541 F. Supp. at 86 n.21.
59 Id., 693 F.2d at 260.
60 Id. Jeanneret, 541 F. Supp. at 86 n.20.
61 According to the parties, they negotiated the sale in New York and Switzerland, Joint Appendix at 11, 617; Appellants' Brief at 6, or in New York and "Europe," Trial Transcript at 74-77, Appellee's Brief at 5. According to the court of appeals the parties negotiated the sale in New York. Jeanneret, 693 F.2d at 266. The parties and the court agreed that the painting was delivered and paid for in Switzerland. Joint Appendix at 581-82; Appellant's Brief at 6; Jeanneret, 693 F.2d at 266.
62 Jeanneret, 693 F.2d at 260.
63 Id. "Vers" means "towards the latter part of" in French.
64 Id.
66 Jeanneret, 693 F.2d at 260.
67 Id., 693 F.2d at 260. Anna referred her to Dr. Magenta, the representative of the DeAngeli family, and to the officer who handled the painting for the Bank Gut Streiff. Magenta referred her back to Luben Vichey and the other DeAngeli heirs. A letter from Jeanneret to Anna Vichey dated November 21, 1974 reported that Bucarelli was looking for the painting and suspected its illegal exportation. Id. at 260-61.
68 See infra note 80 for testimony as to the negative effect suspicions that the painting was illegally exported from Italy had on its market value in the United States. The court of appeals noted this testimony and the fact that none of the amici curiae were willing to handle the painting. Id. at 266 n.14 and accompanying text.
sulted a Milanese attorney, Professor Vitali. He advised that “however serious the Vicheys position might be with respect to illegal exportation . . ., Mme. Jeanneret would have no responsibility to the Italian government if she had acquired the painting and exported it from the United States to Switzerland in accordance with the laws of those countries.” In January 1975, Luben Vichey wrote Jeanneret rejecting her proposal, and similarly rebuffed all later attempts to rescind the sale.

Jeanneret brought suit in 1977 in the Southern District of New York. She alleged breach of express and implied warranties of title, false and fraudulent misrepresentations, breach of contract, and a claim that defendants “used” her in a scheme of tax evasion. She sought to recover the painting's market value at the time of trial without the alleged defect in title, damages for loss of business and reputation, and punitive damages, for a total of $5,000,000.

At trial, two sets of Italian regulations designed to control the export of art from Italy were placed in evidence. The first was the Royal Decree No. 363. The second was Law No. 1089 of June 1, 1939.

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69 Id. at 261 n.2.
70 Id. at 261.
71 Id. The tax evasion count was dismissed by the district court at the close of plaintiff's evidence. Jeanneret, 693 F.2d at 261 n.3.
72 Uncontroverted expert testimony established this to be $750,000. Jeanneret bought the painting for 700,000 Swiss francs, then equal to $230,000. Jeanneret, 541 F. Supp. at 86, 693 F.2d at 261.
73 Id.
74 Approved Regulations for the Execution of Law No. 363 of June 30, 1909 (Jan. 30, 1913) [hereinafter cited as 1913 Decree]. Article 129 of the 1913 Decree requires anyone desiring to export objects of historical, archeological, paleontological, artistic or numismatic interest to present them to a royal office for the exportation of antiquities and art objects. Those seeking export licenses must file a declaration of the value of the objects to be exported. Royal officials, after examining the objects, may bar their exportation and can exercise a right of compulsory purchase at the declared value. Article 130 provides that “[p]aintings, sculptures, and any object made by living artists or not more than 50 years old . . . must be submitted to Export Offices. . . in order to obtain an export permit.” (Emphasis added.) The penalties for violating these requirements encompass fines, confiscation, or simply temporary detainment depending on whether the offender needed an export license or an export permit. The difference between a license and a permit is unclear.

Article 175 provides that “[w]hen exporting takes place, or is attempted, without the prior submission to customs of the items for which an export license or permit is required,” the Customs Office will detain the items and fine the owner. Article 176 provides that “[t]he Export Office shall determine whether the items are subject to an export license or merely to the permit requirement.” Where the Export Office determines that the items are subject to an export license: the Customs office, deeming the items to be smuggled and basing itself on the information given in the seizure order, shall prepare and order for payment of a fine. . . . If, however, the items are subject only to the permit requirement, then the Export Office, after giving due notice to Customs, shall ask that Office to proceed no further in the matter. The items shall . . . remain in storage . . . until such time as the owner reclaims them, and simultaneously pays all expenses incurred for storage, transport, etc.

75 Law No. 1089 of June 1, 1939 [hereinafter cited as 1939 Law] was enacted by the Mussolini Regime for the “Protection of Items of Artistic or Historical Interest.”
which provides that those who are "notified" by the Ministry of Education that the exportation of their property would be a "tremendous loss to the national heritage" may export such property only by obtaining approval and a license from the Export Office.\textsuperscript{76}

Both parties offered expert testimony concerning whether the provisions of the 1913 Decree that regulate the export of works of art less than fifty years old survived the enactment of the 1939 law, which regulates the export of works more than fifty years old.\textsuperscript{77} If the 1939 Law superseded the 1913 Decree and the painting was less than fifty years old when exported, there would have been no export violation and hence no cause of action. Surprisingly enough, the issue has not yet been settled,\textsuperscript{78} not surprisingly, the parties presented conflicting evidence.\textsuperscript{79}

\textsuperscript{76} Article 1 of the 1939 Law, \textit{supra} note 75, provides that the law protects "things of both real and personal property that are of artistic, historical, archeological or ethnographical interest," but it expressly excludes "works by living authors or which are not more than fifty years old." (Emphasis added.) Article 3 establishes a process of notification whereby the "Minister of Education shall give formal administrative notice to private proprietors, owners, or holders on any basis whatsoever of the things indicated in Art. 1 which are of particular interest." The Ministry maintains lists of notified items. Article 35 provides that "[i]t is exporting from Italy of the things indicated in Article 1 is prohibited when these items are of such interest that their export represents a tremendous loss to the national heritage protected by this law." To prevent such a loss, Article 36 requires that anyone intending to export from Italy items specified in Article 1 must first obtain a license, and indicate to the Export Office the items to be exported and their market value. Article 39 gives the state the right, for two months after the declaration, to purchase "those things which are of major interest for the national heritage protected by this law." The state's right of preemption tends to increase the object's declared value, while the progressive tax on items exported outside the European Common Market tends to decrease that value. \textit{Merryman and Elsen, supra} note 12, at 2-83.

The 1939 Law also prescribes penalties. Article 61 provides that any "transfer, agreement or other legal act carried out against the prohibitions set forth in this law or without complying with the terms and procedures specified therein is null and void." Article 66 states that the export or attempted export of objects covered by the law is punishable by a fine of 200,000 to 15,000,000 lire when the item is not presented to Customs or presented so as to evade the license or duty: "confiscation is to be carried out in accordance with the Customs rules and laws pertaining to smuggled goods." It is not clear from the face of the statute when the government may fine the violator and when it may confiscate the protected item. Article 66 also provides that "when it is not possible to recover the things," Article 64 applies. This states that if the item can no longer be traced or has been exported from Italy, the violator is, and multiply violators jointly are, liable to the State for the value of the item.\textsuperscript{77}

\textsuperscript{77} \textit{Jeanneret}, 693 F.2d at 262.

\textsuperscript{78} Article 73, the "Transitory Provisions" of the 1939 Law, \textit{supra} note 75, provides that "[t]he provisions of the regulations approved under Royal Decree No. 363(3) of January 30, 1913, shall remain in force, insofar as they are applicable, until such time as the regulations to be issued in execution of this law takes effect." Footnote 3 of Article 73 states that "[t]he regulations for execution have not been issued." Thus, the 1913 Decree, \textit{supra} note 74, appears still to be in effect. Even so, Article 73 could mean that the 1939 Law left in force only those provisions of the 1913 Decree dealing with works that were more than fifty years old and thus within the scope of Article 1 of the 1939 Law. Or, it could mean that the provisions of the 1913 Decree concerning works less than fifty years old, that are not covered by the 1939 Law, remain in effect.\textsuperscript{79}

\textsuperscript{79} \textit{Jeanneret}, 693 F.2d at 263:
Jeanneret also introduced other evidence, the most important of which was the testimony of three experts testifying as to the negative effect illegal exportation had on the painting’s marketability, and hence on its market value. In addition, on March 28, 1979, the Assistant Minister of Culture had issued a notification to Mrs. Vichey, “the present owner, possessor, or holder of this painting,” in care of Dr. Magenta in Milan. Thus, pursuant to Article 3 of the 1939 Law, the Ministry declared the painting to be “an important work by the French painter, Henri Matisse, datable between 1920 and 1923,” of “particular artistic and historical interest” and “therefore subject to all the regulations regarding custody included therein.”

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Five treatises by Italian lawyers and one by Professor Merryman of the Stanford Law School took the view that, as stated by him, 'a work no more than fifty years old is freely exportable.' Art Law, Domestic and International 260 (DuBoff ed. 1975). Two Italian lawyers submitted affidavits to the same effect. To the contrary opinion that works by living artists or less than fifty years old at the time of export continued to be subject to the 1913 regulations, were two earlier Italian treatises, an affidavit by an Italian lawyer, the live testimony of another, and, at least inferentially, the live testimony of Dr. Carlo Bertelli, Superintendent in the Ministry of Cultural Heritage and Director of the Brera Gallery in Milan. The only relevant judicial decision cited, Corte cass., No. 3325, Aug. 5, 1957, 1958 Fori It. I 1940, gives a featherweight of support to the latter view.

John Tancock, a vice-president of Sotheby Parke Bernet auction house and head of its Department of Impressionist and Modern Painting and Sculpture, testified that, but for the question of illegal exportation, he would appraise the painting at $750,000. On the other hand, if the painting lacked 'the necessary export documents from any country where it had been located,' his opinion was that it would be impossible to sell the painting since '[n]o reputable auction house or dealer would be prepared to handle it.' Hence 'on the legitimate market its value is zero.' He would date the painting 'early 1920's, 1919, 1922, something like that.' Nancy Schwartz, an art dealer associated with the Spencer Samuels & Company gallery in New York, testified that the gallery having received a number of requests for paintings by Matisse, she communicated with Mme. Jeanneret as to sending the painting to New York. Before any arrangements could be made, Ms. Schwartz wrote Mme. Jeanneret on May 1, 1975 that she would not be able to sell the painting as plaintiff had proposed to her in Geneva in February; 'I had a client who was ready to buy it, but as you said that the painting left Italy clandestinely I realized that this would be impossible.' In the latter he confirmed a telephone conversation announcing his refusal to consider handling the painting or advising one of his best clients to buy it 'from the moment that I learned that the painting had been clandestinely exported from Italy by its former owner, Mme. Vichey-Frua DeAngeli and that it could thus be subject to suit.'

