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Whose Art is It Anyway? Title Disputes and Resolutions in Art Theft Cases

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INTRODUCTION

In 1988, a Monet painting sold at auction for a record price of $24.3 million.[1] Just eight years before, Monets could be obtained for about $300,000.[2] Twenty or thirty years ago, the best Impressionists' works sold for $25,000, with lesser works selling for as little as $5,000.[3] Although many legitimate investors have profited from this situation, so have many thieves. Boston's Isabella Stewart Gardner Museum suffered a recent art heist,[4] and auction houses report that claims of an auction house selling stolen art arise as frequently as two or three times a week.[5]

Given the uniqueness of individual works of art, their high value, their rapid appreciation, and numerous occasions of theft, courts often are called upon to resolve disputes between two parties claiming ownership of a particular piece of art.[6] Generally, a prior owner seeks the recovery of an allegedly stolen work. The typical defendants in such actions are good faith purchasers. Part I of this Note introduces the policies underlying these judicial decisions.[7] Next, this Note discusses several of the title dispute cases previously decided.[8] It also examines the rules and policies upon which the courts have relied.[9] Part III analyzes the tension among these decisions, revealing underlying inconsistencies.[10] Finally, this Note offers a viable solution to some of these problems.[11]

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[1] Lyne, *Art Law Blooms*, Nat'l L.J., June 18, 1990, 1, 37, col. 1.
[2] *Id.* at 36, col. 4.
[3] *Id.*
[4] *Id.* at 37, col. 1.
[5] *Id.*
[6] *See infra* notes 32-103 and accompanying text.
[7] *See infra* notes 12-22 and accompanying text.
[8] *See infra* notes 32-103 and accompanying text.
[9] *See infra* notes 24-103 and accompanying text.
[10] *See infra* notes 107-36 and accompanying text.
[11] *See infra* notes 137-52 and accompanying text.

I. THE BASES OF TITLE DISPUTES

The prevailing rule in the United States is that a purchaser cannot take good title from a thief.[12] However, a purchaser can assert the statute of limitations as a defense against a prior owner.[13] Most art replevin actions are brought long after the statute of limitations expires,[14] with courts basing their decisions on an extended tolling period for the statute of limitations.[15] The effectiveness and consistency of these decisions turns on the reconciliation of the statute of limitations doctrine with the rule that prevents a thief from passing valid title.

The rule preventing a thief from passing valid title discourages thefts by decreasing the ready market for stolen items.[16] A countervailing policy requires all civil actions and most criminal ones to be brought within a statutorily prescribed limitations period[17] to prevent stale claims, penalize slothful plaintiffs, and allow good faith purchasers some eventual assurance of finality [18]

A similar doctrine, known as "laches," or "estoppel by laches," is also cited as a motivating factor in resolving competing claims.[19] Like the statute of limitations, the doctrine of laches acts to "aid the vigilant and not those who slumber on their rights."[20] Unlike the statute of limitations, which relies upon a theoretical assumption that plaintiffs' claims grow stale after a certain time, the doctrine of laches requires defendants to prove reliance upon or a detrimental change in position as a result of plaintiffs' inaction.[21]

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[12] *See* UNIFORM COMMERCIAL CODE §§ 2-403(1), 1-201(32), (33) (1990) [hereinafter U.C.C.]; J. EDDY & P WINSHIP, COMMERCIAL TRANSACTIONS 519-20 (1985).

[13] *See* FED. R. CIV. P 8(c). A statute of limitations is "[a] statute prescribing limitations to the right of action on certain described causes of action or criminal prosecution; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued." *See* BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

[14] *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (thirty years elapsed between the theft and the replevin action).

[15] *See, e.g.*, Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d 143, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990), *appeal granted*, 554 N.Y.S.2d 992 (N.Y. App. Div. 1990).

[16] Weinberg, *Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase*, 56 TUL. L. REV 1, 5, 10 (1981).

[17] *See, e.g.*, N.Y. CIV PRAC. L. & R. 214 (McKinney 1990) (action to recover a chattel must be commenced within three years of accrual).

[18] *See, e.g.*, Wood v. Carpenter, 101 U.S. 135, 139 (1879).

[19] *Guggenheim*, 550 N.Y.S.2d at 619.

[20] BLACK'S LAW DICTIONARY 875 (6th ed. 1990).

[21] *Id., see, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392 (1946); *Guggenheim*, 550 N.Y.S.2d at 621-622.

