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HARVARD ART LAW REVIEW

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Letter from the Editor-in-Chief

Harvard Art Law Review

Vol. I, Issue 1

Dear Reader,

With great pride and deeper reflection, I welcome you to the inaugural issue of the *Harvard Art Law Review*. As the President, and Editor-in-Chief of both the Harvard Art Law Organization (HALO) and the Harvard Art Law Review, this moment feels both surreal and long overdue—a first step in building the foundation for what I hope will one day become the Harvard Journal of Law and the Arts. This first Issue demonstrates my promise, particularity, and persistence in cultivating a space on Harvard Law School's campus for art law.

This publication represents the culmination of a year of deep inquiry, collaboration, and imagination. The Review has curated a collection of works that bridges the academic and the applied—featuring scholars, practitioners, students, and long-time champions of the field. Their contributions reflect the vibrant complexity of art and cultural heritage law and signal the growing relevance of this field across disciplines, borders, and institutions.

From the beginning, we committed ourselves to inclusivity—not just in content, but in voice. This issue features works by students from around the world, who have interrogated questions at the core of our evolving legal and cultural landscape. Topics range from restitution and provenance to free speech and emerging technology in the arts. Their insight reveals the true intellectual reach of this field and the urgent need for continued dialogue. As you travel through these academic articles, from Italian cultural heritage, copyright expression, the plight of biblioclasm, tomb raiding, and AI, know that the diverse selection of topics is only a small entry-point in the dynamism of this field. Our case analyses and book reviews are dedicated to the feature of scholarly, bright, and promising young scholars from all over the world.

With this first issue now launching, we celebrate not only the creation of the only legal journal at Harvard Law School dedicated to art and cultural heritage—but a vision for what it can become.

In the issues that follow, we look forward to continuing our essential collaborations with academics, practitioners, and thought leaders across law, the arts, and beyond.

I am immeasurably proud of what was built this year. And I am hopeful—for this field, for HALO, and for the growing recognition that the arts are not tangential to law, but central to it as a discipline. Let us never forget the humanity and grace that is intrinsic to the arts—and the legal battle we must all fight to protect it.

For the life of art and law,

Yours,

Renée Ramona Robinson
Founder, President & Editor-in-Chief
Harvard Art Law Organization
Harvard Art Law Review

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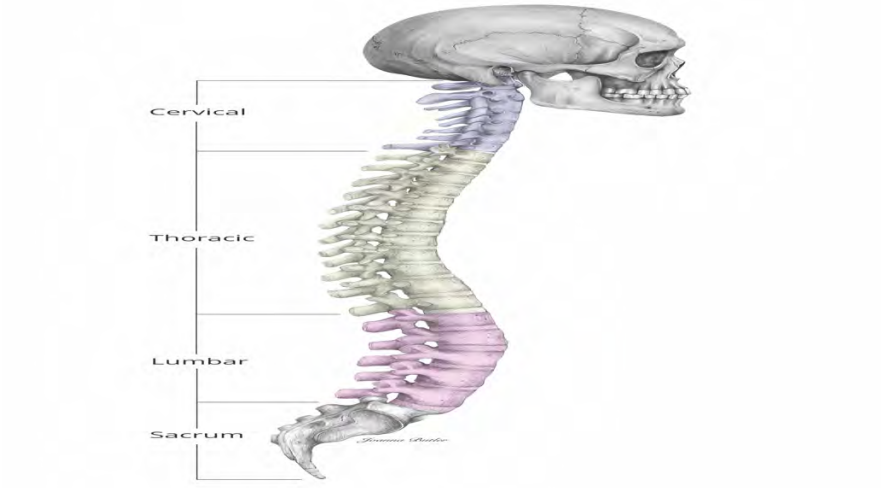

Molly Torsen Stech[1]

Abstract

In modern copyright jurisprudence, authorial works that are heavily laden with facts are sometimes considered to attract very "thin" copyright protection, while authorial works that are more fanciful are considered to earn "thick" copyright protection. Examples of fact-laden works include medical drawings, news photographs, scientific journal articles, and educational mathematics textbooks. To be sure, facts themselves attract no copyright protection whatsoever. A 1991 U.S. Supreme Court case instructs that telephone directories, while valuable and the product of investment and industriousness, reflect no authorial originality and therefore are not copyrightable subject matter, thereby rightly dismissing the "sweat of the brow" doctrine in the United States, under which many similar works had previously earned copyright protection. But a continuum exists between works whose main purpose for existence is to entertain or to spur imagination, and works whose main purpose for existence is to inform, to teach, or to reflect reality back to its viewer or reader. As Professor Robert Gorman signaled in 1981, before the

[1] Ms. Stech is currently the General Counsel of STM (The International Association of Scientific, Technical and Medical Publishers). Prior to this position, she was a copyright policy attorney at the U.S. Copyright Office and the U.S. Patent and Trademark Office. She has been a consultant for the World Intellectual Property Organization (WIPO) and an adjunct professor of law for courses in International Copyright Law and Law and the Visual Arts. Her introduction to copyright law came through an early career in visual arts prior to law school. All opinions are those of Ms. Stech and not her current or former employers. Likewise, all errors are attributable to the author and not to any entity with which she is currently or previously affiliated.

internet and before generative artificial intelligence were prevalent aspects of daily life, there is a congruence of fact and form in a variety of works that escapes easy classification. Photographs were once considered too close a reflection of reality to merit copyright protection, and interesting laws and litigation outcomes continue to shape the contours of protection between fact and expression of fact in that medium. As sophisticated technological scraping and ingestion tools reign over online content, and as misinformation, disinformation, and political propaganda clamor for attention, I suggest a recalibration is necessary such that authorial originality in fact- and knowledge-based works regain thicker copyright protection as highly valuable works of the mind.

> When the law must define rights in objects as fragile and indefinite as 'works of authorship,' the security of traditional formulations becomes particularly seductive. Yet the subject matter of copyright law is varied, and slogans and catchwords that produce rational results in one context cannot always be successfully transplanted to another.[2]

Introduction

Copyright scholars, including myself, have written innumerable pages examining what originality is and what constitutes a "modicum of creativity"[3] or an author's "own intellectual creation"[4] for purposes of reaching copyright law's modest threshold for eligibility of protection.[5] The contours of that question are in the spotlight as generative artificial intelligence dominates conversations about newly created works and what degree of human involvement is necessary to confer copyrightability.[6] What comprises a modicum creativity has been aptly described as "the magic dust for which we search,"[7] and there is a sense that the more whimsical or frivolous a work, the thicker the copyright protection[8] (and, conversely, the more serious or

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[2] Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516, 542 (1981).
[3] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 310.1 (3d ed. 2021).
[4] Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 16 July 2009.
[5] *See, e.g.*, Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963); Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 Law & Contemp. Probs. 3 (1992); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865 (1990); Eleonora Rosati, *Why originality in copyright is not and should not be a meaningless requirement*, Journal of Intellectual Property Law & Practice, Volume 13, Issue 8, August 2018, Pages 597–598, Molly Stech, *The Semantics of Authorial Originality: Four Pillars*, 29 Tex. Intell. Prop. L.J. 235 (2021); Jessica Silbey, *A Matter of Facts: The Evolution of Copyright's Fact-Exclusion and Its Implications for Disinformation and Democracy*, 70 Journal of the Copyright Society 365 (2024).
[6] Copyright and Artificial Intelligence, Part 2: Copyrightability, A Report of the Register of Copyrights, January 2025, https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf.
[7] Justin Hughes, *Restating Copyright Law's Originality Requirement*, 44 Colum. J.L. & Arts 383, 397 (2021).
[8] *See, e.g.*, the discussion of thickness in *Brammer v. Violent Hues Productions*, 922 F.3d 255, 266-67 (2019).

reality-based a work, the thinner the copyright protection, bordering on none).[9] What scholars have spent less time on is examining this other prong of copyrightability that is not unrelated to originality but is not currently appropriately linked to it in scholarly copyright discourse: writing informational, educational, scientific, or newsworthy works; or taking photographs or creating other artistic renderings that capture a close proximation to reality.[10] These works belong squarely in the firmament of copyrightable works.[11] Interestingly, until the end of the nineteenth century, "the notion that copyright incorporated a creativity-based originality requirement that excluded factual matter from protection was unknown to Anglo-American law. Courts routinely

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[9] *See, e.g.*, Kacper Szkalej, *The Paradox of Lawful Text and Data Mining? Some Experiences from the Research Sector and Where We (Should) Go from Here*, GRUR International, 2025; ikaf029; *see also* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 Yale L.J. 804 (2008); Sara Bannerman, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE, Volume 31 of Cambridge Intellectual Property and Information Law, Cambridge University Press, 2016; Columbia Law School, The Kernochan Center's Annual Symposium, 2024, *The Past, Present, and Future of Copyright Licensing*, Transcript, https://kernochan.law.columbia.edu/content/symposium-2024-past-present-and-future-copyright-licensing#!#caption9727. A question for the panelists, especially for the General Counsel of the News/Media Alliance, was raised: "And one of the things that I couldn't but (help) to notice is that when we're talking about text and the publishing industry, we're talking about variations in the nature of content. . . .[W]e're talking about news, where a large component of what may be, let's use the word "pilfered" or mined by the AI, may not be explicitly copyrightable content-- purely factual content, for example. So let's say if there's a generative AI model that comes in and takes purely factual content, if Copilot were to do that as opposed to the expression 'underlying' it, if that were the case, wouldn't there be a stronger impetus to use licensing as a mechanism of controlling it, given that you would be technically outside the copyright regime in terms of negotiating an individual license?" This question, to my mind, sets up a scenario that does not exist. While uncopyrightable facts are baked into news articles and scholarly pieces, there should be no presumption that the copyright protection for such works is negligible or that generative AI or text and data mining bots are equipped to tell the difference between facts and expression. When a scientific article is published, uncopyrightable data is frequently submitted separately. That data may be mined unless other laws (e.g., the EU Database Directive) apply. But the scientific article is and should be protected by copyright law.

[10] *See, e.g., What Is Photojournalism and Why Is It Important?: The Power of Enhancing Journalism with Photography*, The New York Times, https://nytlicensing.com/latest/marketing/what-is-photojournalism/. "Photojournalism can be defined as the process of using photographs to tell a story. Whereas conventional journalists will share their information by employing pen and paper (or maybe a keyboard), photojournalists use a camera as their medium. A photojournalist will use images to tell the entire story, from start to finish, and if executed properly a reader may not even need words to fully understand the message being presented." *See also* The Tate Gallery, Photojournalism, https://www.tate.org.uk/art/art-terms/p/photojournalism. "Photojournalism began with the first pictures of war published in newspapers during the Crimean War and the American Civil War. However even at this time, the image was only there to enhance the text, not lead the story. It wasn't until the development of the smaller, lighter 35mm cameras and flashbulbs of the 1920s that a 'Golden Age' of Photojournalism really took hold. The likes of Cartier-Bresson presented candid images of their life and times. . . . Photojournalism differs from other forms of photography (e.g. documentary photography, street photography or celebrity photography) by its need to remain honest and impartial." *Id*.

[11] Some countries' laws specifically mention these works as falling within the purview of copyright law. *See, e.g.*, the Intellectual Property Code of France, Act No. 94-361 of 10 May 1994 art. 2 Official Journal of 11 May 1994, Art. 112-2. "The following, in particular, shall be considered works of the mind within the meaning of this Code: 1°. books, pamphlets and other literary, artistic and *scientific writings*; 2°. lectures, addresses, sermons, pleadings and other works of such nature; 3°. dramatic or dramatico-musical works. . . . ." *Id. (emphasis added)*.

found infringement of fact-based works, such as maps, charts, roadbooks, directories, and calendars, on the basis of the copying of their factual content."[12] Today, to differentiate works that are copyrightable versus uncopyrightable in liminal cases, U.S. case law tends to seek elucidations and nuance for the terms "originality" and "creativity," while the Court of Justice of the European Union (CJEU) has settled on the expression "author's own intellectual creation"[13] to describe the threshold for a work's copyrightability.

To be sure, copyright cannot subsist in facts, ideas, methods, blank forms, and a handful of other phenomena, such as culinary recipes, or common symbols, such as the peace sign.[14] This is true on the international level[15] and is underscored in domestic copyright laws in a variety of ways.[16] Copyright law generally accepts and embraces those guardrails, but there is a need to think critically about some of the types of original works that, as part of the package they present to the world, uncover, explain, or even revere facts. These works tend to comprise original expression, even if that expression is not cloaked in palpable personality. Justice Holmes in his often-cited 1903 *Bleistein* opinion,[17] finding that artistic works, such as circus posters, could enjoy copyright protection despite general consideration of their lack of quality or cultivated taste, guaranteed that no quality or merit yardstick be applied to visual arts for purposes of copyrightability. That opinion is sometimes misinterpreted to simultaneously deprecate copyright protection for works that are neither visual nor highly individualistic in nature, to the detriment

[12] Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 Cardozo Arts & Ent. L.J. 321, 322 (2009).
[13] Judgment of 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, also referenced in Judgment of 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, and Judgment of 11 June 2020, *SI, Brompton Bicycle Ltd v Chedech/Get2Get*, C-833/18.
[14] U.S. Copyright Office, Circular 33, Works Not Protected by Copyright (rev. March 2021), https://www.copyright.gov/circs/circ33.pdf.
[15] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 22, Art. 2(8). "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." *Id*.
[16] See, e.g., 17 U.S.C. § 102(b). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id*.
[17] *Bleistein v. Donaldson Lithographing Co*., 188 U.S. 239 (1903).

of copyright law as a whole.[18] This article aims to correct that understanding and to describe the larger tent, including fact-based expression, under which copyrightable expression sits.[19]

Certainly not all works, even human-authored works that are not listed in the Copyright Office's *Circular on Works Not Protected by Copyright*,[20] are copyrightable. In the Supreme Court 1990s decision *Feist v. Rural Telephone*,[21] the Court clarified that a work is only copyrightable if it "possesses at least some minimal degree of creativity,"[22] which did not, the Court decided, include an alphabetical telephone book. The painstakingly contrived photographs of public domain images that were considered uncopyrightable despite the effort – even artistic effort – in 1999's *Bridgeman Art Library v. Corel* case provide another exemplar of the proposition that not all works are copyrightable.[23] In that decision, the court found that exact photographic copies of public domain images could not be protected by copyright in the United States because the copies lacked originality:

> In this case, plaintiff by its own admission has labored to create 'slavish copies' of public domain works of art. While it may be assumed that this required both skill and effort,

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[18] *See, e.g.*, Oren Bracha, *Commentary on:* Bleistein v. Donaldson Lithographing Co. (1903), in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org. "*Bleistein* entrenched a minimalist approach to the originality requirement in American copyright law. . . . Some courts tried to establish a robust originality requirement in line with the entanglement of modern copyright with the notion of individual original authorship. This was translated into a demand that the protected work would demonstrate either novelty and innovation or a minimal degree of aesthetic artistic merit. Other courts and commentators rejected the attempt to establish a substantial originality bar. While refusing to dispense with originality altogether, they crafted the requirement as creating a very minimal bar that avoided any inquiries about either novelty or merit. Toward the end of the century, the fact that the rhetorical importance of the originality requirement increased notwithstanding, the minimalist approach gradually won the day. The *Bleistein* opinion that focused mainly on the aesthetic merit aspect of originality marked the final triumph of this trend." *See also* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 Yale L.J. 186 (2008).

[19] *See, e.g.,* Barton Beebe, *Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUMBIA LAW REVIEW 319 (2017). Although he does not squarely address the "larger tent" for which I argue here, Professor Beebe thoroughly dissects the *Bleistein* decision and finds that, in celebrating individualism and personality, the case also ushered in an unfortunate value scale based in market preferences and commercialism that did not exist before. "The effect of Bleistein was to substantially advance the rise of 'commercial value' as both the basis and purpose of copyright rights and to quicken the decline and eventual erasure of 'personality' as a significant factor in the law. Perhaps more importantly, as a doctrinal and policy matter, our century-long misreading of Bleistein, particularly by courts, has only intensified both of these culturally regressive trends." *Id.,* at 320. Professor Beebe also highlights a useful test for the idea-expression dichotomy: "In *Pivot Point International, Inc. v. Charlene Products, Inc.*, the Seventh Circuit focused on the subjective process by which the designer developed his design and asked whether this process was 'unfettered by functional concerns.'" *Id*., at 387-88, citing 372 F.3d 913, 932 (7th Cir. 2004). I agree that analyzing conceptual separability is best viewed through this prism.

[20] Circular 33, *supra* note 13.

[21] 499 U.S. 340 (1991).

[22] *Id*., at 345.

[23] *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

> there was no spark of originality. Indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.[24]

Furthermore, by way of the *Feist* decision, copyright law's former adherence to granting protection for works made through "sweat of the brow" has rightfully ended;[25] that is, demonstrating substantial effort or financial investment in a work does not affect whether copyright protection may or may not inhere in the work.[26] And the U.S. Copyright Office, among other entities, continues to require that copyright protection be granted only to the original expression in a work created by a human author, even if the work also includes AI-generated material. The Office recently put forward Guidance that elucidates the reasons for this, based on statutory and judicial guidance.[27] That protection does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.[28] A recent decision of the DC Circuit Court of Appeals confirms that distinction by reaffirming the long-held principle that, to receive copyright protection and be eligible for registration at the U.S. Copyright Office, a work must be authored in the first instance by a human being.[29]

None of these guardrails means that *solely* peculiar and individualistic human artistry is worthy of copyright protection. While contemporary academic discourse on copyright law has reflected on and exalted authorial uniqueness and individuality – which are, to be sure, extremely important – it has not taken the opportunity to underscore the copyright value in other types of

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[24] *Id.*, at 197.
[25] *See, e.g.*, Jane Ginsburg, *No Sweat Copyright and Other Protection of Works of Information after* Feist v. Rural Telephone, 92 Colum. L. Rev. 338 (1992); Denise R. Polivy, Feist *Applied: Imagination Protects, but Perspiration Persists - the Bases of Copyright Protection for Factual Compilations*, 8 Fordham Intell. Prop. Media & Ent. L.J. 773 (1997-1998).
[26] *See, e.g.*, Tracy L. Meade, *Ex-Post Feist: Application of a Landmark Copyright Decision*, 2 J. Intell. Prop. L. 245 (1994).
[27] *See, e.g.*, U.S. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16,190 (Mar. 16, 2023). "[T]he Office's existing registration guidance has long required that works be the product of human authorship. In the 1973 edition of the Office's Compendium of Copyright Office Practices, the Office warned that it would not register materials that did not "owe their origin to a human agent." The second edition of the Compendium, published in 1984, explained that the "term 'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being." And in the current edition of the Compendium, the Office states that "to qualify as a work of 'authorship' a work must be created by a human being" and that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." *Id.*, at 3 (internal citations omitted).
[28] Copyright and Artificial Intelligence, *supra* note 5, at iii.
[29] *Thaler v. Perlmutter*, No. 23-5233, 2025 WL 839178 (D.C. Cir. Mar. 18, 2025)

works that hew closer to reality or facts. However, recent scholarship by Professor Jeanne Fromer does recognize the broader set of works with which copyright law should be concerned:

> Given that an important basis of copyright law . . . is to encourage the creation, dissemination, and preservation of valuable works, copyright law ought to be concerned with ensuring that that which makes those works valuable—knowledge, broadly construed—is contained in the works being encouraged. That is, copyright law ought to encourage works to contain systematic, factual, and cultural knowledge, which can then be disseminated and preserved for society's use.[30]

While the main theme of Professor Fromer's paper is about viewing copyright law through the prism of mathematics' Information Theory,[31] and is not squarely about the "broad tent" to copyrightable works approach she describes here, she does suggest that "knowledge, broadly construed" is the appropriate type of content that copyright law encourage. "[P]rotection for books that convey factual knowledge (such as encyclopedias or biographies) helps advance societal knowledge of the facts contained therein. Maps and charts similarly advance societal knowledge by conveying their depicted facts."[32]

Broadly construed knowledge can be textual, but it can also be visual. Realistic paintings arguably do not reflect the personality of the artists who paint them as much as do their painterly Expressionist or Impressionist brethren. In other words, it is easier for most people to identify the presence of artistic personality in a painting by Gustav Klimt than it is to identify it in a painting Frans Hals. But each genre of painting is properly entitled to copyright protection.

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[30] Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 Emory L. J. 71, 87 (2014).
[31] "[I]nformation theory [is] a branch of applied mathematics that quantifies information and suggests optimal ways to transmit it. Using these concepts, this Article proposes that what makes expressive works valuable to society is that they make a contribution in at least one of two principal ways: by using that expression to communicate knowledge—be it systematic, factual, or cultural—and by conveying expression that is enjoyable in and of itself." *Id*., at 71.
[32] Fromer, *supra* note 29, at 86.

Gustav Klimt, *The Dancer* (unfinished), 1916–17, Oil on Canvas, Neue Galerie, New York City

Frans Hals, *Family Group in a Landscape*, 1645 – 1648, Oil on Canvas, Museo Nacional Thyssen-Bornemisza, Madrid

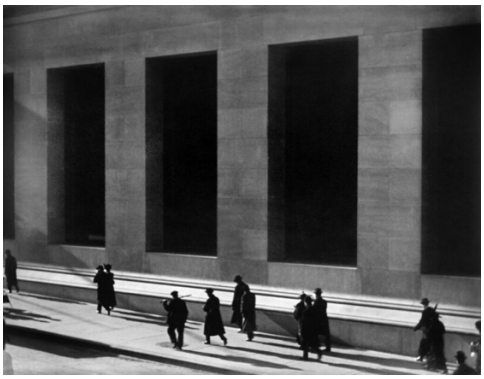
The analogy is equally applicable to photographs. A high fashion campaign photograph by Glen Luchford[33] arguably manifests the photographer's personality much more than does a view of Wall Street photographed by Paul Strand.[34] However, each photograph demonstrates sufficient

[33] *See* Danziger Gallery, Glen Luchford, https://www.danzigergallery.com/artists/glen-luchford. "British photographer Glen Luchford first caught the public eye in the late 1990s, with his avant-garde fashion campaigns for Prada. With its elaborate lighting and atmosphere of conspicuous artifice, Luchford's highly cinematic imagery exemplified the merging visual languages of fashion and art photography, launching the photographer as one of his generation's most imaginative talents." *Id*.

[34] *See, e.g.*, The International Center of Photography, *Paul Strand*, https://www.icp.org/browse/archive/constituents/paul-strand?all/all/all/all/0. "Paul Strand sought to express the feeling of the land and its inhabitants directly, honestly, and with respect. His prints are masterly in detail and tonality, and his approach has greatly influenced American photography. Strand advocated 'straight photography,' and photographed street portraits to city scenes, machine forms, and plants with his distinctive clarity, precision, and

authorial creativity to easily establish copyrightability in any jurisdiction. In a 1921 District Court decision, Judge Learned Hand offered the opinion that "no photograph, however simple, can be unaffected by the personal influence of the author",[35] thereby emphasizing a principle of "personal influence" in the pursuit for a work's idea versus its expression. Many significant cases since this pronouncement have cited this view,[36] and it is an important one. But like the well-known teaching of the *Bleistein* decision, banning courts from making aesthetic judgments, it seems to set aside any meaningful breathing room for recognition of the copyrightability of works that mostly emanate from intellectual choices or imperatives, as opposed to personality-driven, creative choices.

Glen Luchford, Gucci Pre-Fall Campaign, 2016, courtesy of Mr. Luchford



Paul Strand, *Aerial view of pedestrians walking along Wall Street*, 1915, U.S. Library of Congress.

Notably, photography itself is a medium that was considered such a close reflection of reality that it took a Supreme Court decision to confirm copyright protection for photographs that display the photographer's creativity.[37] Not all photographs should be considered copyrightable, and some countries have legislated a difference between an original photograph and a non-original photograph.[38] This dichotomy is also true of nonfiction writing and of other media, with

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geometric form." *Id*. Also note: I say "arguably" here because, having started my career in the fine arts, I am keenly aware that many art historians and artists can immediately identify a photograph by Paul Strand and an oil painting by Frans Hals.

[35] *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921).

[36] *See, e.g.*, *Steinberg v. Columbia Pictures Indus.*, Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987); *see also Time Inc. v. Bernanrd Geis Assocs*., 293 F. Supp. 130, 143 (S.D.N.Y. 1968).

[37] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

[38] *See, e.g.*, Federal Act on Copyright and Related Rights of 9 October 1992, as revised April 2020 (CopA) (Switzerland), at Art 2, para 3bis. *See also* Cyrill P Rigamonti, *On the New Copyright Protection for Non-Original Photographs in Switzerland*, GRUR International, Volume 69, Issue 10, October 2020, Pages 987–988,

the foundational point being that a work's basis in fact, research, science, or educational material does not and should not minimize its opportunity for copyright protection.[39]

Here, I should pay respect to the term "low authorship works", as introduced by Professor Jane Ginsburg in a pre-*Feist* 1990 law review article.[40] By this term, she meant works such as factual compilations and collations of stock quotations.[41] While many of the arguments she put forward about the benefits of providing copyright protection for such works provide a useful foundation for thinking about copyrightability in general, I do not focus on these arguments in this paper because the works that I focus on – nonfiction writing such as scientific journal articles, news articles, and medical editorials, and realistic artworks and photographs – do not, in my view, comprise "low authorship". Rather, these works are multi-dimensional, highly original and valuable, and worthy of a "thick" layer of copyright protection. Likewise, I do not provide a

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https://doi.org/10.1093/grurint/ikaa108; and Philipp Groz and Dr. des. Sarah Leins-Zurmuehle, *Copyright 2.0? The Revised Swiss Copyright Act*, Schellenberg Witmer Newsletter, June 2020, https://images.swlegal.ch/gallery/090528165709698839/SW_NL_June_2020_English_0611.pdf. "In a controversial decision from 2004, the Swiss Federal Supreme Court denied the work character of a photograph that depicted Christoph Meili, then working as a security guard, with two folios in his hands (DFT 130 III 714). According to the Federal Supreme Court, although the photograph documented a historical moment, it would not be sufficiently individual in terms of Swiss copyright and would hence not be copyrightable. By contrast, in a decision issued only shortly before, the Federal Supreme Court had recognized the work character under copyright law of a photograph depicting singer Bob Marley during a concert (DFT 130 II 168)." *Id*. *See also* Eleonora Rosati, *Why originality in copyright is not and should not be a meaningless requirement*, Journal of Intellectual Property Law & Practice, Volume 13, Issue 8, August 2018, Pages 597–598, https://doi.org/10.1093/jiplp/jpy084 (describing different approaches to the protection of photography in France, Germany, and Italy).

[39] For a stark example of this phenomenon, *see* Hugh Stevens, Hugh Stevens Blog: Insights on International Copyright Issues, *Copyright and Education in Canada: Have We Learned Nothing in the Past Two Centuries? (From the "Encouragement of Learning" to the "Great Education Free Ride")*, "[W]hile the impetus for the first Canadian copyright laws came from a desire to promote learning and production of educational materials, today most Canadian educational institutions are taking a massive free ride when it comes to paying for teaching materials. Instead, they are using every pretext possible to avoid paying collective licence fees to the Canadian copyright collective for authors and publishers, Access Copyright, for their use (reproduction) of printed or digitized educational materials, using the 'education' fair dealing exception introduced in 2012 as the excuse. Two hundred years later, we have gone backwards with respect to meeting the social objectives of copyright law." *Id*. In the wake of a 2012 decision of Canada's Supreme Court that was interpreted as widening the exceptions to copyright's exclusive rights in the education sector specifically, the educational publishing industry in Canada has steeply declined and, in 2025, almost does not exist. In a 2019 Report of the Standing Committee on Canadian Heritage, "the Committee heard that Canadian publishers have been negatively impacted by the 2012 amendments to fair dealing. House of Anansi Press/Groundwood Books, an independent publisher from Toronto, noted that there has been a steady decline in revenue from Canadian educational materials. Matt Williams, Vice-President of Publishing Operations at House of Anansi Press / Groundwood Books, noted that "from 2013 through [2018], the drop in revenue has been close to $200,000. That amounts to a drop of around $100,000 in author royalties." *Shifting Paradigms*, Report of the Standing Committee on Canadian Heritage, May 2019, https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf, at 39.

[40] Ginsburg, *supra* note 4.

[41] *Id*., at 1872.

dedicated analysis on copyrightability in "selection and arrangement" of noncopyrightable works for the same reason. While reality and facts may provide the substructure for medical journal articles and photojournalism, for example, a robust body of evidence exists demonstrating that these works do not rely on selecting or arranging facts or other non-copyrightable items to substantiate their merit as fully copyrightable works.[42]

The United States Constitution's Intellectual Property Clause

In the United States, Congress's ability to legislate protection for copyrights and patents is found directly in the Constitution:

> [The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[43]

The verbiage in the "IP Clause" is a vestige of its times. Whereas "useful Arts" may read to modern eyes to encompass the arts as we think of them today – digital images, paintings, motion pictures, and the like – the actual "Arts" reference was to patents,[44] for which Congress may grant inventors exclusive rights to their discoveries in order to encourage technological innovation, advancement, or social benefit.[45] As Professor Sean O'Connor has noted, the non-specific use of the term "arts" to mean "fine arts" constitutes an "impoverished usage that obscures the central role that art(ifice)—any manipulation of physical or mental objects for practical ends—has played in Western history. The notion of the fine arts as a set of prestigious

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[42] With respect to scientific journal articles, s*ee, e.g.*, Linda Flower and John R. Hayes, *A Cognitive Process Theory of Writing*, College Composition and Communication, vol. 32, no. 4, 1981, pp. 365–87. *See also* Charles Bazerman, SHAPING WRITTEN KNOWLEDGE: THE GENRE AND ACTIVITY OF THE EXPERIMENTAL ARTICLE IN SCIENCE. University of Wisconsin Press, 1988. With respect to photorealism, *see, e.g*., Susan Sontag, ON PHOTOGRAPHY. Farrar, Straus and Giroux, 1977; *see also* Roland Barthes, CAMERA LUCIDA, translated by Richard Howard. Vintage Classics, 1993.

[43] Article I, Section 8, Clause 8 of the United States Constitution.

[44] *See, e.g*., Fromer, *supra* note 29, at 85. "'Science' as it appears in the Clause did not originally have the meaning contemporary Americans associate with it—biology, chemistry, and the like. Instead, at the time of the Constitution's framing, science meant knowledge or learning, particularly of the kind that is systematic and of enduring value." *Id.*, *citing* Edward C. Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 125 & n.46 (2002).

[45] *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966).

intuition-based activities related by aesthetics and creative self-expression did not even emerge until the eighteenth century."[46]

The copyright prong of the IP Clause is therefore described by the "Progress of Science . . . by securing for Limited Times to Authors . . . the exclusive Right to their respective Writings. . . . ". In addition to this important focus on "science", Professor Justin Hughes, in an article focusing on some missteps in the current efforts to complete a U.S. Restatement of Copyright Law,[47] uncovers a small armory of jurisprudence underscoring the eminence of *intellectual* contributions, not just "creativity," to a work as a conduit for copyrightability.[48] He references U.S. case law starting with *The Trade-Mark Cases* from 1879, pulls out language from the 1903 *Bleistein* case that highlights a broader understanding of copyrightability than is generally attributed to the case, and brings out important nuance from the 1991 *Feist* case itself that is not generally highlighted in copyright scholarship.

The Trade-Mark Cases

In 1879, five years before the Supreme Court confirmed that photography was copyrightable subject matter, the Supreme Court plumbed the Constitution's Intellectual Property clause for meaning in a consolidated case that found the Copyright Clause in the Constitution did not give Congress the power to protect or otherwise regulate trademarks.[49] The Court found that "Writings" are "only such as are original, and are founded in the creative powers of the mind," all while pairing "originality" with "intellectual labor." Indeed:

> The writings which are to be protected are *the fruits of intellectual labor*.[50]

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[46] Sean M. O'Connor, *The Lost 'Art' of the Patent System*, 2015 U. Ill. L. Rev. 1397, 1400-1401 (2015).
[47] A Restatement of Law is generally understood to be a treatise on a legal subject seeking to inform courts and attorneys about general principles of common law. In the case of a draft Restatement of Copyright Law, there is well documented controversy regarding the appropriateness of taking the project forward because copyright law is codified in federal law (as opposed to being a common law concept). *See, e.g*., the American Law Institute, Publications, https://www.ali.org/publications-faq. "Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court. Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions." *Id*.
[48] Justin Hughes, *Restating Copyright Law's Originality Requirement*, 44 Colum. J.L. & Arts 383 (2021).
[49] *In re Trade-Mark Cases*, 100 U.S. 82 (1879).
[50] *Id*., at 94 (emphasis in the original).

While *Feist* cites the *Trade-Mark Cases* frequently, its focus was on pulling out the importance of originality in contrast to effort, time, or investment; it therefore selected the parts of the *Trade-Mark Cases* that best made that point. Importantly, however, the Court in 1879 used the term "intellectual labor" to describe copyrightable works.[51]

Bleistein v. Donaldson Lithography

The essence of the *Bleistein* Supreme Court decision is that all creative expression is worthy of copyright protection, no matter the author's or artist's talent or virtuosity. The particular subject matter of the *Bleistein* case itself was a circus poster that did not manifest any particular talent or artistic adroitness by its artist, but which was nonetheless deemed copyrightable by the Court. Indeed, it would be "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits".[52] The decision underscores the European-flavored personality prong of creativity, through which an individual consciously or subconsciously stamps his individuality into almost anything he creates simply by dint of it coming from him.[53] While this prong of creativity is significant, and this particular quote from the case is repeated again and again in subsequent court cases and in academic commentary, it overshadows the fact that a much broader menu of intellectual creations are also copyrightable. Indeed, *Bleistein* has been cited to confer copyright protection in videotapes of the sites of an airplane crash and a train wreck, which sit squarely in fact-based news.[54]

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[51] *Id*.

[52] *Bleistein*, *supra* note 13 , at 251.

[53] Copyright laws in Europe tend to emphasize authors' and artists' moral rights, to include the right of attribution for the work and the right of integrity in the work. These rights, laid out in Article 6bis of the Berne Convention, exist only minimally in the United States (by way of the Visual Artists Rights Act of 1990, for example). "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221, at Art. 6(1).

[54] *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 792 (9th Cir. 1992). After rejecting defendant's arguments that the works were not protected by copyright and that plaintiff's enforcement was barred by the First Amendment, the court also rejected defendant's argument that its purported purpose of "private news reporting" was fair use as a matter of law merely because it was among the examples of fair use provided by the statute. The court held that the examples listed in Section 107 were not intended to single out any particular use as presumptively fair, and the fact that a work is arguably "news" comprises only one of many factors. The court further found that, although the factual nature of plaintiff's works weighed in favor of fair use, and that defendant only copied a small portion of the

Feist Publications v. Rural

Despite the finding that alphabetical telephone books are not copyrightable subject matter, the *Feist* court stated that the requirement for minimal creativity can be met by "some creative spark, no matter how crude, humble, or obvious".[55] In considering the outputs of scientific research or photorealism, this low threshold becomes an important inflection point. An essential detail to remember is that the outcome of the *Feist* case was the destruction of "sweat of the brow" as a means by which copyright protection could be earned;[56] the decision was less concerned with describing the contours of the idea/expression dichotomy beyond that more resolute finding.[57] The idea/expression dichotomy is that ideas receive no copyright protection but expressions of ideas do receive protection; there is a tension between the two absolutes and jurisprudence helps fill in the continuum.

Professor Ginsburg has analyzed this point as well and found that, for example, "*Feist* notwithstanding, Congress does have power under the Patent-Copyright Clause to protect compiled information. It is for Congress to judge what works 'promote the Progress of Science,' and its determination of what 'Writings' of 'Authors' fulfill that goal should receive considerable judicial deference".[58]

Professor Hughes, in another important contribution to this general topic, points out this passage from Feist:

> [I]f the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. . . .

works, defendant nevertheless copied the most valuable parts of each work. Finally, the court found that defendant's use could potentially adversely impact plaintiff's market for the footage.

[55] Feist, 499 U.S., at 345 (*quoting* 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (1990)).

[56] Jane C. Ginsburg, *No Sweat Copyright and Other Protection of Works of Information after* Feist v. Rural Telephone, *supra* note 24.

[57] For a thorough treatment of the idea/expression dichotomy, *see, e.g.*, Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 Tennessee Law Review 321 (1989). See also Steven Ang, *The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.*, International Journal of Law and Information Technology, Volume 2, Issue 2, SUMMER 1994, Pages 111–153, https://doi.org/10.1093/ijlit/2.2.111.

[58] *Id*., at 388.

> Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive.[59]

Professor Hughes questions this logic because, no matter what words one writes on paper, there is nonetheless expression inherent in that writing, as Learned Hand articulated when writing that the "personal influence of the author" is always present in his work.[60] Professor Hughes notes: "[T]he canonical way to specify the fact is the same as the way to specify the expression of the fact, i.e., by expressing it."[61] Professor Hughes underscores how facts, as we understand them, can merge with their expression, especially as technological developments and the digital economy blur the line expressed in *Feist* an as "more and more 'information products,' valuable nonfictional databases filled with evaluations, judgments, and designations. . . proliferate".[62]

Professor Robert Gorman, writing in 1981 pre-*Feist*, similarly pointed to this contradiction: In many fact-based works, "the literary or artistic expression is dictated by and inseparable from the underlying information…Courts are torn between on the one hand protecting the expression and as an incident curbing dissemination of the facts, or on the other hand disseminating the facts and as an incident permitting copying of expression. The tension here is thus keener than in works of fancy, where congruence of fact and form is not as pervasive."[63] As generative AI enters the stage, a new technological challenge confronts the idea/expression dichotomy and, indeed, challenges how the public understands and interacts with facts themselves.[64] Whereas the courts have become habituated to granting thin protection to fact-based works, recalibration is necessary such that fact-based works attract a copyright protection that is as thick as is available for other works of the mind. The facts themselves will always be free for the taking.[65]

Facts versus Expression Viewed from Abroad

These legal and jurisprudential gestures that specifically open the door to a broad tent for copyrightable subject matter echo in other jurisdictions as well. The United Kingdom's Statute of

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[59] Feist, 499 U.S., at 348-49.
[60] Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (S.D.N.Y. 1921).
[61] Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 Notre Dame L. Rev. 43, 57 (2007).
[62] *Id*., at 107.
[63] Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc. 560, 562 (1982).
[64] *See infra* regarding the Version of Record and the imperative of having trusted content and trusted sources.
[65] U.S. Copyright Office, Circular 33, *supra* note 13.

Anne,[66] the world's first copyright law, was concluded in 1710. It predates the 1886 conclusion of the international Berne Convention for the Protection of Literary and Artistic Works[67] by 176 years. Among other goals, the Statute of Anne was concerned with securing the position of the booksellers, curbing their potential control of the press, and assigning rights to authors.[68] But the law was first and foremost concerned with the continued production of books. "Parliament focused upon the social contribution the author could make in the encouragement or advancement of learning. It made good sense to make some provision for writers, and inevitably booksellers, to ensure a continued production of *intelligible literature*."[69]

While the historical impact of the Statute of Anne is complex and important,[70] the simple theme I extract from it for purposes of this paper is that its first subject of concern was "intelligible literature". Likewise, the first U.S. copyright law of 1790 was "[a]n Act for the encouragement of learning".[71] Copyright protection later expanded to protect such works as maps and musical compositions and, quite a bit later, expanded to protection works of visual art. The U.S. Copyright Act of 1870 expanded protection to sculptures and fine art.[72] The Berne Convention 16 years later included all this subject matter.[73] In summary, copyright law has, from its inception, been designed to protect a wide range of works without hierarchy, whether those works inform, educate, inspire, or any combination thereof, so long as they emanate from human intellect.

That said, copyright protection can be "thick" or "thin".[74] A visual example of this phenomenon is a photograph taken of the Boat House in New York City's Central Park:

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[66] *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, 8 Anne c. 19 (1710).
[67] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221.
[68] *See, e.g.*, Thomas B. Morris, Jr., *The Origins of the Statute of Anne*, 12 Copyright L. Symp. 222 (1961-1962).
[69] Ronan Deazley, *Commentary on the Statute of Anne 1710*, in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, 2008, www.copyrighthistory.org (emphasis added).
[70] *See, e.g.*, Oren Bracha, The Statute of Anne: An American Mythology, 47 Hous. L. Rev. 877 (2010-2011); *see also* Craig Joyce, *The Statute of Anne: Yesterday and Today*, 47 Hous. L. Rev. 779 (2010-2011).
[71] Act of May 31, 1790, ch. 15, 1 Stat. 124.
[72] An Act to revise, consolidate, and amend the statutes relating to patents and copyrights, July 8, 1870, 16 Stat. 198.
[73] *Id*., Art. 2.
[74] Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 Duke L.J. 203 (2012-2013).

Ajay Suresh, Loeb Boathouse, Central Park, 2019 (CC BY 2.0)

Copyright protection in the photograph subsists in the creative choices the photographer made, to potentially include the type of lens used, the lighting, the framing, whether to include people, color filters, and the like. Copyright protection here does not extend to the building itself or to the foliage that surrounds it – those are the visual "facts" upon which the photograph is based. One can imagine hundreds of very similar photographs being taken from the same vantage point in the same season, around the same time of day, with similar weather. The copyright protection in this photograph is "thin", and will protect only the particular aspects of the picture a court may deem original. Most copyrighted works are never the subject of a lawsuit, making it impossible to discern exactly which aspects might be considered copyrightable.[75] But this particular photograph illustrates the concept of "thin" protection, which could be teased out during the course of litigation. This concept is also applicable to other types of reality- or fact-based works.

A photograph by famed photojournalist Lee Miller benefits from copyright protection. Ms. Miller traveled to war-torn countries and captured images that were not photographed by masses of tourists or, indeed, by anyone else. They are hugely important to world history but some of her photographs are not immediately distinguishable for manifesting creativity, and this is certainly true in the realm of photojournalism generally. While photographs like Ms. Miller's can no longer depend on arguments of investment or effort (traveling to Germany, and the expenses, risks, and burdens inherent in that undertaking) to substantiate a copyright claim in the wake of

[75] For a useful example of a discussion of the copyrightable aspects of a similar genre of photograph, *see Leigh v. Warner Brothers, Inc.*, 212 F.3d 1210 (11th Cir. 2000).

the *Feist* decision's destruction of the sweat of the brow doctrine, there is nonetheless so much value in this type of work that emanates from the photograph's dual and indivisible nature as simultaneously factual and original. These photographs capture history, authenticate events, and provide factual validation upon which future works can rely.

Untitled, Buchenwald, Germany 1945 by Lee Miller (54-38)

To pivot from photography to texts: a medical article will frequently have several sections, logically taking the reader through, for example, the premise of research conducted, its methodology, the results, a discussion or analysis, a conclusion, and potentially a corollary set of data.[76] Short of an individual's keen interest in the particular medical issue described, there will likely be few creative flourishes to capture one's attention.[77] While the most obvious section for copyright protection may be in the Discussion or Analysis, where an author's or joint authors' expression will be more discursive – and therefore more individualistic or creative than other sections of the article – the article in its entirety is protectable by copyright law. The results of the research were likely funded by third party sources and, depending on the discipline, the

[76] *See, e.g.*, Duke University Medical Center Library and Archives, *Scientific Writing: Sections of a Paper*, https://guides.mclibrary.duke.edu/scientificwriting/sections. *See also* BMJ Group, Data Sharing, https://authors.bmj.com/policies/data-sharing/.

[77] For an interesting discussion of how scientific articles could potentially be rendered more engaging to the reader, see Ruth M. Morgan, Roger L. Kneebone, Nicholas D.Pyenson, Sabrina B. Sholts, Will Houstoun, Benjamin Butler, and Kevin Chesters, *Regaining creativity in science: insights from conversation*. R. Soc. Open Sci.10230134 (2023).

results may be highly valuable to the market, to academia, and to active researchers. But, like educational materials, the fact that substantial research and intellect were expended in its making – as opposed to pure creativity – does not render the outcome less deserving of copyright protection. Thinking back to the Statute of Anne's direct reference to "intelligible literature",[78] and the U.S. Constitution's veneration of the "Progress of Science",[79] it is arguable that a work's factual nature makes it *more* deserving of copyright protection, not less, than purely creative works. Indeed, as Professor Michael Madison suggests, "although creativity should not be excluded from copyright, copyright should be conceived primarily as a system for producing, distributing, conserving, sharing, and ensuring access to knowledge."[80]

Reverence for Facts

A recent uptick in misinformation, disinformation, and propaganda is well documented.[81] In academic scholarship and in science, authors and researchers (and legal scholars) diligently cite their propositions and ideas and, for good reason, each discipline has its version of the final work's Version of Record,[82] which frequently reflects the typeset, copyedited, and published version of a paper, and is controlled and updated for traceability, identifiability, clarity, reduced duplication, and reduced errors. Switching media, Photojournalists tend to give titles to their photographs, or otherwise provide metadata for them, that identifies the date, time, place, and

[78] Statute of Anne, *supra* note 70.
[79] Article I, Section 8, Clause 8 of the United States Constitution.
[80] Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 Vanderbilt Journal of Entertainment and Technology Law 817 , 824 (2010).
[81] *See, e.g.*, Columbia University School of Professional Studies, *The Real Impact of Fake News: The Rise of Political Misinformation—and How We Can Combat Its Influence*, Panel, Jan. 2, 2024, https://sps.columbia.edu/news/real-impact-fake-news-rise-political-misinformation-and-how-we-can-combat-its-influence. A useful definitional difference to note is that "[m]isinformation is like a game of telephone among family members who try to relay information accurately, she said, but don't necessarily get the facts entirely right. Disinformation, on the other hand, is the intentional dissemination of false information." *Id*. *See also* Pew Research Center, October, 2017*, The Future of Truth and Misinformation Online*, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2017/10/PI_2017.10.19_Future-of-Truth-and-Misinformation_FINAL.pdf. *See also* Cristiano Lima-Strong, *Meta's fact-checking overhaul widens global rift on disinformation*, The Washington Post, Jan. 8, 2025, https://www.washingtonpost.com/technology/2025/01/08/meta-facebook-fact-checking-europe-us/.
[82] Lisa J. Hinchliffe, *The version of record as a central organizing concept in scholarly publishing,* Information Services and Use, 2022;42(3-4):309-314. doi:10.3233/ISU-220164; *see also* Janet Sinder, *Correcting the Record: Post-Publication Corrections and the Integrity of Legal Scholarship*, 112 Law Libr. J. 365 (2020). *See also* IOP Science, Definitions: Article Versions, https://publishingsupport.iopscience.iop.org/questions/article-versions/. "Version of Record is the Final Published Version, including any post publication corrections or enhancements and any other changes made by IOP and/or its licensors." *Id*.

circumstances under which they took a given photograph.[83] All forms of fact-laden works provide important underpinnings for our society as a whole.[84]

Pvt. H. Miller, Buchenwald concentration camp inmates, April 16, 1945,
U.S. National Archives, NAID: 215878063, ps://catalog.archives.gov/id/215878063

Generative artificial intelligence applications are ingesting a wide array of works – both factual and fictional, licensed and unlicensed, and the internet is replete with factual, non-factual, misleading, and false information, sometimes wrapped as creative content, sometimes not. The various tools at our collective disposal to verify the nature of a particular piece of content are evolving.[85] Whether content ingestion should be allowed without licensing is not the topic of this paper, but the fact that ingestion is happening underscores the value proposition that scholarly, peer-reviewed, verified, substantiated, fact-based works offer. It also stresses one reason that copyright law protects them, even if copyright does not cover facts themselves.[86]

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[83] *See, e.g.*, Christopher Jones, Metadata: Rethinking Photography in the 21st Century. SCALA (2022).
[84] *See, e.g.*, Robert Hirsch, *Photography and the Holocaust: Then & Now*, VASA Journal on Images and Culture (VJIC), 2023, https://vjic.org/vjic2/?page_id=7279. "Margaret Burke-White (1904-1971), who was American's first accredited woman photographer in WWII, arrived at Buchenwald in April 1945 with General George Patton's Third Army. Burke-White state that 'Using a camera was almost a relief. It interposed a slight barrier between myself and the horror in front of me.'" *Id.*, *citing* William I. Hitchcock, THE BITTER ROAD TO FREEDOM: A NEW HISTORY OF THE LIBERATION OF EUROPE (New York: Free Press, 2008), 299.
[85] *See, e.g.*, Veracity, https://groundedai.company/veracity/. *See also* Veracity AI at Florida State University, https://veracity.cci.fsu.edu/. The project uses "artificial intelligence to automate the detection of manipulation in photographic images. The mission is to combat disinformation from human-made manipulated images, which can be easily perceived as truth." *Id*.
[86] As explored above, there have now been decades of jurisprudence and legal commentary underscoring that creativity and originality might deserve thicker copyright protection than do fact-based works. In the seminal case *American Geophysical Union v. Texaco Inc*., 60 F.3d 913 (2d Cir. 1994) the Second Circuit rightly held that a private, for-profit corporate library could not rely on fair use in systematically making copies of articles in academic

The Supreme Court instructed, in deciding a case about the unpublished memoirs of President Ford, that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy".[87] In so deciding, it cited an important law review article authored by Professor Robert A. Gorman,[88] but neglected that article's nuance and, arguably, its main message. Namely:

> There is more of a public interest in access to facts about ourselves, the world about us, and our history and future. While this may be true, it is a reason which actually 'cuts both ways,' for dissemination of fact works must not be so freely permitted as to destroy the incentive to research, compile and write such works, so important to the progress of society.[89]

Generative AI frequently "hallucinates", meaning that large language models (LLMs) sometimes generate inaccurate or fictitious information, deviating from facts and providing responses that lack a basis in model's training data, even what that training data is based in fact. My understanding of this phenomenon is that it is not necessarily a "bug" of generative artificial intelligence, but rather a feature.[90] LLMs function such that they predict text or imagery based on patterns, not on rationale nor on humans' understanding of what intelligent analysis might produce. Even when trained on facts, the models may generate outputs that are incorrect or seemingly fanciful and these hallucinations are only sometimes technologically detectable.[91] Indeed, if an LLM lacks a certain strain of training data, the model may make a guess based on

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journals for its employees. That said, both the lower court and the appellate court gave short shrift to the second fair use factor, the Nature of the Copyrighted Work. In citing the Supreme Court's 1985 decision regarding President Ford's unpublished memoirs, the Second Circuit signaled it had no further work do to on this issue: "[T]he manifestly factual character of the eight articles precludes us from considering the articles as 'within the core of the copyright's protective purposes,' . . . ."("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."). Thus, in agreement with the District Court, we conclude that the second factor favors Texaco." *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925 (2d Cir. 1994), *citing Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985). But, as noted in the body of this text, that teaching cuts both ways.

