

## THE ART COLLECTING COUNTRIES AND THEIR EXPORT RESTRICTIONS ON CULTURAL PROPERTY: WHO OWNS MODERN ART?

*“Appropriately enough, for an age that sees the making of a world civilization, modern art in all its component movements tends to be international, like modern science, technology, industry and politics.”<sup>1</sup>*

### INTRODUCTION

On March 30, 1987,<sup>2</sup> a record \$39.85 million was bid for a painting entitled *Sunflowers* by Vincent Van Gogh.<sup>3</sup> The painting by the Dutch master, who had done the bulk of his work in France,<sup>4</sup> was purchased by a Japanese insurance company<sup>5</sup> at an English auction.<sup>6</sup> This sale is an ideal example of the multinational characteristics of the modern art market.

Yet, despite this apparent free exchange, the international market in modern art is burdened with restrictions which hinder the movement of cultural property. For example, the sale of *Sunflowers* was subject to an English statute which prevented the purchaser from taking possession of the painting for a period of three months.<sup>7</sup> If, within those three months, English public institutions could raise funds to match the bid, they could purchase the piece and retain it within the country.

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1. H. DE LA CROIX & R. TANSEY, *GARDNER'S ART THROUGH THE AGES* 721 (1980). This is the conclusion of the introductory remarks preceding Part Five: The Modern World.

2. The date was the 134th anniversary of Van Gogh's birth. See Hughes, *Of Vincent and Eanum Pig*, *TIME*, Apr. 13, 1987, at 80.

3. *Van Gogh Painting Sold for Record \$39.85 Million*, *L.A. Times*, March 30, 1987, at 1, col. 1. The record amount has since been surpassed by the sale of another Van Gogh entitled *Iris* on November 11, 1987 for \$53.9 million. *Van Gogh Painting 'Iris' Brings Record \$53.9 Million*, *L.A. Times*, Nov. 12, 1987, § 1, at 27, col. 1.

4. For a complete chronicle of Van Gogh's life and career see J. MEIER-GRAEFE, *VINCENT VAN GOGH: A BIOGRAPHY* (1987); I. STONE, *DEAR THEO: THE AUTOBIOGRAPHY OF VINCENT VAN GOGH* (1937).

5. The Yasuda Fire & Marine Insurance Company. *What's Behind That \$39-Million Bouquet?*, *L.A. Times*, Apr. 10, 1987, § VI, at 1, col. 1.

6. The auction took place at Christie's of London. Hughes, *supra* note 2; *Van Gogh Painting Sold for Record \$39.85 Million*, *supra* note 3.

7. *What's Behind That \$39-Million Bouquet?*, *supra* note 5, § VI, at 18, col. 1. This right of preemptive purchase is reserved via the Notice to Exporters (Relating to Export of Works of Art and Antiques). See *infra* notes 86-94 and accompanying text.

This English law is one of many such statutes in force in the various art collecting countries<sup>8</sup> of the world which restrict the free movement of cultural property. At first glance, such laws appear innocent, yet they are in fact contrary to the views of the international community as expressed in numerous multilateral treaties and agreements.<sup>9</sup> These views are that cultural property, no matter where it was created or where it is now situated, reflects the accomplishments of the collective world citizenry.<sup>10</sup> As such, every nation has a duty to protect cultural property, as well as a companion right to enjoy that property. It is true that occasionally protection is at the expense of free circulation.<sup>11</sup> A problem arises where the movement of cultural property is restricted for more selfish reasons.

It is the view of this Comment that the only acceptable reason for a nation to restrict the free movement of cultural property is when a work possesses specific cultural value to that nation, and as such is part of that nation's national patrimony.<sup>12</sup> The concepts of specific cultural value and national patrimony are more readily applicable to antiquity than to modern art, and apply to modern works only in very limited circumstances. Therefore, restrictions on the free movement of modern art should only be allowed in limited circumstances.

The bulk of modern work has accumulated in the world's art collecting countries.<sup>13</sup> The danger is that a country might restrict the free exchange of these works by prohibiting their export, despite its inability to claim any specific cultural link to those works. Thus, it is the restrictive export statutes of these nations which need to be scrutinized.<sup>14</sup>

This Comment will examine the concepts of 1) world ownership of cultural property, 2) specific cultural value in a national context, and 3) the applicability of both concepts to modern art. Current

8. For a discussion of what constitutes an "art collecting" country see *infra* notes 22-27 and accompanying text.

9. For the text of the major agreements and treaties, see UNESCO, *THE PROTECTION OF MOVABLE CULTURAL PROPERTY* 335-86 (1984).

10. For a synopsis of this perspective and its development since World War II, see *infra* notes 28-48 and accompanying text. For a more detailed analysis of the concept of the common heritage of mankind see S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* 52 (1978).

11. See generally P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1981).

12. For a discussion of "specific cultural value," see *infra* notes 49-67 and accompanying text.

13. See *infra* notes 22-27 and accompanying text.

14. A comprehensive, if not exhaustive, compilation of the text of national laws dealing with cultural property is found in UNESCO, *supra* note 9.

export practices in the art collecting countries will be examined to see whether those practices comport with these concepts. Finally, suggestions will be made for model legislation which might serve the interests of both the individual nations and the international community in modern art.