Some courts turned to laches over the statute of limitations in art cases to inject more equitable factors without having to justify the tolling of the statute of limitations.[22]

II. THE DEVELOPMENT OF THE CURRENT LAW

A. The Adverse Possession Doctrine

The Uniform Commercial Code provides a clear distinction between void title and voidable title.[23] A holder of void title, such as a thief,[24] can transfer only void title.[25] A holder of voidable title, as illustrated by the doctrine of entrustment,[26] may transfer valid title to a good faith purchaser.[27] The effect of void and voidable title is not always clear, considering the role of the statute of limitations. If a plaintiff is barred by the statute of limitations or laches from suing for the recovery of a stolen item, then a purchaser of that item has received valid title for all practical purposes, even though he originally acquired only void title.[28] Typically, this happens when several years or even decades pass before a plaintiff brings an action for the theft.[29] Although under the Uniform Commercial Code a subsequent purchaser cannot claim that the thief passed good title to him,[30] he undoubtedly will assert the laches and limitations doctrines to defend his ownership of purchased property that he has believed to be his for years.[31]

Prior to the landmark decision of *O'Keeffe v Snyder*,[32] under the prevailing rule, the defendant could defeat the plaintiff's claim

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[22] *See Guggenheim*, 550 N.Y.S.2d at 621.

[23] Void title is simply another way of stating that there is no title. Voidable title is descriptive of situations in which title could be voided, or could become full title, depending upon what actions are taken. *See* U.C.C. § 2-403 (1990).

[24] J. EDDY & P WINSHIP, *supra* note 12, at 519-20.

[25] *Id.*

[26] U.C.C. § 2-403(2) (entrusting possession of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all the rights of the entrustor to a buyer in the ordinary course of business).

[27] U.C.C. § 2-403(1). See also U.C.C. § 1-201(19) (1990) (defining "good faith") and U.C.C. § 1-201(33) (defining "purchaser").

[28] O'Keeffe v. Snyder, 416 A.2d 862, 874 (N.J. 1980) ("Our adoption of the discovery rule does not change the conclusion that at the end of the statutory period title will vest in the possessor.").

[29] *See, e.g., id.*

[30] *See supra* note 16 and accompanying text.

[31] *O'Keeffe*, 416 A.2d at 873.

[32] 416 A.2d 862 (N.J. 1980).

by meeting the adverse possession test.[33] While the adverse possession doctrine primarily governs real property,[34] courts applied the doctrine to personal property disputes[35] because the underlying policies are similar to the policies underlying the statute of limitations.[36] Both doctrines seek to prevent stale claims, penalize slothful plaintiffs, and allow defendants some degree of finality [37] In order to invoke the adverse possession defense, a defendant must prove that his possession is "hostile, actual, visible, exclusive, and continuous. "[38] If the defendant meets this test for the legislatively prescribed term of years, plaintiff's claim is barred.[39]

In *O'Keeffe*, the plaintiff, an artist, alleged that three of her paintings were stolen from An American Place gallery, which was run by her late husband Alfred Steiglitz.[40] She claimed that the theft occurred in 1946.[41] In 1976, she discovered that the paintings had been sold by Ulrich A. Frank to the defendant.[42] According to Frank, he received the paintings from his father,[43] and he claimed to have seen the paintings in his father's apartment as early as 1941.[44] The lower court, using the adverse possession doctrine, held that Frank's display of the paintings at his residence and at a one-day local art show failed to meet the test of "visibility,"[45] often characterized as "open and notorious."[46]

The Supreme Court of New Jersey reversed, rejecting the adverse possession doctrine as non-responsive to the needs of the art

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[33] *See, e.g.*, Reynolds v. Bagwell, 198 P.2d 215 (Okla. 1948) (purchase of rare violin from established dealer did not toll the statute of limitations under adverse possession doctrine); O'Keeffe v. Synder, 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 416 A.2d 862 (N.J. 1980) (trial court held that display of art in home and one day at local show satisfied adverse possession doctrine); *see also infra* notes 40-45, 54-56 and accompanying text.

[34] 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1012 (1980).

[35] *Id.* at 127-28.

[36] *O'Keeffe*, 416 A.2d at 874.

[37] R. POWELL, *supra* note 34, at ¶ 1012.

[38] *O'Keeffe*, 416 A.2d at 870 (citing Redmond v. New Jersey Historical Soc'y, 28 A.2d 189 (N.J. 1942).

[39] *Id.* at 874 (the *O'Keeffe* court, while rejecting the adverse possession doctrine, provides an excellent summary of the law prior to the *O'Keeffe* decision).

[40] *Id.* at 865.

[41] *Id.*

[42] *Id.* at 866.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 846.