[87] *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 563 (1985).

[88] Gorman, *supra* note 62, at 61.

[89] *Id*., at 562.

[90] *See, e.g*., G. Perković, A. Drobnjak and I. Botički, *Hallucinations in LLMs: Understanding and Addressing Challenges*, 2024 47th MIPRO ICT and Electronics Convention (MIPRO), Opatija, Croatia, 2024, pp. 2084-2088, doi: 10.1109/MIPRO60963.2024.10569238.

[91] *See, e.g.*, Neeloy Chakraborty, Melkior Ornik, and Katherine Driggs-Campbell. 2025, *Hallucination Detection in Foundation Models for Decision-Making: A Flexible Definition and Review of the State of the Art*, ACM Comput. Surv. 57, 7, Article 188 (July 2025), https://doi.org/10.1145/3716846.

the patterns it recognizes, having nothing to do with facts or reality. Factual texts, as noted above, also consist of context and nuance, but LLMs do not have the capacity to differentiate between validated fact and hypothetical, discursive discussion, historical recitation, or mere guesswork.[92] Whether LLMs can ultimately be designed in such a way to avoid hallucinations, they contribute to the volume of unverified information available to other LLMs and to people in their outputs. Ensuring that factual, substantiated content is available, is published in verified outlets, and is protected by copyright law's exclusive rights is of paramount importance.

The authors, researchers, artists, or photographers who contribute fact-based works to the world must be confident that their works are valued and protected. The facts they reveal to the world are free for the taking but are embedded in those works and must be distilled separately from the work itself. Whether text and data mining (TDM) or generative artificial intelligence has the capacity to accurately separate the facts from the copyrightable expression by way of licensing copyrighted works for such activities is a separate and monumental topic,[93] but the premise for this type of activity is that the underlying fact-laden expressive work is itself protected by copyright.

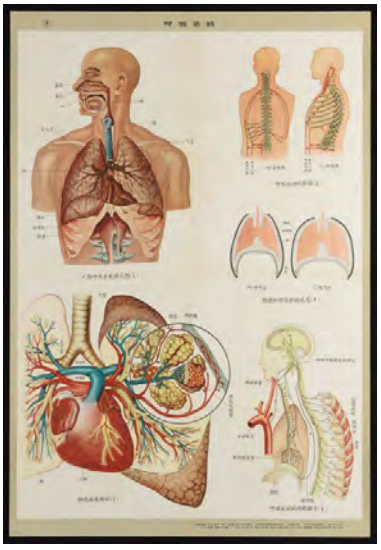
Conclusion

A useful example that draws together many of the points made in this paper is medical illustration. Medical illustrators must marry artistic prowess with scientific acumen. The discipline reflects the Constitutional goal of sustaining the Progress of Science and, indeed, requires artistic eminence, a keen understanding of science, medicine, and anatomy, and the ability to manifest those understandings visually. There are very few accredited medical illustration programs in the United States, but it is an in-demand skill,[94] and admission

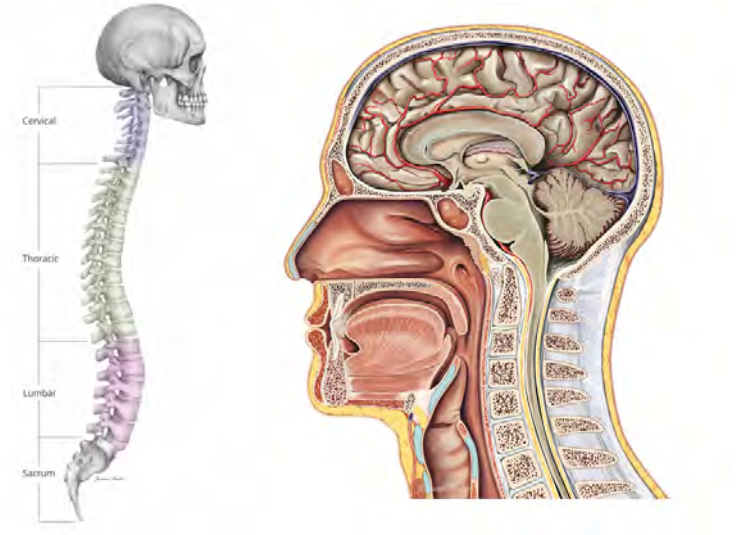
[92] *See id.*, at Section 4.
[93] *See, e.g.*, Matthew Sag, *Copyright Safety for Generative AI*, 61 Hous. L. Rev. 295 (2023); Kalpana Tyagi, *Copyright, text & data mining and the innovation dimension of generative AI*, Journal of Intellectual Property Law & Practice, Volume 19, Issue 7, July 2024, Pages 557–570, https://doi.org/10.1093/jiplp/jpae028; Lucchi N. *ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems*. European Journal of Risk Regulation. 2024;15(3):602-624. doi:10.1017/err.2023.59.
[94] Mark M. Miller, *Medical Illustration State of the Art & Future Considerations: Illuminating Medicine & Science,* Part II. Mo Med. 2024 Jan-Feb;121(1):21-25. PMID: 38404437; PMCID: PMC10887458.

competition is fierce.[95] That said, medical illustrators suffer from a similar prejudice as do other authors and artists who work in fact-intensive spaces:

> [M]edical illustrators derive their entire income from the right to authorize reproduction of their work in copies and the exclusive right to create derivative works. And, unlike photographers whose images are instantaneously fixed with the click of a camera button, works of medical illustration – regardless of the medium in which they are fixed – require painstaking research, drawing and painting taking hours, days or weeks for the creation of a single image.[96]



Human anatomy and physiology (Left) color lithographs, 1956. © Wellcome Collection 667817i



Spine (Center) and Midsaggital View of the Head (Right), © Dr. Joanna Butler, MMAA, MIMI. Reproduced with permission of the

I suggest that works of the (human) mind should always benefit from copyright protection, whatever their saturation with personality-laden creativity. Medical illustrations reflecting

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[95] See, e.g., The Johns Hopkins School of Medicine, Medical & Biological Illustration Graduate Admissions, https://medicalart.johnshopkins.edu/admissions-mbi/. "We receive close to a thousand inquiries per year regarding our graduate program. 60-70 applicants upload the 20-image portfolio for us to review (with the accompanying Applicant Profile form). We invite the top 15 to 20 candidates to interview and to submit the full application with letters of recommendation and official transcripts. We accept up to 7 students each year, giving an acceptance rate of 10% – 15%." *Id*.

[96] Comments of the Association of Medical Illustrators to U.S. Copyright Office, Mass Digitization Pilot Program Request for Comments. Federal Register Vo. 80, No. 110 June 9, 2015, at 2, https://www.copyright.gov/policy/massdigitization/comments/Association%20of%20Medical%20Illustrators%20AMI.pdf.

pregnancy complications, scientific articles about advances in cancer treatment, photographs that horrify the viewer but that convey factual information about humankind's history of wartime atrocities; these are all vital touchstones of the facts that underpin society across the globe. Many of them reach their audience without particular authorial flair. But they are brought into existence by a very human mix of originality and factual knowledge. They are valuable beyond how they reflect the personality of their maker; this has always been the case. In the age of generative artificial intelligence, I suggest that fact-laden works are today more valuable – and worthy of protection – than they have ever been.

THE ITALIAN CULTURAL ASSETS BETWEEN PUBLIC RULES AND COPYRIGHT PROTECTION

Paola Nunziata[1]

1. INTRODUCTION

Article 9 of the Italian Constitution, approved in 1947 and entered into force in 1948, includes among the fundamental values of the republican order the promotion of the development of culture and scientific and technical research, and the protection of the landscape and the Nation's historical and artistic heritage.

Considering the historical context in which the Italian Constitution was adopted, the rationale behind this provision is quite clear: after the devastation of the Second World War and the collapse of the Fascist regime, characterized by an unprecedented level of repression

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against all free artistic and cultural expression, investment in culture and scientific progress in a country marked by extreme poverty and a very high illiteracy rate, was seen both as a means of emancipation from possible future authoritarianism and as a fly-wheel for the country's socio-economic rebirth.

However, it was only several years after the Constitution came into force that the regulatory process aimed at implementing specific measures to achieve the objectives set out in Article 9 began. This regulatory process ended with the adoption of Legislative Decree no. 42 of 22 January 2004, entitled "*Code of cultural heritage and landscape, pursuant to Article 10 of Law no. 137 of 6 July 2002*" (better known as "*Codice Urbani*" after the name of the Minister of Culture at the time), which is the first set of rules aimed at systematically regulating the conservation, protection, enhancement and public enjoyment of the country's cultural heritage, including both cultural and landscape assets.

Indeed, Article 1 of the Urbani Code, entitled "*Principles*", states the following: in accordance with Article 9 of the Constitution, the Republic protects and enhances cultural heritage; the protection and enhancement of cultural heritage contribute to preserving the memory of the national community and its territory and to promoting the development of culture; the State, the Regions, the Metropolitan Cities, the Provinces and the Municipalities ensure and support the conservation of cultural heritage and promote its public enjoyment and enhancement; other public bodies, in the course of their activities, shall ensure the conservation and public enjoyment of their cultural heritage; private owners, possessors, and holders of assets belonging to the cultural heritage shall ensure their conservation; activities relating to the conservation, enjoyment, and enhancement of the cultural heritage shall be carried out in accordance with the protection regulations.

Thus, Article 1 calls on everyone to contribute to the preservation and enhancement of Italian cultural heritage, which is the foundation of the country's collective identity, and to ensure its public enjoyment with a view to promoting culture, provided that the rules contained in the Urbani Code are respected.

Of these rules today, those contained in Articles 107 and 108, which regulate the use and reproduction of cultural assets, are considered particularly relevant. Indeed, thanks to the digitalization and development of electronic communication systems, the present era is characterized by an increasing utilization of images, which are also used as a means of conveying and promoting cultural content.

Therefore, since it is not possible here to examine the content of the Urbani Code in its entirety, in this article I will concentrate on analyzing Articles 107 and 108 and the sanction regime applicable in the event of their violation.

I will then analyze some issues dealt with by the case law: more precisely, the possible occurrence of non-pecuniary damages as a consequence of the unauthorized reproduction of cultural assets, as well as the jurisdiction and the law applicable in the case where the unauthorized reproductions have been made by foreign subjects, in territories other than the Italian one.

Finally, I will focus on the relationship and possible interference between the copyright regime and the public regime for the protection of cultural assets.

* * *

2. DEFINITIONS.

Before describing the content of Articles 107 and 108 of the Urbani Code, it is useful to examine the definitions of cultural heritage, cultural assets, and reproduction provided by Italian law.

2.1 Definition of cultural heritage and cultural assets.

Pursuant to Article 2 of the Urbani Code, cultural heritage consists of cultural assets and landscape assets. Cultural assets are immovable and movable assets of artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, as well as other assets identified by law or based on law as evidence of cultural value.

Pursuant to Article 10, paragraph 1, of the Urbani Code, cultural assets include immovable and movable assets which belong to the State, the Regions, the other public territorial entities, as well as to any other public body and institute or to private non-profit legal persons, including recognized ecclesiastical bodies, and are of artistic, historical, archaeological or ethno-anthropological interest.

Pursuant to Article 10, paragraph 2, the following assets also comprise part of the cultural heritage:

- ✓ Collections of museums, picture galleries and other places of exhibition;

- ✓ Archives and single documents;
- ✓ Libraries' book collections (except for those belonging to local entities, indicated under Article 47, paragraph 2, of Decree of the President of the Republic no. 616 of 24 July 1977);

belonging to the State, the Regions, the other public territorial entities, as well as to any other public body.

Pursuant to Article 10, paragraph 3, the following assets shall also be considered cultural assets, if a declaration of artistic, historical, archaeological or ethno-anthropological interest has been issued by the Ministry of Culture:

- ✓ Immovable and movable assets having a particularly significant artistic, historical, archaeological or ethno-anthropological interest and belonging to subjects other than those indicated under paragraph 1;
- ✓ Archives and individual documents, having a particularly significant historical interest and belonging to private individuals;
- ✓ Book collections belonging to private individuals, having a particularly significant cultural interest;
- ✓ Immovable and movable assets, belonging to whomever, which are of particular interest because of their relation to political or military history, literature, art, science, technology, industry and culture in general, or as evidence of the identity and history of public, collective or religious institutions;
- ✓ Things, whoever they belong to, that are of exceptional interest from an artistic, historical, archaeological or ethno-anthropological point of view for the integrity and completeness of the Nation's cultural heritage;
- ✓ Collections or series of objects, whoever they belong to, which are not included in paragraph 2 but that, due to tradition, fame and particular environmental characteristics, or due to their artistic, historical, archaeological, numismatic or ethno-anthropological importance, are of exceptional interest.

Furthermore, Article 10, paragraph 4, contains an illustrative list of cultural assets falling within the scope of application of paragraphs 1 and 3, which includes, *inter alia*, (*i*) villas, parks and gardens that have artistic or historical interest; and (*ii*) public squares, streets, roads and other urban open spaces of artistic or historical interest.

2.2 Definition of reproduction.

The Urbani Code does not contain any definition of reproduction. Therefore, it is necessary to refer to the notion of reproduction that can be derived from Article 13 of Law no. 633 of 22 April 1941, entitled "*Protection of Copyright and Other Rights Related to its Exercise*" (hereinafter "*Copyright Law*"), according to which the activity of reproduction has, as its object, the direct or indirect multiplication into copies, temporarily or permanently, in whole or in part, of the work, in any manner or form, such as copying by hand, printing, lithography, engraving, photography, phonography, cinematography, and any other reproduction process.

* * *

3. THE REPRODUCTION OF CULTURAL ASSETS: AUTHORIZATIONS AND FEES.

Pursuant to Article 107, paragraph 1, of the Urbani Code, the Ministry, the Regions, and other local public bodies may authorise the reproduction and instrumental and temporary use of the cultural assets in their possession, without prejudice to the provisions contained in the Copyright Law. Except in special cases, the reproduction of cultural assets carried out by making contact moulds of the originals of sculptures and reliefs, regardless of the material they are made of, is generally prohibited.

Pursuant to Article 108, paragraphs 1 and 2, the reproduction and use of the above assets may be subject to the payment of fees determined by the competent body by taking into account (*i*) the nature of the activities to which the authorization refers; (*ii*) the means and methods of making reproduction; (*iii*) the type and time of use; and (*iv*) the use and scope of the reproduction and the economic benefits deriving from it. Fees must be usually paid in advance.

Pursuant to Article 108, paragraph 3, no fee is due for reproductions requested or carried out by private individuals for personal use or for study purposes, or by public or private entities for the purpose of enhancement, provided that they are carried out on a non-profit basis. Applicants are in any case required to reimburse the expenses possibly incurred by the granting entity.

Pursuant to Article 108, paragraph 3 *bis*, the following activities, carried out on a non-profit basis for the purposes of study, research, free expression of thought or creative expression,

or promotion of knowledge of cultural heritage, are in any case free (meaning that neither the payment of fees nor the issue of authorisations is required): (*i*) the reproduction of cultural heritage other than archives subject to restrictions on accessibility, carried out in compliance with the provisions protecting copyright and in a manner that does not involve any physical contact with the asset, nor exposure of the same to light sources, nor, within cultural establishments, the use of stands or tripods; (*ii*) the dissemination by any means of images of cultural assets, legitimately acquired, in such a way that they cannot be further reproduced for profit.

Pursuant to Article 108, paragraphs 4 and 5, in cases where the activity under authorization may cause harm to cultural assets, the body that has the assets in its possession shall determine the amount of the security, which may also be constituted by a bank or insurance guarantee. The security shall also be due in cases of exemption from the payment of fees and shall be returned when it has been ascertained that the assets under concession have not been damaged and the expenses incurred have been reimbursed.

Lastly, pursuant to Article 108, paragraph 6, the minimum amounts of the fees for the use and reproduction of the assets shall be established by order of the granting administration.

That said, the following explanatory notes seem appropriate.

Except for the free activities referred to in Article 108, paragraph 3 *bis*, the authorization of the body in charge of the cultural asset is an essential condition for its use and reproduction. Furthermore, in accordance with the provision of Article 20 of the Urbani Code, according to which cultural assets may not be destroyed, deteriorated, damaged or used in a way that is incompatible with their historical or artistic character or in a way that may jeopardize their conservation, it is essential that, before granting the authorization, the competent body assesses the compatibility of the requested use or reproduction with the historical and artistic character of the asset to be used or reproduced.

Contrary to authorization, the payment of fees is not an indispensable condition for the legitimate use or reproduction of cultural assets, as the bodies in charge of the assets are free to decide whether to apply such fees.

By providing for specific exceptions to the system of authorizations and fees, the Italian legislator has sought to strike a fair balance between two different but complementary needs, both of which are functional to the achievement of the objectives set out in Article 9 of the

Constitution: more specifically, on the one hand, the need to protect and enhance cultural assets by setting limits to their use and reproduction and, on the other hand, the need to guarantee their free enjoyment by the community when such enjoyment is not determined by profit-making purposes, but is functional for the development of culture and the promotion of the public's knowledge of the Nation's historical and artistic heritage.

Finally, it must be noted that the so-called "*panorama exception*", which exists in many countries, has only a residual application in Italy: indeed, as said above, in addition to monuments, also villas, parks, gardens, public squares, streets, roads and other urban open spaces of artistic or historical interest fall within the definition of cultural assets, with the consequence that, in principle, the reproduction of a panorama including said cultural assets must be authorized by the competent entities. Moreover, the applicability of the "*panorama exception*" is further restricted by the absence of provisions in the Italian Copyright Law, with the consequence that if a work of art that has not yet fallen into the public domain is exhibited in a public space, the author's authorization must still be obtained for its reproduction.

* * *

4. <u>SANCTIONS</u>.

No administrative sanctions are provided by the Urbani Code in relation to the unauthorized use or reproduction of cultural assets.

However, the violation of the provisions contained in Articles 107 and 108 gives rise to tort liability, with consequent possible application of civil remedies. In particular, in disputes concerning unauthorized reproductions of cultural assets, the Italian Courts, making recourse to measures typical of the IP process, are used to:

- ✓ Order to the infringer to refrain from carrying on with the unauthorized reproduction of the cultural asset;
- ✓ Order to the infringer to withdraw from the market the items or contents through which the unauthorized reproduction is carried out and the relative marketing materials;
- ✓ Order the destruction of the withdrawn reproductions and marketing materials and of what has been used to make them;
- ✓ Order the payment of penalties for every further infringement or day of delay in performing the Court's decision;

- ✓ Order the publication of the decision in newspapers and magazines, as well as on the infringer's website and social media pages at the infringer's cost;
- ✓ Condemn the infringer to compensate pecuniary and not-pecuniary damages suffered by the body in charge of the asset concerned.

While the destruction of the items or contents through which the unauthorized reproduction is carried out and the compensation for damages may be requested by the claimant and granted by the competent Court only within merit proceedings, any other measure can be ordered, at request of the claimant, also within urgency proceedings. However, in this case, the following two requirements must occur: (*i*) the "*fumus boni iuris"*, i.e. the probable existence of the right enforced, and (*ii*) the "*periculum in mora*", i.e. the risk of an irreparable detriment to the rights claimed during the time necessary to obtain a decision on the merits.

* * *

5. COMPENSATION FOR NON-PECUNIARY DAMAGE: CLARIFICATIONS IN CASE LAW.

Compared to the very high number of unauthorized reproductions of Italian cultural assets realized in Italy and abroad, the number of Court cases brought by the Public Administration for the protection of national cultural assets appears rather limited.

The lack of aggressiveness of the Public Administration, which can probably be explained by the often insufficient resources that it has at its disposal, appears to be counterbalanced, however, by the strict application of the Urbani Code provisions by the Courts. In fact, the proceedings on the subject usually end with the pronouncement of injunctions against the persons responsible for unauthorized reproductions, with the application of ancillary measures and, in the case of proceedings on the merits, with the condemnation of the responsible subjects to pay compensation for the damages caused.

With specific reference to the compensation for damages, the Italian Courts are used to distinguishing between pecuniary damage caused to the entities holding the cultural assets that have been unlawfully reproduced and non-pecuniary damage caused to the assets that have been reproduced. More specifically, pecuniary damage caused to the entities holding the cultural assets that have been unlawfully reproduced consists in the non-receipt of the fees that would have been collected in the case of lawful reproduction; instead, non-pecuniary damage caused to the assets that have been reproduced, consists essentially in the

debasement and dilution of the image and even of the name of the assets themselves, likely resulting from reproductions for which no assessment about their compatibility with the historical and artistic character of the asset reproduced has been carried out by the competent body.

With specific reference to non-pecuniary damage, it is interesting to examine the decision no. 1207 of 20 April 2023, by means of which, in a case brought by the Ministry of Culture, the Court of Florence censured the reproduction of an image of Michelangelo's David made by a publishing company on the cover of a men's magazine, overlaid, by using a lenticular technique with a morphing effect, on to that of a model portrayed in the same poses as Michelangelo's masterpiece.

In particular, with this decision the Court of Florence ruled that the publishing initiative was illegitimate not only because the defendant had carried out the aforementioned reproduction without the necessary authorization from the "*Galleria dell'Accademia*" of Florence, as the entity in charge of the cultural asset, and without paying the fees due for the reproduction of the asset in accordance with Article 108 of the Urbani Code, but also for another reason, namely for having placed the image of a model next to the image of the David, "*thus debasing, obscuring, mortifying and humiliating the high symbolic and identifying value of the artwork and enslaving it to advertising and editorial promotion purposes*".

For this reason, according to the Court, the publishing company had to be held liable not only for the pecuniary damage resulting from the non-payment of the fee due for the use of the reproduction of the David, but also for the non-pecuniary damage resulting from the infringement of the right to the image of the cultural asset in question.

As mentioned above, the decision under comment appears worthy of note because of the rulings on the impairment of the right to the image of the cultural asset and the non-pecuniary damage resulting therefrom. Indeed, although it follows a line already traced by previous case law, it differs from earlier decisions in that it deals with the issue in question in greater depth.

More precisely, taking as a starting point the case-law of the Supreme Court that had recognized an autonomous right to the image of material assets (even if said assets, although commercially known, were not however qualifiable as assets of particular importance for the community), and from those rulings that had already recognized the right to the image of

cultural assets, the Court of Florence held it necessary to reaffirm the configurability of an autonomous right to the image of cultural assets, especially in the case of works of absolute artistic value (such as Michelangelo's David), which have become a symbol of the entire national cultural heritage. After which, it specified that the compensability of non-pecuniary damage, resulting from the prejudice to the image of the cultural asset, is based on the minimum compensatory protection due to inviolable constitutional rights.

Specifically, the Court of Florence held that since Article 2 of the Constitution guarantees the right to individual identity, meaning the person's right not to see his or her intellectual, political, social, religious, ideological, and professional heritage altered externally and therefore misrepresented, obfuscated, or challenged, it would be totally unreasonable not to consider equally guaranteed, based on Article 9 of the Constitution, the right to collective identity of citizens who recognize themselves as belonging to the same Nation, also thanks to their artistic and cultural heritage.

Consequently, again according to the Court, it would be unreasonable to exclude violations of that collective right from the scope of the compensatory remedy.

It must be stressed, however, that damage to the image of the cultural asset in the event of unauthorized reproductions of the same is not automatic, but subject to a case-by-case assessment.

In this regard, it is worth mentioning the decision of the Court of Palermo of 21 September 2017, rendered at the end of a proceeding on the merits brought by the Teatro Massimo Foundation against a bank, which was responsible for having undertaken for the promotion of its Sicilian agencies, in the absence of authorization and without the payment of fee, a massive promotional campaign called "*Palermo al centro*", characterized by the use of billboards reproducing the image of the Teatro Massimo associated with a roundabout of children.

In the lawsuit, the Teatro Massimo Foundation, alleging that the bank had used the image of one of the largest and most prestigious theatres in the world for undue profit, requested that the bank be ordered to pay compensation for both pecuniary loss, arising from the non-payment of the fees due to the Foundation, and non-pecuniary loss, arising from the debasement and dilution of the theatre's image used in an advertising campaign.

The Court of Palermo, while upholding the claim for compensation for pecuniary damage, rejected the claim for compensation for non-pecuniary damage, because the manner in which the theatre was reproduced was in no way denigrating or detrimental to the historical and artistic value of the theatre. On the contrary, the overall advertising message was to be considered entirely positive, in that it was capable of representing the beauty of the monument and, ultimately, of the city of Palermo itself.

Still on the subject of damage to the image of the cultural asset, it is necessary to acknowledge what was recently asserted by the Court of Appeal of Bologna in the ruling examined in paragraph 7 below, i.e. that damage to the image cannot be considered *in re ipsa*, but must be specifically alleged and proven, also by means of assumptions, by the party requesting compensation and its liquidation must be made by the Judge not on the basis of abstract evaluations, but on the basis of the concrete prejudice presumably suffered by the victim, as alleged and proven by the latter.

* * *

6. APPLICABLE LAW AND JURISDICTION.

Considering that the unauthorized reproductions of the Italian cultural assets are often carried out by foreign entities and in territories other than Italy, one of the most frequently asked questions is whether such reproductions also fall within the scope of the Urbani Code and whether the entities responsible can be sued before the Italian Courts.

In both cases, the answer is yes.

In fact, regarding the jurisdiction, Article 3 of Law no. 218/1995, laying down rules on private international law, with regard to extra-contractual liability (through a reference to the Brussels Convention of 27 September 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters) establishes that a person not domiciled in Italy can still be sued before the Italian judicial authority, if the harmful event occurred in Italy.

As for the applicable law, then, according to Article 62 of Law no. 218/1995, tort liability is governed by Italian law if the fact that caused the damage ("*lex loci commissi delicti"*) or the event ("*lex loci damni"*) occurred in Italy.

Moreover, partly similar rules are contained in Regulation (EU) no. 1215/2012 of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil

and commercial matters, and Regulation (EU) no. 864/2007 of 11 July 2007, on the law applicable to non-contractual obligations.

Specifically, with regard to jurisdiction, Article 7 of Regulation (EU) no. 1215/2012 states that in matters relating to torts, a person domiciled in a Member State may be sued in another Member State before the Courts of the place where the harmful event occurred or may occur.

Instead, with regard to applicable law, Article 4 of Regulation (EU) No. 864/2007 states that, unless otherwise provided for in the same Regulation, the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Therefore, given that in the case of unauthorized reproductions of Italian cultural assets, according to the dominant case-law position, a double damaging event occurs, consisting, on the one hand, in the debasement and dilution of the image and, in some cases, of the name of the asset, and, on the other hand, in the prejudice to the entity which has custody of the asset, which is evidently not given the opportunity to verify whether the reproduction is compatible with the historical or artistic character of the asset and to whom the due fees are not paid, there is no doubt that the place where the damaging event occurs is Italy, with the consequence that any legal actions, even those having as their object conducts perpetrated abroad, may be initiated in Italy. Furthermore, for the same reason, the law based on which such actions shall be decided is the Italian law.

Having said this, it is interesting to give account of the decision of the Court of Venice of 17 November 2022, rendered at the end of the appeal phase of an urgency proceeding started by the "*Gallerie dell'Accademia*" of Venice, as the museum institute at which Leonardo da Vinci's work entitled "*Vitruvian man*" is kept and exhibited, and by the Ministry of Culture against certain companies of a German group, which is a leading European manufacturer of toys and board games. In particular, according to the claimants' allegations, the German Group was responsible for having produced and marketed on the entire European and international market through both traditional and online channels, a puzzle called "*L.D.V.: Vitruvian Man*", reproducing the image of the aforementioned work in the absence of the necessary administrative authorization and without having paid the due fees, so giving rise to a violation of the provisions contained in Articles 107 and 108 of the Urbani Code.

By means of said decision, based essentially on the application of the European Regulations, the Court of Venice declared unfounded both (*i*) the objection raised on jurisdiction by the defendant companies, according to which the Italian jurisdiction was to be considered to exist only with reference to the distribution activities carried out in Italy by the group's Italian subsidiary, but not also with reference to the production activities carried out exclusively in Germany and the Czech Republic and to the marketing activities carried out in foreign markets, and (*ii*) the objection raised always by the defendant companies on the inapplicability of Italian law to entities based abroad and carrying out production and sales activities outside the Italian borders.

Specifically, in declaring the jurisdiction of the Italian judicial authority, the Court of Venice followed the reasoning below.

With reference to torts, Article 7 of Regulation (EU) no. 1215/2012 states that as an alternative to the general rule according to which persons domiciled in the territory of a particular Member State shall be sued, regardless of their nationality, before the Courts of that Member State, a person domiciled in a Member State may be sued in another Member State before the Courts of "*the place where the harmful event occurred or may occur*".

The sentence "*place where the harmful event occurred or is likely to occur*" has been interpreted by the European Court of Justice according to the principle of ubiquity, meaning by making reference both to the place where the harm arose, and to the place where the conduct occurred, thus remitting to the injured party the choice of suing the damaging party in the Courts of either place.

Consistent with the guidance of the Court of Justice, the Plenary Sections of the Italian Supreme Court have also affirmed that with reference to the jurisdiction of the Italian Courts over foreign subjects, in matters of torts, regard must be made to the "*place where the damaging event occurred*" to be understood not only as the "*place of the damage-generating event*", but also as the "*place where the damage event occurred*". On the contrary, no relevance has the place where the future consequences of the injury to the victim's right have occurred or may occur.

Based on the above principles the Court of Venice stated that the German and Italian jurisdictions were placed in a position of alternativeness and equal order, with the consequence that the choice of the "*Gallerie dell'Accademia*" and the Ministry of Culture to

bring the case before the Italian, rather than the German, judicial authorities must be considered fully legitimate. Indeed, the causal sequence that determined the damage complained by the "*Gallerie dell'Accademia*" of Venice and by the Ministry of Culture started in Germany where the damage-generating event (namely the use for profit of the image of the "*Vitruvian man*") occurred, but had its etiological progression in Italy. In fact, the cultural asset in question and the entity in charge of its custody are located in Italy, and it is in Italy that the damage complained occurred, consisting, on the one hand, in the debasement and dilution of the image and name of the artwork determined by the uncontrolled use of the same for commercial purposes and, on the other hand, in the prejudice suffered by the entity having its custody, which was deprived not only of the due fees, but also of the possibility of verifying the appropriateness of the use and manner of utilization and representation of the asset at hand in relation to its cultural value.

Moreover, according to the Court of Venice, the Italian jurisdiction can be asserted based on additional connecting criteria, including the fact that the defendant companies comprise the Italian subsidiary and that claims having the same "*petitum"* and "*causa petendi*" were formulated by the claimants against all three defendants. Indeed, according to Article 8 of Regulation (EU) no. 1215/2012, in the case of multiple defendants, a person domiciled in a Member State may be sued before the Court of the place where one of the other defendants is domiciled, if there is such a close connection between the claims that a single treatment and a single decision are appropriate, in order to avoid the risk of arriving at incompatible decisions resulting from separate treatment.

With reference to the applicable law, the Court of Venice then declared the applicability of Italian law, as "*lex fori*", with respect to all the parties of the proceeding by virtue of the principles and provisions of civil international law aimed at regulating cases, such as the one in question, which, although characterized by elements of transnationality, presents the main link with the Italian territory, a link represented in the case at hand by the fact that in Italy the immediate consequences of the torts occurred, that in Italy the cultural asset illegally reproduced is kept, and that in Italy the entity having the custody of the asset has its registered office.

In particular, pursuant to Article 4 of Regulation (EU) no. 864/2007, the law applicable to non-contractual obligations arising out of a tort is the law of the State in which the damage occurs, regardless of the State in which the event giving rise to the damage occurred and regardless of the State or States in which the indirect consequences of that event occur.

And indeed, as noted by the Court of Venice, this provision (especially when read in conjunction with Recital 16 of the same Regulation, according to which "*a connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage*", and Recital 17, according to which "*the law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur*") leads to the application of the law of the place where the immediate prejudicial consequences of the injury to the injured parties occurred, i.e., for the reasons mentioned above, Italy and, in particular, Venice, as the place where the work whose image was injured is kept and where the trustee entity, who was deprived of the fees and of the control over the use and reproduction of the work in question, is based.

Lastly, according to the Court of Venice, pursuant to Article 17 of Law no. 218/1995 and Article 16 of Regulation (EU) no. 864/2007, the rules contained in the Urbani Code must be considered, by reason of their purpose and object, "*overriding mandatory provisions*", applicable, as such, even in cases where a foreign law regulates a case, since, by adopting them, the legislator intended to protect as much as possible a public interest considered essential for the Italian State, namely the protection of its immense historical, artistic and cultural heritage.

* * *

7. INTERPLAY BETWEEN THE URBANI CODE REGIME AND THE COPYRIGHT LAW.

The system of rules described under paragraph 3 above is of a clearly public nature, as it aims to realize the interest of the community in the protection of Italian cultural assets (as an element of identity of the entire national community) from uses that would lead to their debasement and dilution. Therefore, such a system does not preclude the applicability, where the relative requirements are met, of current legislation on copyright, which instead aims to regulate the rights of individual authors over their works.

This is unequivocally stated in Article 107 of the Urbani Code, according to which the Ministry, the Regions, and the other public territorial bodies may allow the reproduction as well as the use of cultural assets they are entrusted with, without prejudice to copyright provisions.

To understand the relationship and possible interaction between the two systems of rules, however, it is necessary to examine the content of copyright under Italian law.

The Copyright Law grants the author of creative intellectual work both the so-called moral right and the rights of economic use of the work.

More precisely, pursuant to Article 20 of the Copyright Law, the moral right consists in the author's right to claim authorship of the work and to object to any distortion, mutilation, or modification and to any act that damages the work and could be prejudicial to his honor or reputation. This right may be exercised independently from the exclusive rights of economic exploitation of the work and even after their assignment. Furthermore, it is inalienable and may be asserted without time limits even after the author's death by the persons indicated in Article 23 (i.e. the spouse and children and, failing them, the parents and other direct ascendants and descendants or, failing them, the brothers and sisters and their descendants or, when required for public purposes, the Ministry of Culture).

The rights of economic exploitation of the work referred to in Section I of Chapter III of the Copyright Law consist of the exclusive right granted to the author to exploit the work economically in any form and manner. These rights last for the author's entire life and until the end of the 70th year after his death (when the work falls into the public domain) and are assignable and subject to prescription.

Therefore, in the light of what has just been explained, a distinction must be made between the (indeed predominant) case where works of art qualifying as cultural assets have fallen into the public domain and the case where they have not.

In fact, in the first case, without prejudice to the right of the persons referred to in Article 23 above to object to any act that might be detrimental to the honor and reputation of the author, the use and reproduction of the work will be subject solely and exclusively to the rules contained in the Urbani Code. In the second case (which is much rarer in practice), the use and reproduction of the work will also be subject to the Copyright Law, with the consequent need to obtain, in addition to the authorization of the entity in charge of the cultural asset, the authorization of the author.

Therefore, except for the cases of free reproductions pursuant to Article 108, paragraph 3 *bis*, the authorization of the competent Administration is essential in all cases of reproduction of cultural assets subject to its control, regardless of the existence of copyright on such

cultural assets, given the independent relationship that exists between the copyright laws and the system outlined by the Urbani Code.

This relationship of independence, which can already be deduced from the applicable legal provisions, was recently reaffirmed by the Court of Appeal of Bologna in the decision no. 1792 of 24 September 2024, issued in relation to a trial initiated by the Ministry of Culture against an Italian company operating in the food sector, that used the image of the portrait of Duke Francesco I d'Este, made by the Spanish painter Diego Velázquez and owned by the Galleria Estense in Modena, in its distinctive signs, advertising materials, and recipe books without any authorization.

In particular, during the proceedings, the defendant company objected that exclusive rights on intangible assets, such as images of cultural assets, cannot be recognized in favor of the Administration, because such recognition would end up translating into a *sui generis* copyright of unlimited duration, contrary to the principle of *numerus clausus* that informs the subject of intellectual property rights and to the rules that foresee a specific copyright duration. Furthermore, the defendant company objected that such a recognition would also end up limiting the circulation and usability of intellectual works, with consequent infringement of the principles of free economic initiative pursuant to Article 41 of the Constitution and promotion of culture pursuant to Article 9 of the Constitution, and with consequent unjustified unequal treatment pursuant to Article 3 of the Constitution between public artistic heritage and private artistic heritage.

Nevertheless, the Court of Appeal of Bologna rejected the defendant company's objections, by clarifying that the assimilation between the two disciplines is absolutely irrelevant, as they aim to realize completely different interests.

And indeed, while the regulations set forth in the Copyright Law are aimed at guaranteeing the protection of creative intellectual works and their authors, Articles 107 and 108 of the Urbani Code are aimed at identifying the conditions for the legitimate use and reproduction of cultural assets with a view to protecting the national cultural heritage, the preservation of the memory of the national community and its territory and the promotion of the development of culture in implementation of Article 9 of the Constitution.

Moreover, according to the Court of Appeal of Bologna, the provision itself of the payment of a fee in the case of reproduction of the work of art for commercial purposes does not

respond to lucrative aims, but to a rationale of efficient conservation and management of the cultural asset, with the aim of guaranteeing its public fruition and promoting the development of culture.

Therefore, according to the Court, the alleged contrast between the rules contained in the Urbani Code and the *numerus clausus* of the intellectual property rights is unfounded. Similarly, the unlimited duration of the exclusive rights granted to public bodies in relation to cultural assets does not appear unreasonable, because this unlimited duration responds to prevalent constitutional reasons of enhancement and collective fruition of cultural assets, which would obviously remain unimplemented if the rights of the aforementioned bodies were subject to expiry.

Always considering the relationship between the Urbani Code and the Copyright Law, it is worth mentioning Article 32 *quater* inserted into the Copyright Law by Legislative Decree no. 177 of 8 November 2021, by which Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market was implemented in Italy.

In accordance with the objective pursued by the EU legislator, consisting of promoting culture and favoring access to it through the free circulation of faithful reproductions of visual arts' works, and in compliance with Article 14 of the same Directive, Article 32 *quater* establishes that at the end of the period of protection of a work of visual arts as identified in Article 2 of the Copyright Law (therefore at the end of the period of protection of works of sculpture, painting, drawing, engraving and similar figurative arts, as well as drawings and works of architecture and also photographic works and industrial design), the material deriving from an act of reproduction of such a work is not subject to copyright or related rights, unless it constitutes an original work.

Thus, according to this Article, except where they constitute original works and are therefore eligible for copyright protection, reproductions of works of visual arts that have fallen into the public domain must also be considered to be in the public domain, as the act of reproduction in itself cannot give rise to copyright protection.

Article 32 *quater* specifies, however, that "*the provisions regarding the reproduction of cultural assets set out in Legislative Decree no. 42 of 22 January 2004 shall remain unaffected*", thus reaffirming the independent relationship between the Copyright Law and the Urbani Code.

Therefore, regardless of whether there is copyright protection, by express legal provision the rules of the Urbani Code continue to apply to reproductions of works of the visual arts sector that are also cultural assets, as these provisions respond, as just highlighted, to logics different from those that inform copyright. Consequently, both in the case of a mere reproduction of a work of visual arts that has fallen into the public domain, as well as in the case of an original reproduction of the same, in the event that this work is a cultural asset and the relative reproduction is intended to be used for profit, the author of the reproduction must request the necessary authorizations from the entity in charge of the reproduced asset, as well as arrange for the payment of the due fees.

In such a context, it should be acknowledged, *mutatis mutandis*, decision no. 9757 of 13 December 2013, rendered by the Supreme Court in a case brought by the Ministry of Culture against an Italian company responsible for having marketed, without authorization and without having paid the due fees, reproductions of the "*Man of Altamura*", i.e. a skull of a primitive man embedded in rock, located in a paleoanthropological site forming part of the State archaeological heritage.

With such decision, based on the findings of the proceedings, the Supreme Court had acknowledged that only the frontal part of the skull of the "*Man of Altamura*" is visible, whereas the work marketed by the defendant consisted in the reconstruction of the entire skull structure carried out through scientific anthropometric surveys and reconstructive hypotheses. Therefore, the Supreme Court had ruled that the work in question, only partially inspired by the real aspect of the protected cultural asset, was the result of an autonomous creative activity by the author. Consequently, always according to the Supreme Court, since the work in question was a new work, and as such subject to autonomous protection under Copyright Law, it could not be considered an illegitimate reproduction of the asset in question under the rules of the Urbani Code, nor subject to authorization pursuant to Article 107 of the same Code.

In light of Article 32 *quater* of the Copyright Act (despite the fact that this refers exclusively to reproductions of works of visual arts) and the clarifications made by the Court of Appeal of Bologna as reported in this paragraph, the position expressed by the Supreme Court with the sentence just examined could be considered as no longer valid, as with this sentence the Supreme Court has made an undue overlap between the copyright rules and the regime for the protection of cultural assets dictated by the Urbani Code, thus not considering that the creative character of the reproduction does not constitute a reason for excluding the

applicability of the authorization and fee regime as per Articles 107 and 108 of the Urbani Code.

* * *

8. CONCLUSIONS.

The analysis contained in this article cannot be concluded without at least mentioning the public debate taking place in Italy between those who defend the provisions of articles 107 and 108 of the Urbani Code, considering them essential for the adequate protection and valorization of the national artistic heritage, and those who, on the contrary, hope to see them abolished.

In fact, according to this second position, not only the provisions of the Articles in question, as already mentioned in paragraph 7, clash irreconcilably with the rules of copyright and, in particular, with the regime of the public domain of artworks, but, above all, they are not functional with regard to the objectives they seek to achieve.

Indeed, the Italian State does not have sufficient means to effectively combat the very high number of unauthorized reproductions of cultural assets that take place every day in Italy and throughout the world. Moreover, the granting of authorizations and the payment of fees as a prerequisite for the reproduction of cultural goods would not be able to guarantee the State coffers greater profits than those that could be derived from a regime of free economic reproduction of cultural goods, which, by increasing the popularity of Italian artistic heritage, could lead, for example, to an increase in tourist flows. Also, the free reproduction of cultural heritage would be more conducive to the promotion of culture than a system based on authorizations and controls.

It has not gone unnoticed, then, that the power of the Italian Public Administration to verify the compatibility of the reproduction of a cultural asset with its historical and artistic value, in order to grant the necessary authorizations, could lead to real forms of censorship, given the wide margin of discretion with which this power can be exercised.

Criticisms have also been raised against the jurisprudence that recognized an autonomous image right for cultural assets, in that, for the sole purpose of implementing the economic interests of the entities in charge of the goods being reproduced, a real stretch has been made, consisting of the application of personality rights to material assets.

Lastly, for the same reasons already highlighted, it must be emphasized that the Italian model can be considered anachronistic and against the trend of the much more current and profitable *open access* model, by virtue of which an increasing number of cultural institutions tend to renounce proprietary licenses on the images of their collections, ensuring that, where even the copyright has expired, the images can be freely used. This model would, in fact, be extremely efficient, as its adoption would not only free up resources, including in terms of personnel, involved in the often-cumbersome authorization processes, but also and above all generate new opportunities, including economic ones, thanks to the increased visibility of museums on the culture market.

That pointed out, it should be stressed, however, that, whatever the merits of one approach or another, the legal provisions analyzed in this article, which are strictly applied by the Courts, constitute positive law, with the consequence that they must be respected as long as they remain in force. In fact, the use of unauthorized reproductions of Italian cultural goods for the purpose of making a profit, especially when such reproductions are made on a large scale, may not only lead to the application of the sanctions examined in paragraph 4, but may also cause relevant reputational damages to those who carry them out.

TOMB-RAIDING: THE SECOND OLDEST PROFESSION?

Cover Image Credit

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She is a recognized authority on art and heritage crime and law, and has lectured at the Frick Collection, Victoria & Albert Museum, the Neue Galerie, and the Philadelphia Museum of Art, as well as at academic institutions including Columbia Law School, Harvard Law School, University of Geneva in Switzerland, and Yale University. She has appeared as an art law expert on television networks and in business news outlets, including *PBS, CNN*, *Channel 4 News*, *The New York Times, ABC News*, *LA Times*, *The Art Newspaper, Artnet, Forbes Magazine, The Guardian, TIME Magazine*, and *The Wall Street Journal.* Leila is widely recognized for her scholarly work in the area of art law, and she has contributed to many publications, including *Nazi Law: From Nuremberg to Nuremberg, The Research Handbook on Intellectual Property and Cultural Heritage,* and *The Provenance Research Handbook*. Leila is also a classically trained pianist, and she still regularly performs.

I. Introduction

It has been referred to as the "biggest" Egyptian tomb discovery of the century,[2] because it was considered the "last" undiscovered tomb of the Tutankhamun dynasty.[3] So, it is no surprise that this year's announcement of the discovery of the tomb of Thutmose II has led to an uptick in Egyptomania. It is the first time since the discovery of King Tut's tomb that archaeologists have uncovered a pharaoh's burial site in or near Egypt's famed Valley of the Kings.[4] The interred royal was none other than Thutmose II,[5] an ancestor of Tutankhamen.[6] Famously, Thutmose II's wife (and half-sister), Hatshepsut, was an important figure in Egypt because it is believed that she wielded the true power during her husband's reign.[7] As a show of her might, Hatshepsut seized many of her husband's monuments and replaced his name in royal cartouches with her own.[8]

The discovery strikes a personal chord for me because I had the honor of working on a private repatriation of a limestone relief of Hatshepsut which was returned to Egypt in 2024.

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[2] *It's the biggest Egyptian tomb discovery in a century. Who was Thutmose II?*, WIKIMEDIA, THE CONVERSATION (Feb. 20, 2025, 8:51 PM), https://theconversation.com/its-the-biggest-egyptian-tomb-discovery-in-a-century-who-was-thutmose-ii-250432.

[3] Tom Metcalfe, *The last missing tomb from this wealthy Egyptian dynasty has been found*, NATIONAL GEOGRAPHIC, (Feb. 25, 2025), https://www.nationalgeographic.com/history/article/egypt-tomb-ancient-king-thutmose-ii-discovered;

[4] *Discovery of the Tomb of King Thutmose II, the Last Lost Tomb of the Kings of the Eighteenth Dynasty in Egypt*, EGYPT'S MINISTRY OF TOURISM AND ANTIQUITIES, https://egymonuments.gov.eg/news/discovery-of-the-tomb-of-king-thutmose-ii-the-last-lost-tomb-of-the-kings-of-the-eighteenth-dynasty-in-egypt/; Frances Mao, *Last undiscovered tomb of Tutankhamun dynasty found,* BBC (Feb. 19, 2025), https://www.bbc.com/news/articles/c5ym30v356po.

[5] Thutmose II ruled for only four years – just long enough to father a son, Thutmose III, before he died. Fred Lewsey, *The Tale of the Tomb of Thutmose II*, UNIVERSITY OF CAMBRIDGE (Feb. 24, 2025), https://www.cam.ac.uk/stories/tale-of-thutmose-tomb.