Compare the testimony of art dealer Klaus Perls who purchased a Marc Chagall painting removed by the Germans during World War II as degenerate art in Menzel v. List, 49 Misc. 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), modified as to damages, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), rev'd as to modifications, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). "Mr. Perls testified that to question a reputable dealer as to his title would be an 'insult.'" Id. at —, 246 N.E.2d at —, 298 N.Y.S.2d at 983-84. He also testified that among reputable galleries "the offer of sale of any painting is in and of itself, in the custom and trade as between galleries, warranty of title. Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title." 49 Misc. 2d 300, 303, 267 N.Y.S.2d 804, 808.

80 Id.: Compare the testimony of art dealer Klaus Perls who purchased a Marc Chagall painting removed by the Germans during World War II as degenerate art in Menzel v. List, 49 Misc. 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), modified as to damages, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), rev'd as to modifications, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). "Mr. Perls testified that to question a reputable dealer as to his title would be an 'insult.'" Id. at —, 246 N.E.2d at —, 298 N.Y.S.2d at 983-84. He also testified that among reputable galleries "the offer of sale of any painting is in and of itself, in the custom and trade as between galleries, warranty of title. Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title." 49 Misc. 2d 300, 303, 267 N.Y.S.2d 804, 808.

81 Jeanneret, 693 F.2d at 264. See supra note 67.

82 Id. at 263. The illegal export of a painting by a French painter which was, at most, slightly
Dr. Bertelli, superintendent in the Ministry of Cultural Heritage and
director of the Brera Gallery in Milan,\(^8\) testified that Jeanneret’s Italian
lawyer, Professor Vitali, had inquired whether export documents had
been issued for the painting after 1969.\(^8\) Bertelli, however, had no evi-
dence that such documents had been issued; he issued the notification
after a telephone conversation with Vitali.\(^5\) Bertelli also testified that on
September 17, 1981, the Italian Attorney General

had shown him a memorandum indicating that a penal proceeding had
been instituted against Anna Frua DeAngeli, that Interpol had been re-
quested to recover the painting, and that the Chief of the Italian Delegation
for Retrieving Works of Art had been asked to present the request of the
Italian Government to the United States authorities.\(^6\)

For the defense, Mrs. Vichey claimed to be ignorant about the paint-
ing’s exportation.\(^7\) Luben Vichey testified that he had first seen the Portrait
at the Bank Gut Streiff in Zurich, and that neither he, his wife, nor one or more of her brothers knew it was to be exported from Italy.\(^8\) He
also testified that Dr. Magenta had arranged export documents for the
paintings taken to Switzerland.\(^9\)

The defense also failed to conclusively establish the date of the

over 50 years old when exported is probably not the kind of “tremendous loss to the national heri-
tage” which the 1939 Law, supra note 75, was designed to prevent. The painting was in Italy from
1951 to 1970 and thus hung on the DeAngelis’ walls for 19 years, along with the rest of their
extensive and well-recognized collection, while the Italian Government neglected to notify the family
that the painting was of “particular interest.” Given the genuine indignation and concern the Italian
Government displayed during the incident of the “Boston Raphael,” see supra note 12, when diplo-
matic pressure resulted in the return of that disputed painting to Italy, one must conclude that the
Ministry of Culture lacked good reasons to consider the Matisse to be the kind of work subject to
notification.

The court of appeals noted dryly that:

[i]t the somewhat surprising conclusion that exportation of a painting by a prolific French
post-impressionist master would represent “a tremendous loss to the national heritage” of Italy
was sought to be justified on the grounds that it had been shown at the Venice Biennale in 1952
“in the large exposition dedicated to art” and “because it is part of the era of ‘a return to
normalcy’ which pervaded all Europe at the end of the first world war, characterized by a
return to classic and Renaissance motifs particularly evident in this balanced, well composed
painting by a master of contemporary art and especially rare among Italian collections of signifi-
cant works of that period.” One is tempted to wonder why if Italian collectors do not care
enough for Matisse to buy his paintings, one of these, not claimed to be an outstanding master-
piece, should be thought to constitute such an important part of the Italian national heritage.

\(^{83}\) See supra note 79.
\(^{84}\) Jeanneret, 693 F.2d at 263.
\(^{85}\) Dr. Bertelli did not testify to this fact; counsel stipulated to it. Joint Appendix, at 748-49;
Appellant’s Brief, at 10, 693 F.2d 259 (2d Cir. 1982).
\(^{86}\) Jeanneret, 693 F.2d at 264. The court of appeals indicated that this evidence may have
prejudiced the jury’s verdict in the Vicheys’ favor. Id. at 265.
\(^{87}\) Id. at 264.
\(^{88}\) Id. at 264.
\(^{89}\) Id.
painting. The Vicheys' sole expert witness did not think it "impossible" that the painting had been executed in 1920, but thought it more likely to have been done in 1921 at the earliest, 1928 at the latest. Of crucial importance, then, was the Vicheys' failure to submit evidence that would have established conclusively the painting's date of execution so as to establish that they did not violate the 1939 Law.

During pretrial discovery, however, the Vicheys' counsel learned that "Mme. Jeanneret had received a letter dated July 10, 1977, . . . from Matisse's daughter, Mme. Marguerite Duthuit, whom Mme. Jeanneret had characterized as a great authority on Matisse's work." This letter expressly states that the painting had been executed "during the 1922-23 season." Mme. Duthuit offered to testify on Jeanneret's behalf. It is obvious why Jeanneret did not accept: If the painting were less than fifty years old when exported in 1970, then Jeanneret's suit would depend on the continued efficacy of the 1913 Decree and the force of its sanctions. Neither proposition could have seemed very promising to her. Yet the Vicheys' counsel inexplicably failed either to depose Mme. Duthuit or to question Jeanneret about the letter at trial. Insofar as Jeanneret could have used the letter to convince the Italian authorities that no notification was necessary and that no expert violation had occurred, her "good faith" is questionable. By not revealing unfavorable

90 Id. The witness was Kenneth Silver, associate professor of art history at Columbia University in New York City. The defense also failed to show that the painting was included in the catalogue for a show held in 1922-23 at the Gallery of Bernheim Jaune, Matisse's Paris dealer. The catalogue was insufficiently authenticated to be admitted under Federal Rules of Evidence 803(16). Id. at 264 n.7.

91 Id. at 264 n.8. This failure to accurately date the painting influenced the court of appeals in its decision to remand the case for such a determination. Id. at 268-69.

92 Id. at 264 n.8.

93 Id. "By this I mean between the month of October, when Matisse arrived in Nice, and the months of April-May following when he left that city before the heat wave common in that region at those times." Id.

94 Id.

95 The court of appeals doubted that the 1913 decree still applied to paintings less than fifty years old, and stated that a violation of that law alone would not breach the warranty of title. Id. at 268-69.

96 "Defendants' counsel did request plaintiff to admit the authenticity of the letter but plaintiff never responded, and the matter was left at that." Id. at 264 n.8.

It is ironical that defendants' counsel should have staked their effort to establish the date of the painting on the opinion testimony of an expert which, in the absence of a date on or datable objects in the painting, could only be approximate, [and which was bound to be contradicted by plaintiff's experts] when they were aware of a document which, if adduced in evidence and uncontradicted, would have established that Matisse painted this work during the season of 1922-23.

Id.

97 Section 1-203 of the "General Provisions" of the U.C.C., entitled "Obligation of Good Faith," states that "[e]very contract or duty within this Act imposes an obligation of good faith in its per-

288
Jeanneret v. Vichey

Evidence of the painting's age and perhaps inducing Dr. Bertelli to notify the painting when he might not otherwise have done so, Jeanneret may have tried to earn by adjudication what she could not earn by the sale of an over-priced painting on which the interest payments were mounting.99

II. THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY

At trial, Jeanneret argued that the painting could have been notified under either the 1913 Decree or the 1939 Law, that it was subject to possible forced sale to the Italian Government,100 and that the 1939 Law protected the works of deceased authors regardless of the age of the work itself.101 The Vicheys countered that the 1939 Law superseded the 1913 Decree's permit requirement, and that even if the 1913 Decree were still effective, a violation of its terms would be of no consequence to Jeanneret's title.102 Furthermore, even if one assumed illegal exportation, neither the painting nor its owner would be subject to sanctions under either regulation if the owner were a bona fide purchaser.103 No Italian statute requiring confiscation or the imposition of fines could be given extraterritorial effect.104 Despite the Vicheys' assertions to the contrary, the district court determined that the parties had agreed that if the painting was more than fifty years old when exported from Italy, then the 1939 Law would apply and the failure to obtain an export license would subject the painting to confiscation if it were ever returned to Italy.105

formance or enforcement.” U.C.C. § 1-203 (1977). The Official Comment to the section states that the “principle involved is that in commercial transactions good faith is required in the performance of agreements or duties.” Section 2-103(b), the “Definitions” section of Article 2 governing “Sales,” states that “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” U.C.C. § 2-103(b) (1977).

Insofar as the U.C.C. uses the concept of good faith between parties as a means of enhancing confidence in and the security of commercial transactions, Jeanneret's attempt to use § 2-312 to rescind an unfavorable contract seems especially cynical. Nevertheless, the Vicheys' counsel failed to take advantage of Mme. Duthuit's letter and so missed a chance immeasurably to strengthen their client's case. It may seem sanctimonious to belabor Jeanneret's bad faith in attempting to engineer a victory under U.C.C. § 2-312 when she was merely trying to compensate for the Vicheys' possible bad faith in breaching U.C.C. § 2-314. In any event, by making the significance of Mme. Duthuit's letter so obvious, the court of appeals made clear to the Vicheys' counsel how to win on remand—thereby depriving Jeanneret of a well-deserved but unplead victory under § 2-314.

98 See text accompanying note 85.

99 Jeanneret incurred interest expenses of $184,000 for the period June 1973 to September 1981.

Jeanneret, 541 F. Supp. at 86 n.20.