[46] *E.g.*, *O'Keeffe*, 416 A.2d at 871; Joseph v. Leshevich, 153 A.2d 349 (N.J. Super. Ct. App. Div. 1949).

world.[47] The court agreed that the defendant had not met his adverse possession burden, but concluded that public display of purchased artwork is too demanding.[48] The court instead adopted a due diligence rule in which the burden shifts to the plaintiff to prove the use of diligence in ascertaining the information necessary to bring suit.[49] This rule tolls the statute of limitations indefinitely if diligence was exercised.[50] What constitutes diligence is a question of fact.[51] O'Keeffe and Snyder settled before the case could be retried.[52]

Other jurisdictions seem more comfortable with the adverse possession doctrine.[53] In *Reynolds v Bagwell*,[54] the Oklahoma Supreme Court held that the purchase of a rare violin from an established dealer did not toll the statute of limitations because no concealment of the sale occurred.[55] Thus, the court held that the defendants did not have to exhibit the item to invoke adverse possession, even though the plaintiffs had never received actual notice of the possession and probably never would.[56]

B. The Due Diligence Rule

Despite these contradictory positions, the due diligence rule has been well received, especially by the New York courts.[57] New York is a leading jurisdiction in this area because of the number and size of its museums. The evolution of New York's use of the due diligence doctrine gives insight into the doctrine's flaws.

A federal court applied New York law in *Kunstsammlungen Zu Weimar v Elicofon*,[58] one of the first New York cases to discuss the concept of diligence. The case involved a German museum's attempts to recover a painting stolen from Germany

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[47] *O'Keeffe*, 416 A.2d at 872.

[48] *Id.* at 871.

[49] *Id.* at 872.

[50] *Id.* at 873.

[51] *Id.*

[52] J. DUKEMINIER & J. KRIER, PROPERTY 127 (1980) [hereinafter J. DUKEMINIER].

[53] United States v. One Stradivarius Kieserwetter Violin, 197 F 157 (2d Cir. 1912) (no concealment occurred where the violin was kept on library table at residence, shown to many well-known violinists, and no obligation existed to publicly exhibit violin).

[54] 198 P.2d 215 (Okla. 1948).

[55] Reynolds v. Bagwell, 198 P.2d 215, 217 (Okla. 1948).

[56] *Id.*

[57] *See infra* notes 58-103 and accompanying text.

[58] 678 F.2d 1150 (2d Cir. 1982).

during World War II.[59] Apparently, a U.S. serviceman stole the painting, selling it to U.S. citizens after returning to the United States.[60] The statute of limitations, although tolled until the United States recognized East Germany as a country, had expired. [61] New York, however, recognized an additional standard in art theft cases. Under New York law, an innocent purchaser becomes a wrongdoer only when a demand for the property is made and refused.[62] In order to prevent slothfulness on the plaintiff's part, the court required that due diligence be exercised in seeking information sufficient to allow such a demand.[63] The court conducted a due diligence analysis of the museum's efforts. Although the museum had been somewhat lackadaisical in its search,[64] the court upheld the district court's decision that the museum was diligent, citing the cold war tensions between the United States and the Soviet-bloc countries as the prime factor for the museum's diminished search.[65]

DeWeerth v Baldinger[66] again confronted the Second Circuit with a stolen art claim, also involving the Allied invasion of Germany at the close of World War II. A German citizen, DeWeerth, owner of a Monet painting stolen during the War, discovered its whereabouts in 1981 after her nephew learned that the art gallery Wildenstein & Co. had purchased the painting in 1957 [67] The current "owner," Baldinger, a good faith purchaser, displayed the art only twice—once when he originally purchased from Wildenstein & Co. in 1957, and again in 1970, for only a few days. Otherwise, the painting remained at his home.[68]

DeWeerth had notified the military government in 1946, had contacted a lawyer in 1948 and other art experts in 1955, and the West German Bundeskriminalamt in 1957 [69] She did not search

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[59] Kunstsanmlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1152 (2d Cir. 1982).

[60] *Id.* at 1155.

[61] *Id.* at 1164.

[62] *Id.* at 1161.

[63] *Id.* at 1165.

[64] Kunstsammlungen Zu Weimar v. Elicofon, 536 F Supp. 829, 851 (E.D. N.Y. 1981) (plaintiff failed to use Central Collecting Points), *rev'd*, 678 F.2d 1150 (2d Cir. 1982).

[65] *Id.* at 852.

[66] 836 F.2d 103 (2d Cir. 1987).

[67] DeWeerth v. Baldinger, 836 F.2d 103, 104-05 (2d Cir. 1987).

[68] *Id.* at 105.