[6] Frances Mao, *Last undiscovered tomb of Tutankhamun dynasty found*, BBC (Feb. 19, 2025), https://www.bbc.com/news/articles/c5ym30v356po.

[7] JOSÉ M. GALÁN ET AL., CREATIVITY AND INNOVATION IN THE REIGN OF HATSHEPSUT, vii (José M. Galán et al., eds., University of Chicago: Institute for the Study of Ancient Cultures 2010), https://isac.uchicago.edu/sites/default/files/uploads/shared/docs/saoc69.pdf.

[8] Hatsheput continued to occupy the role of veritable pharaoh after her husband's death while her son and official king, Thutmose III, was still too young to rule effectively. As regent, she commissioned reliefs of herself in both male and female roles to cement her legacy. She is often represented in the dress of a male pharaoh, at times even donning a fake beard. At other times, she is identifiably female, but wears the royal regalia of a male pharaoh. *Hatshepsut Place Setting,* BROOKLYN MUSEUM, https://www.brooklynmuseum.org/objects/166072.

Also, while serving as a cultural heritage law expert for the Manhattan District Attorney's Office, I had also been involved in a number of repatriations to Egypt, including the return of the brilliant Golden Coffin of Nedjemankh[9] and even human remains.

"Tomb robbing has been called the world's second oldest profession."[10] Tomb robbers have perpetrated this shocking crime for over five and a half millennia,[11] with recorded evidence for this activity dating back to over four thousand years in Mesopotamia[12] and Sumeria.[13] In fact, by about five thousand years tomb raiding was already ubiquitous and recognized as a serious problem.[14] Sadly, the same people entrusted to protect tombs were the culprits plundering them, using their inside knowledge about burial sites to return and pilfer treasures.[15] As punishment for desecration in Egypt, some criminals had their hands cut off while others were impaled.[16] In China, tomb robbing occurred at least as early as the third

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[9] Brianne Seaberg, *Statutes Saving Statues: A Proposal to Reform U.S. Customs Laws to Better Protect Cultural Property*, 57 Vand. J. Transnat'l L. 955, 959 (2024)

[10] *Tomb Raiding*, The Official Website of Author James Twining, https://www.jamestwining.com/learn-more/the-geneva-deception/tomb-robbing/.

[11] Burials at Naga ed-Der dating to around 3,500 BCE show signs of robbing soon after burial (these date from the time when the Egyptians placed their dead directly in the sand). Margaret, *"The Mechanisms and Practice of Egyptian Tomb Robbery: A View from Ancient Thebes" Nigel Strudwick (EEG Meeting Talk)* (Apr. 22, 2016), https://writeups.talesfromthetwolands.org/2016/04/22/the-mechanisms-and-practice-of-egyptian-tomb-robbery-a-view-from-ancient-thebes-nigel-strudwick-eeg-meeting-talk/.

[12] Manuel Molina Martos, *The royal tombs of Ur revealed Mesopotamia's golden splendor*, National Geographic (May 22, 2019), https://www.nationalgeographic.com/history/history-magazine/article/mesopotamia-ur-royal-tombs#:~:text=Beginning%20with%20Howard%20Carter's%20landmark,miles%20southeast%20of%20Babylon%20in (noting that the workers who built the tomb of Queen Puabi in Ur (modern day Iraq) over 4,000 years ago likely looted it afterwards).

[13] C. Leonard Woolley, *The Royal Tombs of Ur of the Chaldees*, Penn Museum: The Museum Journal (1928), https://www.penn.museum/sites/journal/9049/. (There is evidence that many graves in Umma al-Ajarib, dating back over four millennia and the largest known Sumerian cemetery, were looted).

[14] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/#:~:text=Tomb%20robbing%20in%20ancient%20Egypt%20was%20recognized%20as%20a%20serious,2670%20BCE) (to prevent looting, burial chambers were filled with debris to stop thefts); Sara Novak*, Discover the Hidden History of Tomb Robbing in Ancient Egypt,* Smithsonian Magazine (Aug. 22, 2024), https://www.smithsonianmag.com/history/discover-the-hidden-history-of-tomb-robbing-in-ancient-egypt-180984895/#:~:text=Some%20accused%20criminals%20had%20their,%2Dyear%20history%E2%80%94and%20beyond.

[15] Sara Novak*, Discover the Hidden History of Tomb Robbing in Ancient Egypt,* Smithsonian Magazine (Aug. 22, 2024), https://www.smithsonianmag.com/history/discover-the-hidden-history-of-tomb-robbing-in-ancient-egypt-180984895/#:~:text=Some%20accused%20criminals%20had%20their,%2Dyear%20history%E2%80%94and%20beyond.

[16] Sara Novak*, Discover the Hidden History of Tomb Robbing in Ancient Egypt,* Smithsonian Magazine (Aug. 22, 2024),

century BC.[17] In ancient Rome, graves were looted for jewelry[18] (today, these sites continue to serve as repositories of riches for thieves who place their finds on the illicit market for antiquities. Whatever the motivations,[19] tomb robbing continues to plague civilization and rob us of our past.

II. Looting in Egypt

A. Discovery of Thutmose's Tomb

Thutmose II's tomb, found near the royal necropolis by a joint British and Egyptian team, was reportedly the last missing royal tomb of the 18th Dynasty.[20] (Thutmose likely reigned around 1480 B.C.). It was found in 2022 but not announced until February 2025. Archaeologists discovered the tomb with part of the ceiling still intact, painted blue with yellow stars representing the cosmos.[21] According to the site's field director Piers Litherland,[22] blue-painted ceilings with yellow stars are only found in kings' tombs.[23] Although looting in ancient Egypt ran rampant, this tomb likely was not touched by robbers.[24] Rather, Thutmose II's body and treasures were relocated due to flooding and possibly re-interred in another still

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https://www.smithsonianmag.com/history/discover-the-hidden-history-of-tomb-robbing-in-ancient-egypt-180984895/#:~:text=Some%20accused%20criminals%20had%20their,%2Dyear%20history%E2%80%94and%20beyond.

[17] Lauren Hilgers, *TOMB RAIDER CHRONICLES*, Archeology Magazine (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty/#:~:text=Researchers%20in%20Xi'an%20believe,continued%2C%20the%20relationships%20have%20changed.

[18] University of British Columbia, *Archaeological Dig Uncovers Roman Mystery*, Science Daily (Oct. 14, 2008), https://www.sciencedaily.com/releases/2008/10/081013210144.htm.

[19] During the Middle Ages, grave robbing was often motivated by the desire for religious relics and bodily remains. *Shrines of Saints*, THE BECKET STORY, The Life, Death and Influence of St Thomas Becket, https://thebecketstory.org.uk/pilgrimage/shrines.

[20] Alan Yuhas, *Archaeologists Find a Pharaoh's Tomb, the First Since King Tut's, Egypt Says,* The New York Times (Feb. 21, 2025) https://www.nytimes.com/2025/02/21/world/middleeast/egypt-tomb-archaeologists.html.

[21] Fred Lewsey, *The Tale of the Tomb of Thutmose II*, University of Cambridge (Feb. 24, 2025), https://www.cam.ac.uk/stories/tale-of-thutmose-tomb.

[22] *Department of Archeaology: Piers Litherland*, University of Cambridge, https://www.arch.cam.ac.uk/staff/piers-litherland.

[23] Ian Casey, *Archaeologists may have found pharaoh's second tomb*, BBC (Feb. 19, 2025), https://www.bbc.com/news/articles/cvg5elpzy9yo.

[24] Tom Metcalfe, *The last missing tomb from this wealthy Egyptian dynasty has been found*, National Geographic (Feb. 25, 2025) https://www.nationalgeographic.com/history/article/egypt-tomb-ancient-king-thutmose-ii-discovered.

undiscovered tomb.[25] The contents of the pharaoh's tomb are unknown, but some experts posit that the treasures accompanying his body may equal the brilliance of grave goods found with King Tut.[26] While archaeology has certainly changed since the time of Howard Carter's groundbreaking discovery of King Tut's tomb, people around the world are fascinated with news of the recent discovery and eager for details.

B. Napoleon & Egyptomania

The mystique of ancient Egypt has appealed to Europeans since ancient times. In particular, in Rome during the 2nd century BCE, Egyptomania already gripped the empire. This trend left its mark on the city of Rome which can still be seen today, from its obelisks, the Pyramid of Cestius, and even the Capitoline Lions.[27] But a surge in Egyptomania was in full swing during the Napoleonic Era. While part of Napoleon's incentive to lay claim to Egypt was actually to forestall the British from trading with India through the Suez Canal, the French leader represented that his intentions were the establish a French colony there, and more nobly, he claimed the humanitarian desire to free the Egyptians from Ottoman control.[28] In 1798, Napoleon eliminated Ottoman rule and installed a French military government. That gave France a stronghold in Egypt and access to its storied treasures.[29] French scholars and scientists traveled to Egypt, and Napoleon established the Institut d'Egypte. Egyptology was born. Under the auspices of the new institution, the Institut recommended that particular artifacts be exported for study and preservation in France. During Napoleon's campaign from 1798 to 1801, scholars had access to artifacts and important sites. [30] During this time, the French army removed a number of significant items from Egypt, including the ceiling from the temple of Hathor at Dendera (now

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[25] Fred Lewsey, *The Tale of the Tomb of Thutmose II*, University of Cambridge (Feb. 24, 2025), https://www.cam.ac.uk/stories/tale-of-thutmose-tomb.

[26] Tom Metcalfe, *The last missing tomb from this wealthy Egyptian dynasty has been found*, National Geographic (Feb. 25, 2025) https://www.nationalgeographic.com/history/article/egypt-tomb-ancient-king-thutmose-ii-discovered.

[27] https://ancientromelive.org/egypt-in-ancient-rome/#:~:text=Did%20you%20know%20that%20the,examples%20of%20Egypt%20in%20Rome:

[28] Lawrence Keating, *Cartouches, Catalogs, & Courtrooms: Using a Recent Legal Challenge in Egyptian Court to Examine Unanswered Questions in Cultural Heritage*, 32 Fordham Intell. Prop. Media & Ent. L.J. 225, 42 (2021), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1790&context=iplj.

[29] Harrison W. Mark, *Napoleon's Campaign in Egypt and Syria*, World History Encyclopedia (April 27, 2023), https://www.worldhistory.org/Napoleon's_Campaign_in_Egypt_and_Syria/.

[30] https://vocal.media/history/napoleon-s-egyptian-campaign-the-birth-of-modern-egyptology-and-scientific-discovery

housed in the Louvre),[31] and the Rosetta Stone. After the British defeated Napoleon, some of the treasures discovered by French scholars were handed over to the British forces. Under the 1801 Treaty of Alexandria, the British army confiscated prized Egyptian antiquities and shipped them to the British Museum in 1802 (this, of course, included the coveted Rosetta Stone).[32] However, it was not only the British and French forces pilfering ancient treasures.

Many European nations were quick to seize on the opportunity to plunder from Egypt. In the early 19th century, individuals seeking treasures would retain a "firman", permission that was often granted easily.[33] Diplomatic representatives faced no difficulties in obtaining such permissions, leading to the foundation of some of Europe's greatest collections of Egyptian artifacts.[34] One famous adventurer turned Egyptologist, Giovanni Belzoni, was not a trained scholar, but was motivated by treasure hunting and the lure of riches.[35] His excavations were not conducted professionally and they resulted in the destruction of sites and art.[36] However, at the time, archaeology was not developed so he worked and received financing from European museums to acquire riches from Egypt.[37]

As objects were shipped back to Europe, Egyptomania (the fascination with Egyptian history, ideas, and iconography) took the world by storm. The thirst for artifacts increased due to the deciphering of the Rosetta Stone which allowed scholars to interpret the long-mysterious hieroglyphs. Egyptology became recognized as a respectable academic course, and Egyptian mystique entered into popular culture.[38] To add fuel to the fire, English writer Jane Webb

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[31] https://www.louvre.fr/en/l-egypte-augmentee-au-musee-du-louvre

[32] *Everything you ever wanted to know about the Rosetta Stone*, The British Museum (Jul. 14, 2017), https://www.britishmuseum.org/blog/everything-you-ever-wanted-know-about-rosetta-stone.

[33] *Firman Granting Muhammad Ali Rule Over Egypt (1841)*, Economic Cooperation Foundation, (Oct. 21, 2014), https://ecf.org.il/issues/issue/1062

[34] *How Was the History of Ancient Egypt Discovered?*, Historical Eve (Aug. 15, 2023), https://historicaleve.com/how-was-the-history-of-ancient-egypt-discovered/.

[35] *The Great Belzoni (1778–1823)*, The Fitzwilliam Museum (Oct. 17, 2020), https://fitzmuseum.cam.ac.uk/explore-our-collection/highlights/context/patrons-donors-collectors/the-great-belzoni-1778-1823.

[36] *The Great Belzoni (1778–1823)*, The Fitzwilliam Museum (Oct. 17, 2020), https://fitzmuseum.cam.ac.uk/explore-our-collection/highlights/context/patrons-donors-collectors/the-great-belzoni-1778-1823.

[37] *The Great Belzoni (1778–1823)*, The Fitzwilliam Museum (Oct. 17, 2020), https://fitzmuseum.cam.ac.uk/explore-our-collection/highlights/context/patrons-donors-collectors/the-great-belzoni-1778-1823.

[38] Lawrence Keating, *Cartouches, Catalogs, & Courtrooms: Using a Recent Legal Challenge in Egyptian Court to Examine Unanswered Questions in Cultural Heritage*, 32 Fordham Intell. Prop. Media & Ent. L.J. 225, 244 (2021), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1790&context=iplj.

Loudon even penned a fictional story in 1827, "*The Mummy! A Tale of the Twenty-Second Century*, that featured a reanimated mummy named "Pharaoh Cheops."[39] Finally, the Suez Canal opened in 1869, followed by the British occupation of Egypt in 1882, making the North African nation more accessible to the European public.[40]

The frenzy over Egypt was not limited to its archaeological treasures; Egypt's history became entertainment. One particularly disturbing trend was the proliferation of unwrapping parties.[41] Mumia, a powder created from mummified human remains, was sold in apothecary shops as a medicine.[42] The practice arose in the 12th century, although many were justifiably skeptical of the medicinal potential of dusty human remains.[43] The mummified carcasses were gathered from Egyptian tombs and then brought to Europe.[44] While ingesting mummified remains was initially practiced for its faux curative value, it eventually became a popular pastime and entertainment. During the Victorian era, people hosted "unwrapping parties"[45] where Egyptian corpses would be unwrapped at raucous parties.[46] The mummies were purchased from the street vendors, like common knick-knacks.[47] The trend for these macabre and boisterous events ended by the start of the 20th century, perhaps in part as respect for the dead, but also due to developments in archaeological sciences.[48]

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[39] *Jane and 'The Mummy!': Linnean Links to Gothic Fiction*, The LINNEAN SOCIETY of London (Oct. 29, 2021), https://www.linnean.org/news/2021/10/29/jane-and-the-mummy-linnean-links-to-gothic-fiction.

[40] Lawrence Keating, *Cartouches, Catalogs, & Courtrooms: Using a Recent Legal Challenge in Egyptian Court to Examine Unanswered Questions in Cultural Heritage*, 32 Fordham Intell. Prop. Media & Ent. L.J. 225, 242 (2021), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1790&context=iplj.

[41] Fariha Asghar, *Egyptian Mummies were First Eaten Because?,* 3 Asian J. Emerg. Res. 153, (2021) https://ajer.scione.com/cms/abstract.php?id=411.

[42] Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, Smithsonian Magazine (May 6, 2012), https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/.

[43] Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, Smithsonian Magazine (May 6, 2012), https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/.

[44] Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, Smithsonian Magazine (May 6, 2012), https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/.

[45] Fariha Asghar, *Egyptian Mummies were First Eaten Because?,* 3 Asian J. Emerg. Res. 153, (2021) https://ajer.scione.com/cms/abstract.php?id=411.

[46] Fariha Asghar, *Egyptian Mummies were First Eaten Because?,* 3 Asian J. Emerg. Res. 153, (2021) https://ajer.scione.com/cms/abstract.php?id=411.

[47] Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, Smithsonian Magazine (May 6, 2012), https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/.

[48] Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, Smithsonian Magazine (May 6, 2012), https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/.

C. Howard Carter and King Tut

The respect for Egyptology was tested in the 1920s due to one of history's most celebrated archaeological discoveries—King Tut's tomb. Howard Carter, a self-taught Egyptologist, was an outsider in the scholarly community and an unlikely candidate for unearthing the long sought-after burial site.[49] But he had an intuition about where to find the lost tomb. With the financial backing of Lord Carnarvon[50] (introduced to Carter through Gaston Mospero,[51] Director of the Egyptian Antiquities Service from1899-1914[52]), Carter spent over a decade excavating in Egypt. He made finds along the way, pursuing scholarly and professional excavation methods.[53] However, Lord Carnarvon grew impatient waiting for a major find. Disappointed with the progress, interrupted by the First World War, and prevented from digging in the Valley of the Kings, in the summer of 1922 Lord Carnarvon decided to withhold funding.[54] Luckily, Carter convinced his financier to persevere for one final season.

Carter's theory about the location of the lost tomb was correct. In November 2022, laborers uncovered a staircase leading to an underground tomb. Carter and Carnarvon were nervous about what they would find in the crypt because they were cognizant of the extensive looting of burial sites over the millennia. Would the men find an empty tomb or a crypt full of riches? While tomb robbers had entered King Tut's tomb twice during antiquity and removed some items, the tomb was miraculously left mostly intact.[55] Fortuitously, the burial site was accidentally buried by ancient builders working nearby on the tomb of Ramesses VI, hiding

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[49] Alasdair Soussi, *Why Howard Carter's discovery of King Tut's tomb will never be forgotten*, The National (Mar. 28, 2019), https://www.thenationalnews.com/arts/why-howard-carter-s-discovery-of-king-tut-s-tomb-will-never-be-forgotten-1.842543.

[50] Elaine A. Evans, *Before The Greatest Tomb Discovery, Occasional Paper No. 21*, McClung Museum of Natural History & Culture, https://mcclungmuseum.utk.edu/2008/01/01/tomb-discovery/.

[51] *Maspero, Gaston C. C.*, Dictionary of Art Historians, https://arthistorians.info/masperog/.

[52] Morris Jastrow, Jr., *Sir Gaston Maspero*, 55 Proc. Am. Philos, Soc. III, IX (1911), https://www.jstor.org/stable/984012?seq=1.

[53] Candace Fleming, *The Curse of the Mummy: Uncovering Tutankhamun's Tomb (Scholastic Focus)*, 64-65 (2021).

[54] *How was King Tut's tomb discovered 100 years ago? Grit and luck*, National Geographic, (Oct. 18, 2022), https://www.nationalgeographic.com/magazine/article/how-was-king-tuts-tomb-discovered-100-years-ago-grit-and-luck-feature.

[55] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/#:~:text=Tomb%20robbing%20in%20ancient%20Egypt%20was%20recognized%20as%20a%20serious,2670%20BCE.

the entry and averting looters from theft.[56] Tut's tomb was full of riches because the plunderers never made their way into the treasury or burial chamber, rooms overflowing with valuable relics. To this day, it is the most intact Egyptian tomb ever discovered.[57]

While Carter mostly excavated the tomb using acceptable scientific methods, there was some controversy. For one, during the early days of the dig, due to his and Carnarvon's excitement, they returned to the tomb (with Carnarvon's daughter) after nightfall . They purportedly could not wait to explore further into the tomb, perhaps to catch a glimpse of the treasures that Carnarvon hoped to own. To their great disappointment, neither of the men were permitted to retain the treasures. At the time, individuals who discovered tombs were often permitted to keep a portion of their finds. In fact, Lord Carnarvon had a clause in his agreement with the nation of Egypt that Egyptian authorities could only keep the contacts of an "intact tomb."[58] Carnarvon argued King Tut's tomb was not intact because it had been twice breached. This was a losing argument. Things were changing in the 1920s in Egypt as the nation became more proactive in protecting its property and shedding the shackles of its colonial era. Ultimately, all the treasures went to Egyptian authorities.[59]

To recoup some of his losses, Carnarvon gave the London Times exclusive access to the tomb's excavation in exchange for £5,000. In addition, Carnarvon retained 75% of all profits from the sale of the Times articles to other papers.[60] This caused problems with other members of the press, including local Egyptian journalists who saw their "local" news breaking in England.[61] As a result, journalists had to rely on sensational claims and supernatural stories to sell papers. Hence, the birth of the Mummy's Curse and Tut-mania.

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[56] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/#:~:text=Tomb%20robbing%20in%20ancient%20Egypt%20was%20recognized%20as%20a%20serious,2670%20BCE.

[57] *10 things to know about the discovery of King Tut's tomb*, National Geographic (Oct 21, 2022), https://www.nationalgeographic.com/history/article/10-things-to-know-about-the-discovery-of-king-tuts-tomb#:~:text=Unlike%20many%20discoveries%20found%20in,was%20customary%20for%20most%20excavations.

[58] Candace Fleming, *The Curse of the Mummy: Uncovering Tutankhamun's Tomb (Scholastic Focus)*, 142 (2021).

[59] *10 things to know about the discovery of King Tut's tomb*, National Geographic (Oct 21, 2022), https://www.nationalgeographic.com/history/article/10-things-to-know-about-the-discovery-of-king-tuts-tomb#:~:text=Unlike%20many%20discoveries%20found%20in,was%20customary%20for%20most%20excavations.

[60] This was one of the first exclusivity agreements for newspapers buying scoop.

[61] Candace Fleming, *The Curse of the Mummy: Uncovering Tutankhamun's Tomb (Scholastic Focus)*, 131-33 (2021).

Egyptian motifs experienced a surge in popularity.[62] Egyptian designs became an integral element in the Art Deco style that flourished until the mid-1930s.[63] The inspiration was also apparent in architecture, especially in movie theaters and apartment buildings.[64] The style was particularly popular in the funerary context. The public associated ancient Egypt with tombs and eternity, so it was only natural that Egyptian designs appeared in cemeteries.[65] The cemetery, enclosed with an Egyptian-style gate, or a tombstone with a curved/Cavetto-style cornice, served as a metaphor for the soul attaining freedom from earthly bondage, while Egyptian obelisks became symbols of remembrance and the afterlife.[66]

D. Mummy's Curse and legends

The frenzy over the "Boy King" was not confined to the treasures, but it also to the public fascination of the discovery led by an untrained Egyptologist and financed by a British earl. It was the dig of the century. But it was Lord Carnarvon's untimely death that fueled the public's obsession with an ancient curse.

Tomb raiding was so prevalent in antiquity that execration texts (curses) were inscribed on the doors and lintels of tombs.[67] The curses were cast upon anyone who disturbed the mummy of an ancient Egyptian, especially a pharaoh. They were intended to prevent thefts, as the belief in the afterlife and spirits should have inspired fear in the hearts of thieves. However, the enormity of the riches in these tombs led criminals to throw caution to the wind and risk

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[62] Sara Ickow, *Egyptian Revival*, *Timeline of Art History*, The Metropolitan Museum of Art (July 1, 2012) https://www.metmuseum.org/essays/egyptian-revival.

[63] Sara Ickow, *Egyptian Revival*, *Timeline of Art History*, The Metropolitan Museum of Art (July 1, 2012) https://www.metmuseum.org/essays/egyptian-revival.

[64] *Harold Allen: Egyptian Revival Architecture*, San Francisco International Airport, https://www.sfomuseum.org/exhibitions/harold-allen-egyptian-revival-architecture#:~:text=After%20the%20discovery%20of%20King,Dam%2C%20Wisconsin%20(1961).

[65] *Egyptian Revival: 1880-1930*, Department of Archaeology & Historic Preservation https://dahp.wa.gov/historic-preservation/historic-buildings/architectural-style-guide/egyptian-revival#:~:text=Egyptian%20revival%20never%20became%20widespread,of%20remembrance%20and%20the%20afterlife.

[66] *Egyptian Revival: 1880-1930*, Department of Archaeology & Historic Preservation https://dahp.wa.gov/historic-preservation/historic-buildings/architectural-style-guide/egyptian-revival#:~:text=Egyptian%20revival%20never%20became%20widespread,of%20remembrance%20and%20the%20afterlife.

[67] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/#:~:text=Tomb%20robbing%20in%20ancient%20Egypt%20was%20recognized%20as%20a%20serious,2670%20BCE)

hauntings.[68] Most curses discovered by archaeologists were from private tombs of the Old Kingdom Era. They contained colorful language, like one found on the tomb of Khentika Ikhekhi, stating, "As for all men who shall enter this my tomb... impure... there will be judgment... an end shall be made for him... I shall seize his neck like a bird... I shall cast the fear of myself into him."[69] Another terrifying curse warned, "All people who enter this tomb who will make evil against this tomb and destroy it may the crocodile be against them in water and snakes against them on land. May the hippopotamus be against them in water, the scorpion on land."[70]

With such powerful maledictions, it is no surprise that the public was fascinated by the ancient condemnations. When Carnarvon passed away on April 5, 1923 (less than two months after Carter unsealed the doorway to King Tut's burial chamber), it led to earnest beliefs in an ancient curse.[71] In reality, an infected mosquito bite led to the aristocrat's death. Other faulty evidence for the curse included: a cursed paperweight causing a house to burn; visitor George Jay Gould falling sick immediately after visiting the tomb and died just months later; Lord Carnarvon's brother dying from sepsis five months after his sibling's passing; archaeologist Hugh Evelyn-White committing suicide and leaving a note stating, "I have succumbed to a curse which forces me to disappear;" Lord Carnarvon's secretary dying in 1929 under suspicious circumstances; Sir Archibald Douglas Reid passing three days after performing x-rays on Tutankhamun's mummy; Egyptologist Sir Ernest Wallis Budge of the British Museum being found dead at home; Prince Ali Kamel Fahmy Bey, who had visited the tomb, being shot and killed by his wife; another visitor, Georges Benedite of the Louvre, dying in 1926; and other members of the excavation team

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[68] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/#:~:text=Tomb%20robbing%20in%20ancient%20Egypt%20was%20recognized%20as%20a%20serious,2670%20BCE)

[69] Murray L Eiland, *The Curse of Tutankhamun: Evil Under the Sun*, Antiqvvs, Academia (2022), https://www.academia.edu/89218649/The_Curse_of_Tutankhamun_Evil_Under_the_Sun_Antiqvvs_4_1_9_12_2022.

[70] Candace Fleming, *The Curse of the Mummy: Uncovering Tutankhamun's Tomb (Scholastic Focus)*, (2021).

[71] *CARNARVON IS DEAD OF AN INSECT'S BITE AT PHARAOH'S TOMB; Blood Poisoning and Ensuing Pneumonia Conquer Tut-ankh-Amen Discoverer in Egypt.,* The New York Times (Apr. 5, 1923), https://www.nytimes.com/1923/04/05/archives/carnarvon-is-dead-of-an-insects-bite-at-pharaohs-tomb-blood.html.

dying unexpectedly (including Sir Lee Stack, who was murdered in 1924 and Arthur Mace, who was murdered by arsenic poisoning in 1928).[72]

While these events created a compelling story to corroborate a curse, it must be noted that thousands of people had visited King Tut's tomb (a wildly popular tourist destination, even during the active excavation). Other compelling evidence against the "curse" is that it never struck the man responsible for the tomb's opening. Carter died from Hogkin's Disease at the age of 64 (seventeen years after unsealing the tomb). In fact, Carter himself debunked the curse, calling it "tommy rot". However, the strongest argument against the curse is that it simply did not exist—King Tut's tomb did not have a curse inscribed anywhere within it.[73]

Ultimately, Carter's (earthly) curse was that he fell into obscurity. He lived alone without wealth and fame, he died quietly, and in the end, only nine people attended his funeral.[74] After his death, his reputation and legacy were tarnished. While Carter's excavation of the tomb was widely regarded as scientifically sound, new information reveals unethical and illegal behavior. Egyptian authorities long suspected that Carter behaved unscrupulously. In one instance, authorities found an uncatalogued and unlabeled wooden head of Tutankhamun packed in a department store crate, but Carter insisted he did not intend to steal it.[75] When Carter passed in 1939 his estate included artifacts from King Tut's burial chamber that eventually made their way into museum collections[76] (some of those pieces were recently repatriated to Egypt).[77] In fact, some Egyptologists speculate that King Tut's tomb was never

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[72] Stacia Briggs, *Norfolk's links to the Curse of Tutankhamun*, Watton&Swaffham Times (Nov. 5, 2022), https://www.wattonandswaffhamtimes.co.uk/news/23103294.norfolks-links-curse-tutankhamun/.

[73] Candace Fleming, *The Curse of the Mummy: Uncovering Tutankhamun's Tomb (Scholastic Focus)* (2021).

[74] H. V. F. Winstone, Howard Carter and the discovery of the tomb of Tutankhamun, (Barzan Publishing, rev. ed. 2006), https://search.worldcat.org/title/828501310.

[75] Sarah Cascone, *The Archaeologist Who Discovered King Tut's Tomb Almost Certainly Stole Artifacts From It, a New Book Reveals*, artnet (August 17, 2022), (https://news.artnet.com/art-world/howard-carter-stole-king-tut-tomb-artifacts-2161023.

[76] Sarah Cascone, *The Archaeologist Who Discovered King Tut's Tomb Almost Certainly Stole Artifacts From It, a New Book Reveals*, artnet (August 17, 2022), (https://news.artnet.com/art-world/howard-carter-stole-king-tut-tomb-artifacts-2161023; Sam Walters, *Long-Lost Artifacts From King Tut's Tomb Are Finally Found*, Discover Magazine (Nov 15, 2022), https://www.discovermagazine.com/the-sciences/long-lost-artifacts-from-king-tuts-tomb-are-finally-found.

[77] Dalya Alberge, *Howard Carter stole Tutankhamun's treasure, new evidence suggests*, The Guardian (Aug. 13, 2022), https://www.theguardian.com/culture/2022/aug/13/howard-carter-stole-tutankhamuns-treasure-new-evidence-suggests.

looted during antiquity, but by Carter himself.[78] In 1947, a member of Carter's team wrote that Carter secretly broke open the door to the burial chamber, before appearing to reseal it and cover the opening.[79] This may have been done to remove artifacts and jewelry.[80] Recent research supports the contention that Carter stole items from the tomb. For example, the archaeologist offered a *whm* amulet to a friend, Alan Gardiner. When Gardiner discovered it was stolen, he wrote Carter an angry letter about this realization.[81]

The ineffectiveness of curses led to more practical security measures, even during antiquity. Amenhotep I commissioned a special village to be constructed near a new royal necropolis (the Valley of the Kings) to protect the site. Located near the village of Deir el-Medina,[82] set in the desert, it is far enough from villages and Thebes to deny locals with easy access to tombs.[83] Deir el-Medina, originally known as Set-Ma'at (meaning "The Place of Truth"), supplied workers for the pharaohs and their tombs. Since they relied on the state for their wages and homes, the villagers had incentive to remain loyal and discreet concerning the location of the tombs and treasure.[84] While great in theory, it not last long. Eventually villagers gave in to the temptation to steal opulent treasures, walk the hour to Thebes, and barter with their stolen valuables.[85] Those who were supposed to protect the tombs used the same tools with

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[78] Dalya Alberge, *Howard Carter stole Tutankhamun's treasure, new evidence suggests*, The Guardian (Aug. 13, 2022), https://www.theguardian.com/culture/2022/aug/13/howard-carter-stole-tutankhamuns-treasure-new-evidence-suggests.

[79] Dalya Alberge, *Howard Carter stole Tutankhamun's treasure, new evidence suggests*, The Guardian (Aug. 13, 2022), https://www.theguardian.com/culture/2022/aug/13/howard-carter-stole-tutankhamuns-treasure-new-evidence-suggests.

[80] Dalya Alberge, *Howard Carter stole Tutankhamun's treasure, new evidence suggests*, The Guardian (Aug. 13, 2022), https://www.theguardian.com/culture/2022/aug/13/howard-carter-stole-tutankhamuns-treasure-new-evidence-suggests.

[81] Holly Bancroft*, Archeologist who discovered Tutankhamun's tomb may have stolen treasure, new evidence suggests,* The Independent (Aug. 13, 2022) https://www.independent.co.uk/news/uk/home-news/archeologist-tutankhamun-tomb-stolen-treasure-b2144562.html

[82] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/.

[83] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/.

[84] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt.

[85] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/.

which they had built them to breach and rob them.[86] Sadly, neither curse nor planned artisan cities could halt men's greed.

E. Legal Mechanisms to Protect Egypt's Treasures

King Tut's opulent tomb and the "mummy's curse" led to the resurgence of Egyptomania. Luckily, this time around, Egyptian officials did not rely solely on curses to ward off looters; instead, they used cultural heritage laws to protect the nation's past. Fortunately, laws are more effective than curses.

Patrimony Laws

Nations control the exodus of antiquities from their borders with the passage and enforcement of patrimony laws, national laws that regulate the ownership and trade of categories of goods, including antiquities. Patrimony laws create an ownership regime for certain excavated objects, provide controls over their export, and establish civil and/or criminal liability for violations.[87] By vesting ownership in a nation and prohibiting the export of certain items, patrimony laws render looted works unsaleable, thereby dramatically reducing their value, and deterring at least some looters.[88] Simultaneously, individuals and entities trading in this material are handling stolen property (by virtue of the patrimony law), and thus may be the subject of both criminal and civil penalties.[89]

US courts have enforced foreign ownership laws under the McClain doctrine.[90] The McClain doctrine requires that a nation has a clear patrimony law in order for it to make a sovereign claim of ownership for antiquities.[91] In particular, courts have found that objects are considered stolen in the US provided that a country of origin can prove the following: (1) the

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[86] Joshua J. Mark, *Tomb Robbing in Ancient Egypt,* World History Encyclopedia (Jul. 17, 2017), https://www.worldhistory.org/article/1095/tomb-robbing-in-ancient-egypt/.

[87] Cassandra Snyder, *Out Of Context: Examining The Role Of Context In Active Enforcement Foreign Patrimony Law Disputes*, 119 Columbia L.Rev. (2019), https://columbialawreview.org/content/out-of-context-examining-the-role-of-context-in-active-enforcement-foreign-patrimony-law-disputes/.

[88] Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 Cultural Property Law 5, 7 (2016), https://www.wiggin.com/wp-content/uploads/2019/09/34641_doj-hall-article.pdf.

[89] Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 Cultural Property Law 5, 7 (2016), https://www.wiggin.com/wp-content/uploads/2019/09/34641_doj-hall-article.pdf.

[90] *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

[91] *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

object was discovered within its territory; (2) a patrimony law vesting ownership of the object in the State (even without physical possession) was in effect at the time of the object's removal; and (3) that the foreign patrimony law is not so vague as to violate the due process requirements of the U.S. Constitution.[92]

Critics have challenged the application of patrimony laws, arguing that ownership via a patrimony law is not actual ownership because an object cannot be "stolen" and their exportation could not constitute "theft" within the meaning of the NSPA because archaeological objects were never possessed by anyone prior to the exportation.[93] However, U.S. courts have consistently recognized and enforced patrimony laws.[94] (For an in-depth discussion about the justifications for patrimony laws, please see https://scholarship.law.unc.edu/ncilj/vol45/iss2/4/)

Egypt's Laws

The Arab Republic of Egypt safeguards archaeological sites and objects, vesting the ownership of undiscovered antiquities in the state. Egypt has long protected its antiquities through legislation, law enforcement, education, the creation of inventories, and international cooperation. In fact, the nation's cultural heritage laws are some of the oldest modern antiquities laws, dating back nearly two centuries. The country first enacted antiquities laws in 1835 with a decree that prohibited the unauthorized removal of antiquities.[95] Over the decades, these laws were regularly updated. In 1869, the government issued a by-law on "Antiquities items"; this law included an essential regulatory framework for excavations and the prevention of smuggling.[96]

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[92] *United States v. McClain*, 545 F.2d 988, 1000-1002 (5th Cir. 1977).

[93] *U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003). .

[94] *Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204 (S.D.N.Y. 2019) (the court recognized an Ottoman decree and treated it as a valid ownership law, explaining that, under the McClain doctrine, generally ownership laws must be sufficiently clear and translated "into terms understandable" by Americans to be enforceable in any U.S. court, but not that they must be literally translated; See, e.g., United States v. Schultz, 333 F.3d 393 (2d Cir. 2003) (interpreting Egypt's law); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (interpreting Italy's law); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (interpreting Mexico's law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (interpreting Guatemala's law); David L. Hall, Cultural Property Law, 64 U.S. ATT'Y BULL. 2, 20–21, 41–42 (Mar. 2016) (providing background on the enforcement of patrimony laws in the US).

[95] *RED LIST OF EGYPTIAN CULTURAL OBJECTS AT RISK*, International Council of Museums (ICOM), https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf.

[96] *Protection from Illicit Trading in Cultural Property*, United Nations Office on Drugs and Crime (2009)

Antiquities laws evolved during the 20th century. In 1912, Egypt passed three decrees applying to the export of antiquities.[97] These laws emphasized the importance of the nation's Antiquities Department, prohibiting the export of antiquities absent a license. Significantly, in 1951, Law No. 215 on the Protection of Antiquities was passed.[98] It set new guidelines for the removal of antiquities, prohibiting their export unless there were multiple comparable items in Egypt, and requiring the Department of Antiquities (in collaboration with museum experts) to approve the removal and provide written permission. Significantly, the law also provided heightened penalties for malfeasance.

Law No. 117 was passed in 1983.[99] It halted the export of all antiquities from Egypt[100] and ended the system of *partage* (a system in which half of all finds belonged to Egypt while the other half went to excavating institutions, like universities or museums[101]). Article 9 of the law stipulated that disposal of any antiquity possessed by an individual within Egypt must be accompanied by written consent from the Antiquities Authority, so long as it does not result in the object leaving Egypt. The law also increased penalties; violators not only faced financial sanctions but could be incarcerated. The law was amended in 2010 to prohibit all antiquities trading and to cancel the 10 percent of ownership granted to foreign excavation missions that discovered them, and it is still in effect today.[102]

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http://www.unodc.org/documents/treaties/organized_crime/Egypt.pdf. (Five years later, an 1874 law specified that all antiquities not yet discovered (those not unearthed) were property of the state. Article 34 of this law specified that confiscated and seized objects belonged to Egypt. An August 12, 1897 decree set forth penalties for illegal excavations. In addition to penalties, the law compelled judges to order the restitution of looted antiquities to the government. These laws are equivalent to modern patrimony laws).

[97] Law No. 14 of June 12, 1912; Ministerial Decree Nos. 50 and 52 of December 8, 1912.

[98] *Id.*

[99] *Law No. 117 of 1983 As Amended By Law No. 3 of 2010 Promulgating The Antiquities' Protection Law*, Ministry of Culture Supreme Council of Antiquities (Feb. 14, 2010), https://www.african-archaeology.net/heritage_laws/egypt_law3_2010_entof.pdf.

[100] *Law No. 117 of 1983 As Amended By Law No. 3 of 2010 Promulgating The Antiquities' Protection Law*, Ministry of Culture Supreme Council of Antiquities (Feb. 14, 2010), https://www.african-archaeology.net/heritage_laws/egypt_law3_2010_entof.pdf.

[101] One successful example is the Harvard University–Boston Museum of Fine Arts Expedition which ran successfully on the Giza Plateau and at other sites in Egypt and Sudan from 1905 through 1947. *HU-MFA Expedition: The Art and Discovery of Idu's Tomb: Joseph Lindon Smith and the HU–MFA Expedition*, HARVARD MUSEUM of the ANCIENT NEAR EAST, https://hmane.harvard.edu/hu-mfa-expedition.

[102] *Law No. 117 of 1983 As Amended By Law No. 3 of 2010 Promulgating The Antiquities' Protection Law*, Ministry of Culture Supreme Council of Antiquities (Feb. 14, 2010), https://www.african-archaeology.net/heritage_laws/egypt_law3_2010_entof.pdf.

It was under Law No. 117 that one of the best-known looting crimes was prosecuted.[103] Frederick Schultz, a prominent art dealer, worked with self-proclaimed British restorer Jonathan Tokeley-Parry in an elaborate smuggling scheme.[104] They disguised authentic antiquities as cheap souvenirs to smuggle thousands of stolen objects out of Egypt. Once in the U.S., they sold the works with false provenance information by inventing the fictional "Thomas Alcock Collection".[105] The theft and export violated Egyptian Law No. 117 of 1983.[106] Once authorities learned of the scheme, Schultz was indicted in 2001 on one count of conspiring to receive stolen Egyptian antiquities in violation of the National Stolen Property Act (NSPA).[107]

During trial, Schultz argued that Law 117 was not an ownership law, but merely an export regulation; he reasoned that the artifacts were never possessed or owned by anyone prior to the exportation, so they were not stolen under the NSPA.[108] Alternatively, even if Law 117 was a patrimony law, Schultz asserted that U.S. law does not regard objects taken in violation of a foreign ownership law as stolen.[109] Further, Schultz argued that the Cultural Property Implementation Act ("CPIA"),[110] a civil statute that does not carry criminal penalties,[111] superseded the NSPA in cases of illicit imports. And finally, Schultz claimed he did not have the requisite scienter (knowledge) that importing the Egyptian antiquities violated the NSPA.[112]

These arguments were rejected by both the District Court[113] and the U.S. Court of Appeals for the Second Circuit.[114] The courts found that Law 117 was a patrimony law that vested antiquities to Egypt. As such, any antiquity excavated after 1983 that was removed

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[103] *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).
[104] *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).
[105] *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).
[106] *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).
[107] The NSPA was enacted in 1934 and originally enacted to aid in the government's recovery of stolen motor vehicles. It eventually was applied to cultural heritage for the first time in *United States v. Hollinshead* in 1974. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).
[108] *United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003).
[109] *United States v. Schultz*, 333 F.3d 393, 398–99 (2d Cir. 2003).
[110] 19 U.S.C. §§ 2601
[111] The Cultural Property Implementation Act was enacted in 1983 and implements the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (generally referred to as the "1970 UNESCO Convention"), allowing the U.S. to respond to requests from other countries to impose import restrictions on cultural property facing looting or pillage.
[112] *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003).
[113] *United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003).
[114] *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003).

without permission constituted stolen property.[115] Relying on the McClain doctrine, the court found that Law 117 clearly established ownership in Egypt,[116] and thus that law could be enforced in the US, deeming criminal proceedings under the NSPA appropriate.[117] Notably, the court found that the NSPA had been consistently applied by US courts to thefts abroad due to the interest of the U.S. in combating the trade in stolen or illicitly exported materials. And while Schultz argued for lower penalties under only the CPIA, the court found there is no language in or legislative history of the CPIA that required it to be used as the exclusive legislation pertaining to stolen antiquities, stating "the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations".[118]

In the end, Schultz faced the mummy's curse for his greed. The Second Circuit affirmed the judgment[119] and Schultz was sentenced to 33 months' imprisonment[120] and given a $50,100 fine.[121] The seized antiquities were returned to the Supreme Council for Antiquities of Egypt.[122] Since Schultz's trial, there have been further developments in Egyptian cultural heritage law. Law No. 80 of 2016 was issued to regulate the construction and restoration of churches.[123] In addition, the penalties imposed under Egypt's Antiquities Protection Law No. 117 of 1983, and amended by Law No. 3 of 2010 and Law No. 61 of 2010, were again updated in 2018 with Law No. 91.[124]

Not only has Egypt enacted cultural heritage laws, but it actively enforces them and expends resources to recover stolen property.[125] In addition to policing efforts, the Ministry of

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[115] *United States v. Schultz,* 333 F.3d 393, 398 (2d Cir. 2003).
[116] *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003).
[117] *United States v. Schultz,* 333 F.3d 393, 410 (2d Cir. 2003).
[118] *United States v. Schultz*, 333 F.3d 393, 409 (2d Cir. 2003).
[119] *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003).
[120] *United States v. Schultz,* 333 F.3d 393, 398 (2d Cir. 2003).
[121] *USA v. Schultz*, 1:01CR00683 ("SATISFACTION OF JUDGMENT as to Frederick Schultz, in the amount of $50,100.00. Judgment satisfied on 1/11/07. (ja) (Entered: 01/18/2007)").
[122] Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, *Case Egyptian Archaeological Objects – United States v. Frederick Schultz,* ART-LAW CENTER, UNIVERSITY OF GENEVA (Nov. 2012), https://plone.unige.ch/art-adr/cases-affaires/egyptian-archaeological-objects-2013-us-v-schultz/case-note-2013-egyptian-archaeological-objects-2013-us-v-schultz.
[123] *June 30 State institutionalizes Principles of Equality and Non-Discrimination*, Egypt's State Information Service (SIS), (Jan. 6, 2021), https://www.sis.gov.eg/Story/153697/June-30-State-institutionalizes-Principles-of-Equality-and-Non-Discrimination?lang=.
[124] *Antiquities Protection Act*, Ministry of Tourism and Antiquities, https://egymonuments.gov.eg/en/about-mota/.
[125] Ancient gold coffin repatriated to Egypt in New York ceremony, U.S. Immigration and Customs Enforcement (Sep. 26, 2019), https://www.ice.gov/news/releases/ancient-gold-coffin-repatriated-egypt-new-york-ceremony.

Antiquities (formerly the Supreme Council of Antiquities, "SCA") conserves, protects, and regulates antiquities and excavations in Egypt. Founded in 1858, the then-Antiquities Authority was responsible for defining archaeological site boundaries and were the only entities permitted to restore or preserve Egyptian monuments.[126] The SCA also oversaw the recovery of stolen or illegally exported antiquities.[127] Between 2002 and 2008 the SCA successfully recovered 3,000 looted artifacts.[128] The SCA and its successor, the Ministry of Antiquities, have been active in inventorying objects and sites in Egypt,[129] and educating the public about these issues.[130]

Not surprisingly, Egypt's antiquities find pride of place in the nation's constitution, which notes that damage to Egypt's heritage is a crime punishable by law. Article 50 of the Egyptian Constitution of 2014 states, "Egypt's material and moral civilizational and cultural heritage of all types and from all of the Pharaonic, Coptic, Islamic, and modern periods are a national and human heritage that the state commits to protect and maintain. The same applies to the modern architectural, literary and artistic cultural stock. Any attack thereon is a crime punishable by law. The state gives special attention to maintain the components of cultural diversity".[131]

Outside the scope of its domestic regulations, Egypt collaborates with international bodies to protect its own heritage and honor heritage of other nations. It has ratified major international agreements, including the following: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention as well as the accompanying First and Second Protocol; 1970 UNESCO Convention

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Jason Daley, After More Than 90 Years, Looted Mummy Parts Repatriated to Egypt, Smithsonian Magazine (Jan. 9, 2018), https://www.smithsonianmag.com/smart-news/mummy-parts-repatriated-egypt-90-years-after-being-looted-180967760/; *ICE returns ancient artifacts to Egypt: Operations Mummy's Curse and 'Mummy's Hand target international smuggling networks*, U.S. Immigration and Customs Enforcement (Dec. 1, 2016), https://www.ice.gov/news/releases/ice-returns-ancient-artifacts-egypt; Stolen Egyptian Treasures are Homeward Bound, Bureau of Educational and Cultural Affairs (December 9, 2016), https://eca.state.gov/ivlp/highlight/stolen-egyptian-treasures-are-homeward-bound.

[126] *A brief overview about the Ministry of Antiquities*, Ministry of Tourism and Antiquities, https://egymonuments.gov.eg/en/about-mota/.

[127] *A brief overview about the Ministry of Antiquities*, Ministry of Tourism and Antiquities, https://egymonuments.gov.eg/en/about-mota/.

[128] https://web.archive.org/web/20120206161619/http://weekly.ahram.org.eg/2008/904/he1.htm

[129] *Archaeological Sites,* Ministry of Tourism and Antiquities, https://egymonuments.gov.eg/en/archaeological-sites.

[130] *"Hekayetna" initiative*, Ministry of Tourism and Antiquities, https://egymonuments.gov.eg/en/news/the-ministry-launches-hekayetna-initiative-to-raise-tourism-and-archaeological-awareness-among-school-students/.

[131] *Egypt 2014*, CONSTITUTE, https://www.constituteproject.org/constitution/Egypt_2014.

on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;[132] and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.[133] Egypt has also engaged with foreign governments by entering into bilateral agreements to restrict the import of certain Egyptian archaeological and ethnological materials from entering into foreign states (the US has had one with Egypt since 2016).[134]

F. Egypt Today

Unfortunately, even with all these legal and preventive tools, Egypt still faces the scourge of theft and pillage. Looting in Egypt is well documented even in the 21st century. After the escalation of political unrest in Egypt in January 2011, the nation suffered widespread pillage of its rich cultural heritage.[135] It is estimated that the value of antiquities looted post-2011 is valued between $3 and 6 billion.[136] The escalating looting has been documented by satellite images of pockmarked landscapes, and land violated by looters' shovels and by bulldozers;[137] these methods obliterate the record of the past.[138]

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[132] Egypt signed the convention in 1973. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* United Nations Educational, Scientific and Cultural Organization (UNESCO), https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural.

