LEGAL ISSUES AND RECOVERY PROCESSES: AUSTRALIA

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Paper presented at the Art Crime
Protecting Art, Protecting Artists and Protecting Consumers Conference
convened by the Australian Institute of Criminology
and held in Sydney, 2-3 December 1999

Introduction

I have not been able to resist the temptation to commence today with six words. 'This is a world of limitations.' One reason for the start is prosaic. I am considering something about limitation periods and their role in the recovery of stolen art. As you would imagine, 'Legal Issues and Recovery Processes: Australia' is large topic. So I have chosen one aspect about recovery to consider in the Australian context: limitation periods. To do this, some international comparison is useful. Art theft commonly crosses jurisdictions; it often is international.

Time limits apply for bringing actions to recover stolen art. Art works, however, are unusual commodities compared to much stolen property. They are collectibles. Their value often increases over time. This prompts some questions that are internal to the legal system to ask about limitation periods and stolen art. My focus is on civil recovery processes. Just as criminology incorporates diverse approaches from various theoretical positions, this conference clearly incorporates more than merely the penal consequences of art theft. That civil focus, however, also may be a limitation of sorts.

There is another reason for beginning with that six-word assertion, and it concerns the empirical existence of law. As well as addressing professional legal questions about limitation periods, I want to consider something about law as it appears in practice *through* these questions about limitation periods. Again, for questions which could be described as being about law and culture, my comments will be limited.

What consideration of limitations and art has there been in Australia? Almost none. (But I note the Melbourne lawyer Evan Stents expects to publish a detailed paper about Australian limitations and holocaust art claims soon. And don't worry if that practitioner style of inquiry is what you hope to hear today. I will cover some of the same territory.) Internationally, consideration of limitations and art is not so bereft of commentary. After setting out a little about the Australian law, I want to note some of that international academic writing and case law. For my purposes, that writing can be sourced from England and the United States. Yes, a narrow common law hegemony. I knew there was another reason for the way I began in this 'world of limitations'.

Where to begin? Either the start of end of the limitation period suits my professional question. It is to consider when time starts running for claims to recover stolen art, or whether time must end at a fixed date after it commences to run.

The plain legal approach to limitations usually starts with the underlying policy aims that limitation periods are seen to promote. These include the social value in litigating quickly, promoting commercial certainty, and not having courts faced with stale claims. But over time, extensions and exceptions to limitation periods have developed in order to alleviate too great an injustice to a potential plaintiff. One can see a tension between principles aiming for finality in civil litigation and justice in the individual case. No necessary, obvious balance point is implied by those considerations. Thus, there are varied approaches to how time is dealt with and exceptions made in different jurisdictions.

Australian Limitation Periods for Recovering Stolen Art

In an Australian context, art theft raises the torts of conversion and detinue. Conversion is the intentional dealing with chattels by a person other than the owner in a manner inconsistent with the rights of the owner.[1] Detinue is the wrongful detention of chattels following a claim for them by their owner.[2] A reasonable amount of time, however, could be taken by a possessor of an art work to investigate a claim before returning the work without constituting conversion or detinue.[3]

In general, a plaintiff cannot sue in tort once six years have run from the accrual of the cause of action.[4] A cause of action accrues when there is a competent plaintiff and defendant exist and when all material facts are present for the claim to be capable of succeeding. Even if a potential plaintiff cannot identify a defendant, the cause of action accrues.[5]

The cause of action in conversion accrues from the time the chattels are dealt with in a manner inconsistent with the chattel owner's rights.[6] For a theftous conversion of an art work, there rarely is any doubt about an intention to deal with goods to the detriment of the owner. The owner has six years from the theft to sue whoever comes into possession of the art work.

A cause of action in detinue accrues when detention of a chattel becomes wrongful. That is, when the owner lawfully demands the chattel's return and is refused.[7] Where an artwork is stolen, this may sound like time will not commence running until the owner can identify the thief and make a demand on him or her. Statutory provisions relating to successive conversions, however, mean it is not possible to bring an action for detinue after the expiration of the limitation period for conversion arising out of the same circumstances. Victorian and New South Wales limitations legislation, for example, provide that where a cause of action in conversion or detinue has accrued, and a further conversion or detinue occurs before the chattel is repossessed, the plaintiff has only until the expiry of the limitation period with respect to the original conversion or detinue to bring his or her claim. Limitation Acts preclude a further limitation period accruing in respect of the subsequent conversion or wrongful detention.[8]

The principle difference between the two actions lies in the available remedies. Detinue allows the court to order the art work to be returned, rather than merely award damages. One point that is being left aside here is the need for a plaintiff to prove an immediate right to possession of the art work when bringing a claim. It can be done through showing title, although that could prove difficult in some instances.