100 Id. at 84 n.10.

101 Id. at 85 n.16.

102 Id. at 84.

103 Id.

104 Id. at 84 n.12.

105 Id. at 84.

289
Given the conflicting expert testimony,\textsuperscript{106} it was unclear whether and to what extent the 1939 Law superseded the 1913 Decree. The court was therefore "reluctant to state definitely what would happen if the painting was under fifty years old."\textsuperscript{107} The compatibility of the 1913 Decree with the 1939 Law, however, was not the issue put to the jury because, given that the painting's age could not be precisely determined, it was unclear which set of regulations governed its exportation.\textsuperscript{108} The court therefore charged the jury that there was a legal dispute involving Italian law as to what might happen were the painting ever returned to Italy.\textsuperscript{109} If the jury found the painting to be over fifty years old when exported, its chances of being subject to sanctions upon its return were greatly enhanced. The court instructed: "It is for you to decide whether the legal dispute and the possible consequences thereof constitute a substantial cloud over the title to the Matisse. . . ."\textsuperscript{110}

The jury returned a verdict for the Vicheys on the breach of express warranty and fraudulent misrepresentation causes of action, but returned a verdict of $1,688,000 for Jeanneret on the charges of breach of implied warranty of title and breach of contract.\textsuperscript{111} The court denied the Vicheys' motion for a judgment n.o.v.\textsuperscript{112} but granted their motion for a new trial on the question of damages unless Jeanneret consented to a remittitur to $938,000.\textsuperscript{113} Judgment was entered that subject to Jeannerett's obligation to return the painting and transfer title to the Vicheys, Jeanneret would recover $938,000.\textsuperscript{114}

The district judge wrote that the "jury was asked to decide whether the current controversy surrounding this painting and the claims made by the Italian Government constitute a breach of warranty of good title."\textsuperscript{115} Yet the charge was couched in terms of possibilities and probabilities. Faced with conflicting evidence, the court made little effort to determine precisely what claims the Italian Government could bring against a buyer or importer of an illegally exported work of art. Instead

\textsuperscript{106} See supra note 79 and accompanying text.
\textsuperscript{107} Jeanneret, 541 F. Supp. at 84.
\textsuperscript{108} Id. at 84-85 n.13.
\textsuperscript{109} In such event, the painting might be confiscated, or its owner, even if a bona fide purchaser, might be fined. On the other hand, nothing at all might happen. Id. at 83.
\textsuperscript{110} Id. at 83.
\textsuperscript{111} Jeanneret, 693 F.2d at 265.
\textsuperscript{112} A party's motion for judgment notwithstanding the verdict is governed by Fed. R. Civ. P. 50.
\textsuperscript{113} Jeanneret, 693 F.2d at 265. That sum represented the current value of the painting with a clean title, $750,000, plus $184,000 of interest incurred by Jeanneret, and $4,000 for lost profits. Id. at 265-66 n.10.
\textsuperscript{114} Id. at 265.
\textsuperscript{115} Jeanneret, 541 F. Supp. at 84 n.13.
of resolving the controversy about the painting, the court simply explained that "[t]o decide this question the jury had to be appraised of the applicable foreign law but neither the jury nor the court needed to decide what the Italian Government actually can or cannot do."\textsuperscript{116} This unsatisfactory approach flows naturally from the court's understanding of warranty of title. The Vicheys contended that "absent proof of seizure, confiscation, or forfeiture, the implied warranty of title cannot be breached."\textsuperscript{117} The court instead agreed with Jeanneret that the warranty of title is breached when a buyer becomes aware of any claim on title by a third party, whether valid or invalid.\textsuperscript{118}

The court easily could have arrived at a different result had it adopted a different standard of analysis under U.C.C. § 2-312. A buyer of illegally exported art has several possible causes of action under § 2-312.\textsuperscript{119} Section 2-312(1)(a) protects a buyer from a seller who does not pass good title to the work of art sold, as would be the case with stolen art. A transfer must also be rightful, without fraud, deceit or other legal ground for annulment.\textsuperscript{120} If a nation is able to compel the return of a painting from outside its territorial jurisdiction, then title would be conveyed subject to a lien under § 2-312(1)(b). If, however, a nation is able to enforce its sanction only within its borders, then title would be passed subject to an encumbrance, a right or interest in property which diminishes its value but allows title to pass.\textsuperscript{121} For example, a buyer has received an encumbered title if the buyer is denied access to a nation's art market by the threat of government sanctions and can neither exhibit the painting in that nation nor sell to anyone intending to import the painting into that nation. Even if the buyer never brought the painting into that nation and a defendant-seller could prove that no citizen of that

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 82.
\textsuperscript{118} Id. at 82-83. The court cited cases from New York, id. at 82 n.3, and other states as authority for this proposition, id. at 83 n.4. These cases are annotated by the court of appeals, infra note 146, and distinguished in the accompanying text.
\textsuperscript{119} U.C.C. § 2-312, entitled "Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement" provides in pertinent part that:
1) Subject to subsection (2) there is in a contract for sale a warranty by seller that
   a) the title conveyed shall be good, and its transfer rightful; and
   b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the Buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

\textsuperscript{120} U.C.C. § 2-312(1)(a) (1977).
\textsuperscript{121} See Black's Law Dictionary.
nation was ever deterred from buying the painting, the painting's marketability has been impaired. Some buyer, somewhere, some time, for some reason, will desire the painting only on the condition that he or she will be able to use it, if necessary, as a universally marketable asset. If a seller cannot guarantee title the world over the painting's market value will diminish as those potential buyers affected by government sanctions cease to bid against those unaffected buyers who continue to value the painting highly.122

Barring a modification or exclusion of the warranty of title,123 one who unwittingly buys a painting that cannot be sold the world over should be able to invoke § 2-312. According to its official comments, § 2-312 provides

. . . for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good clean title transferred to him also in rightful manner so that he will not be exposed to a lawsuit in order to protect it.124

Unfortunately, this language leaves unresolved the question of whether a seller warrants against third party lawsuits that prove to be invalid.125 The weight of authority accords with the statement of the New Jersey Superior Court in American Container Corp. v. Hanley Trucking Corp. 126 that “[t]he mere casting of a substantial shadow over [buyer's] title, regardless of the ultimate outcome, is sufficient to violate a warranty of good title.”127 Yet this language, relied on by the Jeanneret district court in its charge to the jury,128 simply raises the question of what constitutes a “substantial shadow” on title. The court in Hanley clarified “substantial shadow” somewhat by citing Williston for the proposition that “a buyer who gives notice to his seller may be protected even when he surrenders the chattel without much struggle against a weak adverse claim. . .”129

Other courts have, however, taken a different view of the warranty of title. In the same year that Hanley was decided, the Georgia Court of

122 The desire to preserve a painting's marketability is the rationale underlying the usage of trade requiring the seller to document provenance. See supra notes 1-6 and accompanying text.
123 U.C.C. § 2-312(2) allows parties to a sale to modify or exclude the warranty of title provided by § 2-312(1)(a) and (b) “only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.” U.C.C. § 2-312(2) (1977).
127 Id.
128 Jeanneret, 541 F. Supp. at 82, 83 & n.6.
Appeals held that a third party's invalid attachment of property in the buyer's possession was not a breach of § 2-312. Similarly, in 1979 the Missouri Court of Appeals held that "because the law is not clear . . . as to whether the warranty of title should secure a buyer against unjustified claims," the court would follow the common law rule and "choose not to construe the warranty of title as protecting a buyer of personalty from unwarranted title interference."131

White and Summers prefer the Hanley rule, that "the mere casting of a substantial shadow over title, regardless of the outcome, is sufficient to violate a warranty of good title."132 In the absence of a sale "as is" or any disclaimer or modification of the warranty, a buyer does not expect to have to defend title. Yet White and Summers admit that "there is some point at which the third party's claim against the goods becomes so attenuated that we should not regard it as an interference against which the seller has warranted. The problem lies in defining that point."133

White and Summers propose two solutions. A court might hold a seller liable for expenses a buyer incurs in a successful defense against an inferior claim, where the seller knew or had reason to know that such a claim was likely to be asserted.134 Or, a court might adopt the Supreme Court of Louisiana's reasoning in Kay v. Carter:

[Not all seeming defects render a title unmerchantable, especially those based on objections which are obviously groundless; it is when there are outstanding rights in third persons not party to the action who might thereafter make claims of a substantial nature against the property, and hence subject the vendee to serious litigation, that the title is deemed not merchantable.135

This "serious litigation" standard, however, begs the question of defining "serious" as much as the "substantial shadow" standard begs the definition of "substantial." White and Summers agree that although the seri-

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133 White & Summers, supra note 125, at 362.
134 This is the approach adopted by U.C.C. §§ 2-606(3)(b) and 2-607(5), which codify the common law rule allowing a buyer whose title is challenged to offer the litigation to the seller and hold him liable if seller loses or fails to defend. White & Summers, supra note 125, at 364. Thus, if Mme. Jeanneret were interested in fighting the Italian Government instead of collaborating with it, she could hold the Vicheys liable for the cost of defending her title to the painting or for the cost of the painting itself should she or any buyer through her return to Italy and have it seized by the government. To hold the Vicheys liable for the loss she would need to prove that they knew or should have known that the lack of proper documentation could result in notification. That the Vicheys had prior business dealings with Jeanneret and knew she intended to resell the painting would work in Jeanneret's favor.
ous litigation standard “is vague, it at least makes clear that frivolous claims should not give rise to warranty of title liability. . . .”136

The search for a consistent standard of application for § 2-312 thus uncovers inconsistent application and theoretical disagreement. Although a buyer is protected against serious, but not frivolous, claims, the point at which a claim against a buyer’s title constitutes a “substantial cloud” on title remains undefined.

Based on the evidence that the Italian government had notified the painting and was claiming it back, that the Italian government had begun criminal proceedings against Anna Vichey,137 and that the painting was probably between forty-seven and fifty-two years old when exported,138 the district court held that the jury could have found that the Italian government had a legitimate claim to title and, as a result, Jeanneret had a valid action under § 2-312.139 Yet, under the majority rule the court cited, a seller’s liability under § 2-312 turns not merely upon buyer’s receiving notice of an adverse claim, but upon the colorability of that claim.140 According to the court of appeals, the district judge refused “defendants’ requests to instruct the jury in detail on Italian law, partly [because] he was ‘unable to determine what the Italian law is,’ and partly because [he thought] the precise state of Italian law was ‘almost irrelevant’ since plaintiff didn’t buy litigation.” The district court’s decision, therefore, was flawed in that it failed to determine whether the Italian government cast a substantial shadow over title to the painting. The court, in effect, used a per se rule.

Writing for the New York Court of Appeals, Judge Cardozo, in Norwegian Evangelical Free Church v. Milhause,142 suggested a discretionary standard which will not require holding a seller liable when the defect in title is only a “remote and improbable contingency,” or when the doubt is too insubstantial to endanger buyer’s title.143 This test embodies the de minimus requirements of the “serious litigation” test and is more sensible

136 WHITE & SUMMERS, supra note 125, at 363-64.
137 Jeanneret, 541 F. Supp. at 83 n.5.
138 Id. at 85.
139 Id. at 83.
140 See supra text accompanying notes 124-28, 131-35.
141 Jeanneret, 693 F.2d at 265.
142 252 N.Y. 186, 169 N.E. 134 (1929).
143 Id. at —, 169 N.E. at 135 (1929):

The law assures to buyer a title free from reasonable doubt, but not from every doubt. It the only defect in the title is a very remote and improbably contingency . . . a slender possibility only, conveyance will be decreed. . . . There is in all such controversies a penumbra where rigid formulas must fail. No test more definite can then be found than the discretion of the court to be carefully and guardedly exercised in furtherance of justice. In the exercise of that discretion, we declare this title marketable; the doubt too unsubstantial to place the purchaser in peril.
and fair than the district court's *per se* rule. If Cardozo's test is used as the standard of analysis, the question in *Jeanneret* then becomes whether the sanctions available to the Italian government were too insubstantial to endanger Jeanneret's title. Unfortunately, the court of appeals also failed to analyze this question satisfactorily.