## I. A FEW DEFINITIONS

An effective discussion of export regulations on modern art in art collecting countries requires a common understanding of the terms employed. It is assumed the term "export regulation" is self explanatory. "Modern art" and "art collecting country" are less definite terms, and in the interest of establishing a common understanding, their meaning within the context of this Comment is explained below.

### A. *Modern Art*

What is modern art? Webster's Third New International Dictionary defines modern as: "of, relating to, or having the characteristics of a movement or style in the arts marked by a break with tradition, especially academic forms and techniques of expression, an emphasis upon experimentation, boldness and creative originality, and an attempt to deal with modern themes."<sup>15</sup>

At what point did art attain its stature as modern? Art historians are nearly unanimous<sup>16</sup> in choosing 1863 as the year in which "new art came in and old art went out."<sup>17</sup> It was in 1863 that Napoleon III founded the *Salon des Refusés*,<sup>18</sup> and it was at the *Salon des Refusés* that Edouard Manet shocked Parisian society, and Napoleon himself, with his painting *Déjeuner sur l'herbe*.<sup>19</sup>

For years, the only way for artists in France to gain exposure, and thereby patronage, was by exhibiting in the official *Salon*. The *Salon des Refusés* was an alternative forum founded "in response to the appeals of artists working in ways unacceptable to the official *Salon*,"<sup>20</sup> who nonetheless required public exhibition to sell their work. Over 2,500 works were featured, demonstrating that a sub-

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15. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1986).

16. H. ARNASON, HISTORY OF MODERN ART 13 (2d ed. 1977).

17. For a thorough discussion of the nebulous beginnings of modern art, see 1 J. RUSSELL, THE MEANINGS OF MODERN ART 7 (1974).

18. R. MAIR, KEY DATES IN ART HISTORY FROM 600 B.C. TO THE PRESENT 67 (1979).

19. F. HARTT, A HISTORY OF ART 359 (1976) see also 2 COLLIER'S ENCYCLOPEDIA 705R (1986).

20. S. HUNTER & J. JACOBUS, MODERN ART 9 (1985).

stantial number of artists were working in a manner different from that considered the norm at the time. This would seem to indicate that some “new” art form was being practiced by a substantial number of artists.

Among those artists were Monet and Renoir, who began working regularly in the open air, with broken brushwork and considerably brighter palettes. Camille Pissaro declared that the color black should be outlawed. In the ensuing decades Cézanne, Gauguin, and Van Gogh would continue to stylistically redefine art. Shortly thereafter, the 20th century would see the birth of fauvism, cubism, abstract expressionism and the dozen-odd “isms” more readily recognizable as “modern.”<sup>21</sup>

Thus, it is for very sound reasons that art historians have chosen 1863 as the date of birth of modern art. Given this analysis, this Comment employs the term “modern art” to refer to any artwork created in, or since, 1863.

### B. *Art Collecting Countries*

Many nations of the world have vast collections of cultural property. Certain nations, such as Mexico, India, Turkey, Greece and various African and South American nations, are treasure houses of ancient cultural artifacts, most of which have their origin within that country.<sup>22</sup>

Other nations are equally rich in art, yet are not the country of origin for a substantial percentage of that art. These nations accumulate their cultural property through the international art market. These are the art collecting countries, and their collections are a reflection of the affluence of their citizens and their public institutions.<sup>23</sup>

What nations comprise the art collecting countries? One need only consult a list of branch offices of the world’s top art auction houses to find out. Sotheby’s maintains facilities in the United States, England, Holland, Hong Kong, Italy, Monaco, South Af-

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21. For a discussion of the development of non-representational art (post impressionism and beyond) and an argument that this is the body of work which comprises “modern art,” see generally S. HUNTER & J. JACOBUS, *supra* note 20.

22. See generally B. BURNHAM, *THE ART CRISIS* (1975).

23. Museums, as well as individuals, account for a substantial portion of art purchases. For a discussion of the ethical duty of museums to decline purchasing works of questionable origin see Zelle, *Acquisitions: Saving Whose Heritage*, *Museum News*, Apr. 19, 1971, at 19, reprinted in F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 645 (1974).

rica, Spain and Switzerland.<sup>24</sup> Christie's has branches in Belgium, Sweden, Denmark, West Germany, Austria, Norway and France.<sup>25</sup> An examination of *International Auction Records*<sup>26</sup> provides details of auctions and auction houses not only in the aforementioned countries, but also in Japan,<sup>27</sup> Israel, and Canada. It is the export restrictions on cultural property of these countries that will be the focus of this Comment.

## II. NATIONAL AND INTERNATIONAL CONCERNS OVER CULTURAL PROPERTY

Each nation is sovereign over its own territory. It seems obvious that a nation should be free to regulate the flow of goods in and out of its own borders. Yet, when those goods consist of cultural property, there are conflicting international concerns that the movement of such property should not be unduly restricted.