[69] *Id.* (the Bundeskriminalamt is the West German equivilent of the Federal Bureau of Investigation).

from 1957 to 1981, when she finally discovered the location of the painting.[70] The district court, in examining DeWeerth's diligence for the demand and return requirement, found in her favor [71] The court held that DeWeerth's age of sixty-three and limited resources justified the cessation of her search in 1957 [72] Given this diligence, the court placed the burden on the defendant to prove his chain of title or to somehow refute DeWeerth's claim that the painting was originally stolen.[73] The court also noted that the lack of "open and notorious" display barred an adverse possession defense.[74]

The court of appeals reversed,[75] concentrating on the plaintiff's diligence. The court applied an *O'Keeffe*-type rationale,[76] noting that demand and refusal were unnecessary in all states except New York.[77] The court found DeWeerth's efforts to be lacking because her reports to the authorities consisted only of the minimal paperwork required to report a theft. The court also found DeWeerth's conversations with her lawyer to be more of an insurance matter than an attempt to recover the painting. According to the court DeWeerth failed to give adequate information for investigation to the art experts.[78]

The court relied on DeWeerth's inactions at least as much as on the deficiencies in her search. First, DeWeerth did not use the U.S. military's Central Collecting Points (CCP) Program, which had been set up to hold stolen artwork until claimed by the rightful owner. The court pointed out that DeWeerth's family had used the CCP system to recover other stolen artwork. DeWeerth also failed to use a similar program run by the U.S. State Department.[79]

The court indicated that diligence required more than the efforts DeWeerth had undertaken, which ceased in 1957 [80] Unconvinced that her age prevented additional efforts, the court noted that the wealth and sophistication of the art collector, coupled with

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[70] *Id.*

[71] DeWeerth v. Baldinger, 658 F Supp. 688, 696 (S.D. N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987).

[72] *Id.* at 694-95.

[73] *Id.* at 696.

[74] *Id.* at 697.

[75] *DeWeerth*, 836 F.2d at 112.

[76] *Id.* at 109.

[77] *Id.*

[78] *Id.* at 111.

[79] *Id.*

[80] *Id.* at 112.

the value of the painting, indicated that DeWeerth should have hired someone to continue searching.[81]

Finally, the court concluded that the listing of the Monet's current holder in a *catalogue raisonne*,[82] the publication DeWeerth's nephew had used in tracking down the painting, indicated a lack of diligence on the part of the plaintiff, who could have checked the catalog earlier.[83] Such a catalog is not always definitive,[84] but often reveals the current holder of a painting, or at least someone in the chain of title that might lead to the current holder.[85]

The eyes of the art world are on New York again, waiting for its state court system to decide *Solomon R. Guggenheim Foundation v Lubell*.[86] This case involves a Chagall Govache,[87] now valued at approximately $200,000,[88] acquired by the Guggenheim Museum in the 1930's.[89] In the mid-1960's, the museum discovered that the unexhibited painting was missing.[90] The museum did not notify police because its poor inventory records prevented proving the theft or determining exactly when the painting disappeared.[91]

In May of 1967, Rachel and Jules Lubell purchased the painting for $17,000 from the Robert Elkon Gallery in New York,[92] giving them the status of good-faith purchasers.[93] The painting, displayed publicly twice, hangs in the Lubells' Manhattan apartment.[94] In August of 1985, the museum discovered the painting's location from a former employee.[95] Demand and refusal occurred in January of 1986.[96] The New York Supreme Court granted the Lubells'

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[81] *Id.*

[82] A "*catalogue raisonne*" is a portfolio of the artist's works that includes such information as the locations of the works. "[W]hile the catalog is not always definite, the exclusion of a work could diminish the value of that painting." Lyne, *supra* note 1, at 37, col. 1.

[83] *DeWeerth*, 836 F.2d at 112.

[84] Lyne, *supra* note 1, at 37, col. 1.

[85] *DeWeerth*, 836 F.2d at 112.

[86] Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d 143, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990), *appeal granted* 554 N.Y.S.2d 992 (N.Y. App. Div. 1990).

[87] A govache is "a method of painting with opaque colors that have been ground in water and mingled with a preparation of gum" or "a picture painted by Govache." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 982 (1986).

[88] *Guggenheim*, 550 N.Y.S.2d at 619.

[89] Lyne, *supra* note 1, at 36, col. 3.

[90] *Guggenheim*, 550 N.Y.S.2d at 619.

[91] Lyne, *supra* note 1, at 36, col. 3.

[92] *Guggenheim*, 550 N.Y.S.2d at 619.

[93] *Id.*, *see* U.C.C. § 2-403 (1990).

[94] Lyne, *supra* note 1, at 36, col. 4.

[95] *Guggenheim*, 550 N.Y.S.2d at 623.