### III. THE COURT OF APPEALS OPINION: NO CLOUD ON TITLE BUT AN UNMARKETABLE PAINTING.

On appeal, the Second Circuit determined that the Vicheys would not have breached the warranty of title even had they exported the painting illegally: Anna Vichey took the painting by rightful succession and sold her 100% interest to Jeanneret. Because the illegal exportation did not void the sale from Vichey to Jeanneret, Jeanneret did not have "a true claim of lack of title." The court of appeals criticized the district court's reliance on cases holding that the warranty is breached upon buyer's notice of an adverse claim and on cases "holding that buyer can recover by showing 'the mere casting of a substantial shadow over his title, regardless of the ultimate outcome,'" because these cases dealt with "what would be deemed defects in title or with liens or encum-

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144 See supra notes 54, 59.

145 Article 61 of the 1939 Law, supra note 75, provides that transfers, agreements and acts which violate the law are null and void. No transfer, agreement or act had occurred, however, as a result of the exportation to Switzerland, because the DeAngeli heirs were exporting to themselves. The court of appeals stated that "the rights of the Italian Government were neither a 'security interest' nor, in the ordinary meaning of language, an 'other lien or encumbrance.' *Jeanneret*, 693 F.2d at 266.

146 The court stated that "[n]one of the cases from New York or other states cited by the district court deals with a situation such is presented here." *Id.* at 266-67. The court of appeals distinguished these cases in the following manner:


148 *Jeanneret*, 693 F.2d at 267.
brances in the ordinary meaning of those terms.”

But although the court of appeals determined that the “rights of the Italian Government were neither a security interest nor . . . a lien or encumbrance,” as those terms are commonly used, it avoided determining precisely what the government’s rights were.

The court of appeals noted that Italian domestic law and customary international law strengthen the argument that there was no breach of warranty provided by § 2-312(b). Although Article 66 of the 1939 law provides for confiscation, this could occur only in Italy. Furthermore, the court added, Article 64 provides that any penalties imposed for the illegal exportation of a notified item are to be borne by the exporter, not by the purchaser. Finally, the court stated that major art exporting countries adhere to the rule that “illegal export does not itself render the importer (or one who took from him) in any way actionable in a [United States] court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.” The court concluded: “It is thus reasonably plain that so long as Mme. Jeanneret or any purchaser from her did not bring the painting back into Italy, it could not be confiscated and neither she nor a purchaser from her would be subject to monetary liability to Italy.”

Nor would the United States return the painting to Italy, because the United States will return art works only when a nation’s cultural patrimony is in danger of pillage and the illegal exportation of Jeanneret’s Matisse was hardly the kind of tremendous loss to Italy’s heritage that its export laws were designed to protect.

Notwithstanding the court of appeals’ assumption that the painting could not be confiscated so long as it remained outside Italy, Jeanneret and three art dealers had testified that “the painting could not be sold to any reputable art dealer or auction house.” Nor were any of the amici curiae, including three major auction houses and the Art Dealers Associ-
ation of America, willing to sell the painting. Given the reluctance of reputable dealers to handle the painting and the U.C.C.'s goal permitting expansion of commercial practices through usage, the court found it "hard to reject the commonsensical view of the district judge that an art dealer who has bought a painting which, according to the usage of her trade, she cannot sell through ordinary channels is under a heavy cloud, indeed."

Thus the court of appeals held that Jeanneret's title was not clouded under § 2-312, but observed nevertheless that she had bought a painting she could not sell. Having gropped toward—but not grasped—the relevance of the warranty of merchantability supplied by § 2-314, the court was in a quandary as to how Jeanneret could have suffered a loss without the Vicheys appearing to be guilty. After expressing its reluctance "to decide so serious a question, of particular importance to New York where so many of the country's art transactions take place, on such an unsatisfactory record and without even the slightest clue from the New York courts," the court of appeals concluded that the Vicheys deserved a new trial.

The court of appeals held that the trial judge's jury instructions were faulty in several respects. First, the trial judge erred in charging that the "owner, even if he purchased the painting in good faith, could be required to pay customs duties and/or fines." The court of appeals saw "nothing in the Italian law that imposes any such liability on a purchaser as distinguished from the exporter." Second, "the charge failed to focus the jury's attention adequately on the age of the painting at the time of export." The trial judge had charged only that if the painting was

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159 Id. at 268. U.C.C. § 1-102(1) provides that the "Act shall be liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(2)(b) provides that one of the Code's underlying purposes is "to permit the continued expansion of commercial practices through customs, usage and agreement of the parties."
160 Jeanneret, 693 F.2d at 268.
161 Id. at 268.
162 Id.
163 Id. The implications of this statement were lost on the court. The court had already observed that a purchaser's title is good outside of Italy. If it meant also to imply that a purchaser's title would be good within Italy, it should have inferred that the painting should be marketable the world over. Hence there is no breach of U.C.C. § 2-312. But if the painting was nevertheless unmarketable, the court—or someone—should have discerned some other source of injury, such as breach of the warranty of merchantability. On the other hand, if the painting should be marketable worldwide in theory, then the warranty of merchantability among art dealers based on the documentation of provenance must be a legal non sequitur, as this Note concludes.
164 Id.
165 Id.
166 Jeanneret, 541 F. Supp. at 83.
more than fifty years old when exported, it was more likely to be subject to sanctions.\textsuperscript{167} The jury then could have found that the painting was less than fifty years old when exported and hence subject to the 1913 Decree. But even if the Decree were still in effect, which the court of appeals doubted, neither a violation nor a possible violation of that law alone would breach the warranty supplied by § 2-312 (1)(b).\textsuperscript{168} Although an actual violation of the 1939 Law would breach § 2-312, a claim of a possible violation alone would not.\textsuperscript{169} By considering the substantiality of the cloud on title, then, the court of appeals adopted a different standard of liability under § 2-312 than the district court. It was correct in doing so.

The court of appeals therefore concluded that because neither a violation of the 1913 Decree nor a possible violation of the 1939 Law cast a sufficient cloud on Jeaneret's title, she had to show that the Vicheys had actually violated the 1939 Law by proving that the painting had been executed before the spring or early summer of 1920.\textsuperscript{170} Although "[t]he weight of the evidence pointed to a later date,"\textsuperscript{171} the court ordered a new trial at which more definitive evidence of the date, such as Mme. Duthuit's dispositive letter,\textsuperscript{172} could be provided—"unless, of course, the

\textsuperscript{167} \textit{Jeaneret}, 693 F.2d at 268-69:

\[ \text{Violation of that law alone would not constitute a sufficient cloud to breach the warranty imposed by U.C.C. § 2-312(1)(b), nor could plaintiff bring herself within that section merely by showing there was enough uncertainty about the painting's age that an export violation under the 1939 law should be treated as colorable. Even if we should ultimately agree with plaintiff that actual violation of the 1939 law would create an encumbrance sufficient to invoke § 2-312(1)(b), we would refuse, in the absence of guidance from the New York courts or a body of authority from courts of other states, to take the further step of holding that a claim of possible violation would suffice.} \]

\textsuperscript{168} \textit{Id}.

\textsuperscript{169} \textit{Id}., at 269. According to Mme. Duthuit, the painting was executed between October 1922 and May 1923. \textit{See supra} note 93. The painting left Italy no later than July 24, 1970 and perhaps as early as that spring. \textit{See supra} note 55. To violate the 1939 Law, \textit{supra} note 75, the painting had to be more than fifty years old when it left Italy.

\textsuperscript{170} \textit{Jeaneret}, 693 F.2d at 269. The receipt that Jeaneret gave Luben Vichey dated the painting at 1924, at his instruction. Her initial file card and her exhibition catalogue bore that date, as did a revised card on which the final four was later changed to zero. This card also bore dates of 1922 and 1923 followed by question marks. The sole evidence for a date of 1920 was the testimony of Tancock and Silver who allowed that the painting might have been executed in 1920. This testimony barely sufficed to overcome defendants' contention that judgment n.o.v. should be granted when there is a complete absence of evidence to support a verdict for the non-movant, or where the evidence so strongly favors the movant that the motion cannot reasonably be denied.

\textsuperscript{171} \textit{See supra} notes 91-99 and accompanying text.

\textsuperscript{172} \textit{Jeaneret}, 693 F.2d at 269. By saying this the court demonstrated a fundamental misunderstanding of the suit. Jeaneret sued the Vicheys because she could not document the painting's approved exportation to potential buyers. The painting was thus unmarketable two years before the Italian government notified it. The painting would be unmarketable even after Italy withdrew the notification unless Italy also issued the missing export permit or license which caused the painting to be unmarketable in the first place.
Italian Government should see fit to withdraw its notification or the parties adjust their differences.173

IV. VALIDITY OF JEANNERET'S TITLE UNDER NO CLOUD

The preceding sections have discussed the different approaches to the warranty of the title taken by the trial and appellate courts. The former held that notice of any adverse claim, regardless of substantiality, would breach § 2-312.174 The latter reversed and held that only a substantial cloud could sustain a breach.175 Still, the court of appeals was left with a dilemma. While it acknowledged that the Vicheys had passed good title, it also observed that Jeanneret could not sell the painting.176 Section 2-312, therefore, would not be breached unless the painting was more than fifty years old when exported.177 The court of appeals accordingly remanded the case for a factual determination of the painting's age, which could only favor the Vicheys.178 This is an unjust result given that the Vicheys had sold Jeanneret, a commercial dealer, a painting she could not resell.

The following sections will argue that principles of conflicts of law, as well as Italian, Swiss and United States law, protect a bona fide purchaser's title to illegally exported art inside and outside the borders of the exporting country. The warranty of title not being breached, Jeanneret's painting should be marketable the world over.

The Vicheys, however, failed to provide Jeanneret with documentation of the painting's legal and approved export according to the usage of the art trade.179 This rendered the painting unmarketable, giving Jeanneret and all similar buyers a cause for breach of the warranty of merchantability under U.C.C. § 2-314. But it is not in the United States' interest to allow a seller's failure to comply with overly restrictive foreign export regulations to impair the marketability of art works validly imported into the United States.180 In the case of illegally exported art, the usage that a work's provenance be documented for it to pass without objection on the legitimate market should be discontinued. An illegally exported work of art should be marketable the world over by a bona fide

173 See supra note 118 and accompanying text.
174 See supra notes 166-67 and accompanying text.
175 See supra notes 143, 159 and accompanying text.
176 See supra notes 167-69 and accompanying text.
177 Mme. Duthuit's letter would almost certainly establish that the painting was less than fifty years old when exported. See supra text accompanying notes 91-95.
178 See supra text accompanying note 56.
179 See infra text accompanying notes 242-61.
180 See infra text accompanying notes 180-95.
purchaser. The usage that the provenance of works imported into the United States be documented is not only legally superfluous, but plays into the hands of foreign governments that might wish to stem further exportation by impairing the marketability of works already outside their borders.