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[1] Eg Atkin J, *Lancashire & Yorkshire Rly v MacNicoll* 1919. Many thanks to Melissa Spencer for research assistance in the preparation of this paper.
[2] Eg see *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
[3] Eg *Craig v Marsh* (1935) 35 SR (NSW) 323: 'If refusal is by a person who does not know the plaintiff's title and having a bona fide doubt as to the title of the goods, detains them for a reasonable time before clearing up that doubt, it is not a conversion.'
[4] Eg *Limitation of Actions Act 1958* (Vic) s 5; *Limitation Act 1969* (NSW) s 14; cf 3 years in the Northern Territory: *Limitation Act 1981* (NT) s 12(1)(b).
[5] *RB Policies at Lloyd's v Butler* [1950] 1 KB 76.
[6] *Limitation of Actions Act* 1958 (Vic) s 5; *Limitation Act* 1969 (NSW) s 14.
[7] *Philpott v Kelly* (1853) 11 ER 353; *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
[8] Eg *Limitation of Actions Act 1958* (Vic) s 6(1); *Limitation Act 1969* (NSW) s 21. (In some jurisdictions, the same result would be achieved under general principles rather than a specific statutory provision.)

Traditionally, limitations are seen as either being procedural – they bar the cause of action – or substantive – they extinguish legal rights. The law of the forum decides this. But legislation exists in Australia to counter forum shopping for limitation periods. If a court is applying the law of another Australian jurisdiction, the court is to treat that jurisdiction's limitations law as substantive and also apply it.[9] For the property claims being considered here, limitations are substantive.[10] This means title is lost when the period ends, and even so-called self-help remedies are not available. That is, the former owner cannot physically retrieve the goods.

For claims to recover stolen art, there are relatively few options for delaying the start of time running, or suspending time once it has commenced. Thus, the former owner will lose out even if the current possessor bought the art work 'off the back of truck'. Internationally, there has been debate about this in terms of its effect on the art market.

One option for delaying the limitation clock may be fraud. Limitation Acts provide that where an action involves fraud, the limitation period does not start to run until the plaintiff has discovered the fraud or could have done so having exercised reasonable diligence.[11]

In Victoria, for example, section 27 of the *Limitations of Actions Act 1958* provides (a) where the action is based on the defendant's fraud, or (b) the right of action is concealed by the defendant's fraud, the limitation period will not begin until the plaintiff has discovered the fraud, or could have discovered it with reasonable diligence. For the action to be 'based on the fraud' of the defendant, fraud must be an essential element of the cause of action. Fraud is not an essential element of conversion.[12] Some thefts, however, could come within (b) and the idea of fraudulent concealment. For example, where the defendant has fraudulently concealed the existence of a right of action by replacing a stolen art work with a fake, time will not start to run until the plaintiff discovered the fraud (or could with reasonable diligence have done so).[13] Common law fraud is required; that is, 'actual fraud, personal dishonesty or moral turpitude'.[14] (Unconscionable conduct does not amount to common law fraud.)[15]

The provision, however, also requires fraudulent *concealment* of the cause of action. Most thefts would not amount to this. Facts relevant to the action must be concealed fraudulently. Where the *fact of the theft* itself is fraudulently concealed, time should not start to run until the fact of the theft has been (or should reasonably have been) discovered. In *Bulli Coal Mining Co v Osborne*,[16] for example, the Privy Council held the furtive removal of underground coal through secret trespass amounted to fraudulent concealment. (English case law also suggests concealing the identity of a thief is not enough to postpone time.)[17]

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[9] Eg *Limitation Act 1969* (NSW) s 78 (and *Choice of Law (Limitation Periods) Act* 1993), *Choice of Law (Limitation Periods) Act 1993* (Vic).
[10] Eg *Limitation of Actons Act 1958* (Vic) s 6(2); *Limitation Act 1969* (NSW) ss 63-65, 68, 68A.
[11] Eg *Limitation of Actions Act* 1958 (Vic), s 27; *Limitation Act* 1969 (NSW), s 55
[12] *Beaman v ARTS Ltd* [1949] 1 KB 550 at 558
[13] Eg consider the facts of the US case *Naftzger v American Numismatic Society* 42 Cal App 4th 421 (1996) below n 37 and text.
[14] *Bahr v Nicolay (No 2)* (1988) 164 CLR 604
[15] *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Daraway Constructions Pty Ltd* (SC Vic, Batt J, No 2662 of 1987, 3 August 1995, unrptd).
[16] [1899] AC 351.
[17] Eg *RB Policies at Lloyd's v Butler* [1950] 1 KB 76; but cf *Eddis v Chichester Constable* [1969] 2 Ch 345 (Lord Denning, obiter).