[96] *Id.* at 619.

motion for summary judgment, holding that the museum had not been diligent as a matter of law since it had not even bothered to notify the authorities and apparently searched only its own premises.[97]

The Appellate Division unanimously reinstated the museum's claim.[98] The court interpreted *DeWeerth* to be based upon estoppel as much as pure statute of limitations concerns.[99] The court found the proper standard to be the doctrine of laches, which necessitates a finding of prejudice to the defendant, as opposed to mere delay.[100] The court called for the defendants to share some of the burden of proof and removed their good-faith purchaser status by requiring them to prove that they acted reasonably and that there were no "red flags" to give them notice of a problem with the painting's title.[101] The court also found that the plaintiff's claim of diligence was not, as a matter of law, unfounded. Passive activity, said the court, could be reasonable if the finder of fact believed the museum's contention that publicized searches drive paintings further underground.[102] On March 29, 1990, the New York Court of Appeals granted Lubell's motion for appeal.[103]

III. AN ANALYSIS OF THE CURRENT LAW

Although the current case law concerning title disputes over stolen art may seem consistent, several anomalies underlie its application. The current guidelines of the due diligence doctrine provide uncertainty, not flexibility.[104] Neither the demand and refusal rule nor the adverse possession doctrine adequately satisfies the policy issues involved,[105] and their abandonment by several courts is laudable.[106]

A. The Inconsistencies of the Due Diligence Cases

Although the New York cases appear consistent with *O'Keeffe*, and at least acknowledge each other,[107] their particular applications

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[97] *Id.*

[98] *Id.* at 624.

[99] *Id.* at 621.

[100] *Id.* The court later noted that characterizing the defense as laches recognized that the "defendant's vigilance is as much in issue as the plaintiff's diligence." *Id.* at 623.

[101] *Id.* at 623-24.

[102] *Id.* at 619.

[103] *Guggenheim*, 554 N.Y.S.2d 992.

[104] See *infra* notes 107-35 and accompanying text.

[105] See *infra* notes 132-35 and accompanying text.

[106] See *supra* notes 57-103 and accompanying text.

[107] *See* DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987).

of the due diligence rule have led to differing results. For example, in *O'Keeffe*, the court remanded the case for a determination of whether the plaintiff had acted reasonably in searching for the painting only by contacting fellow artists and others in the community [108] The *DeWeerth* court found diligence lacking in DeWeerth's reporting to government agencies because she did not follow up the reporting through the CCP program.[109] Merely asking fellow artists did not meet the due diligence standard.[110] This reversed the district court's finding of fact that DeWeerth had acted diligently [111] Thus, one court says that a plaintiff might not need report the theft at all, while another finds for the defendant because the plaintiff did not report in a certain way

While the court in *DeWeerth* may have been correct in faulting the plaintiff for not making use of the governmental check points (CCPs),[112] the court also seemed to demand that the owner of stolen art never give up the search, even though the plaintiff did not stop until she was sixty-three years old.[113] The court brushed the age consideration aside, suggesting that the plaintiff should have hired someone else to search.[114] This diligence standard ignores the simple fact that after more than a decade of fruitless searching, even the most diligent owner might be disheartened at the odds of success. It is one thing to require owners to act seasonably when the theft is discovered, or even when new methods of searching become available, but to require an owner to maintain a continual repetition of means that have not worked for several years, with no indication that success is any more likely in the future, imposes a burden that few owners of stolen art would be likely to bear.

Likewise, in *O'Keeffe*, the court purportedly sought to help owners of stolen art by enacting a rule that would prolong the statute of limitations indefinitely, if the owner is duly diligent.[115] Two fundamental flaws exist in this rule. First, in order to fulfill the policies behind the statute of limitations, the owner's cause of

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[108] O'Keeffe v. Snyder, 416 A.2d 862, 870, 872-73 (N.J. 1980) (recognizing a duty of reasonable investigation upon owners of stolen art work to prevent tolling of the statute of limitations).

[109] *DeWeerth*, 836 F.2d at 111.

[110] *Id.*

[111] *See DeWeerth*, 658 F Supp. at 694.

[112] *See infra* notes 144-51 and accompanying text.

[113] *See DeWeerth*, 836 F.2d at 112.

[114] *Id.*

[115] *O'Keeffe*, 416 A.2d at 873.

action must expire at some time. Otherwise, the unsuspecting defendant will bear the risk of having to defend against stale claims.[116] Second, the due diligence standard results in unreasonable decisions by shifting the burdens between plaintiffs and defendants. The court in *O'Keeffe* actually favored the defendant at the original owner's expense by reversing a decision in the original owner's favor.[117] Because of the difficulty of trying to show adverse possession of personal property, defendants would rarely have won under prior New Jersey law [118] The *O'Keeffe* court reversed this trend, putting the burden on the plaintiff, giving defendants a better chance of prevailing.[119]

The due diligence rule also might harm the defendants, current possessors of the stolen art. The *Guggenheim* case demonstrates the effect that this rule can have on defendants. The lower court in *Guggenheim* apparently relaxed the standard for plaintiffs by stating that passive efforts could be enough,[120] directly contradicting *DeWeerth*. In *DeWeerth*, the plaintiff might have prevailed if allowed to argue her passivity aided her search by keeping the art from going further underground. Despite taking far more steps than the Guggenheim Museum, which was given a full trial on the merits,[121] the *DeWeerth* plaintiff lost.[122] Under a *Guggenheim* rationale, the plaintiff might prevail, undermining defendants in *DeWeerth*-type situations.