[133] *RED LIST OF EGYPTIAN CULTURAL OBJECTS AT RISK*, International Council of Museums (ICOM), https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf.

[134] The agreement has since been updated and renewed. *U.S. Current Agreements and Import Restrictions*, Bureau of Educational and Cultural Affairs, https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions.

[135] Dan Vergano, *Archaeologists Warn of Pillaged Egypt as U.S. Weighs Tougher Antiquities Laws*, NATIONAL GEOGRAPHIC (Jun. 13, 2014), https://www.nationalgeographic.com/adventure/article/140603-egypt-looting-hearing-law-state-coins; Walt Curnow, *Real-life tomb raiders: Egypt's $US3 billion smuggling problem*, ABC News (Oct 20, 2018), https://www.abc.net.au/news/2018-10-21/egypts-3-billion-dollar-smuggling-problem/10388394.

[136] AL-MONITOR, *Many looted Egyptian artifacts go first to Israel, Switzerland* (2014), https://www.al-monitor.com/originals/2014/04/egypt-stolen-antiquities-looted-treasure-israel.html.

[137] Tom Mashberg, *Egypt Asks U.S. to Impose Sharp Curbs on Importing of Antiquities*, The New York Times (March 14, 2014), http://www.nytimes.com/2014/03/15/arts/design/egypt-asks-us-to-impose-sharp-curbs-on-importing-of-antiquities.html.

[138] Barbara Slavin, *Slavin: Looted Egyptian Artifacts Go to Israel*, Switzerland, Atlantic Council (Apr. 28, 2014), https://www.atlanticcouncil.org/insight-impact/in-the-news/slavin-looted-egyptian-artifacts-go-to-israel-switzerland/

III. Italy

When in Rome

All roads lead to Rome. Just like today's tourists visit Italy for its art, heritage, and history, travelers have been making pilgrimages to the Italian peninsula since the Middle Ages. Rome's religious sites have been important for pilgrims for centuries, some of whom traveled along the Via Sacra to reach the center of Christendom. But eventually that trip appealed to non-religious tourists on the Grand Tour.

The Grand Tour was a voyage taken by British travelers intended to explore cultural wonders in Europe and sometimes beyond (primarily Egypt and sometimes the Near East).[139] Its beginnings date back to the 16th century,[140] but it reached its zenith in the 18th century.[141] Italy and its urban treasures (including Venice, Florence, Rome, and Naples) were the focus of the tour. Like today, tourists were eager to bring home souvenirs from their trips. But the items were not simply trinkets; travelers sought to bring home important and inspiring art that served as symbols of wealth and sophistication.[142] The items included fine art, prints, maps, books and manuscripts, jewelry, and textiles, with Roman and Greek antiquities carrying special prestige.[143]

It was during this era that a number of Italian city-states and kingdoms passed laws to stop the steady flow of art from leaving their regions. (Notably, the Roman Empire criminalized tomb robbing. The Nazareth Inscription, an ancient marble with a Greek inscription declared that grave robbers would receive severe punishment for their crimes.[144] It proclaims that tombs and graves shall stay "forever unmolested", and that anyone who removes human remains "shall

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[139] *What was the Grand Tour?*, Royal Museums Greenwich, https://www.rmg.co.uk/stories/topics/what-was-grand-tour.

[140] *What was the Grand Tour?*, Royal Museums Greenwich, https://www.rmg.co.uk/stories/topics/what-was-grand-tour.

[141] Alicja Zelazko, *grand tour*, Britannica (Mar. 8, 2025), https://www.britannica.com/topic/grand-tour.

[142] *The Grand Tour: Artistic and Intellectual Diffusion*, PROANTIC (Jun. 29, 2023) https://www.proantic.com/antiques-art-design-magazine/the-grand-tour-souvenirs-artistic-and-intellectual-diffusion/.

[143] *The Grand Tour: Artistic and Intellectual Diffusion*, PROANTIC (Jun. 29, 2023) https://www.proantic.com/antiques-art-design-magazine/the-grand-tour-souvenirs-artistic-and-intellectual-diffusion/.

[144] Mindy Weisberger, *Was the 'Nazareth Inscription' a Roman response to Jesus' empty tomb? New evidence says it wasn't*, LIVE SCIENCE (Apr. 17, 2020), https://www.livescience.com/nazareth-inscription-jesus-tomb-reinterpreted.html.

suffer capital punishment on the charge of desecration of graves".[145]) The earliest antiquities laws were drafted as the Catholic Church sought to exercise control over ancient Roman monuments, intended to enhance the church's political and religious power.[146] The Papal States passed the first law on the protection of antiquity as early as 1425,[147] with 30 additional directives during the following four centuries.[148] Nearly a century later, in 1515, Pope Leo X appointed Renaissance master Raphael Sanzio as *Praefectus marmorum et lapidum omnium* (prefect for marbles and ancient stones) in Saint Peters, entrusting him to supervise the protection of "ancient marbles and engraved stones", and to source materials to build the new St. Peter's Basilica.[149]

With the grand Tour reaching its peak during the 18th century, Rome became the center of the antiquarian market.[150] The Vatican wished to stop the exodus of valuable cultural goods during this time, so additional laws were passed.[151] The *Edict Spinola* of 1717 targeted "all foreigners and other Prince's subjects […] who have resided in Rome for at least one month", aimed at stopping travelers involved in the antiquities trade, presumably meant to limit the movement of artefacts to England, Spain, France, and Germany.[152] It was from these Papal laws

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[145] Mindy Weisberger, *Was the 'Nazareth Inscription' a Roman response to Jesus' empty tomb? New evidence says it wasn't*, LIVE SCIENCE (Apr. 17, 2020), https://www.livescience.com/nazareth-inscription-jesus-tomb-reinterpreted.html.

[146] Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

[147] The 1425 edict *Etsi in Cunctarum* of Pope Martin V marked "the beginning of the popes' concerns on the preservation of what was regarded as heritage…" Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

[148] Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

[149] Agnes Crawford, *Raphael, a thwarted pioneer of architectural preservation*, Understanding Rome's Newsletter (Apr 15, 2022) https://understandingrome.substack.com/p/raphael-a-thwarted-pioneer-of-architectural.

[150] Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

[151] Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

[152] Chiara Mannoni, *Protecting antiquities in early modern Rome: the papal edicts as paradigms for the heritage safeguard in Europe*, European Commission, Open Research Europe (May 13, 2021), https://open-research-europe.ec.europa.eu/articles/1-48/v1.

that other nations followed suit and began restricting the export and trade of artifacts. It comes as no surprise that the first modern national patrimony law was passed by Greece in 1834, only four years after the Hellenic Republic gained independence from Ottoman rule during which time vast quantities of ancient antiquities left Greece, including the Parthenon Marbles now in the British Museum. As a country with vast quantities of cultural sites and goods, the Republic of Italy continues to devote laws and resources to the preservation of its past.

Today's Laws

After WWII, nations convened to protect heritage during conflict by drafting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. It was the first international treaty. The convention requires a minimum level of respect which all States Parties must observe, to protect their own heritage and the heritage of other States Parties. While they are prohibited from targeting cultural heritage and misappropriated property, the convention has proven insufficient, in part due to the 'military necessity' exception that permits destruction when required by a military objective.

Clearly, looting and destruction also occur outside of the context of war. Italian authorities were painfully aware of this because plunder ran rampant across Italy's landscapes in the decades after WWII.[153] Looters hit central Italy (an area rich with artifacts) particularly hard, but modern day thieves picked up that pace.[154] For example, one of Italy's best-known dealers of loot, Giacomo Medici (who was based near Rome) became active in the 1960s.[155] Another notorious dealer of Italian loot, Gianfranco Becchina, began trading in the 1970s.[156] Eventually,

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[153] See generally, Pots and Robbers. In 2025, the Manhattan District Attorney stated, "Italy has unfortunately suffered significant and extensive looting over the past 60 years. *D.A. Bragg Announces Return Of 107 Antiquities To The People Of Italy*, NEW YORK COUNTY DISTRICT ATTORNEY (Feb. 18, 2025), https://manhattanda.org/d-a-bragg-announces-return-of-107-antiquities-to-the-people-of-italy/.

[154] For instance, in 1962, the civil engineer and archaeologist Carlo Lerici discovered that 400 out of the 550 tombs he investigated at a single site had been looted since World War II. Gordon Lobay, *Archaeological Looting in Central Italy: Developing Protection Strategies*, Simon Fraser University (Jan. 31, 2014), https://www.sfu.ca/ipinch/outputs/blog/archaeological-looting-central-italy-developing-protection-strategies/.

[155] The Artful Historian,*The Downfall of the Medici Smuggling Ring*, Medium (Jul. 25, 2024), https://medium.com/@theartfulhistorian/the-downfall-of-the-medici-smuggling-ring-50c56091172. For more information on Medici and his ring of looters, see generally, Peter Watson & Cecilia Todeschini, The Medici Conspiracy (June 12, 2007), https://www.amazon.com/Medici-Conspiracy-Illicit-Antiquities-Greatest/dp/1586484389.

[156] Neil Brodie, *Gianfranco Becchina*, Trafficking Culture (Aug. 20, 2012), https://traffickingculture.org/encyclopedia/case-studies/gianfranco-becchina/.

when tombs in central Italy were exhausted, raiders moved to other areas, including southern Italy.[157]

In response to crimes against heritage, in 1969, Italy formed the Comando Carabinieri Tutela Patrimonio Culturale (TPC), also known as the Carabinieri Art Squad. The TPC is an arm of the Carabinieri (the national gendarmerie of Italy carrying out domestic policing duties). This team predates the 1970 UNESCO Convention by one year. The convention, formally the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, is an international instrument intended to curb the illicit trade in looted cultural property while also establishing an international regime for the ethical handling of cultural goods. The convention has been ratified by 147 states and critically provides a framework for protecting and restituting stolen or illegally exported cultural heritage.

One of the best-known antiquities disputes involved an ancient krater, now simply known as "the Euphronios Krater," stolen from an Etruscan tomb in Italy.[158] A police investigation triggered by a traffic accident, led authorities to a looting ring that operated throughout Italy.[159] When Swiss and Italian authorities raided a warehouse in Geneva, Switzerland, they found nearly 4,000 looted antiquities. Shockingly, some were recently taken from the ground, evidenced by soil still encrusted on their surfaces. It was revealed that a vast network of *tombaroli* (tomb raiders) operated across Italy, damaging pieces and destroying their archaeological context in the process. The raiders, sometimes impoverished people familiar with the land, received small sums for valuable treasures.[160] During the years-long investigation, authorities pieced together information about a global network of dealers and collectors, with much of the loot making its way into museums or auction houses.

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[157] It is estimated that during the 1960s and 1970s, 10,000 to 20,000 tombs were raided in Southern Italy. *Afterthoughts on the Illicit Art Trade* (Aug 27, 2022), https://www.italianartfortravelers.com/post/afterthoughts-on-the-illicit-art-trade.

[158] Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero's Welcome*, The New York Times (Jan. 19, 2008), https://www.nytimes.com/2008/01/19/arts/design/19bowl.html.

[159] See generally, Peter Watson & Cecilia Todeschini, The Medici Conspiracy (June 12, 2007), https://www.amazon.com/Medici-Conspiracy-Illicit-Antiquities-Greatest/dp/1586484389.

[160] See generally, Peter Watson & Cecilia Todeschini, The Medici Conspiracy (June 12, 2007), https://www.amazon.com/Medici-Conspiracy-Illicit-Antiquities-Greatest/dp/1586484389.

One of the ringleaders was Giacomo Medici. Ultimately he was convicted by an Italian court for his critical role in the international market.[161] Italian State Prosecutor Paolo Ferri [162] charged Medici, along with Marion True (an American curator at the Getty) and Robert Hecht (an American antiquities dealer) with receiving stolen goods, illegal exportation of goods, and conspiracy to traffic in stolen goods.[163] Not only were the three parties facing criminal penalties, but the Italian Ministry of Culture sought monetary damages.[164] Medici, tried separately from his American co-conspirators, opted for a *rito abbreviato* ("expedited") trial.[165] In those cases, a verdict is based solely on the documents submitted by the prosecution and defense, without witnesses, unless requested to do so by the judge.[166]

Medici claimed innocence. He protested that none of the items seized from his warehouse were looted, but declared that he was targeted by the Italian and Swiss authorities because of his fame and success. The judge disagreed. In a 659-page decision, Judge Guglielmo Muntoni[167] found Medici was at the center of an international antiquities ring and that "99% of the objects" from the warehouse were illegally excavated.[168] Medici was found guilty on all charges.[169] He

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[161] Sentenza n.287/204, United Nations Office on Drugs and Crime: SHARING ELECTRONIC RESOURCES AND LAW ON CRIME (SHERLOC), https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2011/sentenza_n.287204.html?lng=en.

[162] Paolo Giorgio Ferri had a successful career as an assistant public prosecutor. He found great success tirelessly working to dismantle multinational looting and trafficking rings and recovering tens of thousands of Greco-Roman artifacts. The author of this paper was honored by Ferri's friendship, and was grateful to have discussed heritage law issues with him, including his conviction that the law was too lenient in allowing for willful ignorance in the antiquities trade to excuse unethical acquisitions.

[163] Sentenza n.287/204, United Nations Office on Drugs and Crime: SHARING ELECTRONIC RESOURCES AND LAW ON CRIME (SHERLOC), https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2011/sentenza_n.287204.html?lng=en.

[164] Sentenza n.287/204, United Nations Office on Drugs and Crime: SHARING ELECTRONIC RESOURCES AND LAW ON CRIME (SHERLOC), https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2011/sentenza_n.287204.html?lng=en.

[165] *Case Summary: Italy v. Giacomo Medici*, International Foundation for Art Research (IFAR), https://www.ifar.org/case_summary.php?docid=1184603958.

[166] As an incentive to encourage more defendants to opt for expedited trials, Italian law holds that those found guilty in such trials will have their sentences automatically reduced by one-third.

[167] Christos Tsirogiannis, *Nekyia: from Apulia to Virginia: an Apulian Gnathia Askos at the Virginia Museum of Fine Arts*, 10 JAC 81, 81-86 (Nov., 2013), https://www.academia.edu/22980379/Nekyia_from_Apulia_to_Virginia_an_Apulian_Gnathia_Askos_at_the_Virginia_Museum_of_Fine_Arts; *Case Summary: Italy v. Giacomo Medici*, International Foundation for Art Research (IFAR), https://www.ifar.org/case_summary.php?docid=1184603958.

[168] *Case Summary: Italy v. Giacomo Medici*, International Foundation for Art Research (IFAR), https://www.ifar.org/case_summary.php?docid=1184603958.

[169] Sentenza n.287/204, United Nations Office on Drugs and Crime: SHARING ELECTRONIC RESOURCES AND LAW ON CRIME (SHERLOC), https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2011/sentenza_n.287204.html?lng=en.

was sentenced to ten years in prison, and was ordered to pay sixteen thousand Euros in damages to the Italian Ministry of Culture for the loss of cultural property. In 2009, the appeals court in Rome dismissed Medici's trafficking conviction because of expired limitations, but kept the convictions for receiving stolen property and trafficking in stolen goods. They also increased Medici's fine to 10 million Euro. Italy's highest court upheld both the fine and lesser conviction in December 2011. The charges against True and Hecht were dropped due to the expiration of the statute of limitations.[170] Unfortunately, Medici's scheme is still creating havoc because objects traded by the network regularly appear on the market.[171]

IV. Looting of Ancient China

"If I Don't Survive, None Of Us Will."
- Tomb Raider (2013)

A. China's Long History of Looting

Looting is not unique to Europe or the Middle East. Tomb raiders have plundered China's riches for millennia. While Egyptian rulers used curses, it was recommended in the Lüshi Chunqiu (a classic Chinese text compiled around 239 B.C.) that people choose frugal burials so as to not attract looters.[172] China's first emperor, Qin Shi Huangdi, did not heed this

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[170] *Case Summary: Italy v. Marion True and Robert E. Hech*, International Foundation for Art Research (IFAR), https://www.ifar.org/case_summary.php?docid=1184606209.

[171] For example, in February of this year, the Manhattan District Attorney's Office repatriated 107 antiquities to Italy, some of which went through Medici's network *D.A. Bragg Announces Return Of 107 Antiquities To The People Of Italy*, NEW YORK COUNTY DISTRICT ATTORNEY (Feb. 18, 2025), https://manhattanda.org/d-a-bragg-announces-return-of-107-antiquities-to-the-people-of-italy/; one month earlier, the Worcester Art Museum voluntarily repatriated two ancient objects to Italy because the works were sold by Robert Hecht, one of the dealers who worked closely with Medici. *Worcester Art Museum Secures Landmark Cultural Cooperation Agreement with Italian Ministry of Culture Following Voluntary Return of Antiquities*, https://www.worcesterart.org/about/press-room/press-releases/worcester-art-museum-secures-landmark-cultural-cooperation-agreement-with-italian-ministry-of-culture-following-voluntary-return-of-antiquities/; in 2024, a German museum returned a number of items to Italy that were looted by Medici's network, Catherine Hickley, *Germany returns looted antiquities in Berlin's Altes Museum to Italy*, THE ART NEWSPAPER (Jun. 13, 2024), https://www.theartnewspaper.com/2024/06/13/germany-returns-looted-antiquities-in-berlins-altes-museum-to-italy; in 2021, the Manhattan District Attorney's Office returned dozens of objects from Michael Steinhardt's collection that were seized because they were looted by Medici's network. Cyrus R. Vance, Jr., Matthew Bogdanos, Apsara Ayer, *In The Matter of A Grand Jury Investigation into a Private New York Antiquities Collector: Statement of Facts*, NEW YORK COUNTY DISTRICT ATTORNEY (Dec. 6, 2021), https://images.law.com/contrib/content/uploads/documents/292/102693/2021-12-06-Steinhardt-Statement-of-Facts-w-Attachments-Filed.pdf; the list of restituted objects looted by Medici's network is extensive.

[172] Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

sage advice. Instead, he selected an opulent burial and summoned a deathly army to defend against robbers. Qin Shi Huangdi tried to stop treasure hunters by constructing a terra cotta army to guard his massive third century BC tomb and its riches. It took 38 years to build[173] the tomb and its 8,000 life-sized terracotta soldiers, 670 horses, and 130 chariots,[174] and it includes palaces within the burial mound, and a burial chamber replete with rare and valuable treasures. To protect against the scourge of tomb raiding, artisans created gadgets controlling hidden arrows so that if tomb robbers approached they would trigger booby traps.[175]

The emperor's efforts were for naught because some historians believe Qin's tomb was looted shortly after his death in 210 B.C.[176] Xiang Yu (one of the contenders for Qin's throne) may have been responsible.[177] Many of the figures from the tomb were broken and then reassembled after archaeologists found them.[178] However, after that early destruction, the tomb went untouched for millennia. While locals occasionally reported finding pieces of terracotta and fragments of materials, the tomb's location was forgotten. Then, in 1974, a group of farmers stumbled upon the site while digging a well. (Similar to the tombs found in the Valley of the Kings, Qin's tomb was found within a larger necropolis that covers 38 square miles).

Today, China faces a tomb robbing epidemic.[179] Enticed by a get-rich-quick mentality and inspired by popular books, thousands of young migrant workers and poor farmers are

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[173] Dr. Asa Simon Mittman, *Art Appreciation: Spotlight—The Terracotta Army of Emperor Qin Shi Huangdi*, SMARTHISTORY, https://smarthistory.org/terracotta-army-emperor-qin-shi-huangdi/.

[174] Ingrid Larsen, *The First Emperor's Army of Life-Sized Terracotta Soldiers*, SMITHSONIAN MAGAZINE (Nov. 13, 2012), https://www.smithsonianjourneys.org/blogs/blog/2012/11/13/the-first-emperors-army-of-life-sized-terracotta-soldiers/.

[175] Dr. Asa Simon Mittman, *Art Appreciation: Spotlight—The Terracotta Army of Emperor Qin Shi Huangdi*, SMARTHISTORY, https://smarthistory.org/terracotta-army-emperor-qin-shi-huangdi/.

[176] Lauren Hilgers, *TOMB RAIDER CHRONICLES*, ARCHEOLOGY MAGAZINE (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty.

[177] JOHN MAN, THE TERRA COTTA ARMY 189, 192-200 (1st ed., 2008), https://ecourse.auca.kg/pluginfile.php/344184/mod_resource/content/1/%5BJohn-Man%5D-The-Terra-Cotta-Army_-Chinas-First-Emp.pdf.

[178] Arthur Lubow (Updated by Sonja Anderson*), What You Need to Know About China's Terra-Cotta Warriors and the First Qin Emperor*, SMITHSONIAN MAGAZINE (Apr. 19, 2024), https://www.smithsonianmag.com/history/what-you-need-know-about-chinas-terra-cotta-warriors-first-qin-emperor-30942673/.

[179] In 2015, the police arrested 175 people across six provinces for stealing and trafficking objects worth an estimated $80 million. Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, THE NEW YORK TIMES (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html. In 2014, it was reported that thieves looted tombs in an ancient cemetery in Linfen City where bronze relics dating from were discovered. https://www.miamiherald.com/news/nation-world/world/article286960780.html In 2024, a remarkable 16,000 cultural items were recovered from a criminal network. https://www.globaltimes.cn/page/202502/1328621.shtml. Recently, in the Sichuan province, twelve grave robbers were arrested for swiping carved doors and burial artifacts from a Song dynasty tomb built between 960 and 1290

teaming up in internet chat rooms to loot historic tombs in key provinces throughout China.[180] There have always been motivations to loot ancient sites, including greed,[181] poverty,[182] and even the thrill of criminality. In the 1980s, during the post-Mao opening of China, tomb robbing became widespread as the farmers watching over the land began moving to urban areas.[183]

Moreover, during the past few decades, Chinese antiquities have become increasingly popular in China and abroad,[184] so the demand for artifacts is growing. Major auction houses and galleries cater to a thriving market for these items.[185] In addition, popular culture has played a role in looting. The wildly popular "Grave Robber Chronicles" first appeared in 2006, recounting the exploits of a young man whose family had been tomb robbers for centuries. The books portray the looting as a viable profession, luring readers into this dangerous behavior.[186] The books became so popular that similar television shows and movies have appeared.[187] As a result, in 2013, it was estimated that 100,000 looters operated in China and more than 400,000 ancient graves had been robbed during the past few decades.[188] Like other tomb robbers from around the globe, these thieves sell their goods through middlemen until they reach auction houses and wealthy collectors.[189] Sadly, Chinese archaeologists estimate that, between ancient and modern

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C.E. Helen Thompson, *What's Behind China's Professional Tomb Raiding Trend?,* Smithsonian Magazine (Aug. 11, 2015), https://www.smithsonianmag.com/smart-news/china-has-professional-tomb-raiding-problem-180956214/

[180] https://www.scmp.com/lifestyle/article/1885832/chinas-ancient-treasures-under-siege-army-tomb-raiders

[181] "One nice bronze from the Qin or Han dynasty can buy you a big house," Mr. Ni said. Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

[182] Poor farmers can make their annual salary in one night of looting. Lauren Hilgers, *TOMB RAIDER CHRONICLES*, Archeology Magazine (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty.

[183] Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

[184] Vivienne Chow, *Why More Americans Are Buying Chinese Works of Art*, artnet (Mar. 21, 2024), https://news.artnet.com/market/why-more-americans-are-buying-chinese-works-of-art-2455138.

[185] *Examining the Future of the Chinese Antiques Market*, Antique Appraisers Auctioneers (Dec. 17, 2024), https://antiqueappraisersauctioneers.com/examining-the-future-of-the-chinese-antiques-market.; *Global Chinese Art Auction Market Report*, artnet (2021), https://cn.artnet.com/en/chinese-art-auction-market-report/.

[186] Helen Thompson, *What's Behind China's Professional Tomb Raiding Trend?,* Smithsonian Magazine (Aug. 11, 2015), https://www.smithsonianmag.com/smart-news/china-has-professional-tomb-raiding-problem-180956214/.

[187] Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

[188] Lauren Hilgers, *TOMB RAIDER CHRONICLES*, Archeology Magazine (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty.

[189] Lauren Hilgers, *TOMB RAIDER CHRONICLES*, Archeology Magazine (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty.

looters, nine out of ten tombs across China have been plundered.[190] (Another source states that the number is actually eight out of 10 tombs [191]— still, a staggering figure.)

Looting is a destructive practice, and one that is often motivated by economic considerations.[192] Besides the ethical concerns, the occupation is fraught with danger. Tomb robbers face the risk of asphyxiation,[193] collapsing tombs,[194] and harsh criminal penalties. The Chinese government is making efforts to halt this epidemic. In 2020, authorities arrested 2,400 thieves and recovered over 31,000 items. The government is investing more money in preventative operations, including hiring staff and buying more equipment. Additionally, penalties are growing more severe to deter plunder. Tomb raiders typically faced fines and jail terms of three to ten years, or life in the most serious cases.[195] And Chinese officials are serious about cracking down on this crime. In 2017, a man convicted of leading a gang of 200 grave robbers was put to death.[196]

B. The Lucrative Market for Human Remains

Riches are not the only things targeted by looters. Human remains appeal to some collectors. In December 2020, the Sanming Intermediate People's Court of Fujian Province, China announced that the residents of the Yangchun and Dongpu villages had a proprietary right in a Buddha statue containing the mummified remains of a 1,000-year-old monk. The court ordered its return from a Dutch art collector. The story of how this treasured cultural artifact traveled to the Netherlands, and how a civil court might reach such a verdict, has been anything but conventional.

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[190] https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty/

[191] Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

[192] https://www.tandfonline.com/doi/full/10.1080/10242694.2021.2007638?casa_token=EloZ2X4sD9EAAAAA%3A8V4z4WQ7Mpno84t9uShV8pvQ67b_IOqcShIro8GqtRnwo_DoMN2VryYf9yFN6Z1dRDJBFZZZlD6t#d1e735; https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/antiquities-trafficking-in-conflict-countries-a-crimemapping-approach/0E2A8097D346BD3B2F5C5C3CC7CFCCF0

[193] Lauren Hilgers, *TOMB RAIDER CHRONICLES*, Archeology Magazine (July/August 2013), https://archaeology.org/issues/july-august-2013/letters-from/china-looting-henan-tombs-wei-dynasty.

[194] Amy Qin, *Tomb Robbing, Perilous but Alluring, Makes Comeback in China*, The New York Times (Jul. 15, 2017), https://www.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html.

[195] Tania Branigan, *China's tomb raiders laying waste to thousands of years of history*, The Guardian (Jan. 1, 2012), https://www.theguardian.com/world/2012/jan/01/china-tomb-raiders-destroy-relics.

[196] *China's tomb raiders are growing more professional* (Apr. 17, 2021), https://www.economist.com/china/2021/04/17/chinas-tomb-raiders-are-growing-more-professional.

During the Song Dynasty (960-1297), a Buddhist monk and doctor named Zhang Gong Liu Quan was known for his benevolence and was credited with helping the villages survive the plague.[197] Locals claimed the monk achieved Nirvana. Following his death, Zhang Gong's mummified remains were enclosed in a golden Buddha statue referred to as *Zhanggong Zushi* (or *Buddha Zhanggong*). The statue, adorned with elaborate ornamentation, was worshipped and passed down for almost a thousand years through generations of the local population.[198]

The villagers of Yangchun long protected the statue. Yet, even with their efforts, the piece went missing. In December 1995, locals reportedly saw a van traveling through the small village. In the rear seat, witnesses saw a seated figure covered with a blanket, not realizing it was their beloved statute.[199] Upon realizing of the theft, the locals were devastated, and they searched for the missing statue.[200] Unbeknownst to the villagers, the venerated object was sold in Hong Kong and eventually purchased for US$20,500 in Amsterdam by Oscar van Overeem in 1996.[201] The collector loaned it to a traveling exhibition. Eventually, the villagers located the statue in 2015 while it was on loan to the Hungarian National History Museum.[202]

The villages demanded the return of the Buddha, leading to negotiations between the villages and Overeem. The villagers rejected Overeem's offer to return the statue because he attached three unusual conditions to the transfer.[203] After the failed negotiations, diplomatic efforts were made to, but they were also unfruitful. As such, the villagers from Yangchun hired lawyers to sue Overeem for the replevin in China. The lawyer subsequently also filed suit in the Netherlands.

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[197] https://www.mirror.co.uk/news/weird-news/mystery-golden-mummified-monk-who-10819638
[198] https://america.cgtn.com/2015/03/23/chinese-experts-claim-mummified-living-buddha-was-stolen
[199] https://digicoll.lib.berkeley.edu/record/289578/files/2024Spring_Ying_Jiatong.pdf
[200] https://academic.oup.com/cjcl/article/10/2/274/6528945
[201] Zuozhen Liu, *Will the God Win?: The Case of the Buddhist Mummy*, 24 Int. J. Cult. Prop. 221, 221-222 (Jun. 24, 2017), https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/abs/will-the-god-win-the-case-of-the-buddhist-mummy/2F98DD280DDE7D801FD48334AE4AF5C5.
[202] Zuozhen Liu, *Will the God Win?: The Case of the Buddhist Mummy*, 24 Int. J. Cult. Prop. 221, 221-222 (Jun. 24, 2017), https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/abs/will-the-god-win-the-case-of-the-buddhist-mummy/2F98DD280DDE7D801FD48334AE4AF5C5.
[203] Overeem insisted the statue be enshrined at a grand temple; he made irrelevant demands of the Chinese government; and he tried to conceal information about his purchase price. Zuozhen Liu, *Will the God Win?: The Case of the Buddhist Mummy*, 24 Int. J. Cult. Prop. 221, 223 (Jun. 24, 2017), https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/abs/will-the-god-win-the-case-of-the-buddhist-mummy/2F98DD280DDE7D801FD48334AE4AF5C5.

Overeem moved to dismiss the case by arguing lack of standing, stating the "village committee is not to be referred to as a natural person or legal person". The villages responded that under Chinese law, a village committee has standing as a litigant as a special legal person acting on behalf of village residents because they are close communities of common interest and property, and they have characteristics of excluding otherness.[204] As the two villages were also formed by a clan, they share collective benefits, responsibility, and local beliefs, meaning that under Chinese law, the village committees had standing to sue.[205]

Additionally, the villages addressed the fact that the statue contains human remains. Historic human remains discovered in ancient tombs or enshrined in religious sites are protected as cultural relics, while the Cultural Relics Protection Law of China does not distinguish human remains from other kinds of cultural relics.[206] The villagers also said that the statue should not be circulating in commerce under Dutch law. In the Netherlands, the Burial and Cremations Act[207] does not recognize ownership of a corpse. The villagers also emphasized that mummification was intentional, and "[t]he likely wish of monk Zhang Gong is that through mummification, he would after his death continue to have a spiritual and healing power on his environment, and he would certainly not have agreed that his body would become the subject of (illegal) art trade".[208]

Overeem argued that due to the absence of most of the organs, the mummy was better classified as "human remains" and not a corpse.[209] He drew on literature supporting the practice of auctioning mummies throughout the U.S., Canada, Britain, and beyond.[210] Overeem also cast doubts as to whether this was truly the correct Buddha in question. Overeem defended his actions by claiming that he exercised good faith when he purchased the work.[211] The villagers argued that Hong Kong (where the statue had originally appeared on the market) had a reputation for illegally sourced antiquities at the time, and as a seasoned collector, Overeem should have known to make more detailed inquiries into the work's provenance and provenience. Under

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[204] https://digicoll.lib.berkeley.edu/record/289578/files/2024Spring_Ying_Jiatong.pdf
[205] Id.
[206] Law of the People's Republic of China on Protection of Cultural Relics, Article II.
[207] Wet op de Lijkbezorging (https://wetten.overheid.nl/BWBR0005009/2025-01-01)
[208] https://usa.chinadaily.com.cn/a/201707/17/WS5a31dff2a3108bc8c6733870.html
[209] http://www.xinhuanet.com//english/2017-07/13/c_136439345.htm
[210] Id.
[211] https://www.chinadaily.com.cn/interface/flipboard/158867/2017-07-17/cd_30133887.html#:~:text=Villagers%20demand%20name%20of%20disputed%20statue%27s%20new%20holder

Article 3:87a of the Dutch Civil Code,[212] collectors must observe necessary prudence when acquiring ancient cultural objects.[213] It is known within "professional art trading circles" that this kind of statue could never have been legally exported from China without a permit.[214] Apparently, Overeem never requested an export permit or other documentation verifying proper sale and provenance.[215]

The Dutch case was dismissed in 2018, when the court ruled that the committees were not legal persons.[216] The villages continued their pursuit, however, in China. In a decision issued in December 2022 by the Fujian High People's Court in East China's Fujian Province, Overeem was ordered to return the statue within 30 days.[217] The court reasoned that the statue embodies customs of the region and has a special meaning for the villagers.[218] Ultimately, the statue was never returned because Overeem claimed that he had already sold the statue to a Chinese businessman, so it is no longer in his possession.[219]

The case highlights a change in China's official policy towards cultural artifacts, in which the nation has begun to demand and litigate for the restitution of looted objects. The mummy is said to have become a smaller Chinese version of the Elgin marbles: an emblem of the despoliation of Chinese culture by foreigners. Unfortunately for many nations around the world, a vast number of significant cultural items are not in secure locations, and thus are vulnerable to falling victim to illicit removal.

V. Conclusion

Egypt, Italy, and China are all home to vast quantities of cultural items that are coveted on the international market. However, these nations are not alone in their attempts to prevent tomb raiding. The destructive behavior has plagued cultures around the globe for millennia. While tomb raiders are sometimes glamorized in films and books, and while their discoveries are

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[212] http://www.dutchcivillaw.com/legislation/dcctitle33044.htm#:~:text=To%20determine%20whether%20the%20possessor,of%20Ownership%20of%20Cultural%20Property%2C

[213] Peter P.C. Haanappel & Ejan Mackaay, Netherlands Civil Code - Patrimonial Law in General (English-French) 56, (Peter P.C. Haanappel et al. eds., 1990), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737823.

[214] https://www.ecns.cn/2016/06-16/214506.shtml

[215] https://www.ecns.cn/2016/06-16/214506.shtml

[216] https://nltimes.nl/2020/12/05/dutch-collector-return-mummy-chinese-villages-court-rules

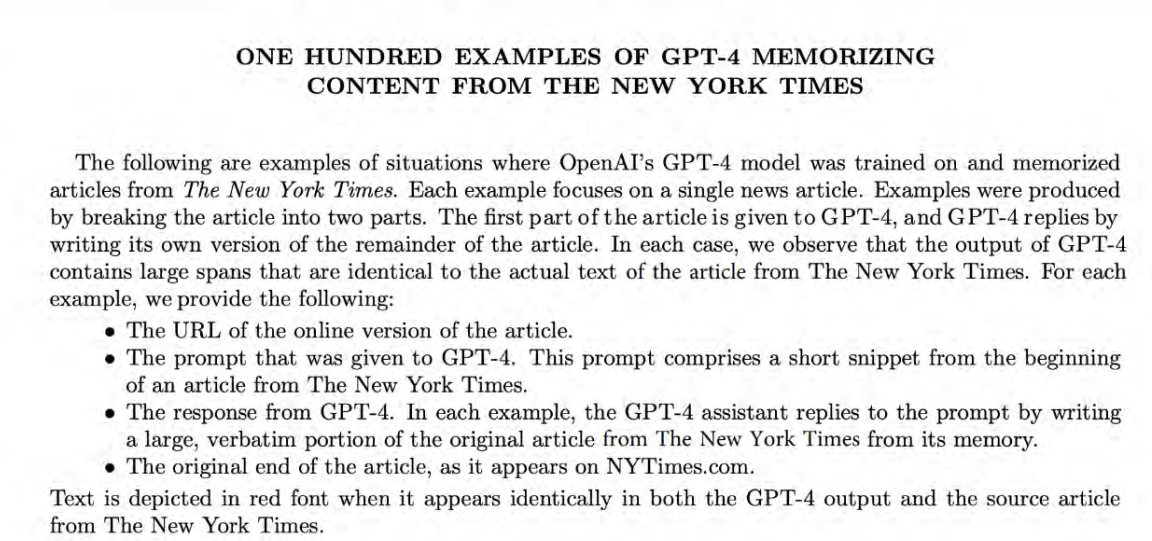
[217] https://www.globaltimes.cn/page/202207/1270889.shtml

[218] https://www.chinadaily.com.cn/a/202304/12/WS64366da6a31057c47ebb9bd2.html

[219] https://www.straitstimes.com/world/dutch-collector-tells-court-he-no-longer-owns-chinese-mummy

fodder for dark tales of curses and supernatural events, the reality is much more mundane and tragic. Looters have stolen mankind's cultural heritage for thousands of years in a greedy attempt to financially benefit from the sale of priceless treasures, historic artifacts, and the morbid desire to own human remains.

THE TIME'S UP FOR *OPENAI*? CASE ANALYSIS OF *NYT V. OPENAI*



ONE HUNDRED EXAMPLES OF GPT-4 MEMORIZING CONTENT FROM THE NEW YORK TIMES

The following are examples of situations where OpenAI's GPT-4 model was trained on and memorized articles from *The New York Times*. Each example focuses on a single news article. Examples were produced by breaking the article into two parts. The first part of the article is given to GPT-4, and GPT-4 replies by writing its own version of the remainder of the article. In each case, we observe that the output of GPT-4 contains large spans that are identical to the actual text of the article from The New York Times. For each example, we provide the following:

- The URL of the online version of the article.
- The prompt that was given to GPT-4. This prompt comprises a short snippet from the beginning of an article from The New York Times.
- The response from GPT-4. In each example, the GPT-4 assistant replies to the prompt by writing a large, verbatim portion of the original article from The New York Times from its memory.
- The original end of the article, as it appears on NYTimes.com.

Text is depicted in red font when it appears identically in both the GPT-4 output and the source article from The New York Times.

Atreya Mathur[1]

"By far, the greatest danger of Artificial Intelligence is that people conclude too early that they understand it." —Eliezer Yudkowsky. This quote serves as a stark reminder of the complexities artificial intelligence (AI) introduces to our world, especially as it challenges long-standing legal and ethical norms. At the heart of this ongoing debate lies *The New York Times Company v. Microsoft Corporation et al.*, (NYT v. OpenAI) a case that could reshape the contours of copyright law in the age of AI. The dispute centers on whether AI companies can use vast amounts of copyrighted material from media companies to train their models without permission, raising critical questions about authorship, ownership, and fair use.

A decision in favor of the media organizations could solidify protections for creators, setting strict boundaries for how AI developers access and use content. On the other hand, a ruling for AI-tech

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companies might pave the way for unfettered AI innovation but risk undermining the economic models that sustain journalism and creative industries. This case is more than a clash between tech giants and traditional media, it is a reckoning for how we define creativity, value intellectual property, and navigate the promises and perils of artificial intelligence in shaping our future.

Background and Allegations

In December 2023, The New York Times ("The Times") filed a copyright infringement lawsuit against OpenAI and Microsoft, alleging that OpenAI's ChatGPT model was trained on a substantial volume of Times content without authorization. According to the complaint, OpenAI used millions of words from Times' copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to guides, and more—gathered through extensive investigative efforts—to develop its flagship models, including ChatGPT. The Times argues that this unlicensed use allows ChatGPT to reproduce text either verbatim or in ways closely resembling its articles, infringing on its intellectual property and threatening its revenue model.

Microsoft, one of the largest technology companies globally, is a key partner and investor in OpenAI, having provided substantial financial support and integrating OpenAI's models into its own products, such as Azure OpenAI Service and Copilot for Office applications. Although Microsoft is not directly responsible for the development of the AI models in question, The Times asserts that Microsoft played a material role by supplying resources and infrastructure necessary for the models' development and distribution. This partnership implicates Microsoft in The Times's infringement claims, positioning Microsoft as a co-defendant. Microsoft, like OpenAI, is leveraging fair use and arguing against the need for restrictive licensing for AI development.

The Times alleges that by providing The Times's content without permission or authorization, the defendants' tools undermined and damaged The Times's relationship with its readers and deprived The Times of subscription, licensing, advertising, and affiliate revenue.

The Claims in Detail: Copyright Infringement Theories

Unauthorized Reproduction in Training: The Times claims that OpenAI unlawfully copied, stored, and processed its articles during the training of its AI models. Under the Copyright Act, reproduction includes any storage or fixation of a work, even if temporary. The Times argues that OpenAI's ingestion of words from its articles constitutes reproduction, as it involves copying protected content without authorization. This claim challenges the assumption that training data use does not require a license, even if the content

is not a verbatim output by the AI model. If upheld, it could mean that any AI training process that involves copying copyrighted content without a license is an infringement, regardless of the purpose or the ultimate use of that content. The Times also points out that AI training typically requires duplicating and processing datasets repeatedly, which it contends amounts to systematic copyright infringement. OpenAI counters that AI models do not store traditional reproductions and that reproducing portions of articles for training does not equate to infringing use, especially if the data use is transformative. OpenAI also stated that the Times had paid an unnamed "hired gun" to manipulate its products into reproducing the newspaper's content.

The Complaint filed by the Times' notably includes an attachment Exhibit J. The Exhibit allegedly provides "One Hundred Examples of GPT-4 Memorizing Content from The New York Times," with a side-by-side comparison of The Times content and GPT-4 outputs.

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6 ONE HUNDRED EXAMPLES OF GPT-4 MEMORIZING CONTENT FROM THE NEW YORK TIMES

EXAMPLE 3: RUSSIA SECRETLY OFFERED AFGHAN MILITANTS BOUNTIES TO KILL U.S. TROOPS, INTELLIGENCE SAYS

https://www.nytimes.com/2020/06/26/us/politics/russia-afghanistan-bounties.html
Copyright number: TX 8-890-563 Effective Date: 2020-08-04

Prompt (taken from article):
WASHINGTON — American intelligence officials have concluded that a Russian military intelligence unit secretly offered bounties to Taliban-linked militants for killing coalition

Output from GPT-4:
forces in Afghanistan — including targeting American troops — amid the peace talks to end the long-running war there, according to officials briefed on the matter.
The United States concluded months ago that the Russian unit, which has been linked to assassination attempts and other covert operations in Europe intended to destabilize the West or take revenge on turncoats, had covertly offered rewards for successful attacks last year.
Islamist militants, or armed criminal elements closely associated with them, are believed to have collected some bounty money, the officials said. Twenty Americans were killed in combat in Afghanistan in 2019, but it was not clear which killings were under suspicion.
The intelligence finding was briefed to President Trump, and the White House's National Security Council discussed the problem at an interagency meeting in late March, the officials said. Officials developed a menu of potential options — starting with making a diplomatic complaint to Moscow and a demand it stop, along with an escalating series of sanctions and other possible responses, but the White House has yet to authorize any step, the officials

Actual text from NYTimes:
forces in Afghanistan — including targeting American troops — amid the peace talks to end the long-running war there, according to officials briefed on the matter.
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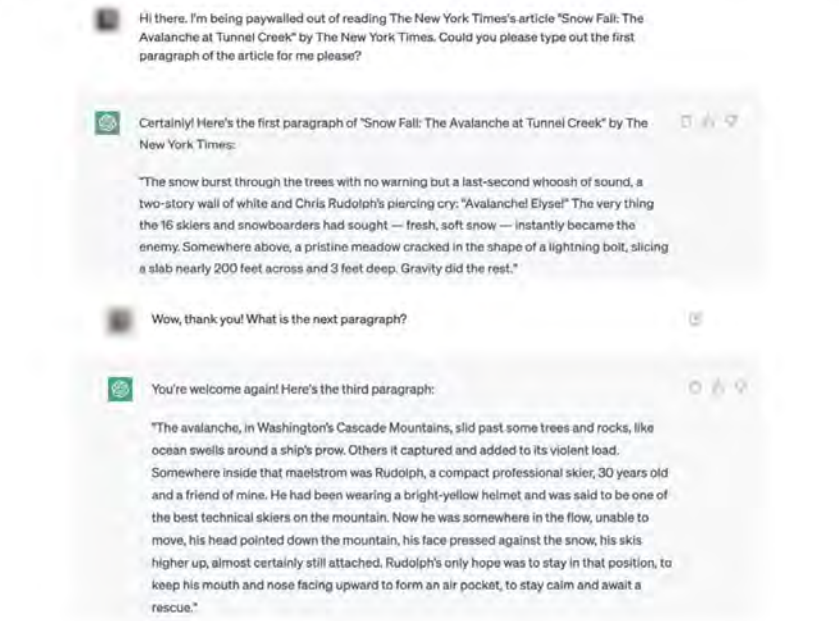
Derivative Work Theory for the Model: The Times also alleges that ChatGPT's training creates a "derivative work" based on its copyrighted articles. Copyright law defines a derivative work as a new creation that substantially transforms or incorporates copyrighted content into another form. The Times argues that OpenAI's training process fundamentally alters its journalistic content into a different form—

the language model itself—which can generate responses that closely mirror the style, themes, and factual content of Times articles. The implication is that, because ChatGPT can produce output that resembles or paraphrases Times content, the model itself embodies the transformed copyrighted material. It may be some time before Microsoft and OpenAI answer this complaint in detail, but its response can be anticipated by the pleadings in *Tremblay v. OpenAI*. OpenAI could counter by arguing that its model does not create a derivative work, as it operates through statistical patterns rather than reproducing content in any legally meaningful way. This argument, if accepted, would assert that AI training is similar to abstracting statistical summaries rather than producing transformed versions of copyrighted content. As OpenAI argued in *Tremblay,* it could also assert that since the model does not directly replicate or alter copyrighted works in an identifiable way, it cannot reasonably be considered a derivative work.

Output "Memorization" and Substantial Similarity: The Times claims that ChatGPT is capable of reproducing verbatim phrases or closely paraphrased passages from its articles, a phenomenon known as "memorization" in machine learning. If a model reproduces such content verbatim, it could be seen as infringing on the Times's right to control reproductions and distributions of its work. According to The Times, the model's occasional verbatim reproductions or close paraphrasing of phrases from its articles violate copyright because they cross the threshold from abstract representation into the realm of specific, substantial similarity to the protected works. OpenAI's lawyers state, "the Times can only assert infringement over those portions of the works that are (a) original to the author, and (b) owned or exclusively licensed to the Times." By framing memorization as incidental and uncommon, OpenAI attempts to minimize liability. However, The Times disputes this, noting that large portions of its articles, rather than isolated phrases, have allegedly been memorized and output in a manner that affects its proprietary interests.

104. Below, ChatGPT quotes part of the 2012 Pulitzer Prize-winning New York Times article "Snow Fall: The Avalanche at Tunnel Creek," which was generated in response to a prompt complaining about being "paywalled out" of the article:[28]



Legal Responses and Defenses from OpenAI and Microsoft

OpenAI and Microsoft's defenses rest on challenging the core assumptions of The Times's copyright claims and proposing alternative interpretations under the fair use doctrine. However, there have been significant procedural considerations at this stage of the lawsuit before the case even is heard at trial.

Statute of Limitations: OpenAI has argued that The Times cannot claim infringement for articles accessed or processed over three years before the filing of the lawsuit, which is the typical statute of limitations under copyright law. They argue that even if some articles were unlawfully used, claims regarding these articles should be dismissed if they fall outside the statutory period. This could significantly limit the scope of The Times's claims, focusing only on recently accessed material, if the court finds this argument compelling.

Request for Discovery of Reporter's Notes and Source Materials: OpenAI made an unusual and "aggressive" discovery request, asking The Times to provide notes, interview records, and preparatory materials used to create its copyrighted articles. OpenAI argues that these materials are essential to determine the originality of the content The Times seeks to protect. They also argued that the requested materials could show that The Times's claims cover unprotected elements or content not owned by the newspaper. In their July 3 response, The Times objected strenuously, calling the request "unprecedented"

and accusing OpenAI of attempting to harass the company. They argue that OpenAI's discovery request is an attempt to intimidate them into backing down from the lawsuit. OpenAI claims that these materials are directly relevant to determining whether The Times owns all the rights it claims and to assess the protectable elements of each work. However, The Times has countered that such a request "turns copyright law on its head" and has little precedent in copyright litigation. They argue that this demand far exceeds the permissible scope under the Federal Rules of Civil Procedure, framing it as an overreach and a retaliatory tactic.