### A. *The International Concern Since World War II*

War is perhaps the oldest form of international relations. And as long as there has been war, there has been wartime plundering of cultural property.<sup>28</sup> Not surprisingly, unified international concern over the protection of cultural property arose during wartime.<sup>29</sup> Such concern has evolved from its wartime beginnings as a somewhat nebulous moral duty into a clearly articulated view of the world's cultural property as global property, to which the world not only owes protection, but deserves access.<sup>30</sup>

1. *Invalidation of Wartime Transfers of Cultural Property*—Among the numerous Nazi operations of World War II was the *Einsatzstab Rosenberg*,<sup>31</sup> a unit whose original purpose was to

24. SOTHEY'S INTERNATIONAL PRICE GUIDE (J. Marion ed. 1986).

25. E. MAYER, INTERNATIONAL AUCTION RECORDS (1987).

26. *Id.*

27. In 1986, Japanese museums and collectors spent over \$400 million on European masterpieces and may account for 30% of world purchases of French impressionism. *A Yen for Western Art*, U.S. NEWS AND WORLD REPORT, Apr. 20, 1987, at 14.

28. Homer's *Odyssey* presents a catalogue of the many treasures collected from the sack of Troy. For a detailed account of pillage through the ages, including the Roman conquests, Spain in the new World, and the Napoleonic Wars, see L. DUBOFF, *THE DESKBOOK OF ART LAW* 129-34 (1977).

29. For a discussion of the evolution of attempts to protect works of art during periods of belligerency, see Marchisotto, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 691-705 (1974).

30. S. WILLIAMS, *supra* note 10.

31. For a discussion of the activities of the *Einsatzstab Rosenberg* see 1 NAZI CON-

appropriate and destroy “decadent art”<sup>32</sup> within Germany. By war’s end it had evolved into an acquisition unit, procuring various masterpieces as requested by Hitler and other top officials for their private collections.<sup>33</sup>

The allies condemned this confiscation and reserved the right to invalidate any wartime transfer of cultural property.<sup>34</sup> Invalidation of such transfers continued as recently as 1969,<sup>35</sup> when a painting<sup>36</sup> confiscated by the *Einsatzstab Rosenberg* in 1941 was returned to its owner by a New York court.<sup>37</sup>

*2. Military Efforts to Minimize Damage to Cultural Property*—In addition to condemning the appropriation of art by the enemy, American forces took affirmative action to protect cultural property, forming a commission whose sole purpose was the protection of artistic monuments in war areas.<sup>38</sup> In 1943, General Eisenhower issued a statement in Italy, reminding American troops stationed there that Italy “has contributed a great deal to our cultural inheritance.”<sup>39</sup> The statement directed the protection of Italy’s numerous monuments as far as military necessity allowed, and only when the choice was between monuments and human lives were the monuments to be sacrificed.<sup>40</sup> Such policies reflect a concern for the preservation of cultural property for future generations.

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SPIRACY AND AGGRESSION 1098-1106, (U.S. Gov’t Printing Office 1946). See also J. MERRYMAN & A. ELSÉN, 1 LAW, ETHICS, AND THE VISUAL ARTS 1-43 (1979).

32. Decadent art included works by contemporary artists, works by Jewish artists, and works in Jewish collections. J. MERRYMAN & A. ELSÉN, *supra* note 31.

33. See generally O’Neill, *Even in Death, Hitler “Lives”*, 4 ENVTL. L. REV. 463 (1974).

34. The allies issued a declaration known as the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, Jan. 5, 1943. See Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT’L LAW. 755, 765 (1987).

35. *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff’d & modified* 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967) (per curiam).

36. *Le Paysan à l’échelle* (The Peasant and the Ladder) by Marc Chagall.

37. After hearing testimony on the “lawful booty of war by conquering armies”, the court rejected such assertions, holding that the activities of the *Einsatzstab Rosenberg* constituted pillage. The court held that when pillage takes place, title of the original owner is not extinguished. *Menzel*, 267 N.Y.S. at 810.

38. American Commission for the Protection and Salvage of Artistic Monuments in War Areas. Graham, *supra* note 34.

39. Report of the American Commission for the Protection and Salvage of Artistic Monuments in War Areas (1946), *reprinted in* J. MERRYMAN & A. ELSÉN, *supra* note 31, at 1-82.

40. *Id.* For an opposing view of the value of monuments over human life, see Sir Harold Nicolson, *Marginal Comment*, SPECTATOR, Feb. 25, 1944, *reprinted in* J. MERRYMAN & A. ELSÉN, *supra* note 31, at 1-85.

3. *The Hague Convention*—The concern with art preservation is further reflected in the first international treaty dedicated solely to the protection of cultural property, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>41</sup> The Convention's preamble articulates the concept that cultural property is global property:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;<sup>42</sup>

By this language, the 1954 Hague Convention acknowledges that the protection of cultural property is the obligation of all nations, not just those within whose nations where such property is located.

4. *The UNESCO Convention*—During the 1960s, the international black market in cultural antiquity exploded.<sup>43</sup> Theft of cultural property was rampant, with the worst activities occurring in Italy,<sup>44</sup> India,<sup>45</sup> and the Mayan ruins of Central America.<sup>46</sup> The situation comprised a genuine international cultural crisis.

Recognizing the need for action on a global scale, the United Nations Educational, Scientific and Cultural Organization (UNESCO) met in 1970 to draft the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>47</sup>

Previously, the various policies of the Allied forces in World War

41. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1956).