The *Guggenheim* court also decided to weigh defendants' actions.[123] This may strike a greater equity among the parties, but it is hardly consistent with prior law.[124] The court further requires that the defendants prove the art work was not stolen,[125] although previous courts required plaintiffs to prove that the work was

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[116] For a discussion of the principles underlying the statute of limitations, see *supra* notes 16-22 and accompanying text.

[117] *O'Keeffe*, 416 A.2d at 846.

[118] See *supra* notes 23-56 and *infra* note 133 and accompanying text.

[119] This is supported by the fact that O'Keeffe had won under the original standard, but settled after the reversal; *see* J. DUKEMINIER, *supra* note 52, at 127.

[120] Solomon R. Guggenheim Found. v. Lubell, 153 A.D.2d 143, 550 N.Y.S.2d 618, 619 (N.Y. App. Div. 1990), *appeal granted*, 554 N.Y.S.2d 992 (N.Y. App. Div. 1990).

[121] *See supra* notes 66-103 and accompanying text.

[122] For a general discussion of *DeWeerth*, see *supra* notes 66-85 and accompanying text.

[123] *Guggenheim*, 550 N.Y.S.2d at 623-24.

[124] *See, e.g.*, *O'Keeffe*, 416 A.2d at 867 ("[G]enerally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others *regardless of their good faith and ignorance of the theft.*" (emphasis added)).

[125] *Guggenheim*, 550 N.Y.S.2d at 624.

stolen.[126] Putting this burden on defendants who can trace their titles to reputable art dealers could cripple the art community. If buyers cannot rely on reputable art dealers, they may well decide not to make such purchases.[127] The enjoyment of a $24.3 million painting over the limited time of possession would be cold comfort, although the court cited this as additional support for switching to a laches standard.[128]

These anomalies, coupled with the apparent problem that lower courts seem to have in applying these standards—all of the cases except *Elicofon*[129] were reversed by the higher court[130]—indicate a deficiency in the applicable standards. This is partly because previous cases seem to turn on their own facts[131] and yet reject the lower courts' weighing of those facts. Without clearer guidelines, the due diligence rule is one destined to be redecided on appeal, no matter how the district court decides the case. Also, if the *Guggenheim* opinion stands, then the due diligence rule may well be obliterated. Allowing plaintiffs to remain passive to keep the art from going underground merely transforms the diligence rule to a rule allowing plaintiffs to ignore the statute of limitations.

B. One Step Forward and Two Steps Back?

Although the due diligence standard is unworkable, the prior standards are also flawed. A return to a pure adverse possession standard still offers no solution to the "open and notorious" problem.[132] If display in one's home is enough, the plaintiff likely

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[126] Kunstsammlungen Zu Weimar v. Elicofon, 536 F Supp. 829, 837 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *O'Keeffe*, 416 A.2d at 867; *see DeWeerth*, 658 F Supp. at 688 (DeWeerth discusses which party actually had the burden; it would seem to have fallen on the plaintiff along with the general burden of proof).

[127] If even the most reputable art dealers could not be trusted, art sales would virtually cease. The risk involved would lower the price at which a buyer would be willing to complete the transaction. The same theory applies to the demand side; if the most reputable art dealers cannot be trusted, buyers will not risk their capital on art work.

[128] *Guggenheim*, 550 N.Y.S.2d at 622.

[129] Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) (using a due diligence standard, the court found the owner of the stolen art was diligent in searching and should recover the art work); *see also supra* notes 58-65 and accompanying text.

[130] *See* DeWeerth v. Baldinger, 658 F Supp. 688 (S.D. N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987); O'Keeffe v. Snyder, 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 416 A.2d 862 (N.J. 1980); *Guggenheim*, 550 N.Y.S.2d at 618 (reversing lower court's unpublished decision and granting appeal to New York's Court of Appeals).

[131] *See, e.g., DeWeerth*, 836 F.2d at 110.