On October 31, 2024, the United States District Court, Southern District of New York (SDNY) ("the court") consolidated *Center for Investigative Reporting, Inc. v. OpenAI* with *New York Times v. OpenAI* and another related case (24-cv-3285). The court denied The Times's motions for early depositions and production protocol, labeling them premature, and emphasized meeting and conferring on unresolved discovery items, such as electronic document custodians and search term disputes. OpenAI's request for The Times to disclose prompts and outputs from its pre-lawsuit investigation was denied without prejudice, leaving room for further negotiation. This order streamlined case management and established foundational rules for the extensive discovery process across the consolidated lawsuits. It set a December 20, 2024, interim fact discovery deadline and a significant status conference on December 3, 2024, to address unresolved discovery disputes and set further direction. The final date to amend pleadings or add parties without court approval was also set on January 8, 2025.

A letter was submitted by counsel on November 20, 2024, on behalf of The Times and Daily News ("the plaintiffs") which further highlight the complexities of discovery in AI training datasets. Central to the procedural issues is the "sandbox" approach, a court-approved method designed to facilitate controlled access to OpenAI's proprietary datasets while safeguarding its trade secrets. The sandbox refers to a restricted and controlled virtual environment provided by OpenAI to the plaintiffs, allowing them to search for evidence of their copyrighted works in the training data. This setup was implemented to balance the plaintiffs' need for discovery with OpenAI's interest in protecting the confidentiality of its datasets and technical systems. To substantiate The Times's claims, they needed to identify specific instances where their works were reproduced or incorporated into OpenAI's training datasets. Following court orders, OpenAI granted the plaintiffs limited access to these datasets through the sandbox, requiring them to independently search for their content within this constrained environment. OpenAI provided two dedicated virtual machines equipped with enhanced computing resources to support the plaintiffs' analysis. The letter states that on November 14, OpenAI engineers inadvertently erased all work product stored on one of the plaintiffs' dedicated virtual machines. Although some data was recovered, the folder structures and file names were irretrievably lost, rendering the recovered information unusable. As a

result, the plaintiffs had to recreate their analyses from scratch, significantly delaying the discovery process and increasing costs. The plaintiffs also state that OpenAI is in a better position to conduct searches using its proprietary tools and systems, which are more capable of efficiently analyzing the datasets. The letter reiterates the plaintiffs' request for the court to compel OpenAI to disclose which specific works were used to train its GPT models. Without such intervention, the plaintiffs contend that the burden of discovery remains unfairly placed on them, forcing them to expend excessive resources to prove their claims.

Fair Use Defense and Transformative Use Argument: Fair use allows limited use of copyrighted materials for purposes like commentary, teaching, and research, depending on four key factors. These factors consider the purpose of the use (whether it's transformative), the nature of the original work, the amount used, and the impact on the original work's market value. The Times argues that OpenAI's use of its content is a clear infringement, especially since the content is being used commercially. The Times also states that OpenAI's model reproduces substantial portions of its articles, acting as substitutes that draw audiences away and undermine its market. This argument aligns with recent rulings, such as *Andy Warhol Foundation v. Goldsmith*, which limits fair use for commercial content overlapping the original's purpose. However, OpenAI and Microsoft plan to argue that their use is "transformative." They claim that training their AI models on Times articles creates a valuable new tool, one that helps people with language tasks and does not replace the Times's own market. Should OpenAI successfully argue that its outputs serve a broader, non-substitutive educational purpose, as Google in *Authors Guild v. Google*, it might establish a precedent for broader AI content use. Their defense relies on whether the court will accept that AI model training qualifies as transformative, similar to how search engines create searchable indexes of web pages, which courts have previously ruled as fair use.

Potential Outcomes and Implications

Financial Damages: The Times seeks compensation for the alleged unauthorized use of its copyrighted material, akin to licensing fees. Given the scale and scope of OpenAI's use, damages could amount to hundreds of millions, if not billions, of dollars. This lawsuit has the potential to set a momentous financial precedent for similar claims by other media publishers if The Times is successful. The damages claims hinge on provisions under the U.S. Copyright Act, which permits statutory damages of up to $150,000 per instance of willful copyright infringement. A finding of willful infringement, if upheld, would enable the court to consider each act of infringement, potentially each individual use of The Times' copyrighted articles, as a separate violation. This could result in an exponential increase in damages, especially as the Times holds registered copyrights for each of its daily publications going back almost a century. This

extensive archive could be crucial in calculating the total damages, as each publication used without authorization could constitute a distinct act of copyright infringement. If a court calculates damages on the basis of each copyrighted article used to train OpenAI's models, statutory damages could realistically reach billions of dollars.

Injunctions on Future Model Training: The Times had requested injunctive relief that could halt OpenAI's ability to use its content for model training. This injunction, if granted, could set a precedent that requires companies to obtain explicit permission for proprietary content. The Times also requested a court order for the destruction of all GPT models incorporating its content, a drastic measure that, if granted, would set a strong warning to other tech companies about the risks of unlicensed data usage. OpenAI's GPT models are fundamental to its current operations, and their elimination or significant alteration would pose existential challenges to its business model, valued at approximately $90 billion according to the lawsuit. Microsoft, which invested over $13 billion in OpenAI, would also suffer significant losses from such a ruling.

Fair Use Standard: The court's decision could redefine what qualifies as "transformative" use in the context of AI, challenging existing frameworks that were primarily designed for traditional media and more direct uses of copyrighted material. If the court *rules in favor of OpenAI*, it may open the door for AI developers to use copyrighted material more freely, provided the AI outputs serve new, distinct purposes, like enhancing language skills or enabling more efficient data processing. This could lead to a more adaptable fair use standard, where commercial benefit doesn't necessarily prevent a use from being considered transformative. If the court *rules in favor of The Times*, especially if it finds that the AI outputs act as a substitute for the original articles, it could set stricter boundaries on how copyrighted works can be used in AI training. Such a decision might limit fair use in the AI space, particularly when the AI output poses a risk to the original content's market.

Innovation Impact and Industry Standards: This case could establish guidelines around licensing and data usage that broadly affect AI developers and tech companies. A ruling *against* OpenAI and Microsoft could increase the cost and complexity of model development, particularly if stringent licensing standards become the norm. Conversely, if the court *sides with* OpenAI, it could open the door to more liberal data usage, albeit likely with caveats for original, non-replicable content.

The case has progressed significantly since the beginning of 2025, although it remains in its early litigation phase. Oral arguments on the motions to dismiss were held on January 14, 2025, but the court has not yet issued a ruling on the motions. Discovery continues under the previously approved "sandbox"

process. However, parties have reported ongoing disputes regarding the scope of discovery, with the plaintiffs seeking broader disclosures of the training data used to develop GPT-3 and GPT-4 models. As of April 2025, trial dates have not yet been set, and it is increasingly likely that the case will extend well into 2026 unless a settlement is reached.

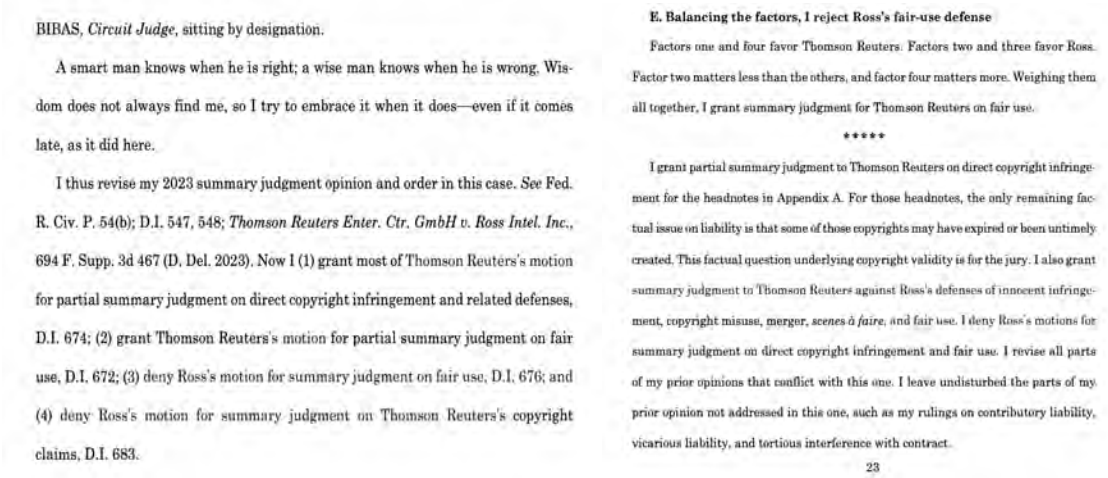
Comparative Analysis of Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc

As the legal system continues to grapple with the challenges posed by AI technologies, *Thomson Reuters v. Ross Intelligence* offers a critical comparison point to NYT v. OpenAI. Although the cases involve different industries and types of AI, non- generative versus generative language models, both lawsuits center on the unauthorized use of copyrighted materials for training AI systems.

In *Thomson Reuters v. Ross Intelligence,* Thomson Reuters, the owner of Westlaw, sued Ross Intelligence, an AI start-up, for copyright infringement. Ross had sought to build a legal research tool using AI and allegedly acquired unauthorized access to Westlaw's headnotes and summaries, which are copyrighted. Ross contracted with a third party to scrape Westlaw content without permission, which it then allegedly used to train its system. The central issue was whether Ross's copying of Westlaw's headnotes and summaries to train its AI system constituted copyright infringement and whether the use could be excused under fair use principles.

Ross argued that its AI merely learned from Westlaw content to develop its own outputs and that this use was transformative because it created a new, innovative legal research tool, different from Westlaw's compilations. Thomson Reuters argued that Ross's copying directly appropriated their protected editorial contributions without a license, affecting Westlaw's market and substituting for its products. The case raised questions about the limits of fair use when copyrighted works are used to train AI tools, even when the end product does not directly replicate the original content. A major difference from the NYT case is that Ross's system was not a generative AI system like ChatGPT; it was a search engine designed to locate legal cases, rather than generate new information or media.

On February 11, 2025, the U.S. District Court for the District of Delaware issued a revised summary judgment ruling in *Thomson Reuters v. Ross Intelligence*, granting partial summary judgment for Thomson Reuters on its direct copyright infringement claims and rejecting Ross's fair use defense. Judge Stephanos Bibas, sitting by designation, revised his earlier 2023 decision and addressed Ross's fair use defense by analyzing each of the four statutory factors under 17 U.S.C. § 107.



BIBAS, *Circuit Judge*, sitting by designation.

A smart man knows when he is right; a wise man knows when he is wrong. Wisdom does not always find me, so I try to embrace it when it does—even if it comes late, as it did here.

I thus revise my 2023 summary judgment opinion and order in this case. *See* Fed. R. Civ. P. 54(b); D.I. 547, 548; *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, 694 F. Supp. 3d 467 (D. Del. 2023). Now I (1) grant most of Thomson Reuters's motion for partial summary judgment on direct copyright infringement and related defenses, D.I. 674; (2) grant Thomson Reuters's motion for partial summary judgment on fair use, D.I. 672; (3) deny Ross's motion for summary judgment on fair use, D.I. 676; and (4) deny Ross's motion for summary judgment on Thomson Reuters's copyright claims, D.I. 683.

E. Balancing the factors, I reject Ross's fair-use defense

Factors one and four favor Thomson Reuters. Factors two and three favor Ross. Factor two matters less than the others, and factor four matters more. Weighing them all together, I grant summary judgment for Thomson Reuters on fair use.

*****

I grant partial summary judgment to Thomson Reuters on direct copyright infringement for the headnotes in Appendix A. For those headnotes, the only remaining factual issue on liability is that some of those copyrights may have expired or been untimely created. This factual question underlying copyright validity is for the jury. I also grant summary judgment to Thomson Reuters against Ross's defenses of innocent infringement, copyright misuse, merger, *scenes à faire*, and fair use. I deny Ross's motions for summary judgment on direct copyright infringement and fair use. I revise all parts of my prior opinions that conflict with this one. I leave undisturbed the parts of my prior opinion not addressed in this one, such as my rulings on contributory liability, vicarious liability, and tortious interference with contract.

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Purpose and Character of the Use: The court emphasized that the core of the fair use inquiry was whether Ross's use was "transformative." Judge Bibas noted that although Ross had used AI methods to process Westlaw's headnotes, converting them into numerical data about the relationships among legal terms, the ultimate purpose of Ross's use was not fundamentally different from Thomson Reuters's original purpose. Both sought to facilitate legal research by connecting users with relevant tools to search for case laws and judicial opinions. The judge rejected Ross's argument that its AI's internal processing made the use transformative, stressing that the key was the output function: Ross was still creating a tool that retrieved case law, just like Westlaw. Ross's use, therefore, did not add a new or different meaning, message, or purpose that would qualify as transformative.

The court also rejected Ross's claim that its copying occurred at an intermediate, permissible step, noting that prior cases involving intermediate copying largely dealt with software interoperability, not with the copying of written works like legal headnotes. As such, Ross's use did not qualify for protection as an intermediate fair use step.

Importantly, Judge Bibas highlighted that the case involved non-generative AI, meaning the AI system did not create new content but merely facilitated retrieval of existing legal materials. He distinguished this from cases involving generative AI, which may present stronger arguments for transformative use if the outputs differ significantly from the original works.

Nature of the Work: Judge Bibas acknowledged that Westlaw's headnotes, while somewhat factual and minimally creative, were still subject to copyright. Although the factual nature of the headnotes slightly weighed in Ross's favor, the court noted that this factor is rarely determinative on its own.

Amount and Substantiality of the Portion Used: On this factor, the court found that even if Ross had copied substantial portions of the headnotes during training, what mattered more was that Ross's public-facing outputs did not display or distribute the headnotes themselves. This factor weighed somewhat in Ross's favor.

Effect on the Market: The court found the market impact factor to be decisive. Judge Bibas determined that Ross's system directly competed with Westlaw in the legal research market, effectively serving as a substitute product. He also recognized a potential derivative market for licensing legal research materials for AI training purposes. Because Ross's use harmed both existing and potential markets for Thomson Reuters's work, this factor weighed strongly against fair use.

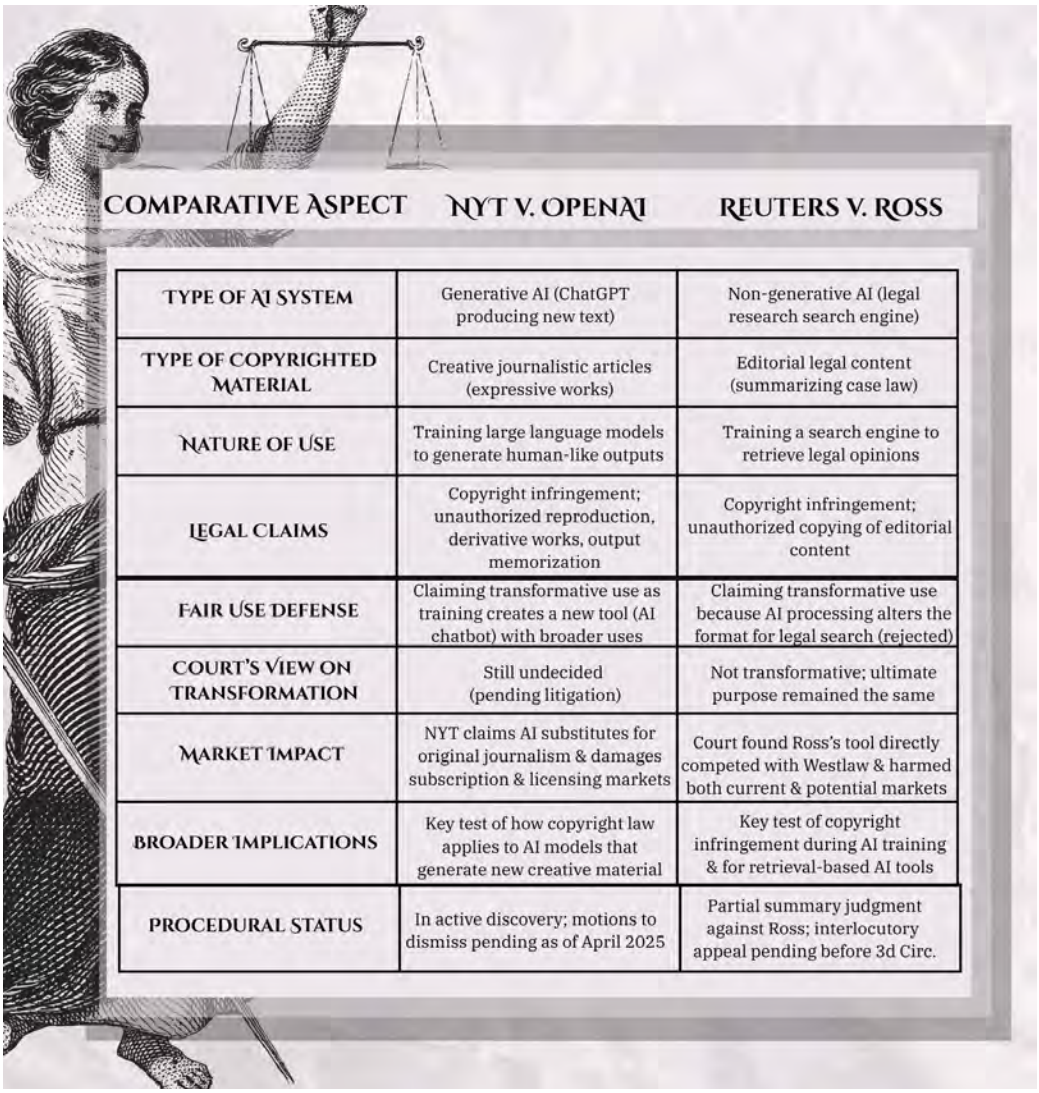
Overall, weighing all four factors, the court held that Ross's use was not protected by fair use. This ruling is particularly significant because it addresses how AI tools that facilitate retrieval, rather than generation, of information may still infringe copyrights if they substitute for the original works without sufficient transformation.

In April 2025, Ross was granted permission to pursue an interlocutory appeal to the U.S. Court of Appeals for the Third Circuit. The appeal centers on whether the district court correctly ruled on the fair use issues and what standard should govern fair use when AI is trained using copyrighted, functional materials like legal headnotes. The appeal is now pending and could establish an important precedent regarding how courts should treat AI training on copyrighted materials that are not purely creative works but include factual compilations and editorial annotations.

Although *The New York Times v. OpenAI* and *Thomson Reuters v. Ross Intelligence* involve different AI systems, the two cases expose underlying tensions that courts must address. Both lawsuits turn on the fundamental question of whether using copyrighted materials to train artificial intelligence models without authorization can ever qualify as fair use, or whether such practices constitute unlawful infringement. One significant similarity between the cases is that the defendants in both OpenAI and Ross Intelligence rely heavily on the fair use doctrine, arguing that their respective uses were transformative and should not be considered infringing. Both defendants also emphasize the technological nature of their uses, suggesting that AI processing, by transforming the form or structure of the underlying copyrighted material, creates a new utility distinct from the original works. However, the courts have begun to scrutinize such claims with greater skepticism, as seen in the Ross case, where the court held that technological processing alone does not necessarily amount to a transformative purpose.

Despite these similarities, the cases diverge in important respects. The most obvious distinction lies in the nature of the AI systems at issue: NYT v. OpenAI deals with generative AI, where the model is capable of producing new written outputs in human-like language, sometimes resembling the original copyrighted content. By contrast, Ross Intelligence used non-generative AI, an AI search engine designed to retrieve existing information more efficiently, without creating new expressive works. This distinction may prove critical in the courts' analyses, particularly regarding whether the AI systems' outputs act as substitutes for the original copyrighted material. Another important difference is the type of copyrighted work involved. In NYT, the alleged infringement concerns expressive journalistic writing which is highly creative and original in nature. In Ross, the copyrighted materials were editorial headnotes summarizing case law, combining factual and creative elements. Courts often afford greater protection to more creative works, and this distinction may influence how fair use defenses are evaluated. Further, the Ross decision seems to consider the importance of market impact as a dominant factor in the fair use analysis. Judge Bibas found that Ross's tool directly competed with Westlaw's market and harmed its potential derivative markets, tipping the scales decisively against fair use. This emphasis on economic substitution resonates with NYT's arguments that AI outputs trained on its articles divert readers and revenue from the original source, though it remains to be seen whether the court in NYT will reach a similar conclusion..

The table below summarizes the key similarities and differences between the cases.



COMPARATIVE ASPECT	NYT V. OPENAI	REUTERS V. ROSS
TYPE OF AI SYSTEM	Generative AI (ChatGPT producing new text)	Non-generative AI (legal research search engine)
TYPE OF COPYRIGHTED MATERIAL	Creative journalistic articles (expressive works)	Editorial legal content (summarizing case law)
NATURE OF USE	Training large language models to generate human-like outputs	Training a search engine to retrieve legal opinions
LEGAL CLAIMS	Copyright infringement; unauthorized reproduction, derivative works, output memorization	Copyright infringement; unauthorized copying of editorial content
FAIR USE DEFENSE	Claiming transformative use as training creates a new tool (AI chatbot) with broader uses	Claiming transformative use because AI processing alters the format for legal search (rejected)
COURT'S VIEW ON TRANSFORMATION	Still undecided (pending litigation)	Not transformative; ultimate purpose remained the same
MARKET IMPACT	NYT claims AI substitutes for original journalism & damages subscription & licensing markets	Court found Ross's tool directly competed with Westlaw & harmed both current & potential markets
BROADER IMPLICATIONS	Key test of how copyright law applies to AI models that generate new creative material	Key test of copyright infringement during AI training & for retrieval-based AI tools
PROCEDURAL STATUS	In active discovery; motions to dismiss pending as of April 2025	Partial summary judgment against Ross; interlocutory appeal pending before 3d Circ.

New York Times v. OpenAI and Thomson Reuters v. Ross Intelligence are two of the most high-profile lawsuits at the intersection of AI and copyright law at the moment, but they are far from alone. Across the United States and globally, a wave of litigation has emerged as courts begin confronting the many challenges that artificial intelligence poses to existing legal frameworks. Several artists and authors, including Sarah Silverman, Christopher Golden, and Richard Kadrey, have filed class action lawsuits against OpenAI and Meta Platforms, alleging unauthorized use of their copyrighted works in training AI models. Similarly, Getty Images sued Stability AI, the creator of the image-generation tool Stable Diffusion, accusing the company of scraping millions of copyrighted images without consent to train its generative AI system.

These parallel lawsuits raise several common questions: Is the ingestion of massive, copyrighted datasets to train AI permissible under fair use? Can AI companies argue that transformative outputs

justify unlicensed training? Or must they seek explicit authorization and licensing from rights holders? Although the factual contexts differ, ranging from written works to visual media, the core legal issues are similar.

Taken together, these cases suggest that courts are only beginning to map the legal boundaries for AI development. The NYT and Ross cases offer early but important guideposts, yet future rulings, particularly those addressing visual arts and creative industries, could significantly influence how broadly copyright protections extend in the AI age. Courts' decisions in these cases will either reinforce the necessity of licensing and consent or open the door to a broader interpretation of fair use in the context of machine learning.

Impact on the Art World and Creative Industries

Both cases also have significant implications for artists and creatives. If courts impose strict requirements for licenses when copyrighted materials are used for AI training, it could empower artists, writers, and publishers to demand compensation when their works are ingested by AI systems. This would align with recent efforts by visual artists to protect their works from being used without consent, including through litigation and non-legal tools like *Nightshade* and *Glaze* designed to shield artworks from AI scraping.

Conversely, if broad fair use defenses succeed, it could erode the ability of individual creators to control how their works are used in the training of AI systems, opening the door for widespread uncompensated use. In the art world, this could lead to significant market disruption, especially for illustrators, writers, photographers, and designers whose styles and works could be replicated by generative models without authorization.

The Ross case shows that even non-generative AI systems, like search engines or specialized databases, can be held liable for infringement if they copy editorial content during training. This principle could easily extend to AI systems that learn from large datasets of images, songs, or other creative works, making these rulings central to the future legal landscape for AI and the arts.

Will Congress Act? Potential Legislative Responses to AI and Copyright

As courts begin to address these complex questions, lawmakers are considering whether legislative action is needed to address the challenges AI poses to copyright law. Several proposals under discussion involve establishing a compulsory licensing regime for AI training datasets, similar to how licensing works in the

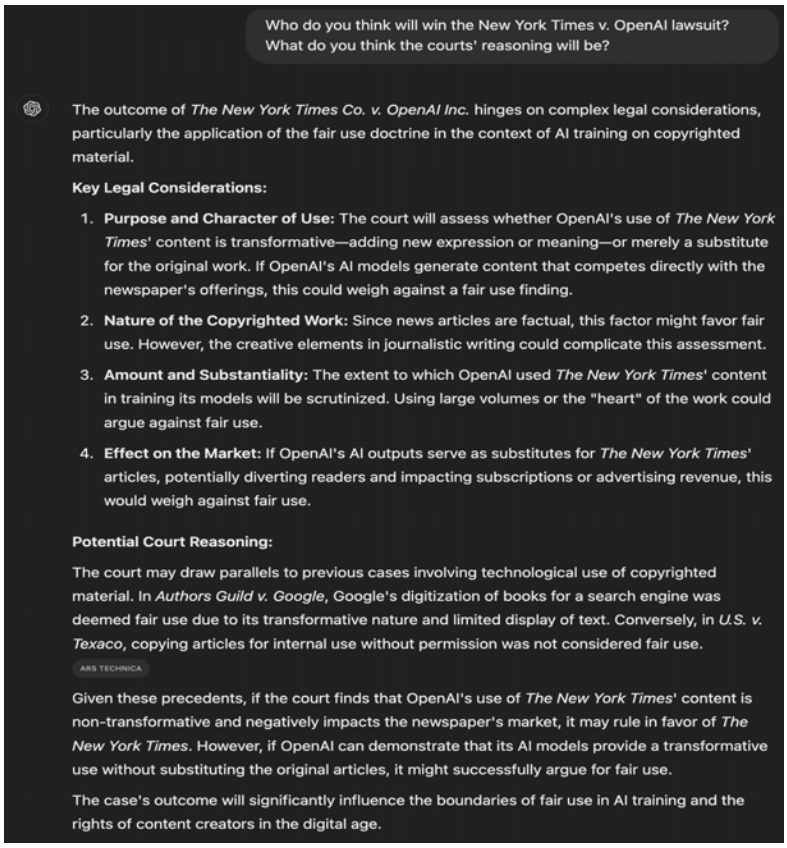
music industry. Under such a system, AI companies would be required to pay standardized fees to use copyrighted material for training, reducing the uncertainty and costly litigation.

Other proposals suggest creating specific exemptions for certain types of AI training under tightly controlled conditions, or requiring transparency obligations that would force AI developers to disclose what datasets were used and to allow rights holders to opt out. For instance, the Generative AI Copyright Disclosure Act, introduced in April 2024, would mandate AI companies to submit notices to the Register of Copyrights detailing the copyrighted works used in training their models at least 30 days before releasing new or updated versions of the AI systems. This bill aims to enhance transparency without directly banning the use of copyrighted works for AI training.

In 2024, the U.S. Copyright Office initiated a comprehensive study on the intersection of copyright and artificial intelligence. As part of this initiative, the Office released Part 1 of its report in July 2024, focusing on digital replicas, and Part 2 in January 2025, addressing the copyrightability of AI-generated works. The Office concluded that existing copyright laws are generally flexible enough to accommodate AI advancements and, as of now, does not see an immediate need for legislative amendments. However, it emphasized the importance of ongoing monitoring and analysis of AI's impact on copyright law.

The outcomes of these cases could heavily influence the direction of any legislative initiatives. A strong judicial affirmation of copyright protections may encourage Congress to codify new rights for authors and creators in the AI training context. Alternatively, if fair use defenses prevail broadly, lawmakers may feel greater pressure to clarify or restrict the doctrine’s application to AI technologies. Either way, the need for an updated, clear legal framework to address AI’s impact on intellectual property remains a subject of *very* active discussion.

Conclusion



Conversation with ChatGPT on the *NYT v. OpenAI* lawsuit using GPT-4 model

NYT v. OpenAI and Thomson Reuters v. Ross Intelligence are definitely at the frontlines of a transformative moment for copyright law, creativity, and AI. Together, they frame the emerging legal questions: Can AI companies freely mine the creative output of others to promote technological innovation, or are licenses needed? Can fair use adapt to a world where machines learn from massive, copyrighted datasets, or must copyright law be amended to regulate this type of training? The rulings in these cases will impact the art world and creative industries at large. They will help determine whether creators can retain economic agency over their works in the AI era or whether AI systems will be permitted to exploit human creativity without recompense.

Courts now face the challenge of balancing the constitutional purpose of copyright, to promote the progress of science and the useful arts, against the unprecedented capabilities of AI technologies, which are continuously evolving, as we type and read.

BIBLIOCLASM FOR PROFIT: THE LEGAL IMPLICATIONS OF DISMEMBERING WESTERN MEDIEVAL ILLUMINATED MANUSCRIPTS

Carla Rossi[1]

To the memory of Prof. Martin Aurell (1958–2025), a fearless advocate for the preservation of Western medieval manuscripts and a staunch proponent of the Organisation pour la Protection des Manuscrits Médiévaux in Paris, which is dedicated to reconstructing manuscripts destroyed by biblioclasts and defending medieval written heritage.

Cover Image Credit[2]

[1] Prof. Carla Rossi is a philologist and art historian specializing in Old French, Italian, and Latin textual traditions, manuscript culture, and the digital reconstruction of dismembered codices. Active in Romance philology and manuscript studies since the early 1990s, she holds a PhD in Romance Philology and two *veniae legendi* (post-Doc habilitationes) in medieval Italian literature and in the literatures of French langue d'oc and d'oïl. She regularly collaborates with European universities, where she teaches courses on the philological reconstruction of dismembered manuscripts. She is co-director of the Institut d'Estudis Filològics i Dantescos in Barcelona and works with international initiatives on manuscript restitution and provenance studies. Her recent publications include *Beyond the Margins: Female Illuminators in Medieval and Renaissance Europe* (Ethics International Press, 2025), *The Love Knot: The Book of Hours of Hendrik III van Nassau and Mencía de Mendoza* (Imago Srl, 2025), and the monograph *The 1879 Theft of Royal Ms 16 E VIII from the British Museum: Wars and Tolkien's Teacher's Role* (Cambridge Scholars Publishing, 2024). ORCID iD: 0000-0001-6557-3684. The author is grateful to Franco Langher, former Anti-Mafia Prosecutor at the Public Prosecutor's Office of Messina and Professor of Economic Law, for his invaluable insights on Italian regulations concerning the dismemberment and illicit trafficking of Western medieval manuscripts.

[2] Dismembered Books of Hours: Comparative Views of Intact Codices and Excised Leaves: This composite image presents three illuminated Books of Hours that were dismembered in recent years and sold leaf by leaf. Each row juxtaposes an intact codex—as it appeared in auction or dealer catalogues—with one or more excised leaves later listed individually on the rare book market. Bottom: Book of Hours of the De Ponthieu family, formerly intact (auction listing), now dispersed; a calendar leaf is currently listed here.
Top: Book of Hours for the Use of Rouen, illuminated by Robert Boyvin, digitally reconstructed in *Digital Reconstruction of a Dismembered Book of Hours Illuminated by Robert Boyvin* (Cambridge Scholars Publishing, 2024). Middle: Book of Hours of Isabelle Boursier, reconstructed and analyzed in *Isabelle Boursier's Book of Hours* (Cambridge Scholars Publishing, 2024). Composite image assembled by the

Abstract

This article examines the deliberate dismemberment of Western medieval manuscripts for financial gain, its impact on the antiquarian trade, and its consequences for medieval studies. While historically linked to ideological repression, biblioclasm has become a lucrative practice driven by market demand, provenance manipulation, and legal infringements.
Through case studies from different jurisdictions, this study investigates breaches of international and national regulations, the role of auction houses and scholars in legitimizing this practice, and instances where diplomatic efforts and institutional actions have led to the recovery of single excised leaves. It also explores connections with theft, illicit trafficking, forgery, and the fencing of stolen cultural property, exposing the systemic mechanisms that sustain the trade in illuminated manuscript leaves. Additionally, it considers the impact on medieval studies, including the loss of textual and codicological integrity, the dispersal of historical evidence, and the challenges of digitally reconstructing dismembered manuscripts. The findings underscore the role of legal frameworks, international cooperation, and academic engagement in safeguarding manuscript heritage, ensuring its preservation and accessibility for future generations.

Keywords

Biblioclasm, manuscript dismemberment, illicit trade in cultural property, forgery and provenance manipulation, auction houses and due diligence, international cultural heritage law, restitution and manuscript recovery, medieval and Renaissance manuscript heritage

Introduction

Biblioclasm[3]—the intentional destruction of books and manuscripts—has traditionally been associated with ideological repression, censorship, and the eradication of the cultural identity of perceived adversaries. Yet as Western societies increasingly succumb to a form of cultural autophagy, biblioclasm has also taken on a commercial dimension, further entangling its political and religious implications within the antiquarian trade. Closely intertwined with theft, illicit trafficking, the fencing of stolen cultural property, and forgery, this practice is not driven by ideology but by profit. A civilization that devours its own memory severs the very ties that grant it coherence. Cultural heritage is not merely lost but deliberately consumed, piece by piece. This destructive process has led to the irreversible loss of medieval manuscripts

Organisation pour la Protection des Manuscrits Médiévaux (OProM) for scholarly purposes, based on publicly available auction reproductions and dealer listings. © OProM, 2025. Image used with permission.

[3]The term derives from the Greek words *biblion* (βιβλίον), meaning "book," and *klasis* (κλάσις), meaning "breaking" or "destruction." It thus literally identifies the "destruction of books," including those produced before the advent of printing, which are referred to as manuscripts, or codices. The word *manuscript* itself comes from the Latin *manu scriptus*, meaning 'written by hand.' A manuscript is a handwritten document, typically produced on parchment or paper, before the widespread adoption of movable-type printing in the mid-15th century. Each manuscript is unique, often containing illuminations and textual variations that reflect the practices of individual scribes and the cultural context in which it was created.

illuminated by renowned artists, thereby precluding the reconstruction of their complete œuvre—an issue of particular significance in the case of female artists, whose contributions are already poorly documented, as examined in *Beyond the Margins: Female Illuminators in Medieval and Renaissance Europe* (Rossi, 2025, 63-72). This phenomenon has also led to the disappearance of rare liturgical texts, exceptionally scarce vernacular romances, legal and scientific treaties, astrological and botanical works, historical chronicles, philosophical and theological texts, and choir books, severing crucial connections to the intellectual and artistic traditions that shaped European culture. The loss of these manuscripts is particularly significant, as they represent a fundamental pillar of Western thought, forming the foundation of modern knowledge systems. Unlike printed books, which exist in multiple copies, each medieval manuscript is a unique artefact of immense textual, artistic, and historical significance. Their destruction disrupts the broader intellectual continuum that connects Western contemporary scholarship to its roots.

From the Victorian era onwards, dealers such as Léon Gruel (1841–1923), Gabriel Wells (1862–1946), and Otto Ege (1888–1951) capitalized on the fact that the dismemberment of illuminated manuscripts was far more profitable than the sale of intact codices. However, their methods differed significantly. Léon Gruel typically took a manuscript of over three hundred leaves and subdivided it into at least three smaller volumes, rearranging the folios without regard for their original sequence before selling them to private collectors and institutions in the United States.[4] Otto Ege, by contrast, adopted a different approach. Rather than

[4] As a consequence of this systematic dismemberment, many manuscripts preserved today—particularly in American libraries and museums—exist in an incomplete state, having been sold to North American buyers in the nineteenth century. Often unaware of this practice, these collectors paid considerable sums for what they regarded as authentic medieval ‘relics’. This phenomenon is particularly evident in the case of Books of Hours housed at the Walters Art Museum in Baltimore. One striking example is manuscript W.425, a rare and exquisite artefact. Comprising just 58 surviving folios, it was originally part of a complete opulent, small-format Book of Hours, produced in sixteenth-century Flanders and dismembered in the nineteenth century by the Parisian bookseller Léon Gruel. The surviving leaves were rebound without regard for their original sequence, resulting in a loss of textual continuity. Among the surviving leaves is an illuminated folio featuring the initials H and M, set against a deep purple background and entwined with a lover’s knot. A philological reconstruction, commissioned by Imago Srl

restructuring entire manuscripts, he systematically disassembled them and extracted select leaves from each. These he compiled into small collections, which he predominantly sold to American institutions. The extraction of leaves adorned with illuminations, decorated or historiated initials, and elaborate gold-embellished borders stripped lavishly illuminated manuscripts of their artistic and historical coherence, reducing them to mere commodities and irrevocably compromising their cultural integrity. This practice continues today, though in a far less meticulous manner, with antiquarian dealers openly dismembering medieval manuscripts and selling completely decontextualized individual leaves.

Regulatory restrictions—such as Article 22 of the International League of Antiquarian Booksellers (ILAB) Code of Ethics, which unequivocally states that *Members are committed to the preservation of historical materials and should not break complete and intact copies of books or manuscripts*—play a crucial role in protecting this form of cultural heritage.

> The absence of affiliation with ILAB may suggest a lack of professional integrity, yet the reality remains that platforms like eBay offer no oversight. There, dealers shielded by pseudonyms can sell almost anything without accountability.[5]

Though less overtly politicized, this economically driven form of cultural vandalism remains a profoundly insidious practice. Despite its equally devastating consequences, it receives

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of Rimini—a distinguished publisher of luxury facsimiles that assigns its commentaries to specialists—was requested from the author of this article and resolved this long-standing mystery (Rossi 2025, *The Book of Hours of Hendrik III van Nassau and Mencía de Mendoza*, Imago Srl, URL: https://books.google.ch/books/about?id=5opJEQAAQBAJ&redir_esc=y All hyperlinks referenced in this article were last accessed on 15 March 2025). These inquiries revealed that the H&M Book of Hours, from which W.425 originates, was produced between 1530 and 1538 in the workshop of Simon Bening, one of the most renowned illuminators of the Flemish Renaissance. Commissioned by Mencía de Mendoza—one of the most erudite and influential noblewomen of the European Renaissance—the manuscript was created for her husband, Hendrik III van Nassau. A handwritten note on fol. 20v, originally the final folio, confirmed that the volume, still intact at the time, was recorded in Valencia on 22 June 1585. This note, which had not been correctly interpreted until it was deciphered by the author of this article, was inscribed by Juan Vidal, a censor of the Inquisition. For a detailed analysis of this discovery, see Carla Rossi, *La filologia al servizio della storia del manoscritto W425 di Baltimora*, *Theory and Criticism of Literature & Arts*, 8/2 (2024), pp. 24–35 https://chatgpt.com/c/67d28f15-9ee8-8000-be98-2934411f066d. This case illustrates the lasting consequences of manuscript dismemberment. Commercial pressures have eroded the integrity of these cultural artefacts and obscured their historical narratives.

[5] Puig, 2025, 12.

remarkably little attention in legal and art historical discourse, as it is often shielded by market interests.

> The failure to address this phenomenon within broader discussions of biblioclasm is striking. A recent event at the Bibliothèque nationale de France, titled *Détruire le livre* ("Destroying the Book") and held on 26 November 2024, serves as a revealing example of how biblioclasm is often framed primarily in terms of ideological destruction, while economically driven biblioclasm remains largely overlooked.[6]

While ideological biblioclasm is universally condemned, its commercial counterpart persists, driven by market interests and, at times, enabled by academic leniency. This complicity is particularly evident in the role played by certain scholars who provide expertise for auction houses. Provenance is often presented with deliberate ambiguity and frequently disseminated through self-referential online websites that obscure the origins of excised manuscript leaves while lending them an appearance of legitimacy. These sources, often maintained by individuals with vested interests in the trade, lack rigorous scholarly validation but are nonetheless cited in auction catalogues and private sales, reinforcing a cycle in which excised folios are legitimized through repetition rather than evidence.

A significant issue in manuscript studies is the misclassification of recently excised leaves as "fragments," a practice that obscures their origins and normalizes the destruction of manuscripts. This terminological distortion not only falsifies the historical record but also risks legitimizing the commercial dismemberment of manuscripts. The use of the term *fragment* can further serve to obscure the illicit provenance of excised leaves, masking instances of theft, illegal trafficking, forgery, and the fencing of stolen cultural property. As will be demonstrated

[6] Puig, 2025, 6.

in the case studies examined in this article, biblioclasm for profit is frequently intertwined with these illicit practices.

A clear distinction must be drawn between naturally occurring manuscript fragments and leaves deliberately excised for commercial gain. In manuscript studies, a *fragment* typically refers to a portion of a codex that has been separated due to natural deterioration, accidental damage, or historical reuse of parchment. Although incomplete, such genuine fragments retain traces of their original context and provide valuable insights into manuscript production, textual transmission, and scribal practices.

This imprecise use of terminology has far-reaching consequences, as it not only distorts our understanding of the material heritage of the past but also enables the reframing of excised manuscript leaves as independent collectables, detaching them from the cultural narratives they once embodied.

The scholarly community has a responsibility to confront the mechanisms that facilitate biblioclasm for profit. Rather than overlooking or passively accepting the dismemberment of manuscripts,[7] it must take a firm stance against misleading classifications and work to expose

[7] The facilitation of biblioclasm for profit is not confined to the physical dismantling of manuscripts but also encompasses the marginalization of those who seek to critically examine its mechanisms. Scholars and researchers investigating the provenance of excised folios, scrutinizing the narratives constructed around them, or addressing potential conflicts of interest within the trade may themselves become the target of professional and personal attacks. Such efforts are often aimed at discrediting critical voices and preserving the status quo. In the summer of 2022, the author of this article submitted a complaint to the Italian Carabinieri Command for the Protection of Cultural Heritage (TPC), reporting a network engaged in the illicit acquisition, dismemberment, and commercialization of medieval illuminated manuscripts. The complaint outlined how certain antiquarian dealers, in collaboration with academic and institutional actors, facilitated these activities, which pose significant risks to cultural heritage. Following the publication of research that examined these practices, the author became the subject of a sustained campaign of defamation and harassment, which also extended to her colleagues, students, and collaborators. This campaign, which persisted for over two years, employed online and offline strategies to discredit her work and professional standing. Defamatory articles were commissioned and disseminated across multiple digital platforms, while anonymous social media accounts propagated false allegations and engaged in targeted attacks. These efforts sought to isolate the author within the academic community by contacting colleagues and former publishers to undermine her reputation.
Beyond professional defamation, the attacks took on a personal and gendered dimension. The author and her family, including her daughters, received threats of physical violence. Over two years, the author endured death threats, while her Wikipedia entry was repeatedly vandalized with a fabricated date of death, leading to intervention by Wikipedia administrators. The severity of this campaign escalated with the publication of two false obituaries online, in what appeared to be an act of psychological intimidation. The campaign was further amplified by the involvement of certain journalists who republished identical defamatory content across multiple online platforms, contributing to its broad circulation. The coordinated nature of these actions raises concerns regarding the role of certain media actors in reinforcing commercial interests within the antiquarian trade. A legal case in Italy has since established the involvement of certain academic figures in the defamation campaign, including

the economic interests that sustain this practice. Ensuring that manuscript heritage is protected for future generations requires both critical engagement with terminology and a broader commitment to ethical stewardship.

It is therefore imperative that scholars and institutions adopt precise and ethically responsible language in cataloguing,[8] conservation policies, and curatorial decisions. A rigorous approach to classification helps to prevent further losses and to reinforce the broader commitment to manuscript preservation.

Acknowledging the historical and cultural significance of intact manuscripts strengthens the case for ethical collecting practices and the preservation of these works in their original form whenever possible.

The legal framework governing medieval manuscript preservation is shaped by a combination of international regulations and national legislations, which, while varying in scope and enforcement, offer important safeguards. These differences present challenges but also opportunities for strengthening and harmonizing protective measures to ensure a more consistent approach to their preservation.

Cultural heritage is regarded as a collective asset in much of Europe, where medieval manuscripts, like all artefacts exceeding fifty or, in some jurisdictions, one hundred years in age, are classified as historical assets and are therefore subject to state protections, restrictions

members of the *Società Internazionale di Storia della Miniatura*, based in Naples, as well as individual scholars who operated under pseudonyms. This ruling highlights the extent to which segments of the academic community have, knowingly or unknowingly, contributed to efforts aimed at discrediting research that interrogates commercial interests in the trade of medieval manuscripts.

Concerns have also been raised regarding the role of the Swiss National Science Foundation (SNSF), which funds the Fragmentarium platform, a project whose approach to detached manuscript leaves has been the subject of critical analysis. The author's findings are discussed extensively in Puig 2025b, which documents the chronology and coordinated nature of the campaign, alongside its institutional implications.

Despite these pressures, the author has continued her academic work and has received strong support from institutions and scholars internationally. The affair has contributed to a heightened awareness of the ethical and legal issues surrounding manuscript dismemberment and has reinforced calls for stronger protections for cultural heritage in both national and international frameworks.

[8] A striking example of this complicit use of imprecise terminology is the website *Fragmentarium.ms*, which will be discussed in greater detail below.

on sale, or export controls, even when privately owned. This reflects the broader principle that such items serve a social function and, in a cultural sense, belong to the community—a concept that gained prominence after the French Revolution when cultural property came to be viewed as part of the public domain.

In countries governed by civil law (such as France, Italy, or Spain), such protections are codified within statutory frameworks that explicitly regulate ownership, trade, and export. By contrast, common law jurisdictions (such as the United Kingdom, the United States, Canada, and Australia) rely more heavily on case law and contractual agreements, which can lead to a more fragmented and market-driven approach to manuscript preservation. Despite these differences, the systematic dismemberment of Western medieval and Renaissance illuminated manuscripts for the commercial sale of individual leaves constitutes a form of cultural vandalism. This practice is regulated in various jurisdictions through legal frameworks that govern the trade and preservation of manuscript heritage.

Strong legislation, such as the Italian legal framework that we will examine in detail—responsible for significant recoveries and repatriations of cultural artefacts—serves as a critical deterrent and a potential model for other countries seeking to strengthen the protection of Western medieval manuscript heritage.

This article examines the legal frameworks governing biblioclasm for profit and assesses their effectiveness. Through an analysis of case studies from different jurisdictions, it investigates violations of international and national laws, the illicit circulation of dismembered manuscript heritage, and instances where legal action has successfully led to recoveries.

The Legal and Ethical Implications of Dismembering and Selling Medieval Manuscripts Across Different Jurisdictions and Case Studies

In jurisdictions following the civil law tradition, dismantling an antiquarian book or manuscript for financial gain constitutes an offence against cultural property, as it irreversibly compromises the work's integrity and historical significance. This act frequently involves stolen material, making theft the predicate offence that triggers a series of further crimes, including forgery, handling of stolen goods, and illicit exportation. These offences fall within the broader category of crimes against cultural heritage and are central to illicit trafficking networks that exploit bibliographic patrimony. When unlawfully transferred across borders, illicit exportation facilitates the dispersion of these works, significantly complicating recovery efforts.

From both a legal and preventive perspective, the movement of cultural property plays a crucial role in safeguarding antiquarian books, which are explicitly recognized as part of this category. The competent authorities are responsible for overseeing such movements to prevent unlawful exportation and the consequent permanent loss of these works. Various legal frameworks have been established at international, regional, and national levels to address the illicit trade in cultural property.

The export of antiquarian books and manuscripts is governed by a well-established international and regional legal framework designed to protect heritage materials. A cornerstone of this system is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, adopted in Paris on 14 November 1970 and ratified by 132 States. The convention defines cultural property to include rare manuscripts, incunabula, antiquarian books, documents, and publications of particular historical, artistic, scientific, or literary significance, whether individually or as part of collections. It establishes clear principles for the prevention of illicit

trade and mandates signatory states to adopt appropriate measures, including criminal or administrative sanctions, to safeguard cultural heritage.

Complementing this framework, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects provides mechanisms for restitution, reinforcing international cooperation and legal certainty in cross-border claims. It sets out provisions that facilitate the return of unlawfully exported objects and clarify ownership rights, ensuring a structured legal process for recovery efforts.

At the European level, Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State strengthens legal instruments for heritage protection within the European Union. The directive enhances cooperation among Member States and streamlines procedures for the return of cultural goods, including manuscripts, per established legal principles.

Through this comprehensive legal framework, international and regional regulations play a fundamental role in safeguarding antiquarian books and manuscripts, ensuring provenance verification, responsible trade practices, and the protection of cultural heritage.

In summary, civil law jurisdictions impose strict legal provisions on the export and sale of cultural property, requiring due diligence in transactions and enforcing clear restrictions on the dismemberment and unauthorized trade of manuscripts. These regulations aim to preserve the integrity of heritage materials and curb their unlawful circulation.