In New South Wales, the Northern Territory and the ACT concealing identity could be enough. Section 55(1)(b) of the NSW *Limitation Act 1969*, for example, says where the *identity of a person* against whom a cause of action lies is fraudulently concealed, the period between the commencement of a limitation period and the discovery (or reasonably imputed discovery) of the fraud is not counted in reckoning the limitation period.[18]

These fraud-related provisions will not apply where the defendant obtained the art work for valuable consideration without notice of the fraud.[19] I'll pick up the idea of good faith that is relevant here when discussing the English provisions.

Fraud may sometimes delay time running. Limitation Acts also provide for the extension of time in certain circumstances. Again, little will help a person whose art work has been stolen. The most important extension provisions are for personal injury and death claims. (Their emergence can be linked to greater legal recognition of the insurance environment. The potential for the private insurance system to interact with, or support alteration in, the law on art limitations could be worth considering.) Two Australian jurisdictions offer more in terms of extending time. In South Australia and the Northern Territory, time can be extended for all causes of action where a material fact was found out after the limitation period ran or where the failure to commence within time was caused by conduct by the defendant.[20] The action must be bought within 12 months of the material facts becoming known and the court must be satisfied an extension of time is just in all the circumstances. Case law suggests a wide meaning will be given to what facts are material to the plaintiff's case.[21] It probably could include the identity of the current possessor of a stolen art work. The conduct of the plaintiff, however, could be important with regard to whether the court considers it just in all the circumstances to grant an extension of time.[22] It may be that due diligence requirements would be considered – and I will pick this up below when considering the United States' situation.

Thus, a brief survey of the Australian law suggests some limitation situations could raise questions of good faith or due diligence, for which international comparisons may be useful.

English Limitation Periods for Recovering Stolen Art

Limits similar to Australia apply for the conversion[23] of chattels. There is one significant difference for present purposes. In England, time being able to run in favour of a thief unless there was fraudulent concealment was specifically addressed in the *Limitation Amendment Act 1980*.[24] Under the present English law, general limitations apply for torts (with similar provisions to Australia for successive conversions).[25] But s 4 of the *Limitation Act 1980*[26] means an owner always can sue the thief and often can sue a person who has obtained title from the thief. Time only starts to run on the first good faith conversion of the art work. And there is a presumption that a later conversion is 'related to' an earlier theft. Where the

[18] In the ACT, deliberate rather than fraudulent concealment is required: *Limitation Act 1985* (ACT) s 31(1)(b).
[19] Eg *Limitation Act 1969* (NSW) s 55(4); *Limitations of Actions Act 1958* (Vic) s 27.
[20] *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1981* (NT) s 44.
[21] Eg *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628; *Napolitano v Coyle* (1977) 15 SASR 559.
[22] Evan Stents has considered this issue in greater detail – see Introduction above.
[23] See *Torts (Interference with Goods) Act* 1977 as to the action and terminology.
[24] This followed the Law Reform Committee, 21st Report, *Final Report on Limitations of Actions* (1977, Cmnd 6923).
[25] Ibid ss 2 and 3.
[26] It consolidated changes brought about by the *Limitation Amendment Act 1980* and earlier Acts.

possessor of a chattel can establish that he or she purchased the chattel in good faith, time will start to run in the possessor's favour from the date of the good faith conversion. So the hypothetical purchase of an art work off the back of a truck would not start time running unless good faith could be shown.

There are three things I want to note in relation to the English provisions: first, good faith and what it requires; second, the special provisions in s 4 for theftous conversions and their status in terms of English public policy; and third, current reform possibilities in England.

De Préval v Adrian Alan Ltd, an unreported 1997 decision,[27] considered good faith. It showed the 'probity' required by the current possessor of an art work can be very high. The plantiff claimed a pair of nineteenth century candelabra had been stolen from her in France in 1986. She issued a writ in May 1995 after the candelabra were pictured on the cover of a Sotheby's catalogue. The defendant dealer said he bought them from a reputable dealer in New York in 1984, that is, before they were stolen. But the court concluded the defendant must have acquired them between October 1986 and June 1989. If the defendant had bought in good faith prior to May 1989 then time would be up. As noted already, the English Act means that any conversion after a theft is presumed to be related to theft unless the defendant shows good faith. The defendant twice had tried to sell through major auction houses which was consistent with good faith. This was not enough to establish good faith. The candelabra were unique. Arden J said a dealer of Alan's experience would have known this, should have been on notice about their provenance, and should not have bought them without verifying the vendor's title. There was no evidence that Alan had consulted computerised registers or other sources, and he failed in establishing good faith. So for people like dealers, or experienced museum professionals, the standard for showing good faith could be quite high.