[132] *See supra* notes 23-48 and accompanying text.

would never prevail. Forcing the defendant to display his purchase publicly for a set amount of time not only restricts a purchaser's right to do with his goods as he pleases, but also seems unworkable given the number of works of art that would have to be displayed. While adverse possession may be well suited to land disputes, it loses effectiveness in personal property cases[133] because of the notice policy

A return to the demand and refusal rule[134] is also unacceptable. If the demand requires diligence to excuse delay, parties are once again at the mercy of the finder of facts, or more likely, an appellate court bent on refinding the facts. The demand and return could work without the diligence rule by excusing any delay, which is how some New York attorneys characterized the rule before *DeWeerth*.[135] Such excuse, however, would defeat the purpose of having a statute of limitations.[136]

IV. A PROPOSED REFORMATION OF THE DUE DILIGENCE RULE

Although the due diligence rule has given rise to much uncertainty and inconsistency in the law, it is not damaged beyond repair. The underlying motivations of the statute of limitations can be fulfilled by reforming the standard. Even the extra requirement of the doctrine of laches—that a defendant actually be prejudiced by a delay—would be met easily in any case similar to those previously mentioned.[137] The great length of time usually involved between a defendant's purchase and a plaintiff's action almost assures a change in position by the defendant. A defendant's defense is hampered where all of the evidence may be decades old and where he had no reason to preserve such evidence.

The problem underlying the *Guggenheim* rationale is the requirement that the defendants prove that their chain of title did

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[133] *O'Keeffe*, 416 A.2d at 873. *See generally* Franzese, *Georgia on My Mind - Reflections on O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1 (1989); Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV 1122 (1980).

[134] *See Elicofon*, 678 F.2d at 1161; *see also supra* notes 57-65 and accompanying text.

[135] Lyne, *supra* note 1, at 36, col. 4.

[136] *See supra* notes 16-22 and accompanying text.

[137] *See supra* notes 57-103 and accompanying text. The scope of this Note is limited to cases involving a question of the statute of limitations and thus a certain amount of time must be assumed to have passed. As the statute of limitations is designed to protect defendants from having to defend against stale claims, a change in defendant's position is also a logical assumption.

not derive from a thief.[138] The law already provides that good title cannot be gained from a thief.[139] These cases should assume that the statute of limitations is the source for the proper question: can title be gained from the passing of a great amount of time? In order to answer this question affirmatively, the courts must conclude that the defendant is a good-faith purchaser[140] and that the plaintiff exercised due diligence. If there is evidence that a defendant is not a good-faith purchaser, then the courts are justified in ruling in the plaintiff's favor. This decision would be justifiable even where the plaintiff's actions would not meet the proposed standard of diligence, because it is inequitable to allow anyone other than a good-faith purchaser to assert the statute of limitations—a defense vesting title in the defendant and defeating the purposes of the rule that a thief cannot pass valid title.[141] Also, a defendant who is not a good faith purchaser is unlikely to have changed his position to evoke the doctrine of estoppel by laches.[142]

If the defendant is a good faith purchaser, then he would be entitled to raise the defense of laches or the statute of limitations. The courts would have to decide if the plaintiff acted with sufficient diligence to toll the statute of limitations. For consistent decisions, the courts must have suitable guidelines for determining a defendant's good-faith purchaser status, and a plaintiff's due diligence.

In order to be considered a good faith purchaser, a defendant must make some effort to verify his seller's title in the artwork.[143] First, a defendant bears the burden of performing any minor investigatory procedures that are readily available. For instance, the Art Dealers Association of America (ADAA) maintains a registry of stolen paintings.[144] Purchasers should be required to consult that registry This burden is minimal and desirable to a purchaser,

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[138] *See* Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d 143, 550 N.Y.S.2d 618, 623-24 (N.Y. App. Div. 1990), *appeal granted*, 554 N.Y.S.2d 992 (N.Y. App. Div. 1990).

[139] *See supra* notes 12, 23-27.

[140] See *supra* note 27.

[141] *See supra* notes 12, 23-27 and accompanying text.

[142] See *supra* notes 19-22 and accompanying text.

[143] J. EDDY & P WINSHIP, *supra* note 12, at 521, 538-39. In order for a defendant to be a good faith purchaser, he must demonstrate his "innocence." Eddy and Winship point to similarities among good faith purchasers and holders in due course. Holders in due course explicitly are held to be ineligible for that status if they overlook obvious title problems or have notice of defenses or claims, and thus that standard may be read into good faith purchasers as well.

[144] *See* O'Keeffe v. Snyder, 416 A.2d 862, 866 (N.J. 1980).

who is willing to spend several million or even several thousand dollars for the art. Also available from Manhattan's International Foundation for Art Research (IFAR) is an "informational lost and found" service.[145] Defendants should be required to consult this service.