A. **Title Validly Acquired Under the Lex Situs of the Cultural Property at the Time of Transfer Is Good the World Over**

The act of state doctrine essentially provides that "the courts of one country will not judge the acts of the government of another done within its own territory." The corollary of this doctrine is that a court of nation A will not enforce nation B's laws where: (1) nation B has not fully executed the act it wants nation A to enforce; or where (2) the act is inconsistent with the laws and policy of nation A. Examples of the first principle are situations where nation A decrees a penalty or confiscation and the object of the sanction thereafter arrives in nation B, the forum state, as yet unpenalized. Barring an agreement to the contrary between the two nations, such as an extradition treaty, nation B will not enforce nation A's decree or law. The courts of one nation do not sit...
to collect taxes or inflict punishment for the courts of another.\textsuperscript{185} Only when title to the object has vested in or reverted to nation A before nation A seeks to enforce its decree will the courts of the forum state respect the act of vestment or reversion as a non-reviewable prerogative of sovereignty.\textsuperscript{186}

As to the second principle, when a decree is intended to have extraterritorial effects to reach property located outside the borders of the confiscating state, "the recognition of such an effect depends upon the \textit{lex situs} of the property at the time of the decree."\textsuperscript{187} The courts of the forum state retain the discretion to deny extraterritorial effect to a foreign decree or law where it is inconsistent with the policy or law of the forum.\textsuperscript{188}

Another conflict of laws principle is that the \textit{lex situs} of the cultural property at the time of transfer determines whether an innocent purchaser has acquired a valid title from the transferor.\textsuperscript{189} This rule enhances the security of transactions. For example, if a Swiss art dealer buys in Switzerland a painting brought from Italy, the dealer should be entitled to operate under the benefit of Swiss law, with which he or she presumably is familiar. The dealer should not have to investigate the seller's title or the complexities of law outside the jurisdiction of the property's situs. Thus, if a thief, A, takes a work of art owned by B from nation X to nation Y and there sells it to innocent purchaser, C, B will be divested of his title if the sale was valid according to the \textit{lex situs}, the law of Y. Moreover, C's title will be good the world over.\textsuperscript{190}

Applying these principles to \textit{Jeanneret}, it should have been a question of fact whether Swiss or New York law, as the \textit{lex situs} of the paint-
ing at the time of its transfer, determined whether Italian export sanctions would be given extraterritorial effect. A United States court would most likely adhere to the principle that one nation’s courts do not enforce another nation’s penalties. Congress’ policy, as demonstrated by the enabling legislation for the UNESCO Convention, is to give effect to a nation’s art export laws only where the cultural patrimony of the exporting nation is in “jeopardy of pillage.” Given the reservations Congress expressed when it enacted the UNESCO Convention, a United States court would neither consider the Matisse to be a legitimate part of Italy’s cultural patrimony nor consider Italy’s cultural patrimony to be anywhere near the “in jeopardy of pillage” predicament which triggers United States action under the UNESCO Convention. In the case of Jeanneret’s Matisse, therefore, Italian export policy is contrary to United States import policy and would not be enforced.

Even if a Swiss or United States court regarded the Italian notification as an act of state, and thus a non-reviewable determination that the painting was part of Italy’s cultural patrimony, the confiscation would not be enforced because it was unexecuted. Title could not vest in the Italian government, if it could at all, until after the painting was outside Italy’s borders. One might argue that actual seizure was not necessary to vest title in Italy, and that the act of illegal exportation itself was enough to divest the owner. But the 1939 law makes no provision for title to an illegally exported object automatically to vest in the government. Instead, articles 64 and 66 allow the government only to fine the violator when it is no longer possible to seize the object—i.e., when it has been exported or is otherwise beyond recovery. Moreover, while Jean-

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191 See infra notes 251, 253 and accompanying text.
192 See infra text accompanying notes 260-61.
193 Id.
194 The only action Italy took was to issue the notification to the Vicheys’ lawyer; it never instituted any proceedings under the 1939 Law or the 1913 Decree. See supra text accompanying notes 81-86. See infra note 195.
195 See supra note 76.

In 1972, Manukonga, a Maori tribesman, whilst cutting a track through the swamp, discovered an exquisitely carved door of great cultural and pecuniary value. It had been lost for hundreds of years. In 1973, an English art dealer bought the carving from Manukonga for $6,000, exported it from New Zealand without obtaining the required export documents, and sold it to defendant, a Swiss collector of African and Oceanic art for $65,000. In 1977 defendant’s daughter was kidnapped and he placed his collection on auction at Sotheby Parke Bernet in London to raise the money for her ransom. The catalogue that Sotheby’s prepared came to the attention of the New Zealand Government, whose Attorney General issued a writ claiming possession of the doors and pleading for an injunction to prevent the sale. Sotheby’s withheld the carving pending trial or further order.

Two questions were put to the trial judge. First, is a historical article knowingly exported or
neret's appeal was pending, an English court, in a carefully reasoned opinion that clarifies many of these conflict of law principles, rejected the argument that title to illegally exported art vests in the state at the moment of exportation.\textsuperscript{197} The three conflict of laws principles mentioned above thus prevent illegal exportation from divesting the Vicheys of their title.

\textbf{Jeanneret v. Vichey}

\textit{6:275(1984)}

attempted to be exported in breach of the New Zealand Historic Articles Act of 1962 automatically forfeited so that title then passes to Her Majesty in right of the Government of New Zealand, or must seizure first take place before the property vests in the Crown? Second, are the provisions of the Historic Articles Act 1962 and the Customs Acts 1913 and 1966 unenforceable in England as foreign revenue, penal, and/or public laws?

The trial judge held for the Attorney General on the ground that it would be consistent with a purposive reading of the New Zealand statute to provide that forfeiture occurs automatically at the instant of export. This would enhance both the law's direct and deterrent effect. These questions were then put to a three member Appeals panel. As to the first question, Lord Justice Denning noted that since 1786 English common law had recognized the principle that a government does not take title to confiscated property until seizure. Lockyer v. Offley, 1786 T.R. 252 ("Property is not altered till after the seizure, though it may be before condemnation.") Because the Customs Act 1913 expressly embodied this principle, the 1962 Act must be implied to do the same.

Furthermore, to read the Customs Act 1962 as providing for forfeiture on export would give New Zealand law extra-territorial validity, an effect plainly contrary to international law. Lord Denning cited Chief Justice Story to the effect that "[t]he laws of no nations can justly extend beyond its own territories, except so far as regards its own citizens." The Apollon, 9 Wheat, 312, 370 (1824).

Among the precedents discussed are King of Italy v. Marquis Cosimo de Medici Tornaquinci, (1918) TLR 623. The archives belonging to the Marquis de Medici spanned 700 years and consisted of both official communications belonging to the Italian Government and family papers belonging to the Marquis. In 1909, the Italian Government passed a law which provided that the state papers were to be kept in Italy; the private papers could not be exported without a permit and the payment of a duty. The state had the right of preemptive purchase. When the Marquis brought the archives to London for auction at Christie's, the Italian Government sued for an injunction of the sale and the return of the archives. Relief was granted with respect to the state papers but denied as to the private papers. Thus, the Italian Government could enforce the return of what it already owned, but it could not prevent the export of private property by enforcing its laws in foreign courts; the law could apply only so long as the private papers remained in Italy. (One commentator has concluded from King of Italy that "[i]nsofar as privately owned works are concerned, export laws will be accorded a strictly territorial effect, and state claims to them based on protection of the nation's cultural patrimony will not be recognized." Comment, The Protection of Art in Transnational Law, 7 VAND. J. OF TRANSNAT'L L. 689, 716 (1973-74).)

Lord Justice Denning concluded that any law concerning the export of art works providing for forfeiture upon export would be a public law which the courts of the importing nation would not enforce "because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory." Although English courts will thus dismiss unexecuted foreign confiscatory decrees, United States courts may enforce such actions where to do so would be consistent with United States policy. This is unlikely in the case of Jeanneret's Matisse because of Congressional policy and the tenuous relation the painting bears to Italy's cultural heritage. See infra text accompanying notes 82, 156.

B. Italian, Swiss and United States Law Protect Jeanneret's Title

Not surprisingly, "New York's choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer."\footnote{198} The courts in Jeanneret therefore should have determined the *lex situs* of the painting at the time of the challenged transfer. Instead, the court of appeals merely noted that the parties assumed that New York law governed, and uncritically followed that assumption.\footnote{199} But the parties negotiated the oral contract in Switzerland and New York.\footnote{200} The painting was delivered to Jeanneret in Switzerland and paid for there with Swiss currency.\footnote{201} Assuming then that Switzerland was the situs of the painting at the time of its transfer, Swiss law should determine the validity of the exchange. It is clear that Jeanneret took good title under Swiss Civil Code § 933, which protects a bona fide purchaser's title.\footnote{202}

Under the rule that title validly acquired under the laws of one nation will be good the world over,\footnote{203} so long as the importer of an illegally exported work of art purchased that object in good faith, Italy, the nation into which the work is imported, may not affect the importer's title. And in accordance with Italian law, Italian courts would have to look to Swiss law to validate Jeanneret's title. Section 22 of the Italian Civil Code states that "[p]ossession, ownership, and other real rights in movable and immovable things are governed by the law of the [property's situs]."\footnote{204} Section 25 states that where the contracting parties are of different nationalities, and have not expressed a different intention, Italy's choice of law rules provide that contractual obligations are governed by the law of the place where the contract was made.\footnote{205} Therefore, even if an Italian court assumed that the contract was made in New York instead of Swit-
Section 2-403 embodies the Anglo-American principle that a purchaser cannot take good title from a thief. The Vicheys were not thieves. Title was theirs to pass as they desired, subject to the unexecuted right of the Italian government to confiscate the painting. Under the English view, at least, such a confiscation is ineffective until seizure. Under customary international law, such a confiscation is ineffective outside of Italy's territorial jurisdiction. At worst, then, the Vicheys had a voidable title—which vested as a good title in Jeanneret when she bought the painting because the Italian government could not confiscate it from her, a bona fide purchaser.

In addition to recognizing the title of a bona fide purchaser under Swiss law, Italian courts are also bound to respect a bona fide purchaser's title by Italian Civil Code § 1153. One might argue that Article 61 of the 1939 Law nullifies any transfer carried out in violation of its prohibitions and, therefore under § 1153, there was no instrument or transaction capable of transferring ownership by which even a bona fide purchaser could take title. But this argument fails because the 1939 Law does not purport to have extraterritorial effect. Instead, Articles 64 and 66 of the 1939 Law provide only that where it is not possible to recover a notified item and the item has been exported from Italy, the violator is to be fined the value of the item. The 1939 Law defines the territorial limits to Italian jurisdiction. Because the painting can be confiscated, if at all, only within Italy the 1939 Law does not support Jeanneret's claim that title to the painting is clouded the world over. Therefore, even if illegal export voided the contract in Italy, an Italian court should recognize the validity of Jeanneret's title or that of a subsequent bona fide purchaser.

For a discussion of § 2-403 and the concept of voidable title, see R. Duffy, ART LAW: REPRESENTING ARTISTS, DEALERS AND COLLECTORS 45-46 (1977) [hereinafter cited as DUFFY].