Second, what is the status of the provisions in s 4 for theftous conversions in terms of English public policy? Some indication exists in the 1998 *City of Gotha* decision.[28] The case concerned Wtewael's *The Holy Family*, which disappeared from the City of Gotha at the end of World War II, was smuggled to Moscow in the 1980s, emerged briefly in Berlin in 1987, and reappeared at Sotheby's in London, 1992. The Federal Republic of Germany and the City of Gotha attempted to reclaim it in the English courts. Moses J upheld their claim against the consignor, a Panamanian company

In obiter, the judge considered whether German law should not be applied because it was argued to be contrary to English public policy. (The *Foreign Limitation Periods Act 1984* raises this as an issue.)[29] The German 30 year limitation period runs irrespective of whether the claimant is aware of the existence of the claim or the identity of the possessor. Moses J considered whether this is contrary to English public policy. Those who are still alert late in this conference afternoon will note this sounds somewhat like the Australian limitation law, where time can run even if the owner is unaware of the claim or the possessor. Moses J held there was a public policy in English law in favour of the owner of stolen property unless the possessor can show good faith – that is, the special s 4 provisions I already have discussed.

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[27] Arden J, 24 January 1997; noted by Ruth Redmond Cooper in (1997) 2 *Art Antiquity and Law* 55; also see Ruth Redmond Cooper, 'Time Limits in Actions to Recover Stolen Art' in Norman Palmer (ed), *The Recovery of Stolen Art* (London: Kluwer Law International 1998) 145.

[28] *City of Gotha (A Body Corporate) v Sotheby's (an unlimited company) and another; Federal Republic of Germany v Same*, unreported 9 Sept 1998, Moses J. See generally, Paul Lomas and Simon Orton, 'Potential Repercussions from the *City of Gotha* Decision', (1999) 4 *Art, Antiquity and Law* 159.

[29] S 2. This a good point to note that the whole question of conflicts of laws or private international law in art claims is being left largely to one side.

While recognising that German law takes a different approach – that is, a long limitation period – the judge found this insufficient to subordinate the rights of the victim of the theft in favour of one who acted without good faith. German limitation law therefore was contrary to English public policy.

Some commentators have not supported this obiter.[30] It earlier had been suggested that the public policy exception with regard to foreign limitation periods should be applied very narrowly.[31] It would seem relevant that demonstrating good faith for old claims may be difficult, which may offer one reason for a legal system not to require it. (It could be a different question in relation to what is appropriate conduct by purchasers now.)

Third, it should be noted that a major Law Commission consultation paper is due out very soon on reforming limitation periods in England. In June 1998, the Law Commission's Consultation Paper proposed wholesale changes to limitations law. It highlighted that limitation periods involve a balance between different factors and that a range of legitimate approaches is possible. The proposed new regime involves a core limitation period of three years from the 'discoverability' of the cause of action, together with a long-stop period of 10 years from when the cause of action accrued. Something like this also would apply to conversion, subject to an extra factor being added to the 'discoverability' test; namely, the location of the property. For conversion, the test would require knowledge (or a situation where the plaintiff ought reasonably know) of the location of the property, the facts constituting the cause of action, the identity of the defendant and the significance of the cause of action. Also, the 10 year long-stop limitation period would be removed for conversion, except as against a bona fide purchaser where the 10 year period would commence on the date of good faith conversion. This model would mean the courts had no other discretion to extend or not apply the limitation period. Thus, a relatively simple model has been proposed (provisionally) which still could allow very long limitation times in relation to stolen art.

England suggests good faith requirements could be high for experienced art world players. This is not surprising, and is consistent with some Australian valuation/attribution case law. The reform proposals sound appealing – offering a simpler legal model at least. They also echo relatively recent Western Australian proposals, which I shall come to below.

United States Limitation Periods for Recovering Stolen Art

There is much greater variation in approaches in the United States. I will mention three here: due diligence, actual discovery and demand and refusal.[32] First, most US jurisdictions operate under a due diligence, or reasonable discovery, requirement. That is, time starts to run against the owner of stolen goods from the date on which the owner could have been expected to discover the location of the goods and the identity of the possessor.[33] This is similar to the expected recommendations of the English Law Commission, which have been mentioned already. The due diligence requirement was considered in the 1990 decision of *Autocephalous Greek Orthodox*

[30] Eg Paul Lomas and Simon Orton, 'Potential Repercussions from the *City of Gotha* Decision' (1999) 4 *Art Antiquity and Law* 159.
[31] P B Carter, 'The Foreign Limitations Periods Act 1984' (1985) 101 *Law Quarterly Review* 68.
[32] A fourth approach which uses an analogy to adverse possession of land seems of less interest in the Australian situation. Although the way it which it takes into account the actions of the possessor could be investigated further. See, eg, *Redmond v New Jersey Historical Society* 28 A 2d 189 (1942).
[33] Eg *O'Keeffe v Snyder* 83 NJ 478 (1980).