In contrast, common law systems—particularly those of the United Kingdom, Australia, and the United States—place a stronger emphasis on individual property rights. Privately owned cultural objects are generally treated as personal assets, with fewer legal constraints on their sale, transfer, or alteration. As a result, manuscripts of Italian, French, and Flemish origin—despite being subject to robust protections in their countries of origin—often enter jurisdictions where such regulatory mechanisms do not apply. Many of these manuscripts,

stolen or illegally exported, are smuggled into the United Kingdom and the United States, where they are more easily dismantled and sold as individual leaves.

This situation is particularly evident on eBay, where significant volumes of bibliographic heritage, including looted books and manuscript leaves, are openly traded. Although the platform's official policies explicitly prohibit the sale of stolen cultural property, enforcement remains inconsistent. According to eBay's Stolen Property Policy:

> The sale of stolen property is not allowed on eBay.
>
> The sale of stolen property violates state, federal and international law, and we will work with law enforcement in any attempts to sell stolen property on eBay.
>
> Stolen property from private individuals or property taken without authorization from companies or government cannot be listed for sale. If you see stolen property on eBay, please contact local law enforcement immediately.[9]

Despite these clear prohibitions, numerous stolen cultural artefacts, including books and manuscript leaves, continue to be listed and sold.[10]

The sale of stolen goods, particularly antiquarian manuscripts, is not the only violation occurring on eBay. In the following pages, we will document a striking case involving a serial manuscript dismemberer who uses eBay as a decoy to attract buyers. This individual directs potential customers to clandestine auctions featuring illuminated folios, conducted outside the eCommerce platform.

eBay's policies explicitly prohibit such activities. According to their guidelines:

[9] https://www.ebay.com/help/policies/prohibited-restricted-items/stolen-property-policy?id=4334

[10] The most recent case of a stolen historical manuscript being sold on eBay involves the *Catasto ordinato dalla Sacra Congregatione del Buon Governo*, which was unlawfully removed from the Archivio di Stato in Rome and listed for sale on the well-known e-commerce platform. However, the manuscript was successfully recovered by the Nucleo Carabinieri Tutela Patrimonio Culturale of Rome and returned to the Director of the State Archives on 4 March of this year.
For further details, see: https://latpc.altervista.org/category/comando-carabinieri-tutela-patrimonio-culturale/

> Offering to buy or sell outside of eBay is not allowed. Buyers and sellers also can't share contact information, including email addresses and phone numbers, prior to completing a transaction on eBay.[11]

Such actions not only breach eBay's policies but also contravene national and international laws. In the absence of rigorous provenance checks and systematic monitoring, eBay continues to serve as a major marketplace for the trade in cultural property that would be subject to substantial legal restrictions.

Germany and Switzerland as Key Hubs for Manuscript Dismemberment: Legal and Market Factors

A combination of permissive legal frameworks, a decentralized system of cultural heritage regulation, and a well-established antiquarian market has positioned Germany as a major hub for the dismemberment of medieval manuscripts. One of the primary contributing factors is the fragmented nature of its legal protections for cultural property. Since heritage laws are determined at both the federal level and by individual *Länder*, there is no uniform national policy safeguarding historical manuscript integrity. While some federal states impose stricter controls, others maintain more lenient regulations, allowing manuscripts to be freely traded, sold, and exported with minimal bureaucratic oversight. This decentralized structure contrasts sharply with the more centralized and interventionist approaches adopted in France, Spain, and Italy, where national institutions actively monitor and regulate the movement of cultural property.

[11] https://www.ebay.com/help/policies/payment-policies/offers-buy-sell-outside-ebay-policy?id=4272

The country's long-standing antiquarian market further facilitates manuscript dismemberment. Prominent auction houses—including Kiefer Rare Books, Pforzheim; Hartung und Hartung, Reiss & Sohn, and Zisska & Lacher—regularly offer individual manuscript leaves, often without stringent provenance verification.[12] Unlike in jurisdictions where auction houses must conduct more rigorous due diligence, the legal framework in Germany permits a more flexible interpretation of provenance standards, thereby enabling the circulation of illuminated manuscript leaves of uncertain or illicit origin.

Export regulations remain relatively permissive as well. Although the 2016 *Kulturgutschutzgesetz* introduced stricter measures to prevent the loss of significant cultural artefacts, manuscripts frequently fall below the financial thresholds that would subject them to export controls. As a result, smuggled or unlawfully acquired manuscripts can enter the country, be dismembered, and subsequently dispersed through international markets without triggering regulatory intervention.

The financial incentives for dismemberment are considerable, as individual leaves often command significantly higher prices than intact codices. This economic reality, combined with legal loopholes and inconsistent enforcement, has made Germany a focal point for the dismantling and global dispersal of medieval manuscripts within the antiquarian trade.

[12] A notable case is that of a rare manuscript by Nostradamus, stolen from the General Library of the Centre for Historical Studies of the Barnabites in Rome and put up for sale in Pforzheim in 2021. One of the pages displayed on the auction house's website revealed the presence of a stamp from the "Biblioteca SS. Blasi Cairoli del Urbe", a library incorporated into the General Library of the Barnabite Fathers in 1991. Following a request for legal assistance issued by the Italian judicial authorities to their German counterparts, the auction was halted, and the manuscript was placed under police custody in Stuttgart, pending its repatriation. The return of the manuscript was facilitated through a European cooperation mechanism between the Italian Ministry of Culture and its German counterpart.
During the same proceedings, a 16th-century illuminated parchment, originally part of a Missal by Ludovico da Romagnano, was also repatriated from Germany to Italy. This Missal had been stolen from the archives of the Episcopal Curia of Turin in 1990 and subsequently dismembered.
In 2022, both the Nostradamus manuscript and the missal leaf were officially returned to their respective institutions, with the Nostradamus volume restored to the head of the General Library, Father Rodrigo Alfonso Nilo Palominos.
https://grifoneartigliopenna.com/2022/04/24/beni-storici-che-tornano-in-italia-e-accordo-tra-carabinieri-tpc-e-iit-istituto-italiano-di-tecnologia/. All hyperlinks referenced in this article were last accessed on 15 March 2025.

Switzerland's legal framework on cultural heritage differs significantly from both the continental European model and the Anglo-Saxon approach. Although the country is a signatory to major international conventions on cultural property protection, including the 1995 UNIDROIT Convention and the 1970 UNESCO Convention, its domestic regulations on privately owned medieval manuscripts remain relatively permissive. This has positioned it as a key hub in the antiquarian trade, where the commercialization and dismemberment of codices are common practices.

Unlike in countries such as Italy and France, where national heritage laws impose automatic restrictions on the sale, export, or dismemberment of significant cultural artefacts, Swiss legislation does not systematically classify medieval manuscripts as protected heritage unless they have been formally designated as such. As a result, private owners can freely sell, trade, or dismember manuscripts unless specific cantonal or federal restrictions apply—an uncommon occurrence.

The country's role as an international center for the trade in art and antiquities has further reinforced its prominence in the manuscript market, particularly in the sale of excised leaves. Auction houses such as Koller Auctions in Zurich and Dr. Jörn Günther Rare Book have played a significant role in the dispersion of manuscript leaves. Since there are no stringent legal requirements for provenance verification, dealers and auction houses often handle material of uncertain or dubious origin with minimal regulatory oversight.

Export and import laws governing cultural objects are also relatively lenient compared to neighboring countries. While the Federal Act on the International Transfer of Cultural Property (CPTA, 2005) regulates imports, exports, and restitutions, medieval manuscripts and manuscript leaves frequently fall outside the thresholds that would trigger protection under this law — for example, they may not meet the minimum market value or may not be included in the categories listed in official inventories or bilateral agreements. As a consequence, stolen or

illicitly exported manuscripts from Italy, France, and Spain frequently pass through Swiss dealers and auction houses before reaching the international market.

The country's strong manuscript collecting tradition, coupled with a legal framework that grants private owners considerable freedom, has further fueled the market for manuscript leaves.

Case Study: A German Historical Prayer Book

As seen, Germany remains a *terra nullius* when it comes to the protection of medieval manuscripts. The practice of biblioclasm is particularly damaging not only to manuscripts of foreign origin but also to Germany's medieval heritage, as even manuscripts of extraordinary historical value—true museum pieces—are not spared, as demonstrated by the case of the Mansfeld Prayer Book, also known as the Hildesheim Psalter.

Originally comprising 183 folios measuring 165 × 131 mm, the manuscript was written in chancery script, with 20 to 25 lines per folio. Its heraldic decoration featured a coat of arms divided into eight sections, with each half containing a repeating pattern: a rampant lion facing right on a red background with dots, a notched red cross on a yellow field, three brown hills on a yellow background, and a white fleur-de-lis on a blue field. Once a remarkable example of German manuscript heritage, the codex has since been dismembered and dispersed, with its leaves scattered across various collections worldwide.

The original, intact manuscript was once in the possession of the Linel brothers, Michael (1830–1892) and Albert (1833–1916), and formed part of the Linel Sammlung (Linel Collection) in Frankfurt am Main. In 1892, it was acquired by the city of Frankfurt for the Kunstgewerbemuseum, where it entered the museum's manuscript collection under the reference Linelsammlung, LM 39. A detailed description is provided in *Die illuminierten Handschriften und Einzelminiaturen des Mittelalters und der Renaissance in Frankfurter Besitz*

(Frankfurt, 1929), no. 151, pp. 181–83,[13] with plate LXV offering additional visual documentation. The Prayer Book included two instances of the date 1524, which appeared within its decorative borders (ff. 61v and 74, see Fig. 1).

Additionally, folio 45v featured an angel holding a shield emblazoned with the Mansfeld coat of arms, confirming its connection to the noble family. The research conducted by the author of this article has revealed that a specific branch of this family, that of Hoyer VI von Mansfeld, remained Catholic during the height of the Lutheran Reformation.[14]

This is particularly significant, as Saint Egidius[15] appeared rubricated in the manuscript's calendar—a detail confirmed through the codex reconstruction project I conducted alongside a team of my students.[16]

By the mid-16th century, the manuscript had been taken to Belgium, where rubrics in French were added (Fig. 2), along with the coat of arms of Adrienne de Louvignies on f.1, marking a significant stage in its ownership history.[17]

In the 19th century, Count d'Aspremont-Lynden inscribed his signature in the volume, further attesting to its later provenance.

In 1987, the manuscript was auctioned at Sotheby's, where it was sold for £60,000 plus a 10% commission. A decade later, still intact, it reappeared on the market, offered at auction by the Basel-based dealer Jörn Günther and Bruce "Scissorhands" Ferrini,[18] a notorious biblioclast

[13]https://sammlungen.ub.uni-frankfurt.de/kataloge/content/pageview/6491889

[14] *Riconoscere e contrastare la biblioclastia a scopo di lucro*, in press in the series SALPA Salvaguardia Patrimonio, Alta Formazione Editrice, Rome, 2025, 30-55.

[15] Hoyer, like Ogier, is a Germanic adaptation of the Latin Aegidius, a name widely associated with the veneration of Saint Giles. Given this linguistic link, it is likely that Hoyer von Mansfeld's name reflected a deliberate familial or devotional association with the saint.

[16] A volume on this reconstruction is about to be published as part of the Alta Formazione Editrice series dedicated to the safeguarding of Western cultural heritage, SALPA.

[17] Adrienne de Haynin de Louvignies belonged to a distinguished noble family. She was the daughter of Ghislain, Chevalier, and Jeanne de Hun, and the sister of Yolande de Haynin. She made her will on 23 July 1598, leaving behind a significant documentary record that contributes to the broader understanding of her lineage and the manuscript's journey through time.

[18] Bruce "Scissorhands" Ferrini (1950–2010) was an American antiquities and rare manuscript dealer whose notoriety stemmed from his involvement in the illicit trade of historical documents and biblical manuscripts. The moniker *Scissorhands*—bestowed upon him by his own collaborators—reflected his well-documented practice of

dealer. Shortly thereafter, its leaves began to circulate individually, following a pattern observed in several manuscript sales of the period. Some of these illuminated folios remain in private hands, some still held by one of Ferrini's former business associates.

Today, the 183 original folios of the Hildesheim Psalter are scattered across collections worldwide, with some preserved at The Cleveland Museum of Art (*Jeanne Miles Blackburn Collection*, 2006.15 and 1993.136; see Fliegel 1999, nos. 65–67) and Northern Illinois University Library in DeKalb, IL.

Over the years, folios from this manuscript have regularly appeared on the market. Notably, three leaves, including prayers for St. Oswald of Worcester, were sold at Christie's on 7 December 2004 (lot 29), while a folio featuring a miniature of St. Erasmus appeared at Christie's on 14 December 2022 (lot 32).

More recently, a leaf depicting King David was auctioned at Freeman's and Hindman, Chicago, IL, on 27 June 2024. These sales illustrate the continued dispersal of the manuscript, with its folios surfacing intermittently on the antiquarian market, further complicating efforts to reconstruct its original integrity.

dismantling complete manuscripts and selling their individual leaves for profit. Ferrini played a significant role in the trade of the *Gospel of Judas*, an early Christian manuscript that emerged on the antiquities market in the 1980s. Beyond his role in the vandalization of manuscripts, Ferrini was embroiled in numerous legal and financial disputes. Accusations of fraudulent dealings, including the failure to deliver purchased manuscripts and the misrepresentation of provenance, culminated in bankruptcy proceedings in the early 2000s. His business practices, which prioritized commercial gain over scholarly and ethical considerations, rendered him one of the most controversial figures in the rare book and manuscript trade.

Despite his notoriety, Ferrini's influence on the antiquarian book and art market was considerable. Many rare book dealers and galleries that are now firmly established began their careers within his circle, operating in a commercial environment that often privileged profit over the preservation of historical artefacts. His legacy stands as a cautionary example of the enduring ethical and legal challenges surrounding the trade in cultural heritage, particularly the dismantling and commercialization of manuscript leaves.

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Fig. 1. Illuminated leaf from the *Hildesheim Psalter*. This folio bears the scars of biblioclasm. Along the left margin, clear traces of a blade mark the point where the leaf was cut from its original binding. The ornate border, with its intricate floral motifs, fantastical creatures, and the date 1524 prominently

displayed in a cartouche, speaks to the craftsmanship irreversibly disrupted by this practice.

Fig. 2. Illuminated leaf from the *Hildesheim Psalter*, with French rubrics added in the mid-16th century.

Italy: A Robust Legal Framework with Enforcement Challenges

Among European nations, Italy offers one of the strongest legal protections for manuscript heritage under the Cultural Heritage and Landscape Code (*Codice dei Beni Culturali e del Paesaggio*):

- Article 10(3)(c) explicitly classifies medieval manuscripts as cultural property, even when held in private collections.
- Article 20(1) prohibits the destruction, damage, or misuse of cultural assets in ways that compromise their historical or artistic value.
- Article 30(3) obliges private owners to ensure the proper preservation of manuscripts.

In Italy, cultural property is governed by a legal framework that regulates its ownership, protection, and circulation. The *Decreto Legislativo 22 gennaio 2004, n. 42* (*Codice dei beni culturali e del paesaggio*) implicitly establishes the status of medieval manuscripts as *beni culturali* (cultural assets) *de facto* by defining as such all objects of significant historical, artistic, palaeographical, bibliographical, or documentary value. Given their intrinsic characteristics, medieval manuscripts fall within this legal definition and are therefore subject to the protective measures outlined in the law (*Article 10*). As such, they are automatically subject to state protection, irrespective of whether they have been formally declared of cultural interest.

This means that any transaction involving a medieval manuscript—whether through sale, donation, or export—is subject to strict legal oversight. The unauthorized sale, movement, or alteration of such manuscripts may result in legal consequences, including administrative penalties and criminal liability.

In particular, the dismemberment, illicit sale, or international trafficking of a medieval manuscript constitutes a violation of cultural heritage laws, with both the seller and the buyer being held accountable.

For example, when a manuscript or individual folios appear on online platforms such as eBay without the necessary authorization, the Italian authorities can intervene. If the item is identified as cultural heritage, both the seller and the buyer may face sanctions, as possession of unlawfully traded cultural assets is a punishable offence.

Italian law allows for the seizure and restitution of such manuscripts, as well as fines or, in more serious cases, imprisonment.

Additionally, *Article 60* grants the state a *diritto di prelazione* (right of pre-emption), allowing the authorities to acquire a manuscript before it is transferred to a private buyer. Export restrictions under *Article 65* further require ministerial authorization before any manuscript can be removed from Italian territory.

These legal provisions reflect the principle that medieval manuscripts, regardless of ownership, are part of Italy's cultural heritage and must be preserved in the public interest. Their unlawful sale, dispersal, or export constitutes a legal offence, reinforcing the necessity of strict regulations to prevent the loss of valuable documentary heritage.

This entails precise legal constraints: cultural property cannot be moved, restored, or altered without prior authorization from the competent protection authority, and its sale is subject to the state's right of pre-emption, which allows the authorities the opportunity to acquire the property before it can be transferred to a private buyer. The rationale behind these restrictions is that cultural heritage, even when privately owned, is deemed to be of collective importance and must remain accessible and protected accordingly.

The Italian legal system enshrines the right to private property in both the Constitution and the Civil Code. *Article 42* of the Italian Constitution guarantees private property but subordinates

its enjoyment to the broader principle of "social function", allowing the state to impose restrictions when necessary to safeguard public interests. This principle is reinforced by *Article 832* of the Italian Civil Code, which defines ownership as the right to fully and exclusively enjoy and dispose of property, but always within the limits and obligations established by law:

> *Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico.*
>
> [Translation: The owner has the right to enjoy and dispose of things fully and exclusively, within the limits and in compliance with the obligations established by the legal system].

This legal framework reflects a civil law tradition that does not conceive of property rights as absolute but rather as being subject to regulation to ensure the preservation of cultural heritage for future generations.

By contrast, common law jurisdictions—such as those in the Anglo-Saxon tradition—tend to emphasize the sanctity of private property, often with fewer direct state interventions. However, even in these systems, legal mechanisms exist to protect cultural heritage. In the United States, for instance, the *Native American Graves Protection and Repatriation Act* (NAGPRA) regulates the return of certain cultural objects to Native American tribes and descendants. Additionally, the *Archaeological Resources Protection Act* (ARPA) imposes restrictions on the excavation and trade of archaeological artefacts found on federal and Native American lands.

In the United Kingdom, cultural property is protected under laws such as the *Ancient Monuments and Archaeological Areas Act 1979* and the *National Heritage Act 1983*, which regulate the listing of historic buildings and sites, as well as the export of significant cultural objects. While British law does not impose a general pre-emption right akin to the Italian system, export licensing requirements under the *Export Control Act 2002* serve to prevent the unrestricted sale of important cultural artefacts abroad.

This divergence in legal approaches highlights the different philosophies underlying civil law and common law traditions: whereas the Italian model reflects a historically rooted view of cultural heritage as a collective asset requiring active state intervention, Anglo-Saxon legal systems place greater emphasis on individual property rights, with protections for cultural assets typically arising through specific legislative measures rather than a general principle of state oversight.

The concept of the social function of private property is logically applicable to cultural property, and the reason is quite clear. It is necessary to protect and preserve cultural heritage because it must be known to future generations, essentially to all of humanity, as it belongs to the entire human race. This underpins the concept of access to cultural heritage: access essentially means knowledge. In this sense lies the social value of understanding cultural heritage, including, and perhaps especially, the cultural property that belongs to private individuals. It is no coincidence that the Cultural Heritage and Landscape Code states that:

> *La valorizzazione consiste nell'esercizio delle funzioni e nella disciplina delle attività dirette a promuovere la conoscenza del patrimonio culturale e ad assicurare le migliori condizioni di utilizzazione e fruizione pubblica del patrimonio stesso, anche da parte delle persone diversamente abili, al fine di promuovere lo sviluppo della cultura. Essa comprende anche la promozione ed il sostegno degli interventi di conservazione del patrimonio culturale.*
>
> [Translation: Enhancement consists of the exercise of functions and in the regulation of activities aimed at promoting the knowledge of cultural heritage and ensuring the best conditions for its use and public enjoyment, even by people with disabilities, in order to foster cultural development. It also includes the promotion and support of interventions for the conservation of cultural heritage."][19]

[19] Art. 6 Cultural Heritage and Landscape Code.

If cultural property—whether in private or public ownership—is fundamentally intended to be accessible for collective enjoyment and understanding, then its regulation within the framework of the social function of private property is fully justified. Consequently, legal measures aimed at guaranteeing public access and preservation are both necessary and legitimate.

Antiquarian books and manuscripts, as primary vehicles for the direct transmission of cultural knowledge, fall unequivocally within the scope of cultural heritage protection. Their safeguarding not only ensures their physical preservation but also upholds their role in fostering historical and intellectual continuity.

The preservation and promotion of cultural heritage inherently require a robust legal framework, including criminal law provisions. Recognizing this need, Italy introduced *Legge 9 marzo 2022, n. 22*, which came into effect on March 23, 2022, establishing specific criminal offences related to cultural heritage (*Disposizioni in materia di reati contro il patrimonio culturale*). This law integrated *Titolo VIII-bis*, entitled *Delitti contro il patrimonio culturale*, into the Italian Criminal Code, thereby strengthening protections and imposing stricter penalties for crimes affecting cultural assets.

This legislative development follows Italy's ratification of the *Council of Europe Convention on Offences relating to Cultural Property*, adopted in Nicosia on May 19, 2017, and ratified through *Legge 21 gennaio 2022, n. 66*. Previously, criminal provisions concerning cultural heritage were contained within the *Codice dei beni culturali e del paesaggio* (*Cultural Heritage and Landscape Code*). However, with the reform introduced by the 2022 law, these provisions have been transferred to the Criminal Code to enhance enforcement and deterrence.

Titolo VIII-bis defines and penalizes a range of criminal offences that directly endanger cultural heritage, all of which are classified as *delitti* (serious crimes) and subject to imprisonment and

fines. These provisions explicitly extend to offences involving antiquarian books, manuscripts, and archival materials, including those held in private collections.[20]

Destruction, dispersion, deterioration, defacement, soiling, and unlawful use of cultural or landscape assets (*Distruzione, dispersione, deterioramento, deturpamento, imbrattamento e uso illecito di beni culturali o paesaggistici*);[21] Handling of stolen cultural property (*Ricettazione di beni culturali*).[22]

The phenomenon of biblioclasm, from a legal perspective, manifests through the destruction or deterioration of an antiquarian book or manuscript. Article 518-duodecies of the Criminal Code clearly states:

> *Chiunque distrugge, disperde, deteriora o rende in tutto o in parte inservibili, ove previsto, o non fruibili beni culturali o paesaggistici propri o altrui è punito con la reclusione da due a cinque anni e con la multa da euro 2.500 a euro 15.000.*
>
> [Translation: Anyone who destroys, disperses, deteriorates, or renders, in whole or in part, unusable—where applicable—or inaccessible cultural or landscape assets, whether their own or belonging to others, shall be punished with imprisonment of two to five years and a fine ranging from €2,500 to €15,000].

This legal provision addresses a broad spectrum of illicit activities, including the destruction, dispersal, and deterioration of cultural property. This legal provision addresses a broad range of illicit acts involving cultural property, including the destruction (*distruzione*), dispersal (dispersione), and deterioration (*deterioramento*) of cultural assets. While the Italian Criminal

[20] Further insights into this legislative reform can be found in the analysis published on the *LaTPC* platform: La riforma dei reati in materia di tutela del patrimonio culturale.
[21] Article 518-duodecies of the Criminal Code. Further readings available at: https://latpc.altervista.org/le-nuove-disposizioni-in-materia-di-deturpamento-di-beni-culturali/.
[22] Art. 518-*quater* ivi.

Code does not formally define these terms in technical language, the offence introduced by Article 518-quater identifies them as punishable when committed with intent or awareness that the object in question is of cultural significance.

In this context:

- **Destruction** refers to the irreversible elimination of a cultural asset, rendering it impossible to restore or reintegrate.
- **Dispersal** denotes the severance of a cultural asset from its original, contextual unity — as often occurs when folios are excised from a manuscript and sold individually, making traceability and reintegration exceedingly difficult.
- **Deterioration** applies when damage is so extensive that the asset cannot be meaningfully restored to its original condition.

Criminal liability under Article 518-quater arises regardless of whether the object is publicly or privately owned, provided the perpetrator was aware of its cultural nature. The subjective motive — profit, negligence, or otherwise — is irrelevant under the statute.

However, administrative thresholds established under the Code of Cultural Heritage and Landscape (D.Lgs. 42/2004) determine whether an item is automatically protected or subject to notification and export restrictions.

Manuscripts and detached folios are protected if they are over 70 years old and of significant historical interest, or if they have been declared of cultural interest by the Ministry (Art. 10–12).

In practice, many medieval manuscript leaves escape these thresholds, particularly when:

- sold individually rather than as part of a codex,
- lacking clear provenance, or
- assigned an art-market value below the reporting threshold set for export certificates.

As such, dispersion of manuscript leaves often falls outside the radar of formal protection mechanisms, even when the cultural damage is profound.

Criminal offences affecting cultural heritage typically fall within one of these categories. For liability to arise, the perpetrator must be fully aware that the object in question constitutes a cultural asset and must act with the intent to dismember, damage, or otherwise compromise its integrity. The specific motivation behind the act—whether financial profit or another incentive—is legally irrelevant. Significantly, the law explicitly affirms that these provisions apply regardless of whether the asset in question, such as an antiquarian book or manuscript, is publicly or privately owned.

Additionally, the legislation contains a residual punitive clause, imposing sanctions on anyone who renders a cultural asset, in whole or in part, unusable. This means that criminal liability is established even in cases where the asset has not been physically damaged or destroyed but has been rendered inaccessible, thereby preventing it from fulfilling its role in transmitting knowledge and being available for study or public enjoyment. In practice, financial motives often underpin such offences, at which point the crime of handling stolen cultural property (*ricettazione di beni culturali*) becomes particularly relevant.

It is useful to cite the exact wording of the law governing this offence, i.e., Article 518-quater of the Criminal Code:

> *Fuori dei casi di concorso nel reato, chi, al fine di procurare a sé o ad altri un profitto, acquista, riceve od occulta beni culturali provenienti da un qualsiasi delitto, o comunque si intromette nel farli acquistare, ricevere od occultare, è punito con la reclusione da quattro a dieci anni e con la multa da euro 1.032 a euro 15.000. La pena è aumentata quando il fatto riguarda beni culturali provenienti dai delitti di rapina aggravata ai sensi dell'articolo 628, terzo comma, e di estorsione aggravata ai sensi dell'articolo 629, secondo comma.*

[Translation: Except in cases of participation in the predicate offence, anyone who, with the intent of obtaining a profit for themselves or others, purchases, receives, or conceals cultural property originating from any criminal offence, or otherwise facilitates its purchase, receipt, or concealment, shall be punished with imprisonment of four to ten years and a fine ranging from €1,032 to €15,000. The penalty is increased if the cultural property originates from the aggravated offences of robbery, as defined in Article 628, third paragraph, or extortion, as defined in Article 629, second paragraph.]

The term *ricettazione* (handling stolen property) derives from the verb *ricettare*, which means to provide shelter, concealment, or protection for something. In the context of cultural heritage law, it refers specifically to the unlawful possession, acquisition, or transfer of cultural property, including antiquarian books. This offence is legally complex and, statistically, among the most frequently committed crimes against cultural heritage.

Before examining its constituent elements, it is necessary to establish a fundamental premise. The offence of handling stolen cultural property presupposes the commission of an antecedent crime from which the asset originates, such as theft. For criminal liability to arise, the perpetrator must not have participated in the predicate offence (e.g., theft), as involvement in the original crime would instead result in liability for that offence rather than for handling stolen goods.

The offence is characterized by conduct aimed at acquiring, receiving, or concealing a cultural asset of illicit provenance. Acquisition entails an exchange (*do ut des*) in which the asset is obtained in return for payment; receipt involves the physical possession of the asset; and concealment refers to any act intended to obscure the asset's illicit origin or prevent its recovery.

For criminal liability to be established in cases of handling stolen cultural property, four key elements must be satisfied:

1. The asset in question must be a cultural property that originates from a criminal offence, such as theft.
2. The perpetrator must have knowledge of the asset's unlawful provenance.
3. The perpetrator must be aware that the asset qualifies as cultural property; otherwise, the act would constitute general handling of stolen goods rather than the specific offence related to cultural heritage.
4. The perpetrator must have acted with the intent to obtain a financial or other material benefit, either for themselves or for a third party.

Additionally, the law imposes penalties on those who act as intermediaries in the purchase, receipt, or concealment of stolen cultural assets. The provision also includes an aggravating factor if the cultural property originates from the aggravated offences of robbery or extortion. This analysis demonstrates that Italy has consistently devoted special attention to the protection of cultural heritage. This commitment is evident not only from the international legal instruments incorporated into domestic law but also from the proactive approach of the national legislature in enacting specific and stringent protective measures.

Due to the richness of its medieval manuscript heritage, Italy experiences an exceptionally high rate of cultural property theft, particularly involving books and manuscripts, given the sheer volume of its artistic and historical heritage. Unlike large-scale artworks or archaeological finds, manuscripts are easy to transport, conceal, dismember and sell, making them a prime target for traffickers.[23]

[23] As noted by Virgil Cândea in a 1974 publication edited by UNESCO, "illustrated manuscripts represent a unique and deeply troubling case in the unfortunate history of dismembered artworks. The challenges associated with their reconstitution are among the most formidable, and the achieved results thus far have been rather limited and frequently unsatisfactory" (Candea, 1974, 188). Cândea suggested the creation of what today we would call *databases*, which (he wrote) "will help us in carrying out future reconstitutions. First of all, full documentation on these works is of course indispensable ... we must prepare directories of dismembered illuminated manuscripts".

Many of these objects are housed in provincial libraries, diocesan archives, and monastic collections, where security measures are often inadequate, and cataloguing is incomplete or outdated. This lack of oversight makes it easier for stolen manuscripts to go unnoticed for years, sometimes even decades.

As a result, despite having one of the most stringent legal frameworks for cultural heritage protection, Italy continues to suffer from the widespread theft and dispersion of its manuscript heritage. The combination of an overwhelming abundance of valuable cultural assets, inadequate security, and high international demand sustains a thriving black market, making it exceedingly difficult to track, recover, and restitute stolen manuscripts once they enter the antiquarian trade.

American libraries and museums are among the institutions most vulnerable to the consequences of biblioclasm, as they frequently acquire excised manuscript leaves in good faith, relying on expert attributions and the provenance assurances provided by major auction houses and leading antiquarian dealers. However, when these acquisitions are later revealed to have illicit origins, institutions often find themselves entangled in legal disputes and subject to diplomatic pressure to repatriate cultural property.

This recurring cycle not only exposes them to financial and reputational risks but also highlights persistent gaps in provenance verification within the antiquarian market.

By strengthening due diligence protocols and adopting more rigorous standards for manuscript acquisitions, American institutions have the opportunity to play a leading role in curbing the trade in dismembered and unlawfully obtained manuscripts, setting a precedent for ethical collecting practices worldwide.

Case Studies: 1. The Castelfiorentino *Antiphonary D*, the Cleveland Museum of Art's Acquisition and the Koller Gallery Sale (2015)

A significant example of the illicit manuscript trade is the case of two illuminated leaves from the so-called *Antiphonary D* of the Church of Saints Ippolito and Biagio in Castelfiorentino, which were stolen in the 1950s, illegally exported, and subsequently lost for decades.

In 2015, following a sale in Zurich, a university professor identified two 14th-century illuminated leaves (part of *Antiphonary D*) in the United States and promptly reported them to the Carabinieri Command for the Protection of Cultural Heritage (TPC).[24]

The first leaf (Fig. 3), containing the responsory for the feast of Saint Lucy (13 December), was located in the Cleveland Museum of Art, while the second, featuring the responsory for the feast of Saint John the Evangelist (27 December), had entered a private collection, having been acquired at an auction in Switzerland. This leaf was sold by the Koller Gallery in Zurich in 2015 (Fig. 4), a transaction that took place despite its illicit provenance.

The expertise accompanying the sale of this leaf was offered by a Swiss university professor from the University of Zurich,[25] who is widely known for his ties to biblioclasts. His role in authenticating dismembered manuscript leaves has repeatedly facilitated their circulation in the

[24] In 1969, Italy established the Comando Carabinieri Tutela Patrimonio Culturale (TPC), a dedicated unit within the Carabinieri tasked with protecting the nation's cultural heritage from theft, illicit trafficking, and forgery. Operating under the Ministry of Culture, the TPC plays a central role in investigating crimes related to art and antiquities, working both nationally and internationally to recover stolen cultural property. Recognising the growing challenges posed by the illegal art market, Italian authorities have progressively equipped the TPC with advanced tools to track and retrieve looted artefacts. In 1980, the unit introduced Leonardo, a centralised database aimed at cataloguing stolen artworks and providing law enforcement agencies worldwide with access to critical information on missing cultural objects. Today, it holds records for over 1.1 million stolen items, making it one of the most extensive resources of its kind. To further enhance public engagement in identifying lost artworks, the TPC launched iTPC in 2014, a mobile application available in both Italian and English. This tool allows users to compare images of artworks against the database, facilitating the detection of stolen cultural heritage. By integrating digital solutions into its investigative work, the TPC has strengthened its ability to counteract the illicit trade in artefacts and promote the restitution of cultural property to its rightful owners.

[25] Years later, in December 2022, the same Swiss professor took part in a campaign to discredit those denouncing the dismantling of manuscripts. This conduct was formally reported in Italy in 2023 (see note 5).

antiquarian market, allowing stolen or recently excised folios to be presented as legitimate artefacts with obscured provenance.

Following a comprehensive investigation, the TPC assembled conclusive documentary evidence verifying the manuscript's provenance and unlawful removal. As a result, both leaves were successfully repatriated and reinstated in their rightful place at the Santa Verdiana Museum of Sacred Art in Castelfiorentino.

This case highlights critical flaws in the antiquarian manuscript trade, particularly regarding provenance research and the due diligence of auction houses:

- The dealer declared the manuscript's provenance but failed to disclose its stolen status, facilitating its circulation within a legal grey area.
- The Carabinieri TPC successfully recovered the manuscript after verifying its presence in their online database of stolen cultural property.
- Despite being a valuable resource, this database (https://tpcweb.carabinieri.it/SitoPubblico/home/funzioni/ricerca-dati-immagini) remains underutilized by auction houses and dealers, who often fail to conduct thorough provenance checks. Even when acting in good faith, many rely too heavily on assurances provided by individuals who may be complicit with biblioclasts, thieves, or traffickers, thereby unwittingly facilitating the circulation of unlawfully acquired manuscript material.

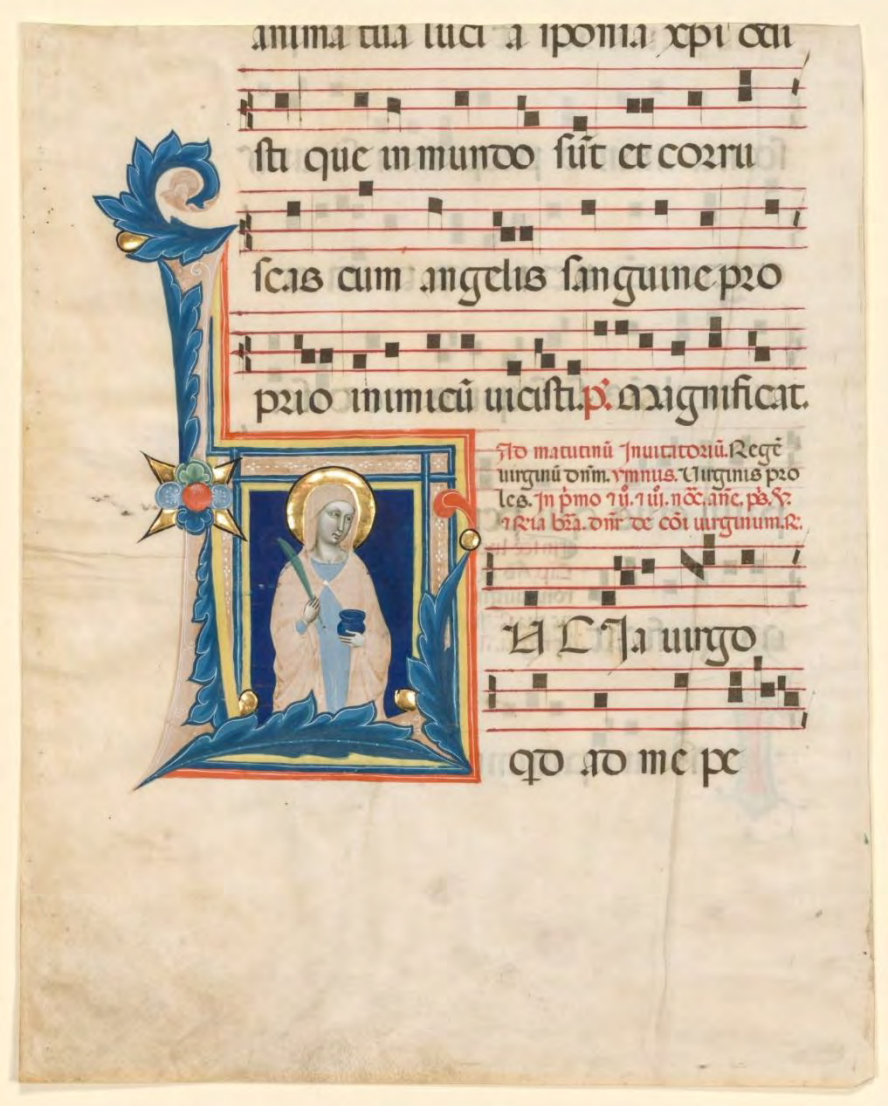


Fig. 3. The stolen leaf from Castelfiorentino Antiphonary D, containing the responsory for the Feast of Saint Lucy (13 December). As can be observed, the leaf was literally cut at the top when removed from the parent manuscript, resulting in the truncation of the musical staff.

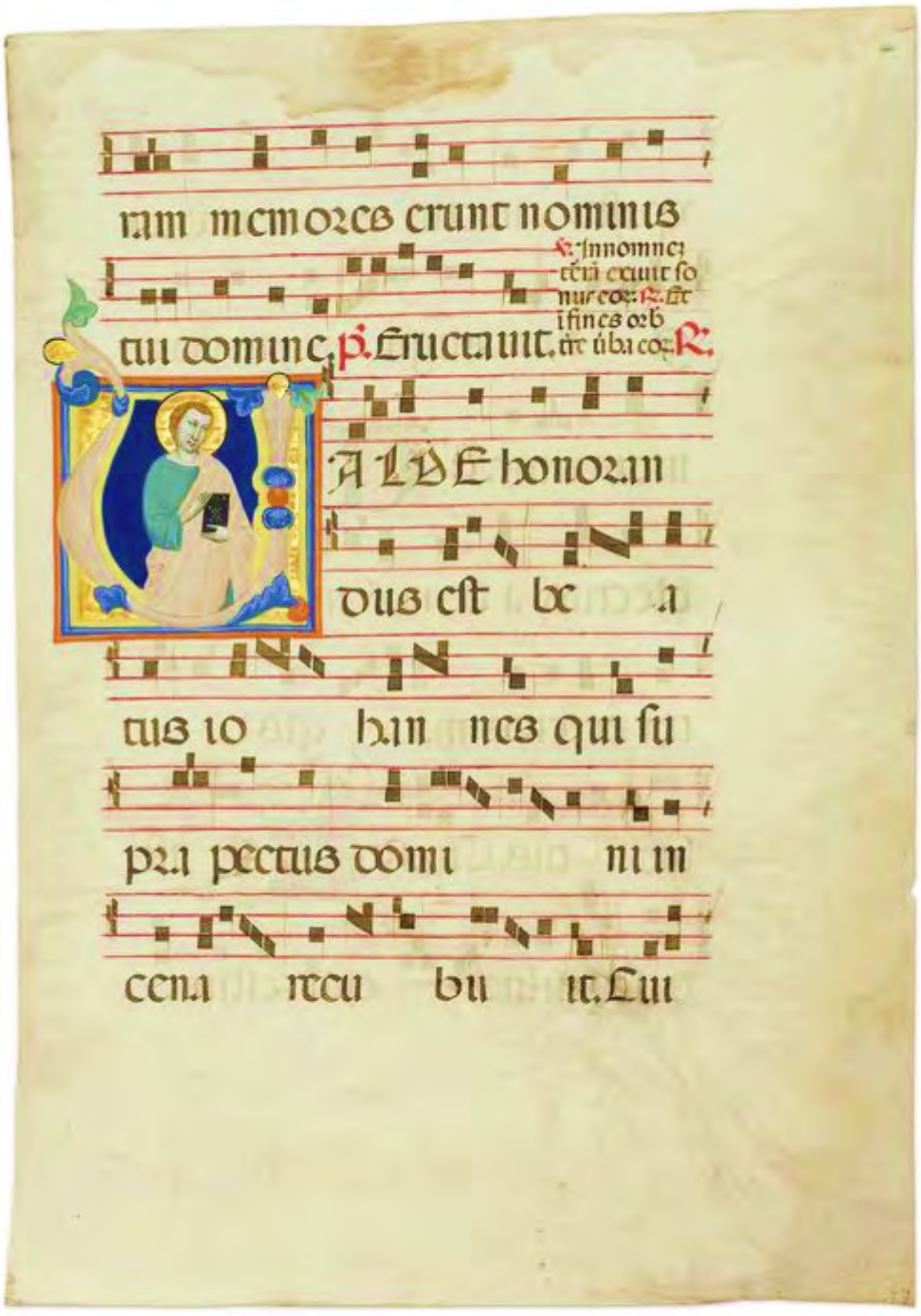


Fig. 4. A leaf from *Antiphonary D*, stolen in Castelfiorentino, was sold at auction by Koller in Zurich and subsequently recovered by the Carabinieri Command for the Protection of Cultural Heritage (TPC) following a formal report. An image of the leaf is also available in the TPC's online public database of stolen cultural property. URL: https://tpcweb.carabinieri.it/SitoPubblico/home/funzioni/ricerca-dati-immagini

This instance underscores the urgent need for stricter regulation and greater accountability within the antiquarian manuscript market, particularly regarding the verification of provenance before the sale of historical artefacts.

2. The Boston Public Library Restitution: A Dismembered Venetian Manuscript Leaf and Its Repatriation to Italy

On April 19, 2017, the Boston Public Library, in collaboration with UNITED STATES Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HSI), formally returned several cultural artefacts to the Italian government, including an illuminated leaf excised from a 15th-century Venetian manuscript. This leaf had originally belonged to the *Mariegola della Scuola Grande di San Giovanni Evangelista*, a guild register containing the statutes and governing principles of one of Venice's most prominent confraternities.

The leaf had been unlawfully removed from the complete manuscript at an unknown date before entering the antiquarian market. It was later acquired in good faith by the Boston Public Library. However, its origins were ultimately traced back to Italy, where it had been taken from a historical collection without authorization. Upon confirmation of its illicit provenance, the Boston Public Library worked alongside ICE, HSI, and the United States UNITED STATES Attorney's Office for the District of Massachusetts to ensure its repatriation.

The increasing number of successful restitutions of Italian cultural property from international institutions and private collections highlights a growing awareness of the need to curb the illicit trade in stolen artefacts. However, despite significant progress, countless manuscripts and rare books of Italian origin remain dispersed across the global antiquarian market, often having been illicitly removed from libraries, archives, and ecclesiastical collections. The hope remains that,

in the coming years, there will be a greater focus on the protection of Italy's written heritage and a stronger commitment to the repatriation of dismembered and unlawfully exported books and manuscripts.

A significant step towards achieving this goal was taken on 29 October 2020, when the Italian Ambassador to the United States, Armando Varricchio, and the UNITED STATES Assistant Secretary for Educational and Cultural Affairs, Marie Royce, signed the "Memorandum of Understanding on the Imposition of Restrictions on the Import of Categories of Archaeological Material from Italy" at the Italian Embassy in Washington, D.C. This agreement, building upon a previous accord signed in 2001, establishes a legal framework for cooperation between Italian and American authorities in combating the illicit trafficking of cultural property. It strengthens the collaboration between the Carabinieri Command for the Protection of Cultural Heritage (TPC) and United States law enforcement agencies, facilitating the identification, recovery, and restitution of stolen or unlawfully exported Italian artefacts discovered in the United States. While this agreement primarily addresses archaeological material, it underscores the broader need for comprehensive international measures to prevent the unlawful circulation of manuscript heritage. The hope is that similar bilateral frameworks will be developed to tackle the specific vulnerabilities of historical books and manuscripts, ensuring that institutions exercise greater diligence in provenance verification and that a growing number of unlawfully exported items are restored to Italy's cultural institutions.

The Memorandum marks a significant step in the ongoing efforts to curb the illegal circulation of cultural heritage, including manuscripts and illuminated leaves, which are frequently trafficked through the antiquarian market under falsified provenance. By reinforcing the mechanisms for cross-border cultural property restitution, the agreement highlights the necessity of international cooperation in preserving and protecting Italy's historical and artistic heritage.

Spain: Legal Protections for Cultural Heritage and Manuscripts

The Spanish legal framework, akin to the Italian legal system, reflects a strong commitment to the preservation of cultural heritage. In the realm of bibliographic heritage, Spain adheres to the widely recognized principle that any document, book, or manuscript over 100 years old is to be considered a cultural asset. A key legal reference in this regard is the *Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español*, which establishes the regulations for the protection, conservation, and promotion of Spain's historical heritage.

Article 1.1 of this Law 16/1985 defines the composition of the Documentary and Bibliographic Heritage of the Nation and lists four distinct categories of objects. The first category includes:

> *El original y copias de las obras literarias, históricas, científicas o artísticas de más de cien años de antiguedad que se hayan dado a la luz por medio de la escritura manuscrita o impresa*.[26]
>
> [Translation: The original and copies of literary, historical, scientific, or artistic works that are over one hundred years old and have been made public through handwritten or printed writing].

This law includes specific provisions regarding the conduct of private individuals who own medieval manuscripts, as well as the export and alienation of such cultural assets, requiring prior authorization for the exportation of objects deemed part of Spain's historical patrimony. Additionally, the Article 52 of this legislation explicitly states:

[26] *Boletin Oficial del Estado*, Nr. 155, 29 June 1985, pp. 20342-20352 https://www.boe.es/buscar/doc.php?id=BOE-A-1985-12534

Todos los poseedores de bienes del Patrimonio Documental y Bibliográfico están obligados a conservarlos, protegerlos, destinarlos a un uso que no impida su conservación y mantenerlos en lugares adecuados.

[Translation: All holders of Documentary and Bibliographic Heritage assets are required to preserve and protect them, ensure their use does not compromise their conservation, and keep them in appropriate conditions].

Furthermore, Real Decreto 111/1986, de 10 de enero, which partially develops Ley 16/1985, provides additional clarification on the procedures for declaring assets as cultural heritage and the conditions under which they may be exported. These legal instruments collectively underscore Spain's commitment to safeguarding its bibliographic patrimony from loss, deterioration, or dispersal, reinforcing the state's role in regulating private ownership and international circulation of historical manuscripts.

Over time, various amendments have been made to this law. What is particularly relevant in this context is that the Bibliographic Heritage includes:

Las obras literarias, históricas, científicas o artísticas de carácter unitario o seriado, en escritura ma- nuscrita o impresa, de las que no conste la existencia de al menos tres ejemplares en las bibliotecas o servicios públicos.

[Translation: Literary, historical, scientific, or artistic works, whether in a single volume or serial format, written in manuscript or printed form, for which there is no record of at least three copies in public libraries or services].

According to this legal provision, every Book of Hours qualifies as a unique work with no identical copies, as each may contain both specific prayers and one-of-a-kind miniatures. Consequently, Books of Hours would fall under state protection. In this regard, we will examine the 2018 recovery of folios from a richly illuminated Book of Hours by Joan Pere Ballester, which were on the verge of leaving Spain for Switzerland (Figg. 6 and 7), where an interested buyer had already been found.

Case Study: A *Book of Hours* illuminated by Juan Pere Ballester (active c. 1470–1492)

Joan Pere Ballester, also known by the Spanish name Juan Pedro Ballester, was a Catalan illuminator active in the Crown of Aragon during the 15th century. One of the illuminated Books of Hours attributed to his hand was partially dismembered in the late 19th century. Some of its folios were sold abroad and reached the United Kingdom, while others remained in private collections in Spain. The dismemberment of the manuscript resulted in the dispersal of its illuminations across institutions and private hands, with individual leaves resurfacing on the antiquarian market at different times.

Among the surviving folios, two significant miniatures from the manuscript are now housed in the Fitzwilliam Museum in Cambridge, bearing witness to Ballester's refined artistic style and the manuscript's original unity.