42. *Id.* at preamble.

43. See Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969).

44. For a detailed description of the activities of the Italian thieves and grave robbers (*tombaroli*) see *Hot From the Tomb: The Antiquities Racket*, TIME, Mar. 26, 1973, at 93. For a view that the *tombaroli*'s efforts should be encouraged as beneficial to society see Stewart, *Two Cheers for the Tombaroli*, NEW REPUBLIC, Apr. 28, 1973, at 21.

45. The looting of Indian temples is described in K. MEYER, *THE PLUNDERED PAST* 139-40 (1973).

46. For a more detailed description of the looters and their methods see L. DUBOFF, *supra* note 28, at 69-70.

47. Convention On The Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), 10 I.L.M. 289 (1971) [hereinafter *Convention on Transfer of Cultural Property*]. For a comprehensive overview of the problem of the international protection and exchange of cultural property see P. BATOR, *supra* note 11.

II, the formation of the Commission for the Protection of Artistic Monuments in War Areas, and the 1954 Hague Convention all recognized the value of cultural property to the entire world. Implicit in such recognition was the idea that cultural property is the world's property, and should be freely accessible to the world. The language of the UNESCO Convention makes this idea explicit: “[c]onsidering that the interchange of cultural property among nations for scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”<sup>48</sup>

The UNESCO Convention is the culmination of efforts since World War II to promote respect for cultural property and encourage its free exchange among nations. As the most recent multilateral agreement, it reflects the current policy of the global community with respect to such property. Yet, while reflecting international concerns, it often conflicts with the desires of individual nations.

### *B. The Desire of Nations To Retain Art Within Their Borders*

Despite the international concern that the world's art be accessible to all nations, certain cultural property can be so valuable to a nation that proper safeguards include denying the world access to the artwork.

*1. The National Patrimony*—Items which possess specific cultural value for a nation constitute its national patrimony. Concern over depletion of the national patrimony is the main factor behind enactment of many national export laws to restrict the movement of cultural property.<sup>49</sup> The question of what qualifies an item as part of the national patrimony was posed by John Merryman: “Is it enough that the authorities of a nation have decreed that certain kinds of objects must remain within its boundaries, or are we allowed to ask what interests are protected by such measures?”<sup>50</sup>

In answering his own question, Merryman enumerates five differ-

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48. Convention on Transfer of Cultural Property, *supra* note 47, preamble.

49. For a discussion of protection of items of specific cultural value as opposed to aggressive nationalism, both in the name of the national patrimony, see Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in *LAW AND THE VISUAL ARTS* 153 (Duboff & Duboff eds. 1974).

50. *Id.*



ent values to be served by cultural property restrictions.<sup>51</sup> Chief among them is the entirely nationalistic, albeit internationally recognized, concern of “specific cultural value.”<sup>52</sup> While the other values discussed by Mr. Merryman explore the underlying reasons behind protection of these works, it is this core value which actually designates a piece of art as part of the national patrimony.<sup>53</sup>

“Specific cultural value” is the value to a culture of a work of art or other cultural property.<sup>54</sup> It describes the specific national connection to a piece of art. It assigns it a value beyond that which it possesses as a piece of art or antiquity. To Americans, the Liberty Bell, or the original Betsy Ross flag would qualify as part of the national patrimony. Each possesses a “specific cultural value” difficult to articulate, yet intuitively understood. Essentially such value is emotional. Objects possessing specific cultural value may be a source of pride or inspiration for a particular people, or merely symbolic of a nation’s values and beliefs.

Two recent examples of the concept of specific cultural value are the Crown of St. Stephen and the *Afo-A-Kom* of Cameroon.<sup>55</sup>

#### a. Hungary: The Crown of St. Stephen

In 1000 A.D. Stephen, Duke of Hungary, received a crown from Pope Sylvester II, recognizing him as the first king of Hungary. The crown, over the centuries, assumed extraordinary historical value for the people of Hungary, as a symbol of independence and religious freedom.<sup>56</sup> In the face of the oncoming Russian army during World War II, the crown, together with various coronation regalia, was entrusted to the United States government by the Hungarian Commander of the Crown Guards, who feared for its safety.

The specific cultural value was still evident some thirty two years later, when President Carter announced his intention to return the

51. In addition to specific cultural value, they are: preservation of the records of a civilization, integrity of the work of art, protection of the work of art, and the appropriate international distribution of works of art. *Id.*

52. Note the actions of the U.S. government with respect to the cultural items discussed *infra* notes 55-66 and accompanying text.

53. Merryman, *supra* note 49. The other values Mr. Merryman enumerates reflect the international interests in cultural property rather than solely the interests of national patrimony.

54. See *infra* text accompanying notes 55-66.

55. While other examples, most notably the celebrated Elgin Marbles, exist, this Comment focuses primarily on the attitudes which have evolved since World War II and the legal problems and solutions of the same time frame.