Church of Cyprus v Goldberg.[34] Substantial efforts had been made by the plaintiffs to discover the location of stolen mosaics and to notify relevant authorities. This meant time did not start to run until the plaintiffs discovered the mosaics' location nearly a decade later. (As well, many aspects of the acquisition of the mosaics by the US dealer in Switzerland could have raised suspicions. It also is a useful case to consider with regard to good faith.)

The relative equities of each of the parties in *Autocephalous* suggest a successful limitations defence would have been a harsh penalty for the plaintiffs. The Indiana court applied domestic law and Bauer CJ held the action was timely. It accrued when the plaintiffs learnt the mosaics were in possession of Goldberg, and the plaintiffs exercised due diligence in searching for mosaics. The information could not reasonably have been ascertained earlier. One of the criticisms that has been made of the due diligence approach, however, is that the courts have failed to establish sufficiently clear (or objective) guidelines on the necessary level of diligence.[35]

The second US approach is actual discovery. That is, the owner's cause of action does not accrue until the owner discovers the location of the property. This has been enacted in California, specifically in relation to art and heritage objects.[36] It is possible, but unlikely, that the courts may hold a due diligence requirement is implicit in the provision. Under earlier Californian legislation, case law has not favoured any requirement of due diligence, instead implying an actual discovery provision.[37] The intent in the current law is to avoid any such requirement in an approach which strongly favours art owners, in an important US art market. (It could be noted that, in the Anglo-Australian terminology, the cause of action seems to have been fraudulently concealed. In *Naftzger*, the plaintiff society sought the return of eighteenth and nineteenth century coins, which were stolen sometime before 1972 when they were sold to a good faith purchaser. As lesser coins had been substituted for the stolen ones, the theft was not discovered until 1990, and the location of the coins not until 1991. Also, the plaintiff society appears to have been blameless in not discovering the theft earlier.)

The third approach is demand and refusal. As the other main US centre for commercial art transactions, New York also has adopted an approach favouring owners. Under its demand and refusal rule, time does not start running until the dispossessed owner makes a formal demand that the possessor return the property.[38] (No demand is necessary against a bad faith possessor or purchaser to start the limitation period running. This has the paradoxical result that time runs out in favour of a bad faith purchaser much more quickly.)[39] The rule has been affirmed most recently in *Guggenheim v Lubell*,[40] when the New York court rejected a due diligence rule.

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[34] 917 F 2d 278 (7th Cir 1990); and earlier first instance decision *Autocephalous Greek Orthodox Church of Cypress v Goldberg* 717 F Supp 1374 (SD Ind 1989).

[35] Eg Rodney Schwartz, 'The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II' (1998) 32 *Columbia Journal of Law and Social Problems* 1.

[36] Section 338(3) of California Code of Civil Procedure provides that a cause of action in relation to articles of 'historical, interpretive, scientific or artistic significance' is not deemed to accrue until 'the discovery of the whereabouts of the article by the aggrieved party, his or her agent or the law enforcement agency which originally investigated the theft'.

[37] See *Naftzger v American Numismatic Society* 42 Cal App 4th 421 (1996); *Naftzger v American Numismatic Society* unreported, Cal CA, 17 June 1999; Carla J Shapreau, 'The California Court of Appeals Second Decision in Naftzger v The American Numismatic Society' (1999) 8 *International Journal of Cultural Property* 524.

[38] See, eg, see *Menzel v List* 267 NYS 2d 804 (SC 1966) and *Kunstammlungen zu Weimar v Elicofon* 678 F2d 1150 (2d Cir) affirming 536 F Supp 813 (1982).

[39] As noted by several writers including Ralph E Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 *New York University Journal of International Law and Politics* 15.

[40] *Solomon R Guggenheim Foundation v Lubbell* 567 NYS 2d 623 (CA 1991).