206 WHITE & SUMMERS, supra note 125, § 3-11 at 141. See, e.g., Allstate Ins. Co. v. Estes, 345 So.2d 265 (Miss. 1977).

207 See supra note 143 and accompanying text.

208 See supra note 195.

209 See supra note 182 and accompanying text.

210 He to whom movable property is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership. Ownership is acquired free of rights of others in the thing, if they do not appear in the instrument or transaction and the acquirer is in good faith. ITALIAN CIVIL CODE, supra note 202.

211 WILLIAMS, supra note 8, at 102.

212 See supra note 76. The notification was issued to the Vicheys in care of their Italian lawyer, not to Jeanneret. See supra text accompanying note 81.

213 See supra note 200.
under Swiss Civil Code § 933, which protects the title of a bona fide purchaser “even where the transferor himself had no authority to alienate it.”

Finally, Article 66 of the 1939 Law provides that “confiscation [be] carried out in accordance with Customs rules and laws pertaining to smuggled goods.” The decision in Constitutional Court Case No. 229, held unconstitutional that part of an Italian customs law which requires the confiscation of . . . items that served or were intended to be used in committing the customs offense . . . [if] they belong to persons not party to the offense who cannot be charged with lack of vigilance.” The court reasoned that to confiscate goods from those not involved in the offense would make innocent parties suffer for the acts of others. The state may therefore confiscate smuggled goods only from those bona fide purchasers who lack vigilance. That the painting was not notified until six years after Jeanneret bought it implies that she had no notice of the Italian government’s interest. Unless Jeanneret otherwise knew or should have known, in her capacity as an art dealer or from her previous dealings with the Vicheys, that the Portrait lacked the proper government clearance and documentation, she meets the vigilance standard under Italian law.

Similarly, the Court of Cassation Case No. 605 (March 27, 1972) held that because the Italian Civil Code protects the title of a good faith purchaser, it would be inconsistent to uphold that portion of Article 116 which provides without exception for the confiscation of all smuggled goods. “The acquisition in good faith terminates . . . the relationship between the thing and the illegal importation . . . confiscation shall not be ordered, if acquisition [from a third party was in good faith],” The rationale of the civil code should govern. A bona fide purchaser should not suffer the consequences of a wrongdoer’s actions.

Thus, the notification issued by the Italian government does not cast

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214 See supra note 76.
216 Article 116, par. 1, Customs Law No. 1424 of September 25, 1940.
217 Foreign Law Supplement to Appellant’s Brief, at 131, Jeanneret, 693 F.2d 259 (1982).
218 Id. at 133.
219 Any subsequent purchaser through her, however, who had notice of the notification would not meet the vigilance standard, and would probably not be a bona fide purchaser so as to gain the protection of Swiss Civil Code § 933 and Italian Civil Code § 1153.
220 Foreign Law Supplement to Appellant’s Brief at 139, Jeanneret, 693 F.2d 259 (1982).
221 Id. at 140, 143.
222 Id. at 143.
223 See supra note 80.
a substantial shadow over Jeanneret's title to the Matisse. The Italian government cannot confiscate the painting outside of Italy, absent the acquiescence of the nation in which the painting is located, and it is highly unlikely that a foreign nation would assist Italy in doing so. It is also reasonably plain that the painting cannot be confiscated within Italy. Instead, Italian law protects Jeanneret's title. Jeanneret is not deprived of access to the Italian art market, and may be able to exhibit the painting wherever and sell it to whomever she pleases. Accordingly, her suit under § 2-312 should have failed.

V. BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY AND DAMAGES

A. Breach of the Implied Warranty

Jeanneret should not have been without a remedy, however. A cloud on title is not the only actionable defect that can impair the marketability of a work of art. It is a customary practice of the legitimate art trade to sell only objects whose provenance can be documented. Although the Vicheys passed good title, they failed to document the painting's legal and approved export. This rendered the painting unmarketable in the eyes of reputable art dealers.224

This impairment of marketability should render the Vicheys liable

224 Section 2-314, entitled "Implied Warranty: Merchantability; Usage of Trade," provides:

(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
(2) Goods to be merchantable must be at least such as
   (a) pass without objection in the trade under the contract description; and
   (c) are fit for the ordinary purposes for which such goods are used;
(3) Unless excluded or modified (2-316) other implied warranties may arise from course of dealing or usage of trade.

Comment 2 provides that "Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally accepted in that line of trade under the description or other designation of the goods used in the agreement." Comment 3 provides that a person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

Comment 8 provides that although merchantability is also a part of the obligation owing to the purchaser for use . . . protection . . . of the person buying for resale to the ultimate consumer is equally necessary and merchantable goods must therefore be 'honestly' resalable in the ordinary course of business because they are what they purport to be.

For a discussion of the applicability of § 2-314 to art transactions, see DUFFY supra note 204, at 47-51. Provided that a seller can be considered a merchant for the purpose of § 2-314, see infra note 225, Duffy's analysis accords with the analysis herein.
for breaching the warranty of merchantability implied by § 2-314. Subsections 1 and 2 of § 2-314 provide that where the seller is a merchant of a certain type of goods, a contract for the sale of such goods implies a warranty that they will pass without objection in the trade and are fit for the ordinary purposes for which they are used. Comment 2 to § 2-314 provides that the goods must be of a quality generally acceptable in the trade under the contract description. Comment 8 particularly states that to protect those persons buying for resale to the ultimate consumer, merchantable goods must be “honestly resaleable” in the ordinary course of business. It is obvious that Jeanneret, a dealer, bought goods for resale which are not “honestly resaleable” in the ordinary course of her business. The Vicheys knew or should have known from their prior dealings that Jeanneret was buying for resale.

For purposes of § 2-314, the Vicheys should be considered merchants. But Comment 3 provides that even a casual seller’s “knowledge of any defects not apparent on inspection would . . . impose an obligation” to disclose any “known material but hidden defects.” Under this standard, even if the Vicheys are not deemed to be merchants,

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225 See supra note 58.
226 WHITE & SUMMERS, supra note 125, at 345 provides:
§ 2-104(1) defines a merchant as “one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in that transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” Comment 1 assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer.” Comment 2 provides that professional status may be based upon specialized knowledge as to the goods, and business practices involved, and that such specialized knowledge may be sufficient to establish one’s status as a merchant. Comment 3 notes that even universities may be considered merchants, if through their agents, they can be charged with familiarity with the business practices involved. Clearly the “2-104 definition of ‘merchant’ includes a considerably broader class than the man on the street might think.

On the other hand, Duffy states that:

It is clear that a commercial art gallery, art auctioneer or private art dealer would be included within the definition of the term “merchant” and consequently, unless disclaimed, will be deemed to make an implied warranty of merchantability in every sales transaction.

It is equally clear that a collector whose occupation is not related to art, and who sells items from his art collection only occasionally, should not be deemed to make the warranty with any such sale.

DUFFY, supra note 204, at 48.

He reasons that, “[I]nexperienced sellers are excluded from the scope of the warranty because buyers do not, or should not, rely upon such a seller to the same extent that reliance is placed upon the knowledge of a professional dealer.” Id. at 48-49 n.150. However, in Jeanneret, the buyer, a professional dealer, was, if anything, less familiar with Italian export requirements than the seller, a family who had long been importing and exporting art to and from Italy with the assistance of a professional legal advisor, Dr. Magenta. Because sellers had more expertise or familiarity with the export requirements than the buyer in Jeanneret, it seems only fair to impute the responsibilities and liabilities of a merchant to the sellers for the purposes of U.C.C. § 2-104(1) and § 2-314.

227 See supra note 225.
they should be liable if they knew or through their legal or business representative had constructive knowledge that lack of documented export clearance would render the painting unmarketable.\textsuperscript{228} Thus, unless the Vicheys are shown to be casual sellers without the scienter proscribed by Comment 3, § 2-314 gives Jeanneret a remedy under which the Vicheys are strictly liable for the sale of unmerchantable, unmarketable goods.\textsuperscript{229}

Jeanneret’s counsel, however, failed to plead a cause of action under § 2-314. Future plaintiffs should not repeat the mistake of believing that their inability to market a painting lies solely in a defective title, rather than in the art trade’s standards for marketability.

\textbf{B. Damages}

The confusion over the cause of action naturally affected the issue of damages, resulting in a judgment for Jeanneret in the trial court\textsuperscript{230} that was arguably four times greater than the amount she should have received under the U.C.C.

The court of appeals rejected the Vicheys’ argument that the district court improperly instructed the jury on the measure of damages for breach of the warranty of title, and noted that “there is ample New York authority for the assessment of damages at the appreciated value of property at the time of trial.”\textsuperscript{231} Yet the cases it cited merely state that a

\textsuperscript{228} “[T]he 2-314 warranty is a form of strict liability which is applicable even in situations where the seller would be unable to discover the defect in the work of art. If the goods do not conform to the contract, the seller's utmost care will not relieve him of liability.” Note, Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery, 14 WM. & MARY L. REV. 409, 423-24 (1972). \textit{But see supra} text accompanying note 226 for a discussion of liability under Comment 3. Furthermore, “lack of privity should not preclude recovery.” Note, Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery, 14 WM. & MARY L. REV. 409, 426 (1972). “[L]iability under such a warranty . . . is imposed by law and is essentially tortious rather than contractual. It would be immaterial, therefore, whether the defendant is a remote or immediate seller . . . where it is reasonably foreseeable that the breach of warranty of merchantability will cause an economic loss to the ultimate consumer, the remote seller should be held liable for such a loss.” \textit{Id.}

\textsuperscript{229} \textit{See supra} note 113 and accompanying text.

\textsuperscript{230} \textit{Jeanneret}, 693 F.2d at 266 n.11.

\textsuperscript{231} Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), modified as to damages, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), rev'd as to modifications, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969); Itoh v. Kimi Sales, Ltd., 74 Misc. 2d 402, 345 N.Y.S.2d 416 (Civ. Ct. 1973). In Menzel, plaintiff was allowed the appreciated value of the painting at the time of its return to the rightful owner because that was the only way, given the facts of the case, to award plaintiff the benefit of his bargain, his expectation interest. The Menzels had bought a painting by Chagall in Belgium before World War II began. When the Germans invaded in 1940, the Menzels fled, leaving their possessions. When they returned to Belgium in 1946 the painting was gone. In 1955 Klaus Perls, a New York art dealer, purchased the painting from an art dealer in Paris. Perls then sold it to List in New York. Mrs. Menzel noticed a reproduction of the painting in an art book stating that List owned it. She demanded the painting from him. He refused. Menzel sued List in replevin and List impleaded Perls. List returned the painting to Menzel and won a judgment of
buyer's damages for breach of contract should protect his expectation or benefit of the bargain interest, not that this interest must always be measured at the time of trial. The rule affirmed by the Court of Appeals directly contradicts the measure of damages allowed for breach of warranty by § 2-714(2).