56. *Dole v. Carter*, 444 F. Supp. 1065, 1067 (D. Kan. 1977), *aff'd* 569 F.2d 1109 (10th Cir. 1977) (per curiam).

crown to the Hungarian people. Fearing the return of the crown would constitute recognition of the Soviet dominated government of Hungary, and thereby legitimize it, Hungarian-Americans protested vehemently.<sup>57</sup> United States Senator Robert Dole tried to prevent the crown's return by suing the president.<sup>58</sup>

The crown was returned to the Hungarian people despite such protests. Its specific cultural value to these people was evident from their enthusiastic response to its return. The Communist government, embarrassed by the emotional reception of the people, removed the crown from its special display at the Hungarian Parliament to the National Museum, in an attempt to downplay it as just another historical exhibit. The crowds continued to throng to it. According to one press account, the Communist Party chief himself made three private visits to view it.<sup>59</sup>

#### b. Cameroon: The *Afo-A-Kom*

The story of the *Afo-A-Kom* is another excellent illustration of the idea of specific cultural value, and a prime example of the international recognition assigned such value. The *Afo-A-Kom*<sup>60</sup> is a carved wooden statue, claimed to be over 100 years old, used in coronation and renewal ceremonies of the Kom, a west African tribe in Cameroon.

The statue was stolen sometime in 1966,<sup>61</sup> and appeared for sale for \$60,000 in a New York art gallery in 1973. The value of the idol to the tribe was chronicled in the New York Times article which broke the story.<sup>62</sup> Among other things, the theft resulted in the death of the then ruling *Fon* (tribal king) due to his distress over the theft, and the inability of the succeeding *Fon* to effectively rule his people, even after ordering a duplicate idol carved.<sup>63</sup>

57. See *Hungary's Crown*, TIME, July 3, 1978, at 17.

58. *Dole v. Carter*, 444 F. Supp. at 1067.

59. *Hungary's Crown*, *supra* note 57.

60. Literal translation: "the Kom thing."

61. Several versions of the story of the theft exist. One claims that the former king sold the idol. Another claims that the king's nephew stole it. There were also unsubstantiated claims that shortly after its return, the idol was once again being offered for sale on the international art market.

62. Although the matter affected one of the tribes within its borders, the government of Cameroon was not as concerned. When contacted by the New York Times for a response to the fact that the idol had, at last, been located, the President of Cameroon responded "Le quoi? Qu'est-ce que c'est? Où est Kom?" ("The what? What is it? Where is Kom?") See Burnham, *The True Adventure of the Sacred Idol of Kom*, ESQUIRE, May 1974, at 117.

63. *Lost Sacred African Art Turns Up in Gallery Here*, N.Y. Times, Oct. 25, 1973, at 1, col. 6.

The statement of the First Secretary of the Cameroon Embassy in Washington about the idol comprises a nearly perfect articulation of the concept of specific cultural value: "It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together. It is not an object of art for sale and could not be."<sup>64</sup>

The matter was eventually settled through diplomatic, rather than legal channels.<sup>65</sup> Through United States government assistance, and the efforts of numerous private American groups, the idol was eventually purchased from the New York dealer and returned to the Kom tribe. The restoration of the *Afo-A-Kom* to the Kom tribe resulted in festivities similar to those that accompanied the return of the Crown of St. Stephen.<sup>66</sup>

2. *National Patrimony v. International Interests*—The Crown of St. Stephen and the *Afo-A-Kom* are two examples in which genuine specific cultural value established a cultural object's place in the national patrimony. Aesthetic value, monetary value, and a desire for possession of items of scholarship are additional reasons for retaining a work of art within a nation's borders.<sup>67</sup> However, in view of the international interest in access to the world's cultural property, these reasons are insufficient to restrict the movement of those works. Specific cultural value should be the only valid criterion to restrict the movement of a work of art. The fact that specific cultural value is an internationally recognized criteria for such restrictions is clear from the actions of the U.S. government in seeing that both the Crown of St. Stephen and the *Afo-A-Kom* were safely returned to those nations to whom they had such value.

### C. *The National and International Interests as Applied to Modern Art*

We have thus far examined international efforts to protect the world's supply of cultural property. Underlying those efforts is the

64. *Id.*

65. The situation was unique in that the American government contacted the Cameroon government to see what Cameroon wanted it to do rather than waiting for a demand from Cameroon.

66. For an account of the idol's return and the Kom tribe's response, see Ellis, *A Sacred Symbol Comes Home*, NAT'L GEOGRAPHIC, July 1974, at 141. For a behind the scenes account of the political motivations and reservations of the government of Cameroon, see Burnham, *supra* note 62.

67. See P. BATOR, *supra* note 11.

belief that such property belongs to the world. A companion belief is that the entire world should have access to that property, to experience and appreciate it. We have also examined instances where the specific cultural value of an object to a particular nation supersedes the international interest in accessibility. In either situation, the actual property under discussion, whether the artistic monuments of Europe or a centuries old crown, whether the ancient Mayan ruins of Central America or a tribal symbol for generations of Africans, has shared the common characteristic of antiquity.

What of art and cultural property of more recent vintage? How do these national and international values apply to the cultural property of the last century? What is the proper place of a Henry Moore sculpture, a Georges Braque collage, or a Van Gogh painting of sunflowers?

The international view is that artwork created by any citizen adds to the cultural heritage of all mankind. Such artwork thus belongs to the world and should be freely circulated for all people to experience and appreciate.