In *Guggenheim v Lubell*, a Chagall was stolen from the museum in the late 1960s, but the museum told no one. In 1987, the museum sought the work back from the possessor who had purchased the work in good faith in 1967. It had been publicly exhibited twice, in 1969 and 1973, but identified as the missing work only when taken to Sotheby's for appraisal in 1985. In 1986, the museum demanded its return, which was refused, and it sued. At first instance the court used a due diligence approach and held the action was time barred. The museum had not taken active steps towards recovery over a 20 year period other than searching its own premises. The trial court said the museum should have told the police, FBI, Interpol and others, and time began to run from date of second exhibition. An appeal succeeded, however, with the New York Court of Appeals refusing to apply a due diligence requirement. In deciding not to place a duty of due diligence on the original owner, the court reasoned that (a) there were inherent difficulties in declaring what conduct would be necessary to show due diligence; and (b) such a duty could encourage illicit trading of stolen art.[41] New York courts have followed *Guggenheim*, and held a duty of due diligence on the original owner is not a necessary aspect of the demand and refusal rule.[42]

Both the New York and Californian approaches may be tempered by the doctrine of laches. The possessor of stolen goods may resist a claim from a prior owner on the basis the prior owner could have discovered the location of the property at a much earlier date. That means concepts of due diligence could be considered, but with a different burden of proof. The defence of laches usually involves knowledge by an aggrieved party of its rights, an unreasonable delay in exercising the rights and a change of position working to the detriment of the defendant. That is, the defendant would need to show prejudice by the unreasonable delay by the plaintiff in demanding the work back. This allows the court to consider conduct of the defendant purchaser of stolen art work.[43]

The last few years has seen many writers address limitation questions in relation to art, often in the context of holocaust-related claims. I want to set out a few of their reform suggestions, before returning to consider the Australian situation. The international suggestions increasingly focus on the possibility of fairly comprehensive searches by potential buyers and widespread listing by dispossessed owners on databases and similar services. While there is clear appeal in legal recognition for these searches or listings, there may be dangers in the greater factual analysis needed if transactions are later legally challenged.

Norman Palmer, for example, has suggested that the forensic difficulties of massively expensive litigation and complex questions of fact and law make it tempting 'to ask whether anyone, other than a State, a State-supported party, an oil company, or a private individual of enormous wealth, could seriously contemplate litigation'[44] for the return of stolen art across borders. (Ralph Lerner also has emphasised the difficulties in litigating the art market

[41] Eg, see, Rodney Schwartz, 'The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II' (1998) 32 *Columbia Journal of Law and Social Problems* 1.
[42] Eg *Golden Buddha Corp v Canadian Land Co of America* 931 F 2d 196 (2d Cir 1991), *Hoelzer v City of Stamford* 933 F 2d 1131 (2d Cir 1991).
[43] Eg see Ralph E Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 *New York University Journal of International Law and Politics* 15.
[44] Norman Palmer, 'Recovering Stolen Art' [1994] *Current Legal Problems* 215.

approaches. Proving the elements of the defence of laches places a heavy evidential burden on a good faith purchaser. The defence turns on an *unreasonable* delay rather than a *long* delay. This virtually ensures long and expensive litigation. It favours an original owner too greatly.[45])

Stephanos Bibas has suggested that title should go *immediately* to theft victims who report the loss to police and to international computerised database(s) of art thefts. The idea is that this would 'create clear incentives for owners to report thefts and for buyers and art merchants to check the database, thus drying up the market for stolen art.'[46] The approach certainly would be comparatively simple, once issues of which database or databases would be effective legally were dealt with.

Writing at the start of the 1990s, in a somewhat different communications environment, Leah Eisen suggested a great weakness in due diligence requirements is that US courts had not yet been clear about the degree of effort a dispossessed owner needs to exercise to establish due diligence. To avoid unprincipled favouritism between the two parties, she suggested the law needs objective measures for determining whether an owner can bring an action. The most significant standard should be whether the plaintiff has contacted law enforcement agencies and art foundations which disseminate information on art thefts. This suggestion would seem even more applicable nearly one decade later. She also suggested a duty to check provenance should be placed on the purchaser. A reciprocal duty would discourage the art theft market.[47] A similar concern for predictable standards is evident in Lyndel Prott and Patrick O'Keefe's work from the 1980s.[48]

Ralph Lerner also has suggested legislation to encourage dispossessed owners to register losses with an international registry – which could stay limitation periods, at least against purchasers who do not make inquiries – and to encourage purchasers to check database listings – which would start time running on a short three year limitation period. If neither party had used the registry, some form of discovery approach could be used.[49] And the English limitations writer, Ruth Redmond Cooper, has made broadly similar suggestions about encouraging registration and checking through some link to a reformed limitations regime.[50]