Section 2-714(2) provides for the recovery of expectation damages but states expressly that "[t]he measure of damages for breach of warranty is 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 as warranted, unless special circumstances show proximate damages of a different amount." To give Jeanneret the benefit of her bargain under § 2-312 or § 2-314, any award for damages should put her in as good a position as she would have occupied had the contract been kept. Had the painting been legally exported she would have possessed a painting worth at least the 700,000 Swiss francs that she paid in June 1973. If the painting as accepted was rendered worthless by a breach

$22,500 against Perls, the value of the painting at the time of the trial. Perls appealed and the judgment was reduced to $4,000, the price List paid for the painting. List and Perls both appealed again. The New York Court of Appeals cited Williston to the effect that "it is a violation of general principles of contracts to deny [the buyer] . . . such damages as will put him in as good a position as he would have occupied had the contract been kept. 24 N.Y.2d 91, 97, 246 N.E.2d 742, 744, 298 N.Y.S.2d 979, 983 (1969). It then reasoned that:

"List can only be put in the same position he would have occupied if the contract had been kept by the Perls if he recovers the value of the painting at the time when, by the judgment in the main action, he was required to surrender the painting to Mrs. Menzel or pay her the present value of the painting."

Id. Menzel thus stands for the basic proposition that a buyer's damages for breach of contract are measured by his expectation or benefit-of-the-bargain interest and not for a hard and fast rule that a plaintiff's expectation damages must always be measured at the time of trial. Accord, Itoh v. Kimi Sales, Ltd., 74 Misc. 2d 402, 404, 345 N.Y.S.2d 416, 419. See DUFFY, supra note 204, at 35-39.

Comment 3 states that "[s]ubsection (2) describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure."

See supra text accompanying note 59.

Alternatively, Comment 13 to § 2-314 implies that damages should be measured from the time the breach of warranty proximately caused plaintiff's loss. In a suit under § 2-314, the market value of the painting might thus be established as of November 1974. Comment 13 states that:

"In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense."


Immediately after she bought the painting in 1973, Jeanneret offered it for resale. Apparently it was overpriced. She did not learn of the export violation until November, 1974, after she had already rejected at least three offers which averaged 1,000,000 francs. Thereafter it seems that she warned each prospective buyer that the painting lacked the proper export clearance. The Italian
of warranty, Jeanneret should have been awarded at least the equivalent of 700,000 Swiss francs. Given that 700,000 Swiss francs were equivalent to approximately $230,000 in March 1973, the $938,000 awarded by the District Court was four times greater than the amount that Jeanneret should have received.235

VI. CASE LAW AND POLICY CONTEXT

The United States has long encouraged the importation of art into the United States.236 This attitude is reflected by the general rule that it is not illegal to import art into the United States simply because it has been illegally exported elsewhere.237 The growth in the appreciation of art in developed nations has increased in proportion to their citizens' ability and desire to acquire objects of art. As a result, demand has long outstripped the supply of desirable classical, Egyptian, and European works, causing prices of these and other types of art traditionally coveted by Westerners to steadily rise.238 Moreover, new markets have developed for primitive or native works from Oceania and Africa, and the "pre-Columbian" objects of South and Central America.239

The attitude of United States collectors toward the importation of art began to change in the 1970s when the new popularity of pre-Columbian antiquities led to the widespread and well publicized pillage of Mayan archeological sites.240 In an attempt to remedy the situation, Congress enacted an "Act of the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals."241 This law was carefully drafted to deter the despoliation of pre-Columbian sites in Central America by drying up the market in the United States for a limited class of antiquities.242

The United States has recently come under increasing diplomatic pressure from other nations to stem the flow of looted antiquities and stolen art into the United States.243 Nations which are generally poor, Third World, and artifact-rich have charged that the rich, Western, arti-

235 McAlee, supra note 8, at 566.
236 Id.
237 Bator, supra note 8, at 291.
238 McAlee, supra note 8, at 569 n.23.
239 Id. at 569.
241 McAlee, supra note 8, at 574.
242 Bator, supra note 8, at 277-85.
243 Bator, supra note 8, at 303, 277-94.
fact-importing nations are draining them of their cultural patrimony. The response of the importing nations is that the artifact-rich nations lack the means, expertise and interest adequately to excavate, document and preserve such objects, which are often duplicates or specimens of little historical or even aesthetic value. News reports of the illicit acquisition and coerced return of valuable art objects discomfit collectors and dealers at home and pique governments abroad. In short, nationalism and market forces have led art-rich countries to regulate the outflow of their antiquities and archeological materials by erecting export barriers that are often over-inclusive and unenforceable. This creates "a repressive and rigid climate which deters realistic, sensible and effective measures of reform," and stimulates the black market.

Predictably, then, the UNESCO Convention represents a compromise between the competing interests of art-importing and art-exporting nations. Just as predictably, the United States "vigorously resisted" the Convention's initial draft, under which signatory nations would have been "bound to prohibit the importation into their own territory of 'cultural property' exported in violation of the exporting country's standards, no matter what the content of those standards [were]." This draft, in effect, would have given the exporting nations a "blank check" to determine United States policy regarding the importation of art, a consequence the United States found unacceptable. The final draft of the Convention therefore incorporates modifications to meet the United States' objections.

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244 The Egyptian Museum's attempt to raise cash by selling off duplicates and unimportant works was stymied by the nationalistic outcry raised when the plan was publicly announced. Id. at 326 n.93.
245 Id. at 277-85.
246 See Chart of National Treasures Law, DUBOFF, supra note 1, App. 10 at 1008-71.
247 Bator, supra note 8, at 326; see Brief of Amici Curiae filed by the American Association of Dealers in Ancient, Oriental and Primitive Art; United States v. McClain, 545 F.2d 988 (5th Cir. 1977); see also McClain, 545 F.2d at 991 n.1.
248 See supra note 38.
249 McAlee, supra note 8, at 599.
250 Id. at 598 n.139.
251 See infra text accompanying notes 257-62.
252 Article 6(a) provides for a prohibition on imports in the case of property "stolen from a museum or a religious or secular public monument or similar institution," while Article 9 embodies a "crisis provision similar to that proposed by the United States. It provides that "a state whose cultural patrimony is in jeopardy from pillage of archeological or ethnological materials may call upon" other parties to the Convention "to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned." McAlee, supra note 8, at 599.
Although the United States Senate unanimously ratified the Convention in 1972, the Convention required the enactment of enabling legislation to implement its terms. The Convention on Cultural Property Implementation Act\textsuperscript{254} was not enacted until 1982, however, because opponents of the bill, including the American Association of Dealers in Ancient, Oriental and Primitive Art, claimed that the bill was "far more sweeping than anything needed to fulfill the letter and the spirit of the UNESCO Convention."\textsuperscript{255} First, they objected that the term "pillage," if loosely defined, might allow the executive branch to "shut off the importation of antiquities in less than critical situations."\textsuperscript{256} Second, there was "no objective check" on executive discretion,\textsuperscript{257} in that, when evaluating requests for import restrictions, the executive branch might be guided more by concerns unrelated to art, than by the need to preserve and protect art while maximizing its legitimate international exchange.\textsuperscript{258} Third, once the United States banned imports from one country, other nations would demand similar protection. Fourth, although Article 9\textsuperscript{259} calls for action by the United States only in the context of a "concerted international effort," the enabling legislation permits unilateral restrictions which, if imposed, would simply channel illegally exported art to those nations which lack such controls, thereby pointlessly

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\textsuperscript{254} Sections 203-205 and 207 implement article 9 of the Convention. These sections authorize the President, subject to certain conditions and limitations, to enter into bilateral or multilateral agreements or to invoke emergency import regulations to control the importation of archeological or ethnological materials that have been illegally exported from another State Party or are in danger thereof. The exercise of this authority is contingent upon a request from a State Party, the cultural patrimony of which is in jeopardy of pillage. . . .

Section 208 implements article 7 of the Convention. This section simply declares illegal the importation into the United States of cultural property identified as appertaining to the inventory of a museum, a religious or public monument, or a similar institution in a State Party. . . .

Section 206 establishes a Cultural Property Advisory Committee comprised of representatives of the general public, and experts from the academic, museum, and art dealer communities [which] will advise the President concerning the requests of State parties for import controls and the scope and operation of such controls.

Sections 210-211 subject to seizure and forfeiture any articles imported in violation of sections 207 or 208. Pursuant to section 209, however, U.S. museums or similar institutions may retain the articles, subject to certain protections, until their final disposition is determined. Under section 21, certain articles are excluded from any controls authorized by this bill because they are entering this country solely for the purposes of exhibition or because they have been held in this country for a significant period without challenge to the legitimacy of their procurement.

S. REP. No. 564, 97th Cong., 2d Sess. 22 (1982).

\textsuperscript{255} McAlee, supra note 8, at 599.

\textsuperscript{256} Id. at 602 n.163.

\textsuperscript{257} This was the case in 1969 when Mexico stated that it might not enforce its agreement with the United States providing for the reciprocal return of stolen cars unless a similar agreement was arranged for the return of cultural property. Id. at 602 n.165.

\textsuperscript{258} See supra note 251.

\textsuperscript{259} McAlee, supra note 8, at 599-604.
penalizing the United States public.\textsuperscript{260} The Senate report on the implementing legislation acknowledges these fears.\textsuperscript{261} For example, after a request by a victimized nation, the President may enter into agreements to apply the import controls authorized by section 207 only if he follows certain guidelines which:

- ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical value made by other nations. . . . [and] should not be bound by the characterization of other countries. . . . [Yet] these other countries should have the benefit of knowing what minimum showing is required to obtain the full range of U.S. cooperation authorized by this bill.\textsuperscript{262}

The implementing legislation thus seems to balance the need to grant the executive branch the flexibility and discretion it needs to impose bilateral restrictions in narrowly defined circumstances, with the need to deny art-exporting nations the unilateral ability to determine United States art import policy. Unfortunately, while the implementing legislation was delayed in committee, the federal courts handed down a series of decisions which, to the consternation of those who collect and deal art, seemed to give foreign nations the “blank check” which the bill’s critics sought to deny.

In June 1975, the Department of Justice obtained the conviction of five defendants in a criminal case based on a novel application of the National Stolen Property Act.\textsuperscript{263} This statute makes it a crime to buy, sell or transport in interstate commerce goods worth more than $5,000 which one knows to have been stolen, converted or taken by fraud.\textsuperscript{264} The Justice Department charged that the illegal exportation of antiquities from Mexico amounted to “stealing” in that five successive Mexican statutes, the first promulgated in 1897 and, the last in 1972, purported to...