It must now be determined whether modern art possesses any characteristics which justify restricting its export. Specifically, the question is whether an art collecting nation can claim that any modern work has specific cultural value which is historically essential and meaningful to that nation's growth and heritage. This seems unlikely, unless the work was either 1) created by a citizen of that particular country, or 2) created within its borders, regardless of the nationality of the artist.

When a citizen creates the artwork, its connection with the national heritage is obvious. The artist's creation is a reflection of national attitude, as any perceptions he may have are necessarily the result of his culture. The work also represents an accomplishment by a national citizen, and as such is a source of pride. The fact that a work was created within a nation's borders, even if by a foreign national, also establishes a basis for specific cultural value. Again, it is a reflection of the culture within which it was created. Often such works will feature the nation as their subjects, establishing another basis for claiming specific cultural value.

In the absence of either of these criteria, a nation cannot, in the name of specific cultural value, justify denying the rest of the world free access to a work of modern art. Yet, many national export regulations do exactly that.

#### IV. NATIONAL EXPORT REGULATIONS REGARDING CULTURAL PROPERTY

While the protection of cultural property is an international responsibility acknowledged by agreements such as the 1954 Hague Convention and the 1970 UNESCO Convention, the ultimate enforcement falls upon the individual states themselves. Even under the aforementioned treaties, enforcement depends largely upon the enactment of import/export legislation concerning cultural property by the signature states.<sup>68</sup>

In so doing, the states not only serve the global interest, but tend to provide equal or better protection for their own national interests. The export regulations of the United States, Italy and England are examined below.<sup>69</sup> Each is assessed for its service in the name of global cultural heritage and its protection of national patrimony.

##### A. United States

United States policy towards the export of cultural property is extremely consistent. Simply put, there is none.<sup>70</sup> The best explanation for this is that laws that restrict the flow of artwork or cultural property from the country are simply not needed. The possibility of anyone attempting to export the Liberty Bell or the Declaration of Independence is just too remote to warrant legislative action.

Another reason is that the American value system promotes free trade among people, whether the product be coffee, copper, or Turner masterpieces. As one of the world's wealthier nations, the United States benefits by a policy of free trade in art, allowing ac-

68. Article 6 of the UNESCO Convention calls upon signature states to design a certificate of export authorization to accompany each object exported. Convention on Transfer of Cultural Property, *supra* note 47, at art. 6. Article 7 requires that convention parties prohibit importation of items that have been illegally exported. *Id.* at art. 7.

69. Italy, England and the U.S. are representative of those art collecting countries with both national and international concerns regarding the protection of cultural property. See *supra* notes 22-27 and accompanying text for an explanation of the definition of "art collecting countries" used for this Comment.

70. While there is no law which prohibits the *exportation* of cultural property, there are laws which deal with cultural property. See *e.g.*, Antiquities Act of 1906, 16 U.S.C. §§ 431-33; Historic Sites Act of 1935, 16 U.S.C. §§ 460-67; National Historic Preservation Act of 1966, 16 U.S.C. § 470. The U.S. does have import regulations relating to cultural property. See Act to Prevent Importation of Pre-Columbian Sculpture and Murals, 19 U.S.C. §§ 2091-95. The U.S. is also party to a treaty with Mexico which requires it to enact certain import restrictions: The treaty of Cooperation Providing for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, July 17, 1970 22 U.S.T. 494, T.I.A.S. No. 7088.

quisition by its citizens and public institutions.

Whatever the reason, the fact remains that the United States has no legislation that prohibits exportation of artwork,<sup>71</sup> whether it is of national historical interest or not. Obviously, under such a policy, there are no undue restrictions on the exchange of modern works.

### B. Italy

The Italian government, in contrast, makes it extremely difficult for artwork to leave the country. The export of cultural property is regulated by the Law on Protection of Things of Artistic or Historical Interest.<sup>72</sup> The law defines property to be protected as any object “of artistic, historical, archeological, or ethnographic interest” which is not the work of a living artist and is at least fifty years old.<sup>73</sup> If a work is determined to fall within the statute, exportation is prohibited if doing so would “constitute a great injury to the national patrimony.”<sup>74</sup> The Italian Ministry of Education is the final arbiter as to what would or would not cause such serious injury.<sup>75</sup>

The exclusion of works by living artists and, to a lesser extent, the exclusion of works less than fifty years old would seem to allow free exchange of more modern works. Yet, it is conceivable that someone could purchase an early Salvador Dali painting circa 1934, transport it to Italy, and be unable to leave with it, should the octogenarian artist pass away the very next day. The Italian law has no requirement that the artwork have any substantial connection with that country. It requires only that the artwork be within the Italian borders and of “artistic, historical, archeological or ethnographic interest.”

Such was nearly the case in *Jeanneret v. Vichey*.<sup>76</sup> In *Jeanneret*, Anna Vichey inherited *Portrait sur Fond Jaune* by Henri Matisse, from her father who resided in Italy. Ms. Vichey apparently brought the painting to the United States without obtaining the required export license from the Italian government.<sup>77</sup> *Jeanneret*, a

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71. Of the art collecting countries under consideration, only Switzerland is similarly without such legislation.