Some writers have suggested smaller steps in the same direction – encouraging provenance searches and publicity of thefts. Rodney Schwartz, for example, supports the New York position, as long as the idea of laches is given due weight. He suggests the demand and refusal rule better serves the art world than existing alternatives. It need not unfairly reward non-diligent former owners at the expense of good faith purchasers. By using the equitable doctrine of laches – and its incorporation of the possessor's conduct through the US cases –

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[45] Ralph E Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 *New York University Journal of International Law and Politics* 15.
[46] Stephanos Bibas, 'The Case Against Statutes of Limitations for Stolen Art' (1994) 103 *Yale Law Journal* 2437; reprinted in (1996) 5 *International Journal of Cultural Property* 73.
[47] Leah E Eisen, 'The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World' (1991) 81 *Journal of Criminal Law and Criminology*.
[48] Eg Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage, Volume 3 Movement* (London: Butterworths 1989) ¶ 361 'Protection against claims'.
[49] Ralph E Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 *New York University Journal of International Law and Politics* 15.
[50] Ruth Redmond Cooper, 'Time Limits in Actions to Recover Stolen Art' in Norman Palmer (ed), *The Recovery of Stolen Art* (London: Kluwer Law International 1998) 145.

the rule places the burden of proof on good faith purchasers to demonstrate diligence prior to purchasing the work. It assigns obligations to both parties and avoids the complication of trying to define 'reasonable diligence' by the dispossessed owner alone. Thus, it will promote more thorough provenance searches.[51] Canadian writer Robert Patterson also suggests that it is feasible to require purchasers to conduct reasonable investigations about provenance. Most simply, by imposing due diligence obligations on both sides courts will establish a more equitable basis for awarding ownership.[52]

Australia reconsidered?

What could be wrong in the comparatively mechanistic Australian approach to when time commences? Some commentators suggest jurisdictions with approaches like the Australian ones may become havens for stolen art.[53] At the same time, themes in this international writing concern the use of international databases and listings services, and encouraging both parties to take an active role in questions of title.

So there are at least some 'policy' questions, removed form the black letter of the law. And it is here that I want to note a cultural question about law, and about its relationship to art. What response, if any, should law (or more realistically, legal commentators) make to this not surprising revelation? Artists and other players in that cultural realm have a different understanding of many situations to the legal understanding. Surely it cannot be unusual to suggest, especially to criminologists, that people subject to the legal process do not always have the same perception of what is occurring as the legal actors do. Yet, this is a too common complaint in writing about art and law. The most simple version is to say law does not understand the essence of art. For example, it infringes artistic free speech through the blunt application of obscenity and intellectual property law and so limits the social contribution of art; perhaps I should add an adjective here, somewhat ironically, and say it limits the social contribution of avant garde art. In Australia, I think a non-lawyer has written some of the best commentary on this. Peter Anderson has on several occasions made the simple point that law has a role to 'manage the cultural field' rather than to promote art on its own terms.[54] He shows how a richer understanding of the practices of legal and artistic actors would assist art and law writing.

I mention the issue because there is a similar point here. That is the question of whether limitation periods for art should be the same as for other property. If a categorical solution is tried – as in the California legislation – then the legal approach could be to say, 'When it's stolen art you want to recover, time starts running not a point X, but later', or 'When it's art, time is extended'. But for what? What would be within the category of stolen 'art'? There is a practical question about the difficulty of creating a specific legal approach for a particular class of transactions. If art is not all 'high culture', to use an unhelpful but common label, does it have boundaries for law to discern?

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[51] Rodney Schwartz, 'The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II' (1998) 32 *Columbia Journal of Law and Social Problems* 1.
[52] Robert K Paterson, 'Hitler and Picasso – Searching for "the degenerate"' (1999) 33 *University of British Columbia Law Review* 91.
[53] Eg Ralph E Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 *New York University Journal of International Law and Politics* 15.
[54] Most recently see Peter Anderson, 'But is it art? Review of Paul Kearns, *The Legal Concept of Art*, Hart Publishing: Oxford 1998' (1999) 4 *Media & Arts Law Review* 127.

That sort of demarcation issue is common enough for law, but not enthusiastically undertaken in relation to 'art'. I could go on here with illustrations about judges describing art – for example, the English case law on copyright protection for 'Works of Artistic Craftsmanship'.[55] I prefer in this context, however, to follow the lead from Sydney academic Patricia Loughlan, who has noted the principle decision on that question[56] as 'interesting though dithering and highly inconclusive'.[57]

Instead, I just wish to make the point that such categorisation may be difficult, but a lead could be taken from international conventions in the area, particularly the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 and the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995. Indeed, Australian examples exist in relation to the UNESCO Convention, which underlies the *Protection of Movable Cultural Heritage Act 1986* (Cth) and its extensive classificatory scheme controlling the export of certain cultural objects. (It is worth noting here that questions about limitations and indigenous cultural material raise separate issues, as their consideration in UNIDROIT illustrates, some of which are taken up in Australian indigenous commentary by Terri Janke.)