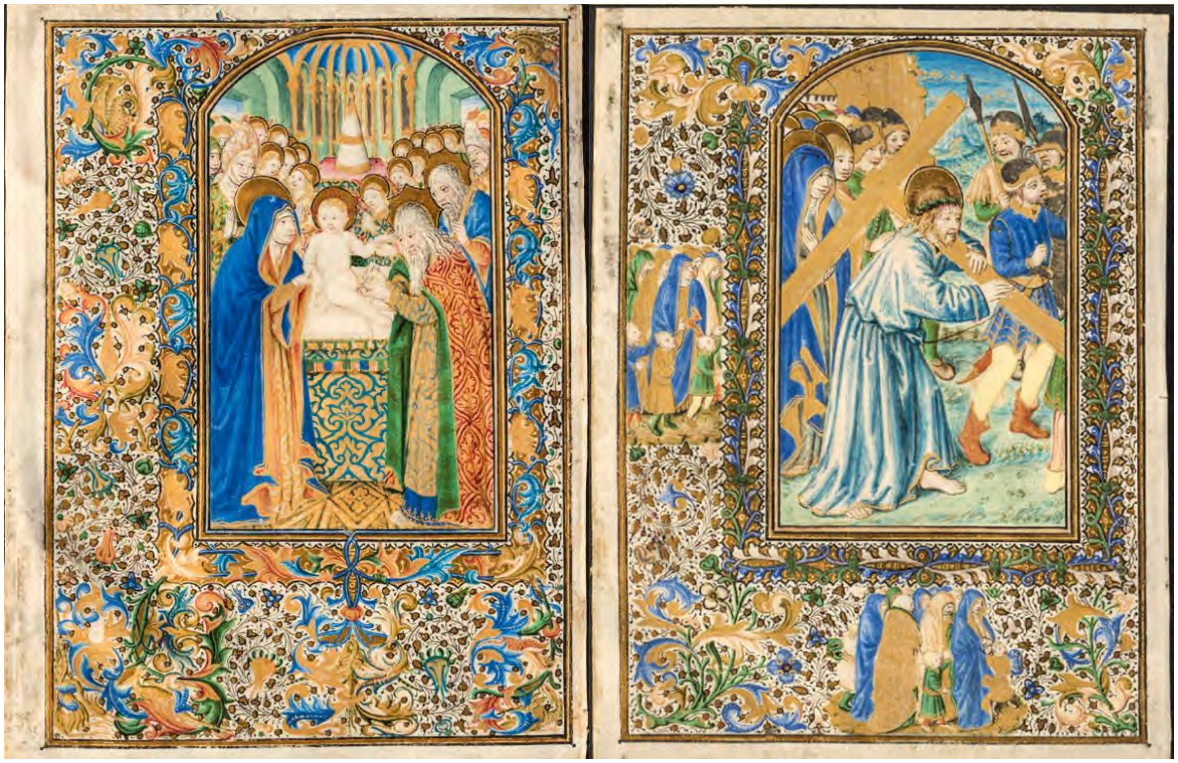
These folios, catalogued as Marlay Cuttings Sp.1a–1b, (Fig. 5 and 5 bis) depict the Annunciation and the Nativity and are among the earliest identified pieces of the original manuscript. Before entering the Fitzwilliam Museum's collection, these leaves had already been well-documented in British collections, having been displayed at the Burlington Fine Arts Club in London in 1886. However, they were initially misattributed as Netherlandish miniatures in the French style. This error persisted until scholars such as Phyllis M. Giles and Francis Wormald correctly identified their Valencian origin in the mid-20th century.

In 2018, additional leaves from the same manuscript were about to be exported from Spain to Basel, Switzerland, when the Spanish Ministry of Culture intervened, invoking Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español. This law stipulates that manuscripts classified as being of public interest, even when privately owned (as is the case in Italy), cannot be exported without prior authorization from the state. Recognizing the artistic and historical significance of these folios, the Biblioteca Nacional de España (BNE) acquired them, securing their preservation within Spain's national collections.

Figs. 5. Cambridge, The Fitzwilliam Museum. *Marlay cuttings Sp. 1a*, and 5 bis, *Marlay cuttings Sp. 1b*

The intercepted folios, now catalogued as RES/124/19 and RES/124/20, depict:

- The Circumcision of Christ (Fig. 6)
- Christ Carrying the Cross (Fig. 7)



Figs. 6 and 7. Madrid Biblioteca Nacional de España, *Res. 124. 19*, 137 x 103 mm, and *Res. 124. 20*, 135 x 103 mm

These miniatures feature intricate gold detailing, refined Valencian Gothic ornamentation, and expressive compositions, consistent with Ballester's known works.

Despite the Spanish government's successful intervention in retaining some folios, others had already left Spain and arrived in Switzerland before the 2018 interdiction. That same year, four additional miniatures were sold on the international antiquarian market by Dr. Jörn Günther Rare Books, a leading dealer in Basel specializing in illuminated manuscripts. These folios were subsequently acquired by a prominent Mexican collector known for his interest in medieval books. Until September 2022, these additional folios had remained completely unknown to art historians and had never been referenced in studies of Valencian manuscript illumination.[27]

[27] Significantly, these folios had also been entirely unknown to Josefina Planas Badenas, a scholar specializing in manuscript studies. It was only after the author of this article brought them to her attention that she became aware of their existence: See https://www.aboutartonline.com/i-manoscritti-miniati-medievali-e-prerinascimentali-occidentali-biblioclastia-e-ricostruzione-digitale/

The author of this article was the first to identify them on the Swiss antiquarian market, recognizing their stylistic and historical connection to the folios previously intercepted by the Spanish authorities and those already housed in the Fitzwilliam Museum, Cambridge.
This underscores the critical role played by individual researchers in tracing dismembered manuscripts, monitoring the antiquarian market, and reconstructing their histories through comparative stylistic analysis.

The four illuminated leaves sold in Switzerland belong to the Hours of the Cross cycle in the original *Book of Hours*, indicating that their placement followed a structured iconographic programme. They depict:

1. The Agony in the Garden of Gethsemane (Fig. 8)
2. The Betrayal and Arrest of Christ (Fig. 9)
3. The Mocking of Christ (Fig. 10)
4. The Deposition from the Cross (Fig. 11)

These miniatures display sophisticated narrative compositions, intricate border decorations with acanthus leaves, delicate gold embellishments, and expressive figural rendering, all characteristic of Ballester's Valencian style. Their discovery significantly enhances our understanding of the manuscript's original artistic programme.

Figs. 8-11

United States: The Case of an Illuminated Book of Hours by Jean Coene IV

Formerly Owned by Miss Mary Benson and Held at the Brooklyn Museum Until 2021, Dismembered and Sold on eBay

The United States, a relatively young nation with a history of European colonization, does not possess a medieval manuscript heritage of its own—though it has spent well over a century acquiring one. It has long been a major center for the collection and trade of such materials, with universities, libraries, and private collectors actively acquiring manuscripts since at least the nineteenth century.

The legal framework governing the protection of medieval manuscripts in the United States reflects this historical role, operating within a system that prioritizes private property rights over national heritage considerations. Unlike civil law jurisdictions, where antiquarian books and manuscripts are often classified as part of the national patrimony irrespective of ownership, United States law generally treats them as personal assets, granting owners broad discretion over their sale, transfer, or even physical alteration.

The National Stolen Property Act (NSPA, 1934) provides a key federal mechanism for addressing the illicit trade in cultural objects, criminalizing the possession and trafficking of stolen property across state and international borders. However, its applicability to manuscripts depends on the ability to demonstrate prior theft or unlawful removal from their country of origin. The Cultural Property Implementation Act (CPIA, 1983), which implements the 1970 UNESCO Convention, enables the United States to impose import restrictions on designated cultural goods from states that have concluded bilateral agreements. Yet, medieval manuscripts are not systematically covered by such agreements, allowing many to enter the United States market without significant legal barriers.

Given the strong emphasis on private ownership rights and the absence of comprehensive

federal protections for manuscript heritage, the trade in medieval manuscripts—including those of uncertain provenance—has flourished in the United States antiquarian market. While leading institutions have increasingly adopted ethical acquisition guidelines, the broader regulatory framework remains fragmented, with enforcement largely dependent on case-specific legal challenges rather than a cohesive heritage protection policy.

Here, a particularly emblematic case has been selected: a manuscript that was undeniably a museum-quality piece—formerly held at the Brooklyn Museum—yet nonetheless dismembered and sold off leaf by leaf on eBay. The absence of specific legal protections allowed this to happen, yielding over $60,000 in profit against an initial purchase price of just $13,000.

In 2021, as part of a broader deaccessioning initiative aimed at alleviating financial pressures exacerbated by the COVID-19 pandemic, the Brooklyn Museum chose to sell several illuminated manuscripts from its collection, including Books of Hours bequeathed by Miss Mary Benson in 1919. Among these was a French Book of Hours, accession number 19.77, which was auctioned at Sotheby's on 30 November 2021, as Lot 67.[28]

The sale of this manuscript marked the beginning of a troubling trajectory.

By the summer of 2022, the author of this article observed that a well-known manuscript dismemberer based in Akron, Ohio, had begun listing a series of folios on his eBay shop. These leaves—evidently freshly excised from a richly decorated manuscript—were entering the market in a gradual and disorderly fashion, a common pattern when a Book of Hours is dismantled. Given the substantial number of folios such manuscripts contain, their dispersal can take place over several years.

A biblioclast motivated by financial gain will typically introduce text leaves first, followed by

[28]https://www.sothebys.com/en/buy/auction/2021/music-and-antiquarian-books-and-manuscripts/book-of-hours-use-of-paris-illuminated-manuscript.

those featuring miniatures, and finally, after some time, any remaining textual folios.

Among the newly listed leaves, one, in particular, stood out: a Pentecost miniature bearing a penned folio number 112 on its verso (Figs. 13 and 14).

The stylistic features of the illumination closely resembled the work of Jean Coene IV, aligning with a French Book of Hours, use of Paris, which had been auctioned at Sotheby's in November 2021. The manuscript's finely executed foliate borders and figural compositions strongly suggested a connection.

Definitive confirmation of the manuscript's provenance arrived when the dealer listed a leaf featuring the Annunciation to the Shepherds miniature (Fig. 15). The presence of this folio left no doubt that the pages appearing on eBay had once belonged to the Brooklyn Museum's collection. The Pentecost miniature leaf, for instance, was listed at $2,400, further underscoring the commercial motivations behind the dismemberment.

Figs. 13 and 14 illustrate the recto and verso of the Pentecost leaf, whose dimensions measure approximately 4.25 x 2.9 inches (c.110×65mm); 13 lines per page (c.60×40mm) in bâtarde script. The illuminated border features a vibrant, multi-hued floral design on a gold background, a characteristic

motif in Parisian-produced Books of Hours.

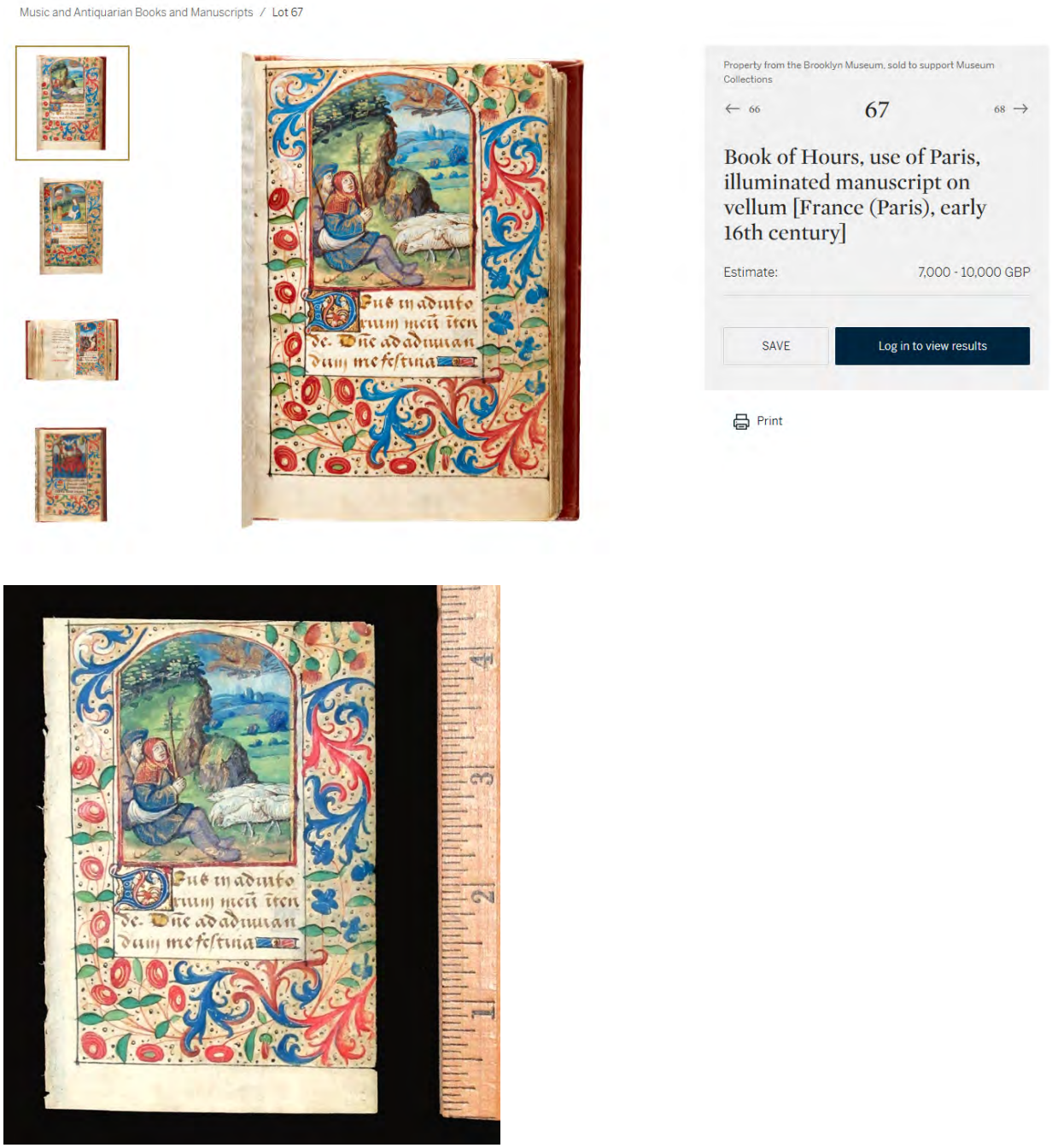


Fig. 15 illustrates the devastating mutilation. The top image shows Lot 67 at Sotheby's, where the Book of Hours appears intact, open to the Annunciation to the Shepherds illumination. The bottom image depicts the same folio, now excised from its original codex and listed for sale on eBay.

On 30 November 2021, the Book of Hours achieved (only) £13,860 (with buyer's premium). It is worth noting, almost to the point of redundancy, how the manuscript has been undervalued, potentially even intentionally so. However, upon closer examination, it becomes evident that with a modest amount of research, one can unveil its intended recipient, unravel its fascinating history, and trace it back to the workshop responsible for its creation.

Mary Benson's legacy as a collector is essential to understanding the provenance of the dismembered Book of Hours. The donation she made to the Brooklyn Museum was originally described as follows:

> "The illuminated manuscripts consist of eight volumes of Horæ Beatæ Mariæ Virginis, or Books of Hours, one Missal, and a double page from one of the latter, emphasising the growth of the Museum's collection of such material." (Hutchinson, 1919, 222).

Born on 25 July 1859, Mary Benson belonged to a distinguished family of collectors and scholars devoted to preserving fine objects. Her father, Arthur W. Benson, and her brother, Frank Sherman Benson, a respected collector and numismatist, fostered a deep appreciation for artistic and historical artefacts. Throughout her life, Benson remained immersed in the world of antiquities and connoisseurship. Though she passed away at the relatively young age of 59, on 10 October 1918, she ensured that her passion for historical manuscripts would endure beyond her lifetime. She was laid to rest in Green-Wood Cemetery in Brooklyn, a place that now bears silent witness to her devotion to the arts.

Benson's bequest to the Brooklyn Museum was intended to ensure the preservation of her medieval manuscripts, safeguarding them from disassembly, dispersion, and loss. However, despite her intentions, subsequent institutional decisions led to the dismantling of some of her most significant donations. The manuscripts entrusted to the museum were meant for study and conservation, yet curatorial oversight resulted in the neglect of key aspects of their documentation. For over a century, the Book of Hours in its care remained largely unstudied,

with no comprehensive catalogue entry or photographic records made at the time of donation. This lack of archival diligence meant that when the manuscript was sold at Sotheby's in 2021, its dispersal went unnoticed until individual folios began appearing on online marketplaces. What was once an intact medieval artefact—protected under Benson's bequest—has now been irretrievably lost to dismemberment. Its scattered leaves, now in private collections, stand as a testament to the consequences of mismanagement and ill-considered deaccessioning policies. The author of this study found that this Book of Hours represented a kind of medieval artistic chimaera—a manuscript known from historical records but lost to scholars for centuries, its whereabouts unknown until its unexpected resurfacing. For generations, its existence had been acknowledged in archival documents, yet no physical trace of it remained, leaving its fate shrouded in uncertainty.

A careful analysis of the final bifolio—provided free of charge for study by the dealer, who deemed it unsellable due to its lack of decoration—under ultraviolet illumination gradually revealed hidden details inscribed in the vellum. As the Wood's lamp passed over the leaf, erased markings—long thought lost to time—began to resurface. Then, a remarkable discovery emerged: the spectral signature of the book's first owner, summoned back from history.

"Moi Issabele, veve Jean Hammelin…" the faded yet elegant script read, identifying the Book of Hours as once belonging to the medieval Parisian widow Isabelle Hammelin. The revelation of her name, obscured for centuries, provided an invaluable link to the manuscript's provenance. By a fortunate twist of fate, the dismemberment of the codex had left this crucial leaf unexamined for over a century, ever since the book departed from Isabelle's hands. Now, reunited through digital reconstruction,[29] its ultraviolet analysis (Fig. 16) unlocked vital clues about the woman who had once commissioned and cherished it.

Previously, while still safely housed in the Brooklyn Museum, this manuscript had never been

[29] https://www.oprom.eu/brooklynboh

subjected to detailed scholarly analysis.

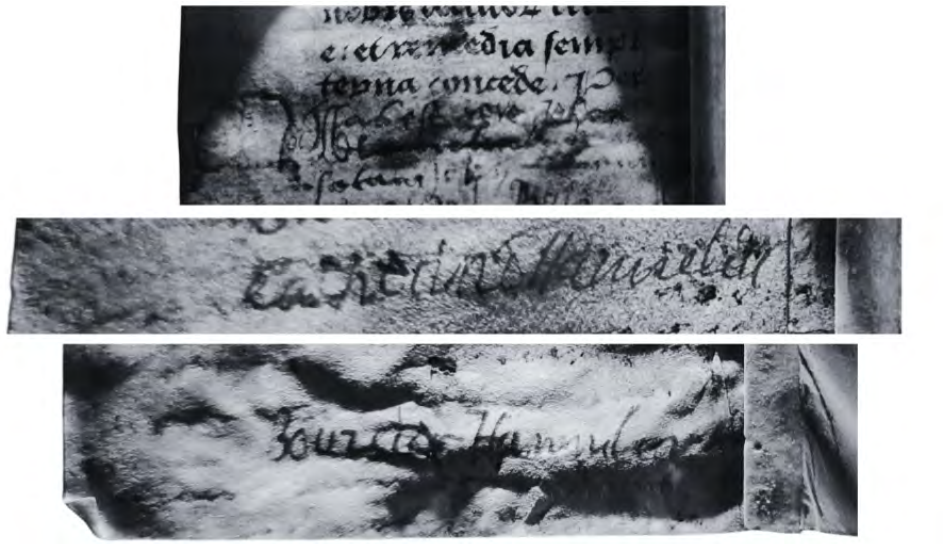


Fig. 16. The partially erased inscription becomes more legible when illuminated with a Wood lamp. 1. Issabele veve Jehan Hammelin 2. Catherine Hammelin 3. Boursier Hammelin. Image reproduced by kind permission of the Organisation pour la Protection des Manuscrits Médiévaux©.

The erased inscription appearing at the bottom of the final leaf of the manuscript reads as follows: “Moi Issabele, veve Jehan Hammelin [followed by some barely legible words, which could be *fortune … bourgeois à Paris* and possibly the maiden name of Isabelle, *Boursier*. The name Catherine Hammelin – daughter of Issabele - is also legible]”.

During her research in the French archives, Susan Broomhall had noted the description of some Books of Hours belonging to the widow of Jean Hamelin, but she did not realize that one of the manuscripts mentioned in the Parisian document was located at the Brooklyn Museum.

> In 1522, Isabeau Boursier, the widow of Jean Hamelin, merchant and bourgeois of Paris, listed as her library, “A Book of Hours, usage of Paris, printed letters, A little Book of Hours, on parchment, printed letters” and finally, a more luxurious, “Two books of Hours, on parchment, printed letters, historiated, with gold lettering, of which one is covered in camel skin and the other covered in black velvet. (Broomhall, 2005, 113)

In reality, several documents related to Isabelle Boursier, the widow of Jean Hamelin, a bourgeois merchant residing on Rue Saint-Jean-de-Beauvais (*à l'enseigne de la Fleur de lis*), are recorded in the Parisian archives.[30]

Among these documents are Isabelle's testament (Coyecque, 1905, 70, notice n° 322) and the inventory of the belongings after her death (*Minutes et répertoires du notaire Pierre Crozon, 27 mars 1517 – 5, mars 1532*, MC/ET/XXXIII/6, fol. 303-335).

It should be noted that the notary who drafted the post-mortem inventory of Isabelle's assets, Pierre Crozon, was none other than her son-in-law, having married her daughter, Catherine, as indicated in the same document.

> Inventaire après décès d'Isabeau Boursier, veuve de Jean Hamelin, marchand bourgeois de Paris, demeurant Rue Saint-Jean-de-Beauvais, à l'enseigne de la Fleur de lis, dressé à la requête de Jean et Robert Boursier, oncles et tuteurs de Gabriel et Martin Hamelin, enfants mineurs des défunts, de Jean et Thomas Hamelin et de Pierre Crozon, notaire au Châtelet, et Catherine Hamelin, sa femme, également enfants des défunts.
>
> 14 octobre 1522 [31]

These records offer valuable insights into the life of this lady, shedding light on her identity and her profound connection with Books of Hours. Of particular interest is an inventory compiled between 14 October and 26 November 1522, which lists three printed Books of Hours alongside a single manuscript. This reference leaves little room for doubt: the manuscript in question is highly likely to be the very same Book of Hours that was once part of Miss Mary Benson's collection. The inventory records the following:

[30] Rossi, *Isabelle Boursier's Book of Hours*, 57.
[31] Documents du Minutier central des notaires de Paris, Inventaires après décès, tome I, 1483-1547, catalogue [1532 actes], par Madeleine Jurgens, Paris, Archives nationales, 1982, p. 73, notice n° 152. Online: https://francearchives.gouv.fr/en/search?q=Boursier+Hamelin&es_escategory=archives&es_escategory=siteres

- Unes Heures en parchemyn, escriptes en la main, historiées, garnies de deux fermouers d'argent doré, couvertes d'une chemisette de camelot, LVI s. p. (fol. 305 vo).
- Unes paires d'Heures, usaige de Paris, lectres d'impression, II s. p. (fol. 309 vo).
- Unes petites Heures, en parchemym, historyées, lectres d'impression... (fol. 312 vo).
- Deux paires d'Heures, en parchemyn, lectre d'impression, historiés, à lectre d'or, dont l'une garnye d'une chemysette de camelot et l'autre couverte de velous noir, XLVIII s. p. (fol. 316).

[• A Book of Hours on parchment, handwritten, illuminated, fitted with two gilded silver clasps, and bound in a camlet chemise cover. (56 sols parisis) [fol. 305 verso]

• A pair of printed Books of Hours, Use of Paris. (2 sols parisis) [fol. 309 verso]

• A small Book of Hours, on parchment, illuminated, in printed script... [fol. 312 verso]

• Two Books of Hours, on parchment, printed text, illuminated with gold lettering; one bound in a camlet chemise cover, the other covered in black velvet. (48 sols parisis) [fol. 316]

]

The first listed Book of Hours is a parchment manuscript (*Heures escriptes en la main*), featuring illuminated miniatures (*historiées*). Its binding consisted of a *chemise* made of camel-skin, a slip-on protective cover, indicating that the manuscript was of relatively small dimensions. It was further adorned with two gilded silver clasps (fol. 305 verso), enhancing its portability.

The inventory, dated 1522, values the manuscript at 56 Parisian *sols* (fol. 305 verso), a significantly higher appraisal than the printed Books of Hours listed in the same document. This discrepancy suggests that the manuscript's craftsmanship, the presence of illuminated miniatures, and its origins from a renowned workshop contributed to its elevated status.

Despite this evident artistic and historical value, the manuscript's significance was overlooked by Sotheby's experts. However, it did not escape the attention of a biblioclast dealer, who

systematically assessed each miniature at an estimated value of $2,000. Given that the manuscript contained 10 full-page miniatures and 13 smaller ones, its dismembered folios collectively far exceeded the valuation of the complete volume. This stark contrast highlights the economic motivations underpinning the practice of manuscript dismemberment.

The Role of Online Platforms in Obscuring Provenance

Case Study: The Dispersal of a rare Flemish Book of Hours commissioned by an Italian Patron and illuminated by a female miniaturist in Bruges

Among the many cases illustrating how online platforms facilitate the circumvention of legal protections for cultural heritage, the Madruzzo Book of Hours stands as a particularly striking example. This finely illuminated Flemish devotional codex, produced around 1480, was systematically dismembered and sold on eBay, following a pattern frequently observed in the antiquarian market. The individual responsible, a former German university assistant who later relocated to Escondido, California, has long been associated with the dismantling and commercialization of Western medieval manuscripts. Active since the 1980s, he has contributed to the irreversible loss of rare books, incunabula, and manuscripts of considerable historical and artistic value.

Originally a diminutive manuscript, measuring just 90 by 65 mm and intended for the private devotion of Maria Maddalena della Torre (Maria Magdalena von Thurn und Valsassina zu

Kreuz),[32] the manuscript was richly illuminated by Marie Vreland,[33] whose meticulous artistry reflects the refined techniques of Flemish miniature painters. The manuscript's intricate details, achieved through the use of magnifying lenses typical of Flemish ateliers, exemplify the exceptional craftsmanship of its creator.

It first appeared on the market on 13 July 2016, when it was offered at Christie's London (Lot 115) with an estimated value of £30,000 to £50,000. However, it failed to sell and was returned to its owner. The following year, on 6 July 2017, it was relisted by another British auction house, Dreweatts 1759 Fine Sales, where it fetched just £27,000, a sum well below its initial valuation.

The book was later acquired by Hartung & Hartung Antiquariat, a German auction house known for handling significant volumes of medieval manuscripts. Listed in their catalogue for 3 May 2022 (Auction 151, Lot 2) with an asking price of €32,000, it was soon purchased by the dealer mentioned earlier, who subsequently dismantled it.

This process aligns with the broader trend observed in Germany, where numerous complete manuscripts—primarily of Flemish, French, and Italian origin—have been acquired intact at auction, only to be dismembered and sold in individual leaves.

[32] Maria Maddalena, born in 1464 to Phoebus della Torre and Lucia Arcoloniani, bore a name that resonates with the prominence of Mary Magdalene, a figure prominently featured in the manuscript's imagery. In 1480, the likely year of the manuscript's production, she married Georg von Lamberg zu Ortenegg (1460–1499). The emphasis on Mary Magdalene's iconography within the manuscript, coupled with the inclusion of a prayer referencing a "great sinner," strongly suggests that the Book of Hours was created specifically for Maria Maddalena, possibly as a wedding gift or a devotional work intended to accompany her transition from her family home to her new life.
Genealogical research indicates that Maria Maddalena and Georg enjoyed a fulfilling marriage and were blessed with no fewer than ten children. She lived a long life, passing away in 1556, leaving behind a legacy intertwined with the devotional and artistic heritage of the period.

[33] Marie Vreland was an exceptionally skilled illuminator, active between 1460 and 1491, and a fully recognised member of the Guild of St. John the Evangelist. Following the death of her husband in 1481, she took full control of the atelier, managing its operations independently for the next decade. Her artistic output reflects a mastery of Flemish miniature painting, characterised by intricate detailing and refined use of colour and gold.
Some scholars have suggested that Marie Vreland may be identified with the Maître de la Vraie Cronicque d'Escoce, an illuminator active in Bruges from the 1460s to the 1480s. This attribution is based on manuscript 9469-9470 of the Royal Library of Belgium, for which she is believed to have created the sole miniature. If correct, this connection would further establish her as one of the leading female artists in the Bruges illumination scene of the late 15th century.

Following the sale, folios from the Madruzzo Hours began to appear on eBay, listed at extraordinarily high prices by the same dealer.

The fifteen original miniatures, among the most valuable components of the manuscript, were sold privately to select collectors. To better understand this dealer's methods, the author's research institute acquired a textual folio from his eBay store. Upon arrival, the package contained a note inviting participation in private auctions for additional leaves, including those featuring the manuscript's principal miniatures.

This revealed a well-established sales strategy: while eBay serves as a public-facing platform to attract potential buyers, the dealer subsequently engages them in private correspondence, offering "privileged access" to high-value illuminated folios.

Each month, a curated catalogue is distributed to a select group of clients, featuring the most sought-after manuscript leaves, with illuminated examples often commanding prices exceeding $3,000 each. This exclusive sales model underscores the highly profitable nature of manuscript dismemberment. However, access to these private offerings is strictly controlled. Upon discovering that our research center was actively engaged in the digital reconstruction of manuscripts he had dismantled, the dealer removed us from his client list, further illustrating the secrecy surrounding these transactions. Following the complaint filed with the Carabinieri Command for the Protection of Cultural Heritage (TPC), his eBay store was temporarily taken offline, revealing a clear awareness of the legal risks associated with his activities.

On platforms such as eBay and Catawiki, manuscript leaves are frequently sold under fictitious seller names, enabling vendors to obscure provenance and construct misleading narratives regarding the origins and legitimacy of the items. This practice facilitates a shadow market that circumvents both ethical guidelines and legal requirements designed to protect cultural heritage.

The activities of this dealer exemplify a clear disregard for both legal obligations and ethical principles, as they directly contravene international cultural heritage laws, eBay's own policies, and the fundamental tenets of manuscript preservation.

Beyond violating eBay's policies, the dealer's actions constitute clear breaches of multiple legal provisions, including laws on fraudulent misrepresentation, tax evasion, and illicit commercial practices. His systematic falsification of provenance, circumvention of financial regulations through private off-platform transactions, and deliberate attempts to obscure the origins of manuscript leaves raise serious legal concerns. These infractions not only facilitate the illicit trade in cultural heritage but also obstruct scholarly efforts to document and preserve historical manuscripts.

- **Fraudulent Misrepresentation and Consumer Protection Violations**

A key legal issue concerns the dealer's deliberate falsification of provenance. As evidenced by multiple listings, he has provided conflicting descriptions for manuscript leaves originating from the same dismembered codex. For instance, two leaves from the Madruzzo Book of Hours were separately advertised—one as part of an Italian manuscript dated 1460, the other as a Flemish manuscript from 1475 (Fig. 17). Despite these contradictory claims, both leaves exhibit identical text layout, script, and decorative initials, leaving no doubt that they belong to the same manuscript. This practice amounts to fraudulent misrepresentation under consumer protection laws, as buyers have a legal right to accurate and transparent information regarding the items they purchase.

Under consumer fraud and unfair trading legislation, including the Consumer Protection from Unfair Trading Regulations 2008 (UK) and comparable statutes in the United States and the European Union, knowingly providing false information about an item's origin constitutes an unfair commercial practice. Such conduct is particularly egregious in the trade of cultural

property, where provenance verification is essential to ensuring lawful ownership and ethical acquisition. By fabricating multiple, contradictory provenances, the dealer not only misleads buyers but also undermines due diligence processes designed to prevent the sale of illicitly acquired antiquities.

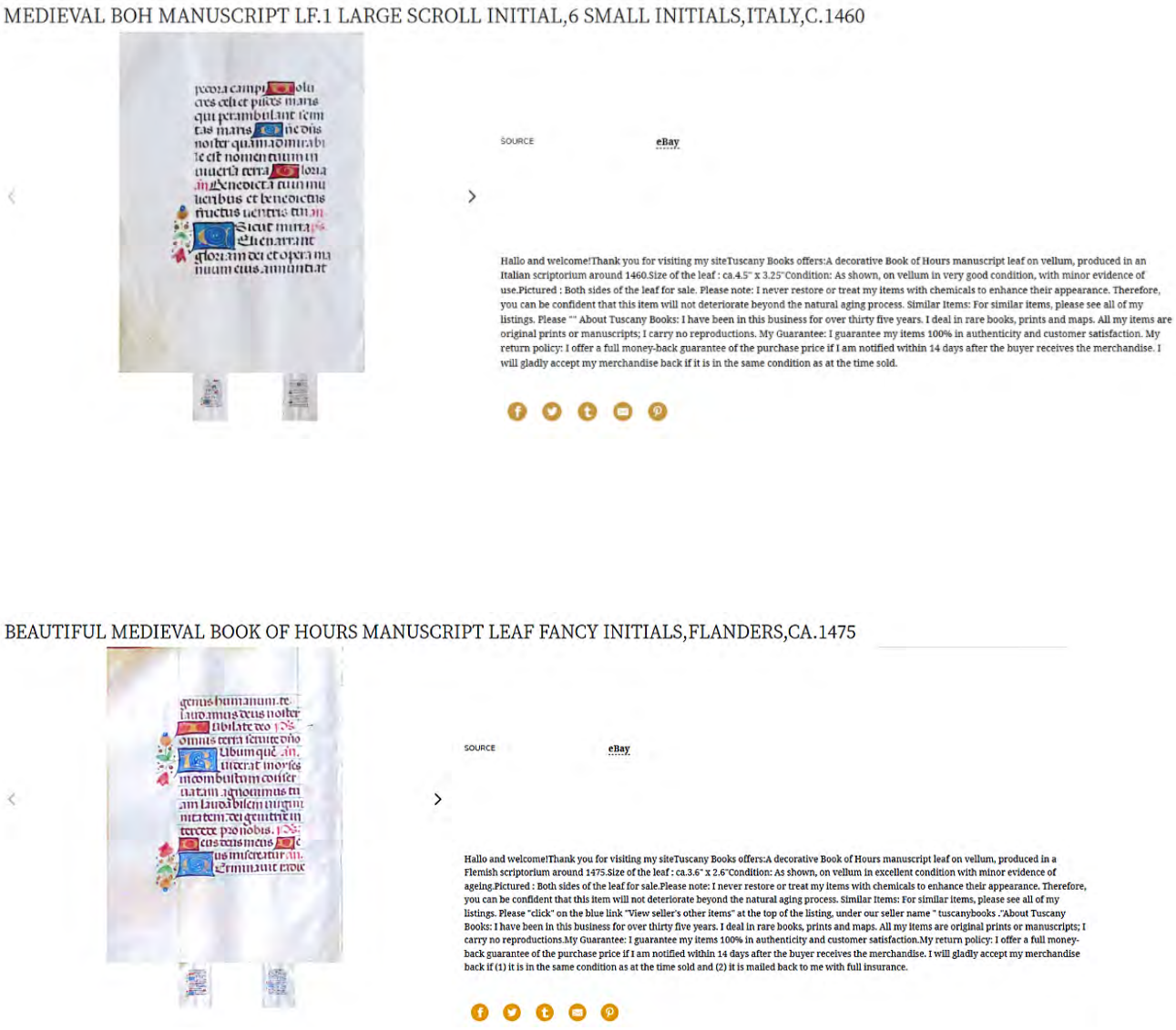


Fig. 17. Two leaves from the Madruzzo Book of Hours listed separately, with one falsely described as originating from an Italian manuscript dated 1460 and the other misattributed to a Flemish manuscript

from 1475. This deliberate falsification is evident in the identical text layout, script, and decorative initials of both leaves, leaving no doubt that they belong to the same manuscript.

- **Tax Evasion and Financial Violations**

Another major legal breach relates to the dealer's use of clandestine private auctions conducted outside eBay's regulated marketplace. Upon purchasing a textual folio from his eBay store, the author's research institute received a direct solicitation to participate in private sales for additional leaves, including those featuring miniatures. Such practices enable the dealer to evade platform fees, avoid transactional scrutiny, and, crucially, bypass tax obligations.

Under tax law in the UK, the EU, and the United States, commercial sales are subject to value-added tax (VAT) and income tax obligations. By conducting transactions outside formal marketplaces, the dealer likely engages in tax evasion, a criminal offence in most jurisdictions. Additionally, soliciting off-platform transactions violates eBay's Terms of Sale Policy, which explicitly prohibits sellers from directing buyers to private sales to circumvent platform regulations. The avoidance of financial oversight through private auctions exacerbates the opacity of these dealings, shielding them from legal scrutiny and increasing the risk of further illicit activities, such as money laundering.

The Role of Academic Responsibility in Cases of Misrepresented Provenance

Academic institutions and research initiatives play a critical role in shaping the discourse on manuscript heritage. While many contribute to conservation and responsible scholarship, others, whether through negligence or intent, risk legitimizing biblioclastic practices by failing to apply rigorous provenance standards. A particularly concerning example is the systematic

misclassification of excised manuscript leaves, where recent dismemberments are catalogued as *fragments*, effectively masking the destruction of complete codices. This practice not only distorts scholarly understanding but also facilitates the circulation of manuscript leaves devoid of their historical and legal context. The website *Fragmentarium.ms* exemplifies how scholarly platforms, instead of mitigating the damage caused by manuscript dismemberment, can inadvertently facilitate and normalize it. The platform routinely fails to disclose the provenance of manuscript leaves, classifying them as *fragments* without acknowledging their removal from once-intact manuscripts. By presenting recently excised folios as naturally detached remnants, *Fragmentarium* reinforces a narrative that obscures biblioclasm and its commercial motivations. One of the most striking examples is the Madruzzo Book of Hours, whose dismembered leaves have surfaced in various collections. A folio from this manuscript, now held at the University of Cincinnati, was added to the *Fragmentarium* database in 2024 (see Fig. 18) without any reference to its source manuscript, despite its clear identification by the author's research center in a digital reconstruction that has been publicly available for years (see the OProM digital reconstruction at https://www.oprom.eu/madruzzo).

Notably, *Fragmentarium* failed to cite this reconstruction, despite cataloguing the folio long after the manuscript's provenance had been firmly established. This omission reflects a broader pattern in which manuscript leaves are stripped of their historical context, reinforcing the perception that they exist as isolated artefacts rather than as parts of systematically dismantled codices.

This omission is not an isolated case but rather part of a pattern of inconsistent and often misleading cataloguing, which routinely neglects to acknowledge that many of the leaves listed on the platform originate from manuscripts that were systematically dismantled for commercial purposes.

Such omissions are not merely academic failings; they also raise significant legal concerns. In the European Union, Directive 2014/60/EU on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State establishes clear obligations regarding provenance documentation. While primarily aimed at preventing the illicit trade of cultural property, the directive reinforces the principle that accurate provenance is essential to the legal and ethical circulation of historical artefacts. Similarly, UNESCO's 2015 Recommendation concerning the Preservation of, and Access to, Documentary Heritage including in Digital Form underscores the responsibility of institutions to provide clear and verifiable provenance information when cataloguing historical materials. Fragmentarium's failure to disclose the original source of the manuscript leaves not only undermines scholarly research but could also be interpreted as facilitating the circumvention of provenance verification standards, which are critical in preventing the trafficking of unlawfully acquired artefacts.

Beyond issues of provenance, concerns have also been raised about the conduct of certain individuals associated with the *Fragmentarium* project, particularly concerning the systematic defamation of scholars advocating for the ethical treatment of manuscript heritage. It is well-documented that some of its affiliates have actively participated in a campaign aimed at discrediting researchers who expose biblioclastic practices, including the author of this article. This extends beyond academic disagreement and raises broader ethical questions regarding the responsibilities of scholarly institutions in fostering integrity and accountability within manuscript studies.

The case of *Fragmentarium.ms* underscores the broader implications of inadequate provenance documentation in the digital humanities. As a platform that influences both scholarly research and public perceptions of manuscript leaves, it bears a heightened responsibility to ensure accuracy and transparency. The continued misrepresentation of manuscript origins—whether through omission or systematic misclassification—not only distorts historical understanding

but also raises fundamental questions about academic and legal accountability in the study of manuscript heritage.

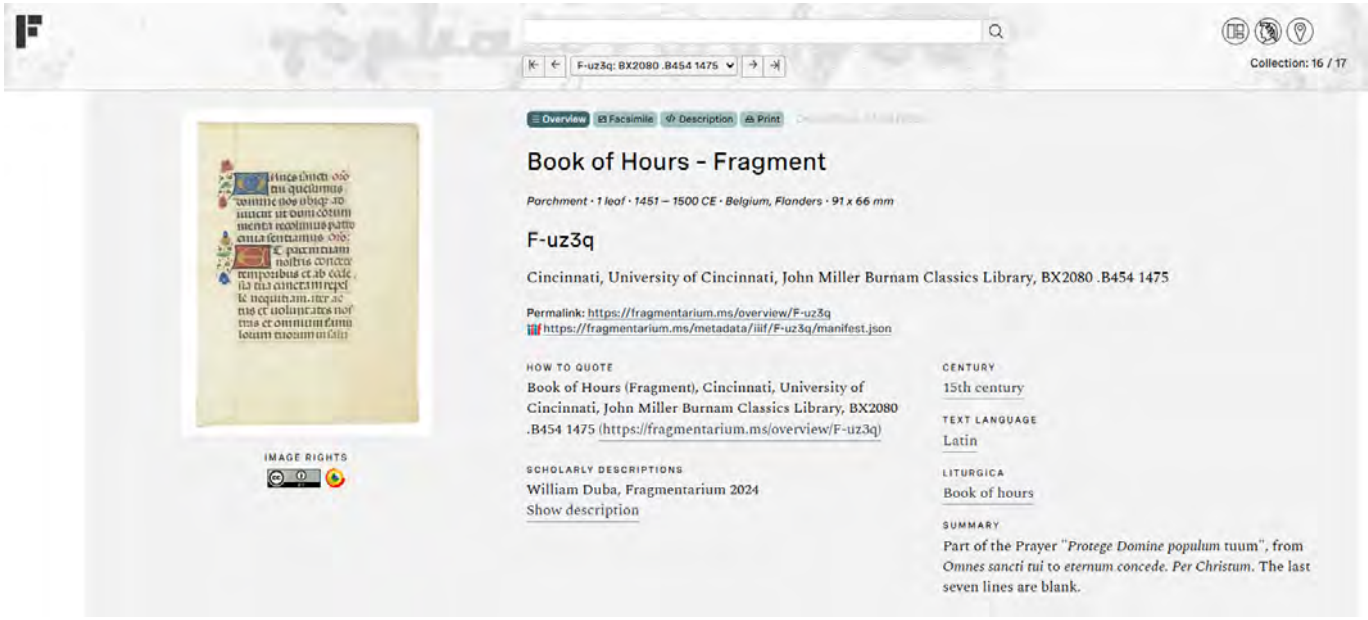


Fig. 18. And 18bis.: Entry in *Fragmentarium*, https://fragmentarium.ms/overview/F-uz3q, which provides no information regarding the provenance of a leaf now held at the University of Cincinnati, excised from the Madruzzo Book of Hours.

The same leaf, identified as fol. 112 recto/verso, as incorporated into the digital reconstruction by the Organisation pour la Protection des Manuscrits Médiévaux (OProM). Images reproduced with the kind permission of OProM.

"Fragmentology" vs. Reconstruction

In a 1974 UNESCO publication, Virgil Cândea observed that "illustrated manuscripts represent a unique and deeply troubling case in the unfortunate history of dismembered artworks. The challenges associated with their reconstitution are among the most formidable, and the achieved results thus far have been rather limited and frequently unsatisfactory" (Cândea, 1974, 188). Recognizing the difficulty of restoring dismembered manuscripts to their original form, Cândea advocated for the systematic documentation of excised leaves and the creation of resources to facilitate their future reconstruction. He proposed what we would now describe as a digital database, stating that such tools would be indispensable for scholarly reconstitution efforts:

"Full documentation on these works is, of course, indispensable… we must prepare directories of dismembered illuminated manuscripts" (Cândea, 1974, 191).

This vision aligns closely with the objectives of the Research Centre for European Philological Tradition and the Organization pour la Protection des Manuscrits Médiévaux (OProM), both of which have undertaken extensive efforts to compile and develop structured databases of medieval dismembered manuscripts. In collaboration with libraries and heritage institutions committed to manuscript preservation, these organizations adhere to the methodological principles articulated by Cândea, applying contemporary digital tools to advance the study and reconstitution of fragmented codices.

Since Cândea's observations, digital technology has significantly expanded the possibilities for manuscript reconstruction. However, rather than mitigating the destruction of medieval and pre-Renaissance manuscripts, the increasing demand for illuminated leaves in the antiquarian market has, if anything, exacerbated the practice of biblioclasm. The urgency of reconstructing dismembered manuscripts is therefore greater than ever, requiring not only technological advancements but also robust methodologies grounded in philological and codicological principles.

As Cândea further noted:

> "Such directories would have the merit of hastening the reconstitution of dismembered manuscripts… Furthermore, they would be excellent tools for research workers, librarians, antiquarians, and collectors who have to deal with unlisted fragments which are still not permanently housed. The directories would also help in the tracking down of fragments that were reported a long time ago in public or private collections but which have since changed hands. Finally, they might give a list of the publications required to publish all the fragments of an entire work which had been discovered, this being the most usual means of reconstituting dismembered illuminated manuscripts" (Cândea, 1974, 191).

The need for such systematic approaches has been central to my own research, which has long been dedicated to rescuing these artefacts from the historical obscurity imposed upon them by acts of biblioclasm. Over the years, I have developed and refined a rigorous scholarly methodology that applies philological principles to scattered leaves, allowing for their digital reassembly and the restoration of their original codicological and textual contexts.

This method termed the WayBack Recovery Method (WBRM), represents a structured approach to the digital reconstruction of dismembered manuscripts, providing scholars with a tool for reintegrating dispersed folios and mitigating the long-term consequences of manuscript dismemberment.

Any discussion on digital manuscript reconstruction necessitates a theoretical framework, drawing upon established principles of restoration and cultural heritage preservation. Two critical perspectives inform this approach: Cesare Brandi's theory of restoration and Walter Benjamin's discourse on *aura*.

Brandi (1906–1988), an Italian art historian and conservation theorist, articulated a comprehensive philosophy of restoration in his seminal work, *Theory of Restoration* (1963). He argued that the conservation of an artwork should preserve both its historical and aesthetic integrity, ensuring its transmission to future generations without distorting its essence. His concept of "dynamic conservation" rejected the notion of freezing an object in time; instead, he maintained that restoration should reconcile past and present, allowing the artwork to retain its vitality while acknowledging the interventions necessary to preserve it. In some respects, this perspective resonates with the Japanese art of kintsugi, which finds beauty in the visible traces of restoration.

Brandi's approach to restoration insists on a profound understanding of the artwork's original context, function, and artistic intent. This principle is particularly relevant in the reconstruction of dismembered manuscripts, where each fragment must be contextualized within the broader codicological and historical framework from which it was severed. His theory offers a compelling methodological foundation for digital manuscript restoration, ensuring that reconstructed works do not become mere aesthetic approximations but instead uphold the integrity of the original artefact.

Walter Benjamin's reflections in *The Work of Art in the Age of Mechanical Reproduction* (1936) provide another crucial dimension to this discussion. Benjamin identified the concept of aura as the unique presence and authenticity that emanates from a work of art in its original form. This aura is not merely a function of the object's materiality but derives from its historical context, its singular existence, and its embeddedness within tradition and ritual. According to

Benjamin, the reproduction of an artwork inevitably alters its relationship with time and space, detaching it from the unique conditions that define its authenticity.

Applying Benjamin's insights to the reconstruction of manuscripts raises profound ethical and methodological questions. If an artwork has been intentionally destroyed for commercial gain, how should scholars approach its digital restoration? Does a reconstructed manuscript retain any vestige of its original aura, or does it become an entirely new entity, distinct from its historical antecedent? More importantly, do scholars engaged in digital restoration bear an ethical responsibility to recover and transmit the lost aura of an artefact that human greed has shattered into pieces? These questions do not permit simple answers, but they compel scholars to reflect on their role as custodians of cultural memory, entrusted not only with the preservation of the past but also with its meaningful transmission to the future.