72. Law on Protection of Things of Artistic or Historical Interest Gaz. Uff. 892, 897, Law No. 1089, June 1, 1939, (Italy), *reprinted in* J. MERRYMAN & A. ELSER, *supra* note 31, at 2-81.

73. *Id.* at art. 1.

74. *Id.* at art. 35.

75. *Id.* at art. 36.

76. 693 F.2d 259 (2d Cir. 1982).

77. As required by article 36 of the law on Protection of Things of Artistic or Histori-

Swiss art dealer, bought the painting from Vichey, and then brought suit for breach of implied warranty of title.<sup>78</sup>

It is ridiculous that circumstances such as those in *Jeanneret* should be able to cloud title<sup>79</sup> when one considers the actual relationship between the painting in question and the country attempting to restrict its export. Henri Matisse was a French citizen, and painted *Portrait sur Fond Jaune* in France.<sup>80</sup> While it is not clear how long the painting had been in Italy,<sup>81</sup> it seems unlikely that the government of Italy could claim it had any specific cultural value to the Italian people.

It is more likely the government was interested in collecting the export tax on the work. This is indeed the very nature of the Italian law. It is not so much concerned with the national patrimony, as defined earlier, as it is with the national wealth. The law appears to lay the groundwork for determining a fair market value rather than a system for protecting cultural property of national importance. In applying for an export license, the applicant is required to file a statement of the market value of the artwork.<sup>82</sup> If the license is granted, there is a tax based upon that stated value.<sup>83</sup> The government also retains a right to purchase the work for the value stated in the application.<sup>84</sup>

The exporter, who would normally be tempted to state a rather low value to escape paying a high tax, is in fact encouraged to overstate the price to discourage purchase by the government. Overstating a work's value probably results in few acquisitions by the government, but ensures the collection of fairly substantial taxes.<sup>85</sup>

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cal Interest, *supra* note 72.

78. The federal court declined to decide the matter in the absence of any guidance from the New York courts, and remanded the case for a new trial. 693 F.2d at 261.

79. The plaintiff claimed that because the painting had been exported illegally, she could not, as a reputable art dealer, sell it until the matter was cleared up. *Id.*

80. For a detailed account of the life and work of Henri Matisse, see N. WATKINS, MATISSE (1985).

81. The actual date of the painting as well as the date it entered Italy were not clearly established by the court in *Jeanneret*.

82. See Law on the Protection of Things of Artistic or Historical Interest, *supra* note 72.

83. *Id.* at art. 37. This tax has since been declared illegal by the Court of Justice of the EEC as violating EEC regulations. The tax has been abolished as it applies to EEC member nations.

84. *Id.* at art. 39.

85. See MERRYMAN & ELSEN *supra* note 31, at 2-83.

### C. England

The English system<sup>86</sup> represents a more sincere effort in protecting the national patrimony. The English law covers works of art more than 100 years old.<sup>87</sup> This provision assures that no restrictions are placed on the works of living artists. In addition, the works must have been imported into England at least fifty years ago.<sup>88</sup> Unlike the Italian law, this assures at least minimal physical contact with the nation. The Salvador Dali hypothetical discussed earlier could not occur under the English law. By broadening the category of work exempt from export regulation, the English law improves upon its Italian counterpart, which has no minimum time requirement before a work is subject to export restriction.

Under its 100 year requirement, the English law guarantees that the exchange of recent work will continue without incident. Yet what of those works predating 1888? We have established that modern art originated twenty-five years earlier.<sup>89</sup> Those works, because they are in excess of 100 years old, are subject to the statute. On what grounds are they granted or denied export?

A work is not denied export simply because it falls within the protected category. The English law requires the exporter to apply for an export license.<sup>90</sup> Upon application for the license, a determination of the item's national significance is made.<sup>91</sup> Even if the work is designated as having national significance, export is not denied. The license application must then be submitted to a reviewing committee which determines, based on three criteria, whether that designation is justified.

The three criteria employed to appraise a work's importance to the national patrimony are detailed in paragraph 16 of the law:

“(a) is the object so closely connected with our history and national life that its departure would be a misfortune?

(b) is it of outstanding aesthetic importance?

(c) is it of outstanding significance for the study of some particular branch of art, learning or history?”<sup>92</sup>

The paragraph goes on to explain that the committee's decision

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86. NOTICE TO EXPORTERS (RELATING TO EXPORT OF WORKS OF ART AND ANTIQUES), 1969, C. MND., reprinted in F. FELDMAN & S. WEIL, *supra* note 23, at 573.

87. *Id.* at para. 2(b).

88. *Id.*

89. See *supra* notes 15-21 and accompanying text.

90. See NOTICE TO EXPORTERS, *supra* note 85, at para. 13.

91. *Id.* at para. 14.

92. *Id.* at para. 16.



depends on “how high the object stands in one or more of these categories.”<sup>93</sup>

The first of the three criteria clearly constitutes an assessment of an object’s specific cultural value, yet specific cultural value is not required to deny export. The second criterion allows retention solely on the grounds of “high aesthetic value.” As all art possesses aesthetic value, such a requirement creates an extremely broad category of work which may be retained. The third criterion, requiring significance for the study of art, learning or history is similarly broad in scope. If the educational significance was related to English history, a basis for specific cultural value might be claimed. Such is not the case, however, and thus the scope of this category is as broad as the previous one.