There are two more possibilities that I want to close with: one relates to improving practice without legislative change (or before it); the other suggests a general reform to limitations could be very well suited to art claims. The first possibility relates to the current art market and improving its integrity in terms of observance of legal title. The common limitations approach in Australia could remain. That is, time starts running and the dispossessed owner may well become the former owner over time and be left without redress. But a parallel structure could be added. This could be based in industry self-regulation, if legislation would be too much to seek. (And I do not mean to be taken to suggest that legislation should not also be sought.) This parallel structure would utilise digitisation and communications technology. I would hesitate to suggest this as the sole focus. A unadulterated optimism that future technology will offer solutions can be laughable in this as in most areas. Technology does not create equity. But technology offers one, if not the sole, worthwhile avenue. Online databases of stolen art are an emerging change in art trade practice. That change in trade culture could be of greater magnitude than the arrival of photographically illustrated auction catalogues. Criteria for object identification would be important for the extent the information would be effective, as has been recognised.[58]

How can this quantitatively and qualitatively different access to information be linked to limitation periods? In a self-regulatory approach, the information can help in the detection and recovery of stolen items. It can avoid the need to submit to the legal rules. At least for works above a certain value, sellers, dealers and buyers should routinely check online listings. A 'trade memory' of works that have been thought suspect could be harder to achieve, but also is an important question for a conference like this one.

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[55] Eg see David L Booton, 'Art in the Law of Copyright: Legal Determinations of Artistic Merit under United Kingdom Copyright Law' (1996) 1 *Art Antiquity and Law* 125.
[56] *George Hensher Ltd v Restawhile Upholstery Ltd* [1976] AC 64 (HL).
[57] Patricia Loughlan, *Intellectual Property: Creative and Marketing Rights* (Sydney: LBC Information Services 1998) 30.
[58] Eg see generally Patrick J O'Keefe, Conference report 'Protecting Cultural Objects in the Global Information Society, Amsterdam (May 27-28, 1997)' (1998) 7 *International Journal of Cultural Property* 549.

It is a partial solution, localised to the particular art transactions. To an important degree it could avoid definitional problems about law categorising art by encouraging those in the market to act. Also, such approaches are extremely useful in an area like art theft where items move across legal borders so much. The technical application and comparison of a few jurisdictions' approaches to limitation periods as they apply to stolen art may seem labyrinthine. But it is far worse with an expansion of the focus to conflict of laws, or private international law, issues. This self regulation possibility follows easily from much recent US and related writing. It also accords with some of the limitations seen in a solely legal response to holocaust-related art claims.[59] (That the law's practical operation cannot reach its posited goal of 'justice' cannot surprise in relation to such events.)

The second suggestion is to consider general limitations reform. The Western Australian Law Reform Commission published an extensive report on limitations in 1997.[60] The Commission examined a range of limitation statutes from around the world, and recommended the adoption of an entirely new Act based largely on an Alberta proposal. All actions (with some exceptions for certain actions involving land) would have a 'discovery limitation period' of three years. This would run from the date on which the plaintiff suffers an injury, can attribute the injury to the defendant's conduct, and the injury warrants bringing proceedings. 'Injury' was recommended to be broadly defined, and to include conversion and detinue. It also recommended all actions have an 'ultimate limitation period' of 15 years. If either the discovery or ultimate periods expired, a claim would be statute barred, except with leave of the court. There are clear similarities to the expected English proposals,[61] which may offer an even better general approach to limitations, at least in relation to dealing with stolen art recovery.

Either of these approaches could provide greater protection to owners of a particular type of property without necessarily creating greater uncertainty for the market. And they would provide protection to further an aim of decreasing art theft, or to better manage this aspect of the cultural field in this world of limitations.

[59] Cf the wider approach suggested through material such as the 1998 Washington Conference: eg Robert K Patterson, 'The Washington Conference on Holocaust era assets: 30 November-3 December 1998' (1999) 4 *Media & Arts Law Review* 123; the Association of Art Museum Directors Principles: eg Report of the AAMD Taskforce on the Spoliation of Art during the Nazi/World War II Era (1933-1945)' (1998) 7 *International Journal of Cultural Property* 545.
[60] Western Australian Law Reform Commission, Report 36(II), *Limitation and Notice of Actions* (January 1997).
[61] These also have considered the Alberta material.