\textsuperscript{261} Id. at 27.
\textsuperscript{262} See supra note 10. One of the defendants, Rodriguez, had taken an assortment of pre-Columbian objects, mostly Mexican, from California to Texas, where he planned to sell them. He searched for potential buyers by looking in the telephone directory for appropriate sounding names. The “Mexican-Cultural Institute” that the defendant unfortunately called was an agency of the Mexican Government, and it promptly alerted the F.B.I.. Rodriguez was arrested when he began to discuss a sale with undercover agents posing as buyers. He and the other defendants were charged with trafficking in stolen goods under the NSPA. United States v. McClain, 545 F.2d 988 (5th Cir. 1977), reh’g denied, 551 F.2d 52 (5th Cir. 1979), aff’d in part, rev’d in part, 593 F.2d 658 (5th Cir. 1979), cert. denied, 444 U.S. 918 (1979).
\textsuperscript{263} 18 U.S.C. § 2314 (1982) prohibits transportation “in interstate or foreign commerce [of] any goods, wares, merchandise, securities or money of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud.” 18 U.S.C. § 2315 (1982) states that “whoever receives, conceals, stores, barters, sells or disposes of [such] goods” may be criminally liable.
\textsuperscript{264} McAlee, supra note 8, at 580.
vest ownership of all pre-Columbian artifacts in the Mexican nation.265

"The reaction was immediate and heated since the theory adopted by the trial court cast a cloud on the title of nearly all pre-Columbian objects in the United States."266 Indeed, the court of appeals itself stated that "[m]useum directors, art dealers and innumerable private collectors must have been in a state of shock when they read the news of the conviction of the five defendants in this case."267

The Council of the American Association of Museums, an organization then representing 1,248 institutions, issued a statement condemning the decision,268 and the American Association of Dealers in Ancient, Oriental and Primitive Art filed a brief *amicus curiae* which argued for a reversal of the district court's decision.269

Congress, however, had clearly intended a broad construction of the word "stolen" when it drafted the NSPA, and Mexico "had done all it reasonably could" to protect its pre-Columbian art.270 The court of appeals therefore rejected the arguments of the *amicus curiae* and held that a legislative declaration of ownership "combined with a restriction on exportation without consent of the owner is sufficient to bring the NSPA into play."271 Because the scienter requirement of the NSPA eliminated the possibility that a defendant could be convicted for "an offense he could not have understood to exist,"272 actual knowledge of a declaration

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265 Id.
266 United States v. McClain, 545 F.2d 988, 991 (5th Cir. 1977).
267 Statement of Concern, Council of the American Association of Museums (Jan. 9, 1976), in McAlee, *supra* note 8, at 581:

The radical and novel interpretation of a domestic criminal statute, originally intended to deal with problems of an altogether different nature, ... poses particular dangers both to American museums and to ongoing efforts at international cooperation. Such an interpretation may not only serve to brand as criminal those past actions that American museums have taken in good faith over the past three quarters of a century but also calls into question the future ability of such museums to use large portions of their collection, painstakingly acquired over so many years, for the educational, and research purposes that constitute the very reason for their being.

268 "Ownership," it contended, "implies more than a mere legislative assertion by a foreign government of national dominion over artworks." Such assertions are "not much more than a metaphor for the police power to regulate the class of property over which ownership was asserted." Furthermore, "to base the meaning of the term 'stolen' as used in the NSPA upon the interpretation of foreign law would inject an intolerable uncertainty into the administration of the statute in the United States," and make it "a trap for the unwary." Finally, such a holding would reverse the policy of the United States to encourage the importation of art and antiquities. Brief for Amicus Curiae, at —, United States v. McClain, 545 F.2d 988 (5th Cir. 1977); McAlee, *supra* note 8, at 581.

269 McAlee, *supra* note 8, at 582.

271 McClain, 545 F.2d at 1002 n.30.
272 McAlee, *supra* note 8, at 582.
of ownership by a foreign government would henceforth be necessary to sustain a conviction under the NSPA.\textsuperscript{273} The Court of Appeals concluded that Mexico had not unambiguously declared that it owned all pre-Columbian artifacts until May 6, 1972,\textsuperscript{274} because the prosecution had failed to present evidence that the defendants had exported the works after that date, the case was reversed and remanded.\textsuperscript{275} The Court of Appeals, however, agreed with the District Court “that a foreign nation could trigger enforcement of the NSPA in America by a properly worded” declaration of ownership.\textsuperscript{276}

The second Court of Appeals decision left open the possibility that Mexico could invoke the NSPA to recover pre-Columbian art exported after the enactment of the 1934 legislation but before the date of the 1972 legislation.\textsuperscript{277} This result clouded the title of even bona fide purchasers of pre-Columbian objects who had learned of Mexico’s declaration of ownership after the objects had entered the United States.\textsuperscript{278} A deputy legal advisor to the Department of State said that “the correct policy would be to indict individuals who conspire to steal or distribute stolen objects [such as unscrupulous dealers and] not to prosecute museums or other [good faith] purchasers of art objects after they come to rest in interstate commerce.”\textsuperscript{279} Yet the lack of case law and the inscrutability of the Justice Department have done little to reassure bona fide purchasers of pre-Columbian art.

The United States has successfully based prosecutions under the NSPA on Mexican and Guatemalan law,\textsuperscript{280} and obtained indictments

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    \item[273] Id. at 583.
    \item[274] Id.
    \item[275] McAlee, supra note 8, at 583. On remand the district court ignored the findings of the court of appeals and charged the jury that possession of pre-Columbian antiquities had vested in the Mexican state since 1897. The defendants were once again found guilty. On appeal for the second time, a different panel of the court of appeals followed the earlier court of appeals decision regarding the construction of the NSPA, but concluded that although Mexico had actually considered itself the owner of all pre-Columbian artifacts for almost 100 years, its earlier statutes failed to express this view “with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.” McClain, 593 F.2d at 670. Thus, the prosecution had relied in part on legislation that “was vitiated by its vagueness for the purposes of a United States criminal prosecution.” McAlee, supra note 8, at 584 n.85. Nevertheless, the court sustained the convictions under 18 U.S.C. § 371, which makes a conspiracy to violate a federal law a separate offense regardless of whether the crime is completed.
    \item[276] McAlee, supra note 8, at 585.
    \item[277] Id. at 589-90.
    \item[278] Id. at 590 n.107.
    \item[279] United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).
    \item[280] McAlee, supra note 8, at 590.
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based on the laws of Costa Rica, Peru and Panama.\textsuperscript{281} Many Third World and communist bloc nations, including most of the signatories to the UNESCO Convention, have enacted restrictive export regulations or statutes vesting ownership of cultural property in the state.\textsuperscript{282} Because the \textit{McClain} decisions imply that with proper legislative wording a foreign nation can convert a violation of its export laws into a criminal violation of the NSPA, the federal judiciary has handed art-exporting nations "a blank check to create crimes in the United States."\textsuperscript{283}

As of February 1983, legislation was pending which would amend the NSPA to undo entirely the unsettling effects of the \textit{McClain} decisions.\textsuperscript{284} Until this legislation is enacted, however, an unfortunate state of affairs will prevail which "will reflect less the interests of the United States than the craft of foreign draftsmen and will neither serve the values that favor the movement of art across state boundaries nor provide any meaningful contribution to the preservation of art or archeological monuments."\textsuperscript{285}

The issues raised by \textit{Jeanneret} are simply an extension of the issues raised during the debates over \textit{McClain} and the UNESCO Convention. Once again, a group of \textit{amici curiae} contended that the decision of a federal district court would impose liability on holders of art which has been legally imported into the United States but which may have, at any time, been illegally exported from another nation, without any showing that the art is part of the exporting nation's cultural patrimony. Foreign nations may be able to control the flow of art into the United States by imposing retroactive sanctions against any work exported without their approval. The scienter requirement of the NSPA ensures at least that only those holders or dealers of illegally exported art who knew of the exporting nation's claim to ownership can be convicted. The question posed by \textit{Jeanneret} is, therefore, whether art work purchased in good faith can be rendered unmarketable by a seller's failure to comply with a

\textsuperscript{281} See \textit{supra} note 245.
\textsuperscript{282} McAlee, \textit{supra} note 8, at 567.
\textsuperscript{283} The amendment would add these words to the NSPA:

No archeological or ethnological material taken from a foreign government or country claiming ownership shall be considered as stolen, converted, or taken by fraud within the meaning of this section where the claim of ownership is based only upon—(1) a declaration by the foreign government of national ownership of the material; or (2) other acts by the foreign government of national ownership of the material and functionally equivalent to a declaration of national ownership, and the alleged act of stealing, converting, or taking is based only upon—(A) illegal export of the material from the foreign country; (B) the defendant's knowledge of the illegal export; and (C) the claim of ownership described in clauses (1) and (2).

\textsuperscript{284} McAlee, \textit{supra} note 8, at 605.
\textsuperscript{285} Brief of Amici Curiae at 1, \textit{Jeanneret} 693 F.2d 259 (2d Cir. 1982).
foreign nation's restrictions and without a court determination of the effect of that nation's available sanctions. If the art can be rendered unmarketable, it is conceivable that art-exporting nations will use retroactive sanctions to intimidate buyers and impede the outflow of art from their borders, thereby frustrating Congress' policy of enforcing a nation's art export restrictions only if the nation's cultural heritage is truly endangered.

VII. CONCLUSION: TWO SOLUTIONS

There are two solutions to the problems paired by Jeanneret. First, the art trade can alter or forego the usage of trade that requires a seller to document provenance. This would avoid problems with marketability such as Jeanneret encountered, and make trade practice reflect the legal nonconsequence of illegal exportation.

According to international law and the terms of the 1939 Law, Italy—and all other nations—in the absence of treaty, lacks the extra-territorial jurisdiction necessary to enforce confiscation of art works beyond its borders. Under international, Italian and New York choice of law principles, the lex situs of the property at the time of the disputed transfer governs questions of title and contractual validity. A federal court with diversity jurisdiction must apply New York conflict of laws rules and give effect to Swiss Civil Code § 933, which protects bona fide purchasers from adverse claims to title, as do U.C.C. § 2-403 and Italian Civil Code § 1153. Recent Italian decisions have held unconstitutional statutes which provided for confiscation of smuggled goods from a bona fide purchaser. Therefore, Italy cannot enforce its export sanctions either at home or abroad against Jeanneret or any bona fide purchaser through her. Jeanneret's title to the painting is unclouded under U.C.C. § 2-312.

Because art dealers are ignorant about the legal consequences of illegal exportation, and refuse to handle illegally exported art on the legitimate market, Jeanneret's painting is unmarketable under § 2-314. Yet this refusal to handle illegally exported art is grounded upon a usage of trade that developed without regard to the legal consequences—or lack thereof—of illegal exportation. Barring a treaty or diplomatic pressure, an exporting nation's sanctions against a bona fide purchaser of illegally exported art end at that nation's borders. There is no legal reason why Jeanneret's painting or any illegally exported work of art should be unmarketable. Even so, the refusal to handle illegally exported art will probably continue to be the usage of trade among reputable art dealers. Therefore, unless § 2-312 and § 2-314 are amended in a manner similar
to the proposed NSPA amendment art-rich nations may be able by proclamation or regulation to impair the marketability of works exported without their consent. They may thus prevent under the U.C.C. what they could not achieve by direct enforcement of their own overly restrictive export regulations.


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William Pearlstein