The committee’s evaluation of the work in light of these criteria is not conclusive, however. Even if the committee concludes that the work is indeed of national significance, its exportation will not automatically be denied. Only if a British public institution comes forward with funds to purchase the piece will it be retained within England.<sup>94</sup> Thus, even if a work is deemed part of the national patrimony due to its specific cultural value, it may still be exported. By the same token, high aesthetic value or significance to the study of art or history may be enough to prevent the work’s exportation.

## V. PROPOSALS FOR FUTURE LEGISLATION

It would certainly be ideal, from the point of view of art lovers and collectors, if every nation could exist without export regulations on cultural property, as does the United States. While the art collecting countries are, as a whole, wealthier than most nations, not every nation has the wealth to guarantee that its art treasures would stay within its borders. Nor can every nation expend funds to safeguard its truly national historic treasures as the United States does. Therefore, export controls will continue to be employed as effective protection devices.

Export regulations, while necessary, need not be as restrictive as those of Italy to provide the desired protection of items of national cultural value. Such laws, while admittedly effective in safeguarding national concerns, fall short of fulfilling the international interest in the free exchange among global citizens of the world’s collec-

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93. *Id.*

94. *Id.* at para. 17.

tive cultural property.

The English statute also fails to properly serve these international interests, despite its narrower focus. It, too, allows the retention of work not necessarily of valid importance to the national patrimony. The English can hardly be blamed for wanting to retain an early Monet on the grounds of aesthetic value, yet they cannot validly assert a greater claim than any other nation to such a work.

The retention of “foreign” works within a nation can help stimulate scholarship, improve the quality of life, and help shape the cultural future of the retaining nation. Yet, these are the very benefits which the international community seeks to gain by the open exchange of such works. No nation has a superior right to retain such works for these purposes.

Specific cultural value is the only valid ground for restricting the free exchange of art. This is especially true of modern art, upon which such claims are more difficult to establish. The significance of specific cultural value can be reflected by export regulations that ensure that those works denied export are only those which possess specific cultural value to the nation seeking to retain them.

Most of the current export regulations discussed above use such artificial criteria as the age of the work or time within the country to establish a work’s connection to that country. These criteria do not directly address specific cultural value. A Renoir which is handed down from generation to generation in an American family for a century does not make it an American painting. It remains the work of a French citizen created in France and reflective of a period of French history. Therefore, export regulations should forego age and time requirements in favor of the following criteria.

#### *A. Historical Significance*

A work may be retained within the restricting country if it has some close connection to that country’s history, either actual or symbolic. Such a connection is a valid example of specific cultural value.

#### *B. Works Created by Nationals*

This criterion allows a nation to retain a work that possesses no historical significance, yet does have specific cultural value to that nation because it was created by one of its citizens. A citizen’s work must necessarily reflect the culture of that country, whether the work is created at home or abroad.

### *C. Works Created Within the Nation's Borders*

This criterion also establishes a valid link, albeit a minimal one, with the country's culture. Although this does not create as direct a reflection of that nation's culture as a work by a citizen, it may still reflect the influence of that culture on the creating artist. This can be enough to demonstrate specific cultural value to that nation.

### *D. Close Connection to National Life and Culture*

A work may be retained within the restricting country if it possesses some close connection to the national life or culture of that country. This criterion fills any gaps left by the preceding factors, by including those items possessing specific cultural value not easily definable in terms of historical significance, nationality of creator or place of creation, but justifiably retainable nonetheless. It incorporates those values which are intuitively understood, however difficult to articulate they may be.

## CONCLUSION

Through the use of export regulations, nations have the ability to retain works of art within their borders. Such retention conflicts with the desires of the international community for the free exchange of cultural property. As policies, treaties, and agreements have indicated since World War II, the cultural property of any nation is the cultural property of the world. Protection and preservation of that property is therefore an international obligation. The correlative concept is that the right to enjoy the work belongs to the world as well.

There are justifiable reasons for restricting world-wide enjoyment by retaining a work within a nation's borders. One reason is that the work may have specific cultural value for that nation. Specific cultural value reflects the deeper meaning, beyond an object's value as a work of art, that such an object has to the spirit of the nation. Such works are generally symbolic of national accomplishment or are historically significant to that nation.

Modern art generally does not fall within such a category. The only possible significance a recent work might have to any nation is that it was executed within that nation or by one of its citizens. As such, an assertion of specific cultural value might be made. Claims of aesthetic value, value to scholarship or quality of life are reasonable, but can be asserted by any nation; and the international inter-

est in free exchange will not allow preference to be given to any one nation based on such claims. Accordingly, national legislation should not restrict exportation on such grounds.

By observing these considerations, and drafting export regulations reflecting them, individual nations will be able to retain those items in which they have a valid interest without depriving the global community of the opportunity to share in the world's cultural heritage.

*William P. Buranich\**

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\* This article is dedicated to Godfrey and Catherine Buranich, without whose love, support and prayers so many things would not have been possible.