To keep this burden from hindering art transactions, a rebuttable presumption should exist that a defendant is a good faith purchaser if he has consulted the aforementioned sources and if he has purchased from an established dealer. This would encompass purchasers who deal with ADAA members, large museums, public auctions, or reputable private collectors. This presumption could then be rebutted by a plaintiff who showed that the seller had acted in some manner that would put the defendant on notice that he might be buying stolen art; for example, if the artwork had been sold for substantially below its market price the buyer might have notice.[146]

Although no exhaustive standards for what constitutes due diligence could be set out to cover every situation, those standards most often in question can be addressed. First, "passive searches" should be inadequate. While it may be true that stolen art may be driven underground if publicity is generated, it is unfair to allow plaintiffs to sleep on their rights to recover. The statute of limitations justifiably penalizes slothful plaintiffs.[147] Publicity arguably deters thefts, making the artworks unmarketable for a longer period of time after the theft.

Active searches require not only reporting the loss among fellow art collectors and artists but also reporting the theft to the police. Such a duty would cause owners of stolen art to seek the best help available. In other words, the filing of the minimal paperwork required would be enough only if no further action could be taken. If a more diligent method existed, such as the CCP program after World War II, the owner of the stolen art would have to make use of such methods.[148] This diligence would be required for three years, for example.[149] At the end of that time, if the owner had no indication of the art's location or had little expectation of

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[145] Lyne, *supra* note 1, at 37, col. 1.

[146] J. EDDY & P WINSHIP, *supra* note 12, at 521, 538-39. A sales price far below market value would be clear notice of a defense or title defect.

[147] *See supra* notes 19-22 and accompanying text.

[148] *See supra* note 79 and accompanying text.

[149] This time period is based on New York's statute of limitations. The period should be tied to each state's particular statute of limitation.

success, he would be excused from further search. This excuse would last until a new method became available. For example, an owner whose art was stolen in 1910 would be required to report the theft and to search for a reasonable time, for instance two years, if no indication of the art's location surfaced during that time. Then he would be excused from further searching until the ADAA art registry program (or some other additional source) became available, at which time he must register with the ADAA. This would allow for as much consistency as possible among owners who suffered thefts before such means were available and those who had access to greater means from the time of the theft.

The other burden the owner of stolen art would bear is a requirement to consult any *catalogue raisonne*[150] available for the artist who created the stolen work. Although such catalogs are not always complete,[151] this minor inconvenience may lead to the current location of stolen art. To the extent that the art's current location could be determined from the catalogs, they serve as notice to the owner of stolen art, starting the statute of limitations from their date of publication unless it had started earlier. The owner of stolen art also must notify the publisher of a *catalogue raisonne* so that the next catalog could reflect that the artwork is stolen. A subsequent purchaser, then, would have constructive notice of the theft, which would deprive him of the status of a good faith purchaser. Consulting the current catalog is a part of the minor investigatory tasks a purchaser must perform to obtain the status of a good faith purchaser under this proposal.[152]

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[150] See *supra* note 82.

[151] Lyne, *supra* note 1, at 37, col. 1.

[152] This Note recognizes that some European countries allow purchasers to take good title from a thief if purchased on the "market overt." The United States courts have consistently applied United States law, as in Kunstsammlungen Zu Weimar v. Elicon, 536 F Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (New York, not German law controlled), and *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F.2d 278 (7th Cir. 1990) (Indiana not Swiss law controlled due to the "most significant contacts test"). Also, as a result of the United Nations Convention on Contracts for the International Sale of Goods, which has been ratified by several countries including the United States, Italy, and France, sellers must now deliver free of third party claims. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS arts. 41 & 42 (West 1989). Even if the artwork in question were purchased from a thief, and the United Nations resolution did not control, the court might still reject the purchaser's claim as being inequitable. Regardless, such a buyer would not be a good-faith purchaser, as the market overt should give notice that the goods may have been stolen.

CONCLUSION

The competing interests of a long-term good faith purchaser and the original owner of a stolen artwork are not served by the current law. The current law has sought to create flexibility but has instead created uncertainty and inconsistency. Although owners of stolen art must have some recourse in order to discourage theft and protect ownership rights, such recourse cannot be absolute.

These competing interests can best be served by enunciating clear guidelines for lower courts to apply in determining whether an owner has been diligent. Clearer guidelines will afford both parties an opportunity to comply with the law, reducing the number of lawsuits that the lower courts would have to decide. Such guidelines also would result in consistent decisions by the lower courts. This would provide equity, because cases involving similar facts would produce similar results. This consistency also would preserve the principle of *stare decisis* upon which our judicial system is founded. Precedents must be consistent to be persuasive; otherwise, each judge can ignore prior case law, substituting his own judgment. Only by using clear guidelines can the values of certainty, equity, and precedent be realized.

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