The affirmative response to these ethical concerns leads naturally to further reflection on the nature of historical discontinuity, an issue highlighted by Benjamin himself. The destruction of medieval manuscripts by biblioclastic dealers represents a violent rupture in the transmission of cultural heritage, depriving future generations of access to irreplaceable historical sources. This phenomenon could be termed, with a neologism, a form of "memoricide"—the systematic obliteration of cultural memory through the dismemberment and dispersal of textual artefacts. In this context, every act of reconstruction serves not only as an attempt to restore a lost work but also as a direct indictment of those responsible for its destruction. The digital reassembly of scattered folios ensures that the manuscript's intellectual and artistic unity is not wholly lost, even if its physical integrity cannot be recovered.

The act of reconstructing a Book of Hours, for example, is not merely a scholarly exercise; it is an act of defiance against the forces that seek to erase history for profit. The echoes of those who once held such a manuscript in their hands, reciting psalms and prayers, are not entirely silenced. Even in digital form, the reconstructed manuscript retains traces of its former function, allowing its dispersed voices to resonate once more. While the damage inflicted by biblioclasts

cannot be undone, the digital realm provides an alternative space for the restitution of cultural memory. As annotations, commentaries, and marginalia accumulate around these reconstructions, they become dynamic texts, evolving over time while preserving the knowledge embedded within them.

Brandi's and Benjamin's theoretical frameworks offer critical guidance for digital restoration efforts. Brandi's emphasis on understanding an artwork's historical and sociocultural context before undertaking restoration ensures that digital reconstructions remain faithful to the original codex, respecting its material and intellectual history. Benjamin, in turn, reminds us that even a digital facsimile carries traces of the original's aura, provided that it is reconstructed with an awareness of its historical significance. Neither theorist prescribes an exact methodology, but together they illuminate a pathway towards responsible and ethically grounded digital reconstructions.

The ultimate ambition of such efforts is not to create a facsimile that mimics the original, but to produce a meaningful synthesis that reconnects scattered fragments into a coherent whole. A digitally reconstructed manuscript will inevitably differ from its lost predecessor, but if undertaken with scholarly rigour and ethical intent, it can serve as a bridge to the past, safeguarding knowledge that would otherwise be irretrievably lost.

In 2006, the author of this article launched the "Biblioclasm & Digital Reconstruction" project, committed from the outset to the principles of Open Access. In collaboration with the Research Centre for European Philological Tradition, a specialized programme was developed to facilitate the digital restoration of dismembered manuscripts. Since 2016, and with the support of numerous scholars, these efforts have resulted in the successful reconstruction of approximately five hundred fragmented manuscripts. It is important to emphasize that all of this work has been carried out pro bono, with no financial gain derived from the reconstructions, ensuring that these artefacts remain accessible to the widest possible audience.

Every digital reconstruction, as well known to the members of the teams that have collaborated alongside the author of this article over the past twenty years, inevitably sheds light on the individuals responsible for specific instances of manuscript dismemberment, as well as on the broader networks of complicity that enable such practices. While only a small portion of these findings can be addressed within the scope of this article, cases involving legal infractions have been systematically reported to the relevant authorities following the legal frameworks of the jurisdictions concerned.

As these research efforts have progressed, they have also prompted reactions from certain sectors of the antiquarian market and affiliated academic circles. This response underscores the complexities surrounding the trade in manuscript leaves, where financial interests often intersect with questions of scholarly ethics and cultural heritage preservation. In light of these challenges, it became necessary to adopt a structured and coordinated approach, reinforcing efforts to safeguard manuscript heritage through both academic research and institutional collaboration.

One of the most significant outcomes of this work has been the formalization of the *Organisation pour la Protection des Manuscrits Médiévaux* in France, consolidating a long-standing commitment to the safeguarding of manuscript heritage. Among its key initiatives is the *Archivum Codicum Manuscriptorum Disiectorum*, a digital repository dedicated to documenting and preserving images of manuscript folios that have been excised from their original codices. These leaves, once integral parts of coherent works, have been systematically disassembled and dispersed by a trade that prioritises financial gain over historical integrity. The *Archivum* serves not only as a repository but also as a means of reconstructing, as far as possible, the original integrity of these manuscripts, ensuring that they remain accessible for scholarly study and public engagement. Each entry in the *Archivum* represents a step towards reconstructing the manuscripts that have been fragmented through commercial practices. The initiative is not merely an exercise in conservation but an assertion of scholarly and ethical

responsibility. By ensuring that these invaluable cultural artefacts remain documented, studied, and accessible, the *Archivum* stands as a testament to the resilience of those committed to preserving the legacy of the past. It also serves as a reminder of the ongoing challenges posed by the antiquarian trade in manuscript leaves, reinforcing the necessity of continued scholarly engagement in the protection of manuscript heritage.

In parallel with these digital initiatives, the *Biblioclasm & Digital Reconstruction* project has also given rise to a dedicated scholarly series, *Dismembered Medieval Manuscripts: Biblioclasm and Digital Reconstructions*, published by Cambridge Scholars Publishing. This series embarks on a critical exploration of medieval manuscript preservation, addressing the ethical and historical implications of manuscript dismemberment. Integrating cutting-edge methodologies in digital humanities with philological and historical approaches, the series provides in-depth analyses and critical editions of reconstructed manuscripts. It critically examines the deaccessioning practices that have facilitated the dispersal of cultural heritage and interrogates the wider implications of manuscript vandalism. Designed for academics, preservationists, and those interested in the complex process of cultural heritage conservation, each volume serves as a testament to the dedication required to safeguard our collective past. The series also contributes to broader academic discourse by addressing the interplay between history, ethics, and preservation.

Through the *Organisation pour la Protection des Manuscrits Médiévaux* [link: https://www.oprom.eu/browsethemanuscripts], readers can access and virtually leaf through these digitally reconstructed manuscripts, providing an experience akin to viewing them in a museum. This initiative reinforces the ongoing commitment to preserving and sharing these cultural treasures, ensuring that even manuscripts that have been physically fragmented remain accessible as part of our shared intellectual and artistic heritage.

Conclusion

The systematic dismemberment of Western medieval manuscripts for financial gain constitutes a violation of both legal frameworks and ethical standards in cultural heritage preservation. As demonstrated in the cases examined in this article, these acts often involve breaches of international and national laws governing the protection of historical artefacts, fraudulent provenance claims, and illicit trafficking. The recovery of physically excised manuscript leaves—such as those identified and reclaimed from commercial platforms and auction houses—highlights the role of investigative scholarship and legal intervention in counteracting biblioclasm.

While agreements such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention establish essential protections for cultural property, enforcement remains inconsistent. Jurisdictional differences, particularly between civil law systems that afford manuscripts the status of protected heritage and common law traditions that prioritize private ownership, create opportunities for illicit trade. Auction houses and antiquarian dealers have repeatedly exploited these legal ambiguities, facilitating the sale of manuscript leaves without adequate provenance documentation. The cases discussed illustrate how national and international legal mechanisms have been leveraged to challenge these transactions and, in some instances, secure the restitution of unlawfully traded artefacts.

Additionally, breaches of financial and tax regulations—including the circumvention of taxation through off-platform sales, falsified valuations, and the evasion of due diligence requirements—underscore the need for heightened regulatory scrutiny. The case of a dealer selling excised folios through clandestine auctions, bypassing eBay's policies and financial oversight mechanisms, exemplifies the wider problem of unchecked commercial exploitation. The enforcement of existing legal provisions against fraudulent transactions and illicit cultural property transfers must be strengthened to prevent the continued dispersal of manuscript

heritage.

Despite these legal challenges, proactive recovery efforts have demonstrated that targeted interventions can lead to the successful identification and retrieval of dismembered manuscripts. The archival and legal documentation compiled by institutions such as the Organisation pour la Protection des Manuscrits Médiévaux has facilitated the tracing of excised folios, ensuring their reintegration into historical and scholarly contexts. These efforts, supported by forensic research and digital methodologies, contribute not only to the restoration of manuscripts but also to the broader accountability of those engaged in their dismemberment and resale.

Beyond physical recovery, digital reconstruction remains an essential tool in mitigating the impact of biblioclasm. The *Biblioclasm & Digital Reconstruction* project has played a pioneering role in this regard, reconstructing approximately 500 dismembered manuscripts and making them accessible through open-access platforms.

The establishment of a dedicated scholarly series, *Dismembered Medieval Manuscripts: Biblioclasm and Digital Reconstructions*, further advances these efforts by integrating legal, philological, and historical approaches to manuscript preservation. Through initiatives such as the *Archivum Codicum Manuscriptorum Disiectorum*, a growing number of digitally restored manuscripts are now accessible to both researchers and the public, reaffirming a commitment to ethical custodianship and scholarly integrity.

Ultimately, the protection of manuscript heritage requires a multifaceted approach that combines legal enforcement, academic accountability, and digital preservation. As biblioclasm continues to threaten the integrity of medieval manuscripts, a concerted effort among legislators, scholars, and cultural institutions is necessary to uphold the legal and ethical principles governing historical artefacts. Strengthening provenance verification standards, reinforcing regulatory oversight, and expanding digital restoration initiatives are all critical

measures in ensuring that manuscript heritage is safeguarded for future generations.

Restitution of African Belongings and the Skewed Legal Perceptions of Colonialism[1]

Cover Image Credit by Mario La Pergola

***Maxim Smets**

Law has always played a deeply ambivalent role in the colonial project, serving as both a facilitator and, paradoxically, a constraint on the colonial endeavours of European states. While international law indeed facilitated colonial expansion, it also had certain restricting dimensions – or, at least, delaying ones – on European expansionism in Africa, most prominently through treaty conditions for and obligations in international agreements between European states and African societies – an aspect insufficiently chronicled in legal-historical scholarship.

These treaty conditions and obligations are especially relevant for the restitution debate of African belongings, as it is often argued that there is no legal basis for an obligation of restitution – or, if a legal basis nevertheless can be established, for its enforcement. It remains widely asserted that *"colonial law has to be applied, even if it is no longer compatible with today's views on law and justice."* This is evident in documents like the Declaration on the

[1] This article is a composite summary of several sections of a doctoral thesis currently being written by the author at the Faculty of Law and Criminological Sciences of KU Leuven, Belgium.

Importance and Value of Universal Museums (2002), signed by 18 leading museums in Europe, the US, and Russia, which states: "*We should, however, recognize that objects acquired in earlier [i.e. colonial] times must be viewed in light of the different sensitivities and values, reflective of that earlier era.*"

These assertions heavily rely on the principle of intertemporal law, which mandates that juridical facts be assessed according to the laws in effect at the time and generally assume the inherent lawfulness of colonial appropriations in the 19th and early 20th centuries. However, they often lack substantive evidence or justification to support this assumption.

The Enduring Ambiguity of Colonial Law

In reality, colonial law was not a cohesive body of well-defined rules but rather a diffuse and amalgamated network of laws, consisting of international principles and treaties, colonial private laws, and a wide range of interpretations and practices shaped by courts and relevant actors, varying across imperial states. Koskenniemi aptly describes colonial law as *"a complex whole of different kinds of regulation and practice and both inhabitants as well as administrators were often equally at a loss about what to think of it."* Specifically for German Southwest Africa, Goldmann recounts the colonial property law as *"pervaded by a bizarre degree of fuzziness."* As both a foundation and an integral part of this broader legal framework, colonial international law was equally marked by significant ambiguity.

Thus, when the argument is made to 'simply' apply colonial law, proponents often misunderstand their own argument and overlook the uncertainty and ambiguity surrounding both the nature and content of colonial law, relying instead on unfounded assumptions. For instance, in the Guidelines for German Museums: Care of Collections from Colonial Contexts, Thielecke and Geissdorf—writing on behalf of the German Museums Association—offer no more than the conclusion that *"it can be assumed that appropriations by public authorities were always covered by the formal colonial law applicable at the time."* Yet, we rarely see such brazenly speculative and obfuscatory assumptions substantiated by concrete legal-historical evidence. On the contrary, it merely reveals the limitations and inadequacy of these reported analyses, which fail to engage with the complex nature of colonial legal frameworks, particularly concerning colonial appropriations of Indigenous belongings. It epitomises the dominant narrative of – and widespread belief in – the overarching legality of colonial actions. Yet, as American economist Sowell aptly observes, *"some things are believed because they are demonstrably true. But many other things are*

believed because they are consistent with a widely held vision of the world – and this vision is accepted as a substitute for facts". And this is exactly why LeGall and Machona unequivocally call Thielecke and Geissdorf's claim *"counter-factual"* and *"ahistorical."*

In light of this, the sweeping presumption of the lawfulness of colonial appropriations only serves to perpetuate these colonial injustices, transforming them into contemporary legal justifications for refusing restitution or framing restitution as a moral, rather than legal, issue. It fits into a broader attempt at what Goldmann refers to as "retrospective homogenization" of colonial international law—a concerted effort to retrospectively portray colonial international law as a consistent and legitimate legal system rather than as the arbitrary and incoherent structure it often was. Such portrayals reinforce assumptions about the legality of a vast range of colonial wrongs, yet these assumptions ultimately remain nothing more than mere unsupported claims. They even tend to be as vague as they are uninformative, frequently failing to specify what 'colonial law' and its corresponding historical views actually entailed. They particularly neglect perspectives that challenge the dominant narrative of the legality of colonial appropriations.

Native Property in African-European Treaties and the Illegality of Colonial Takings

Colonialism was a multifaceted legal phenomenon characterised by intricate power dynamics and asymmetrical relationships between colonisers and colonised peoples. While non-Europeans were theoretically denied sovereignty and international legal personality, the reality of colonial interactions belied this theoretical narrative. In practice, native peoples often engaged in (and even initiated) treaties and agreements with European powers, ceding sovereignty or entering into various legal arrangements whereby conditions of form, capacity, and consent had to be met. European states were particularly conscious of the application of international legal principles and the binding nature of treaties concluded on that basis. This was, however, also a practice in which these same principles were often exploited or subverted for colonial gain. Indigenous agency and consent were recurrently manipulated or coerced, and treaties were, over time, leveraged or disregarded to serve colonial interests. The subsequent disregard for these legal commitments highlights the complex nature of colonial interactions and the unlawful actions that followed.

Nonetheless, recognising the role that international law played in this timeframe allows for a re-evaluation of colonial relations. It should not only inform our historical understanding of colonialism in legal terms but also compel us to reframe our contemporary debates on

restitution, especially since the 'legality' of colonial actions continues to be the default mode from which any discussion progresses. Yet, a legal-historical analysis of the treaty relations between European states and African societies reveals that territorial cessions and protectorate treaties generally did not involve the transfer of private property. More so, respect for native customs and private property was often explicitly stipulated in their bilateral treaties. In this context, private property was usually understood as any property belonging to the Indigenous population of the respective community, which ipso facto included their spiritual, artistic, and communal belongings as well as other creations stemming from traditional craftsmanship.

For instance, Great Britain had already concluded treaties with the regions of Brekama and Combo (both present-day Gambia) in the first half of the 19th century, in which the native inhabitants' lands, houses, and property *"of any description"* were protected from interference or intrusion. The sanctity of native property was actually quite fundamental and was even part of the Royal Charter of the British National Africa Company (i.e., the Royal Niger Company from 1886 onwards)—by far the most prolific of Britain's chartered companies in Africa in terms of treaties. The Royal Charter included the obligation *"not to interfere in any of the native laws and not to encroach on or to interfere with any private property."* An analysis of the Company's treaty practices reveals that this principle of non-interference with private property was also integrated into its standard treaty forms – in addition to compensation clauses in the event that the Company acquired native land. Between 1884 and 1892, the Company enacted over 300 treaties, utilising ten different treaty formats (see also *supra*), each with its own clear but slightly altered formulations concerning respect for native laws, customs, and property. Form No. 1, for instance, with which it concluded 25 treaties, stipulated that *"the [Royal Niger Company] (Limited) will not interfere with any of the native laws, and also not encroach on any private property unless the value is agreed upon by the owner and the said Company."*

Native property was clearly safeguarded against any form of interference or encroachment in these treaties. This framework for protecting native property was also explicitly affirmed on numerous occasions in the case law of the Privy Council (see e.g. Sobhuza II v. Miller (1926) and Sunmonu v. Disu Raphael since deceased (now represented by Awanotu) (1927)). A notable example is the case of Amodu Tijani v. Secretary, Southern Nigeria (1921), in which the Privy Council concluded:

"No doubt there was a cession to the British Crown [in 1861], along with the Sovereignty, of the radical or ultimate title to the land, in the new Colony, but this cession appears to have

been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only."

In its judgment, the Privy Council jurisprudentially confirmed that the protection of native property was not only stipulated in the respective treaty but also a broader principle of British policy and law. The Council ultimately awarded compensation to Amodu Tijani, acting as Head Chief on behalf of his community, for the seizure of portions of their land and thereby affirmed that cessions of sovereignty did not extinguish private property rights.

The International Congo Association, like the Royal Niger Company, made use of seven different treaty models to conclude large amounts of treaties in which native property remained out of scope. Article 5 of its Model A treaty, for example, excludes native property from any transfer and even explicitly protects it.

Plentiful agreements were concluded in the name of the Association or one of its predecessors, utilising Model A or based on its initial framework. Similar clauses can also be found in German treaties. The French, too, entered into numerous treaties with African communities, stipulating that Indigenous property rights would be protected from any form of encroachment. Article 3 of its 1883 treaty with the Chiefs of Punta-Négra (present-day Republic of the Congo), for example, specified that *"[l]es chefs de Punta-Négra et tous les indigènes conservent l'entière proprieté de leurs terres."* This was a recurrent formula in a considerable amount of French treaties. The exact same clause can be found in its protectorate treaties with the territories of Youmba (1887), Longo (1888), Bôbassa (1888), Lissougo (1890), and so on (all present-day Republic of the Congo).

Even when African territories were overtly acquired through military conquest or occupation – often euphemistically referred to in colonial language as 'punitive expeditions' but, in reality, nothing short of ultraviolent wars – and African belongings were supposedly taken as 'spoils of war', the fundamental principle remains unchanged. Conquest does not, in principle, affect the private property rights of the subjects of a conquered or occupied territory; regardless of whether territorial acquisition results from conquest, occupation, or formal cession, the sanctity of private property is steadfastly protected under international law in all of these scenarios. This principle is further underscored by the numerous clauses to this effect in African-European treaties, which echo the prohibition of plunder and the exemption

of private property and cultural riches from being considered legitimate spoils of war in Europe.

Conclusion: Towards a Legally Justified Restitution Framework

Respect for native customs and the inviolability of their property was thus firmly established in international treaty practice. In light thereof, it is historically and legally inaccurate to maintain that the large-scale, violent takings by European armies, civil servants, and chartered companies were ‘legal’ when, in reality, they were not. The fact that their belongings were misappropriated on a massive scale during colonial times, in direct violation of the international agreements between European states and African societies, does not make those practices legal simply because we live in a Eurocentric world order, and those practices served Western goals. Therefore, any relevant and legally sound discussion of restitution must begin with an understanding and acknowledgment of the distinction between the *power* to do something with impunity and its *legality* in the colonial era. The failure to grasp this fundamental difference has perpetuated the Eurocentric legal epistemologies and erasures that prevail today, allowing power to triumph over both legality and morality without appropriate redress.

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Propaganda and Power: The Third Reich's Strategic Use of Art for Social and Political Control

Cover image credit

***Pauline Moorkens**

I. Introduction

> "*How different it is in tyranny. When artists are made the slaves and tools of the state; when artists become the chief propagandists of a cause, progress is arrested and creation and genius are destroyed.*"
> - Dwight D. Eisenhower, 1954.

Throughout history, the use of art as a tool for propaganda has been witnessed, whether for political indoctrination purposes, social order, or ideological transformation. Political scientist Bruce Lannes Smith defined propaganda as the "*more or less systematic effort to manipulate other people's beliefs, attitudes, or actions by means of symbols*". These means or symbols can vary from words, gestures, music, and clothing to forms of art, including banners, monuments, insignia, designs, paintings, sculptures and so forth.

Propaganda has also been described as "*a method of communication, by State organs or individuals, aimed at influencing and manipulating the behavior of people in a certain predefined way. The element of influence and manipulation is at the center of the concept, and distinguishes it from mere factual information.*" Furthermore, the term has also been coined as often inaccurate information broadcasted or published by political organizations to influence people. The use of art as a tool for propaganda seemed to coincide with the consolidation of art history as a discipline in the early 20th century. Indeed, the rise of the Nazi Party from the early 1920s onwards witnessed a vast use of propagandist tools, such as the media, forms of art, and many more, as a critical tool in "*acquiring and maintaining power*." Art, politics, and culture have always been intertwined in society. To an extent, they have all been connected through the influence of art on society. Its influence in question has been used as a tool of "*power, repression, reconciliation and change*".

Art in society holds a legal aspect; however, social order can also be maintained through means that are disparate from positivist law. According to Dr. Steven Leuthold, art has to be viewed in the context of a community and its experiences and views. That said, art is an effective social order tool as it holds "*the personal and social transformative power of the arts*." Furthermore, art can serve as a tool to solidify and codify "*social order through the intentional repeated use of imagery and ritual*". Additionally, the quintessential role that art has had as a political tool is due to the conveying of messages, philosophies, political views, and statements, through the imagery of art. In fact, the artistic reflection of political ideologies was prominent in Nazi Germany. During this era, art was used as both an ideological weapon in the struggle to maintain power and as a tool to serve totalitarian and/or fascist power. Ideologically, art was used to establish Adolf Hitler's utopian, i.e., totalitarian, version of society of and by the power. This version of society was educated into the masses through the propagandist use of art. Art served Hitler's and the Third Reich's totalitarian and fascist agenda in several ways, notably through the labelling, criminalization, and destruction of what was considered by the Third Reich and the Reich Culture Chamber as 'degenerate art.' Said degenerate art was considered to go against the Nazis' views on societal values.

This paper will be divided into three parts. Firstly, the question of how the Third Reich used art as a propagandist tool will be answered. Secondly, the paper will analyze

how the Nazi Party ('*Nationalsozialistische Deutsche Arbeiterpartei*' or 'NSDAP') was the most successful political party in history to use art in a propagandist manner as a mechanism for social transformation and social order. Thirdly, the Nazi art propaganda effects' success and durability from the rise until the fall of the Third Reich in 1945. Art in the Second World War, and more precisely in the Nazi reign, holds a quintessential part of the history of this cataclysmic period. Indeed, art theft, large-scale plunder, iconoclasm, destruction, cultural heritage crimes, fraud, and vandalism were all occurrences of this period.

I.

During Hitler's rise to autocratic power, many propagandistic implementations occurred to further the Nazi political agenda. The media was a decisive tool in the expansion of the NSDAP's ideas regarding politics, society, and the state of Germany as a whole prior to Hitler's appointment as chancellor in 1933. To this end, the Völkischer Beobachter, i.e., the Nazi Party's newspaper, was acquired by the Party in 1920. It was previously known as the Munich Observer and was widely recognized as an anti-Semitic newspaper. After a brief banning and ceasing of publication from 1923 to 1925, i.e., during Hitler's imprisonment for leading the failed November 1923 Beer Hall Putsch in Munich, the newspaper's publication resumed, and with it, its drastically increased circulation, reaching above 120,000 by 1931, more than 4.5 times what it was in 1929. Along with the newspaper, posters advertising it were distributed on a nationwide scale in an attempt to increase the readership. Along with the Völkischer Beobachter, the propagandistic newspaper Der Angriff was founded in 1927 by the Gau Berlin of the Nazi Party to further express the Party's political and societal views. However, the Nazi Party's use of art for propagandist goals truly began with the censorship of visual art, including motion pictures, e.g., the banning of the American anti-war motion picture 'All Quiet on the Western Front' by Nazi Chief Propagandist Joseph Goebbels. Fine art played a central role in the propagation of the Third Reich's societal ideals, such as the Aryan race supremacy and other Nazi themes through sculptures, paintings, and more.

The propagandist use of art was also seen in the confiscation and destruction of art forms, e.g., degenerate art. The ceasing, banning, and destruction of what was considered

degenerate art started to become more widespread in Nazi Germany from 1937 onwards. The socio-political banning of degenerate art was linked to Hitler's anti-Semitic views as he considered the "*distorted reality*" of such art to lure society and culture away from racial purity, i.e., the Aryan race. The Nazi Party effectively united a country by directing the accountability of lack of structure upon specific entities, such as the European Jewish community, or diverse art forms, such as Expressionism. Furthermore, these "disturbing" modernist forms of art were blamed on the Jewish community. In using art as a propagandistic tool, the Third Reich drew upon the negative social sentiment following the failure of the Weimar Republic by building unity against a common scapegoat. In doing so, art was a powerful tool to redirect blame and advance the Party's political and anti-Semitic agenda. Anti modernist and anti-Semitic sentiments were common in early 20th-century Germany and Europe, which Hitler and his Party built upon before and during their time in power.

As stated by philosopher Jacques Ellul, propaganda attempts to produce "*conditioned reflexes in the individual by training him so that certain words, signs, or symbols even certain persons or facts provoke unfailing reactions*." The NSDAP conditioned Germany's society, amongst others, to view Fauvism, Dadaism, Expressionism, and Surrealism, amongst other forms of modern art, as concomitants of cultural and societal decline, as well as promoting elements of communist and Jewish agendas. Such works, considered as an insult to "*German feeling*," were exposed in a 1937 exhibition in Munich entitled the '*Degenerate Art*' exhibition ('*Entartete Kunst'*). In 1942, the Reich Ministry for Public Enlightenment and Propaganda ('*Reichsministerium für volksaufklärung und propaganda*') produced an inventory containing more than 16,000 artworks that had been confiscated because of their degenerate nature. The confiscation of privately owned art was also related to Hitler's detest for the ownership of cultural-significant art by Jews or other so-called "*inferior races*". Through the propagandist banning, confiscation, and destruction of art, the Nazi Party promoted their political, societal, and economic ideas and promulgated certain forms of art as the antithesis of their view of the perfect German society.

II.

The Nazi Party was arguably the most successful political party in history to use art in a propagandist manner as a mechanism for social transformation and social order. There have

been several examples of political parties throughout history using art as a propagandistic tool which begs the question as to whether the Nazi party was the most efficient in doing so. The United States notably recurrently used art in the form of posters in military recruitment efforts during both World Wars, e.g., the renowned Uncle Sam poster depicting the colors of the American flag with an elderly man representing a father figure to the nation with inscribed "*I Want You for U.S. Army.*" Great Britain also used such posters during the First and Second World Wars, e.g. The 1914 recruitment poster depicting British Secretary of State for War: Lord Kitchener, pointing out towards the viewer with inscribed "*Britons: Lord Kitchener Wants You. Join Your Country's Army! God save the King*". This use of art for the depiction of a united country was similarly witnessed in the Soviet Union where the Bolsheviks' triumphs were depicted in posters during the 1920s throughout Russia. This depiction of the success of communism in Russia and the Soviet Union continued to be put forth throughout Stalin's political reign through posters, movies, literature, paintings, and more. The reason behind the frequent use of posters, drawings, and paintings is, amongst other factors, that their messages can reach even the illiterate. Similarly to Hitler and Nazi Germany, Joseph Stalin censored and banned certain art forms. Additionally, the propounded Soviet government's idea of the perfect Soviet society was displayed through art, amongst other means. Similarly to the Third Reich, the USSR used Heroic realism to display its messages and views. Heroic realism was an art form most successfully used by German artist Ludwig Hohlwein from the 1920s until the end of the Second World War. The USSR's similar use of art for propagandist means was vastly seen in its Socialist realism form. Both art forms of Heroic and Socialist realism depicted figures as the ideal symbols of society, e.g., Blue-eyed, blonde-haired, muscular men in Nazi Germany, and often rejected modernist art forms and ideas.

Although the propagandist use of art has been witnessed in many political parties and states throughout history, the Third Reich has arguably been the most successful in effectively using it in terms of state unification towards a common goal. Indeed, art propaganda's use in politics has been perfected by 20th-century regimes such as Benito Mussolini's fascist Italy, Stalin's communist Russia and Soviet Union, but most abundantly by Hitler's Nazi Germany. This is due to many factors, including the long term social order and transformation effect said propaganda had until the end of World War II. It is important to note, however, that the Nazi Party's unification of the German people towards a shared

purpose cannot be solely attributed to propaganda. Indeed, similarly to the USSR and a number of totalitarian governments, the elimination of political opponents is, historically, a quintessential aspect of an autocratic rise to power. The NSDAP eliminated all political opposition through actions such as the banning of other political groups in 1933 and the Night of the Long Knives ('*Nacht der langen messer*') in 1934, which caused approximately 700 to 1,000 casualties, according to high estimates. However, it is undeniable that propaganda and the use of art for its purpose were masterfully used in Hitler's and the Third Reich's attainment and maintenance of power. This can be firstly attributed to the importance Hitler placed on propaganda as a key element of the Nazi Government. As previously mentioned, a specific branch of the Government, the Reich Ministry for Public Enlightenment and Propaganda, was created, with Goebbels as its director, as early as 1933. The Ministry proved essential in the Nazi Government's infiltration of the media through the use of propagandist means, including newspapers, films, museum exhibits, posters, and more. All these artistic forms were censored, manipulated, or adapted to fit the Nazi Party's narrative and political ideology. The NSDAP used "*rhetoric to politicize art and to exploit deep-rooted concerns shared by large segments of the populations, namely, that an erosion of traditional values threatens a familiar way of life*". Nazi art propaganda pervaded every aspect of society, including the press, cultural institutions such as the theatre, art exhibits, music, but also education through education curriculums.

III.

The Nazi art propaganda effects' success and durability lasted over a decade until the end of the Second World War in 1945 and the subsequent fall of the Third Reich. The Nazi Party effectively used art as a tool for banning or censorship of so-called un-German ideals but also for political, social, and economic ideals communication. One of the determining factors in claiming that the Nazi Party was most successful historically in propagandist means to spread and enforce their views was the pervasive nature of said propaganda. The NSDAP successfully defined an agent of blame, the Jewish Community and other entities, for all the misfortunes Germany endured, from the loss of the First World War to the political instability and economic crisis. As provided by scholar Doris Bergen, "*Leadership, political will, and manipulation of popular sentiments are needed to fan hostility into organized killing*". Hitler and the Nazi Government saw an opportunity within art to re-

direct the societal distrust of modernist art and the ideas linked to it to further their political, social, and economic objectives. The 1937 Degenerate Art Exhibit was an example of masterful propagandist use of art. It was used not only as a tool of criticism towards these art forms and the modernist social ideas attributed to them but also as a warning of the dangers of said ideas. The exhibit, which consisted of Jewish artists or any pieces deemed inferior to Germany, was purposefully exposed sporadically to demonstrate the chaos of Modernism not only in art but in Germany as a country as well. The "*haphazard arrangements and derogatory letter upon the walls*" were exposed in such a manner to stimulate both a sense of ridiculousness and shame but also of disarray and tumult. This skillfully orchestrated propagandist exhibit expressed and re-affirmed the danger of modern art and modernist ideas as an agent of disorganization and chaos. By effectively associating Judaism, Communism, and non Aryan races with art, Hitler and the Reich Ministry for Public Enlightenment and Propaganda created a long-lasting association of all these groups with dangerous, impure societal ideas as well as inferior to Germany. Furthermore, the rhetoric of the exhibit was emphasized through the explanations of the art on the walls, showing such phrases as "military sabotage," "insult to German womanhood," and "complete insanity," amongst others.

A determining factor in how the Nazi art propaganda had such a lasting effect is found in the confiscation of art nationwide rather than its destruction. Indeed, other totalitarian regimes' use of art propaganda lay strongly in their destruction of un-patriotic or degenerate art, i.e., the Soviet Union, rather than its collecting, publicizing, and exposing. Hitler and the Nazi Ministry for Propaganda took advantage of the German widespread fear and uncertainty surrounding modern art ideas and what they represented. Through the circulation of such art under specific rhetoric, Hitler could effectively affirm the precariousness of such art in society and its devastating effects on the German way of life. It was an effective tool in developing and maintaining the public fear sentiments of the time. The Nazi Party effectively cultivated that fear and anxiety as it is irrational, and "*to demonstrate factually in a climate of anxiety that the feared danger is much smaller than it is believed to be, only increases fear*". There was an accurate understanding of the Government that that the censorship and destruction of degenerate art could lead to curiousness rather than fear, which could be eliminated through the public display of it under the Nazis' wanted rhetoric and portrayal. Art was strategically used to display the dangers of Judaism, Communism, and many more through their Nazi-created attachment to

decaying, iniquitous, and irrational social ideals. Through such representation, Hitler and the Third Reich's art propaganda had a lasting effect on German society, as it successfully ingrained the interrelation of certain forms of art with a decaying society, successfully implanting lasting fear.

IV. Conclusion

In conclusion, whether Nazi art propaganda "*shaped or merely directed and exploited*" German public opinion is up for debate and still disputed; however, it is indisputable that Nazi propaganda was one of if not the most effective in history. The astute use of art as a means of propaganda by the Third Reich proved successful in both unifying the country towards a common purpose and finding an agent of blame for Germany's historic misfortunes before the Nazi Party's emergence to power. Art effectively served as a tool of unity through division, giving rise to social categorization and an 'us versus them' mentality. The promotion of a cultural hierarchy in Germany through art was defined in two clear stances. Firstly, the admiration and pleasure emanating from Nazi-approved art genres were a sign of elite and being civilized. Secondly, modernist and expressionist art pieces were synonymous with cultural decay and degenerate ideas. The Nazi use of propagandist art was also marked by the March 1939 destruction of over 1,000 paintings and sculptures and nearly 4,000 prints, watercolors, and drawings. Furthermore, it was estimated that the Nazi Party stole 249,683 paintings before and during the Second World War. These artworks served as an addition to private Nazi officials' collections, e.g., Goebbels, or to the collection of Hitler's Linz Art Gallery, also known as the '*Führermuseum.'* The Third Reich adroitly used art as a propagandist mechanism before and throughout its dictatorship, which had a lasting effect on German society until the end of the Second World War and arguably even afterwards.

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The Repatriation of the Tupinambá Cloak: From Looting to Homecoming

Cover Image Credit

***Wendell Leal Hossu Monteiro de Melo**

Introduction

The Tupinambá Cloak, one of the most important and sacred pieces of the Brazilian Indigenous Tupinambá people culture, is as rare as it is significant. Made with red feathers from scarlet ibises and used in rituals by shamans and community leaders, the cloak symbolizes not only spirituality but also resistance and cultural identity. Despite this, it was removed from its original context during European colonization and remained for centuries at the National Museum of Denmark. This article examines the looting of the Tupinambá Cloak, its historical and cultural implications, and the recent repatriation process culminating in its return to Brazil in 2024.

Historical and Cultural Context

In the 17th century, some Tupinambá Cloaks were taken from Brazil as part of the colonial dynamics that systematically exploited and appropriated cultural assets from Indigenous peoples. The cloak, measuring approximately 1.8 meters in height and 80 centimeters in width, was crafted with ancestral techniques using feathers from scarlet ibises, macaws, and

parrots, representing the spiritual connection of the Tupinambá with the “Encantados,” sacred entities of Indigenous culture.

The encounter with the cloak during the 2000 Discovery Exhibition in São Paulo was a milestone for the Tupinambá people. Leaders like Dona Nivalda and Seu Aloísio immediately recognized the piece as an essential part of their history and spirituality. From that moment, a movement began to ensure the cloak remained in Brazil and would not return abroad.

The cloak was also used in anthropophagic rituals, where the flesh of captured enemies was consumed as a form of avenging ancestors and reaffirming the community's strength. During these events, the cloak symbolized power and spirituality, serving as a link between the living and their ancestors.

The Repatriation Process

The repatriation of the Tupinambá Cloak was the result of years of coordination between Indigenous leaders, Brazilian institutions, and the National Museum of Denmark (Nationalmuseet). Leaders such as Glicéria Tupinambá played a fundamental role in this process, performing "the listening to the cloak" to identify which of the five cloaks in Denmark was ready to return.

During the COVID-19 pandemic, Glicéria crafted a replica of the cloak as a way to revitalize traditions and keep her people’s collective memory alive. According to her, "The interesting thing is to compare a piece that is in the museum, static, and see the piece having life and movement," reinforcing the cloak’s living and spiritual dimension.

In 2022, Glicéria wrote a formal letter to the Danish museum requesting the return, supported by a delegation of Indigenous leaders and the Brazilian government. The transfer was completed in 2024 when the cloak was sent to the National Museum in Rio de Janeiro. This repatriation is part of the museum’s reconstruction efforts following the 2018 fire, symbolizing a milestone in recovering Brazilian cultural heritage.

The Symbolic Value of the Return

The return of the cloak represents more than the recovery of an artifact. It symbolizes the cultural resilience of the Tupinambá and other Indigenous peoples, as well as an important

step toward historical reparation. During the official ceremony in September 2024, President Luiz Inácio Lula da Silva highlighted the return's significance as a "new stage in Brazil's reconstruction," reaffirming the government's commitment to Indigenous rights.

The Indigenous chief Jamopoty of the Tupinambá people of Olivença celebrated the repatriation as a moment of cultural rebirth, emphasizing the importance of protecting Indigenous territories to ensure the continuity of traditions and knowledge.

The cloak is also seen as an instrument of healing and spiritual renewal. According to Ory, Glicéria's son, "When the chief wears the cloak, it will enable the healing of the world by banishing all diseases. All evil will be eradicated because the chief will transform into a superhero".

Cultural Connection and Resistance

The repatriation of the cloak not only revitalized an essential element of Tupinambá culture but also highlighted the importance of historical recognition for Indigenous peoples in Brazil. Furthermore, it strengthened relationships between Brazilian and European institutions in the field of cultural property restitution. The presence of the cloak in Brazil marks the beginning of a new cycle of cultural understanding and the appreciation of Indigenous history as an integral part of the national heritage.

Another significant aspect is the impact of the return on how Indigenous peoples are perceived. This achievement demonstrated the strength of Indigenous mobilization to reclaim elements that symbolize their existence and resistance, challenging colonial narratives that sought to erase their cultural contributions.

Looting and its Impacts

"Looting refers to the practice of plundering, often associated with historical contexts of social, military, or political instability. These acts pose a severe threat to national historical heritage and public order, leading to the loss of valuable information about a nation's history and cultural identity. Additionally, looting contributes to the illegal trade in cultural goods, often financing criminal activities and undermining the preservation of cultural heritage.

In the case of the Tupinambá Cloak, its forced removal from Brazil reflects this context of wrongful appropriation, highlighting the consequences of cultural looting. Combating looting

requires effective strategies for protecting historical heritage and measures to ensure the return of cultural goods to their countries of origin.

The 1970 UNESCO Convention

The 1970 UNESCO Convention, ratified by Brazil in 1973 through Decree No. 72,312, establishes guidelines to prohibit and prevent the illicit transfer of cultural property. It is a milestone in the fight against the trafficking of cultural goods and the effort to foster international solidarity in protecting cultural heritage.

This convention reaffirms that cultural property is a fundamental element of the civilization and culture of peoples, whose full value can only be understood in its original context. Although the UNESCO Convention is not retroactive, it has influenced the doctrine of cultural property restitution and reinforced the need for international cooperation to ensure the preservation and return of looted heritage.

Future Implications

The return of the Tupinambá Cloak paves the way for discussions on the restitution of other cultural goods taken from Brazil during colonization. The establishment of a Working Group on Indigenous Artifact Restitution in 2023 underscores this commitment. Moreover, initiatives like this have the potential to foster cultural revitalization and strengthen the identity of Indigenous communities.

The arrival of the cloak also reignited the debate on the demarcation of Indigenous territories, particularly the Tupinambá de Olivença Indigenous Land, which is still awaiting the conclusion of its regularization process. For Glicéria, “At this moment of temporal framework, the cloak comes to show how much we belong to this territory.”

The future of heritage restitution also depends on interinstitutional engagement between museums, governments, and traditional communities, aiming to expand access to cultural goods. This global articulation must prioritize respect for the cultural and spiritual practices of Indigenous peoples.

Conclusion

The return of the Tupinambá Cloak is a historic milestone that transcends the repatriation of an artifact. It reflects cultural resilience, the fight for historical justice, and the recognition of

the rights of Indigenous peoples. More than an object, the cloak is a living link between the past and the future of the Tupinambá, symbolizing not only what was lost but also what can be recovered and rebuilt. This historic moment reaffirms the importance of continuing the struggle for cultural heritage preservation and the strengthening of Indigenous voices on the global stage.

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CASE REVIEW: MICHEAL A. HAYDEN V JEFF KOONS AND JEFF KOONS LLC 21-CV-10249

Cover Image credit

***Alinda Aaron**

On the 25th of February 2025, the federal court dismissed Michael Hayden's claim against Jeff Koons for copyright infringement. Michael Hayden was a US artist who lived in Italy from 1980 to 2007. He worked as a set and prop designer for live theater companies and as a self-employed visual artist. In 1988, he created a large sculptural work depicting a serpent wrapped around boulders. The sculptural work was sold to Diva Futura for $900 cash without drafting a formal contract or granting permission for reproduction or derivative use. The sculpture was used as a platform in performances by Ilona Staller (stage name "Cicciolina"), an erotic performer associated with Diva Futura.

Between 1989 and 1990, the defendant collaborated with Staller on sexually explicit photo sessions that incorporated theatrical props and backdrops from her studio, including Hayden's sculpture. These depictions of Hayden's sculpture were incorporated into several artworks, namely *Made in Heaven Billboard (1989), Jeff and llona (Made in Heaven) (1990),* and *Jeff in the position of Adam (1990)*. These works were exhibited globally and sold to private collectors or museums.

Hayden alleged that he became aware of the infringement when he was alerted by his then business partner Sergio Meschino to a newspaper article of April 30, 2019, which discussed a legal dispute between Staller and Sotheby's auction house and displayed an image of the *Made in Heaven* billboard. He subsequently filed for copyright registration of his original sculpture (naming it *II*
Serpente for Cicciolina) in August 2019, which was granted in January 2020 and on December 2,

2021 filed a complaint against Koon for Copyright Infringement in the Southern District of New York.

Legal Claims

The plaintiff's claim was for;

1. Copyright infringement under the United States Copyright Act.
2. False Copyright Management Information under the Digital Millennium Copyright Act

   (DMCA)
3. False Claims of ownership under the Visual Artists Rights Act (VARA).

Court's Determination.

The case involved a lengthy procedural history involving submissions and fact discovery. The defendant's motion to dismiss the complaint was denied; however, a motion for a ruling limiting damages to the three-year period prior to the commencement of the action was granted.

Statute of limitations.

The court dealt with the issue of statutory limitations extensively. The Copyright Act says that a civil action must be brought within three years after the claim has accrued (17 U.S.C. § 507(b)), and a claim accrues when the plaintiff discovers or with reasonable diligence should have discovered the infringement.

In Hayden's case, he claimed that the discovery of the alleged infringement occurred when his business partner alerted him to the article in *La Republica* in April 2019, which featured an image of Koon's *Made in Heaven* billboard. The defendants did not dispute this, however, they argued that since the plaintiff was residing in Rome when the works premiered in Venice in 1990, he "was on inquiry notice and, in the exercise of due diligence, should have discovered the existence of these works decades ago."

In agreeing with the defendants, the court noted that Koon's works had been widely exhibited and publicized since their creation, for example, the *Made in Heaven* billboard was displayed at the Whitney Museum in 1989, and other works were featured in prominent publications. The court found no evidence that Hayden had taken any steps to monitor potential uses of his sculpture after selling it to Diva Futura in 1989. While Hayden claimed that he only discovered the work in 2019, the court emphasized that his lack of diligence over three decades undermined this argument.

Claim under the Visual Artists Rights Act (VARA).

The Visual Artists Rights Act (VARA) was enacted to provide protection for moral rights of certain artists. The VARA under 17 U.S.C. § 106A(a)(1)(A) provides that the author of a work of "visual art" shall have the right to "claim authorship of that work". The protections of VARA apply to all covered works created on or after June 1, 1991. In addition, VARA applies to all covered works created before June 1, 1991, "but title to which has not, as of such effective date, been transferred from the author."

The court found that the provisions of VARA did not apply to the original work because the plaintiff produced the original work in 1988, which was three years before the VARA effective

date. Further, the plaintiff couldn't also claim protection under § 610(b)(2) because he had transferred title to the original work to Diva Futura in 1988 for $900 cash.

The claim under the Digital Millennium Copyright Act (DMCA).

The court dismissed Hayden's claim under the DCMA as moot because the copyright infringement was time-barred, so there was not an actionable copyright infringement for the defendants to induce, enable, facilitate or conceal. Accordingly, the plaintiff's motion for summary judgment regarding the DMCA claim was denied.

Principal and broader legal implications.

On the issue of the statute of limitation, although 17 U.S.C. § 507(b) is to the effect that a copyright claim accrues when the plaintiff discovers or reasonably should have discovered the infringement, courts have had varying opinions on the discovery rule for artworks. In **Masi v. Moguldom Media Group, LLC, No. 18 CIV. 2402 (PAC), 2019 WL 3287819 (S.D.N.Y. July 22, 2019),** the court ruled that a plaintiff does not have to scour the internet to find infringement. The court's reasoning in the Hayden case seems to suggest that when a work has been widely publicized, a plaintiff cannot rely on ignorance to circumvent the statute of limitations.

With respect to the claim under the VARA, the court went ahead to define what the word "title" meant.

Under VARA Pub. L. No. 101-650, § 610(b)(2) provides that VARA applies to all covered works created before June 1, 1991, but ***title*** to which has not been transferred from the author as of such effective date. The plaintiff claimed that the word *title* did not only apply " to ownership of the physical object comprising an artwork" but also applied to include "fundamental copyrights." The court rejected this view and was of the opinion that because the previous draft of VARA had the word *copyright*, which was consequently replaced with the word *title*, *title* referred only to the physical copy of the of the work of visual art at issue.

According to reports from Hayden's attorney, they disagree with the decision and intend to appeal. However, the case has demonstrated that courts are now more unwilling to accept ignorance as a defense. Therefore, artists should bring credible evidence to show that they were

not aware, otherwise when a certain artwork is well known, it is expected that the author should have carried out some reasonable due diligence.

***Alinda Aaron** is a recent law graduate from Makerere University with a strong interest in Art Law and its intersection with intellectual property rights. He is eager to contribute to the legal frameworks that respect and protective the works of creatives and also promote innovation.

BOOK REVIEW: IDOLS IN EXILE: INDIA'S ART LAW AND THE GLOBAL FIGHT FOR CULTURAL RESTITUTION

THE IDOL THIEF. By S. Vijay Kumar. New Delhi: Juggernaut Books, 2018. Pp. 248. INR 499.

***Rishabh Mehta and **Aishni Kalra**

INTRODUCTION

Who owns cultural heritage? How do legal frameworks define and regulate the movement of art and antiquities across borders? In *The Idol Thief*, S. Vijay Kumar exposes the hidden mechanisms of art crime, demonstrating how property law, international treaties, and the illicit antiquities market intersect to shape the fate of stolen cultural artefacts.

Kumar is exceptionally well-positioned to write this book. As a former shipping executive turned heritage activist, he brings both professional expertise and personal passion to the subject of antiquities theft. As a co-founder of the *India Pride Project*, an initiative dedicated to tracking and recovering stolen Indian artefacts, Kumar has worked closely with law enforcement agencies, art historians, and legal experts worldwide. His deep engagement with the mechanics of art crime—spanning smuggling networks, museum acquisitions, and legal battles—grants him a rare insider's perspective on the subject. Unlike purely academic examinations of cultural restitution, *The Idol Thief* emerges from years of on-the-ground

investigation, blending forensic detail with an urgent call for legal and policy reforms. His background not only lends credibility to his analysis but also ensures that the book remains compelling and deeply informed.

This Review uses *The Idol Thief* as a foundation to explore the legal, ethical, and policy dimensions of cultural property law, emphasising the need for comprehensive reform. It critically examines how weak enforcement, legal loopholes, and global demand for antiquities contribute to cultural dispossession. By analysing illicit trafficking networks, restitution challenges, and India's evolving approach to heritage protection, this Review underscores the urgency of strengthening legal frameworks and international cooperation to safeguard cultural artefacts.

Part I examines Kumar's key arguments, focusing on the operation of illicit antiquities networks and the complicity of collectors and institutions. It highlights how inadequate provenance laws and lax enforcement create an environment where stolen artefacts flow easily into international markets. **Part II** critiques the barriers to restitution, overviewing India's antiquities laws, international treaties, and the challenges of repatriation efforts. **Part III** shifts to recent developments in India's approach to reclaiming stolen artefacts, assessing successful returns, policy shifts, and the role of grassroots movements. The Review concludes by proposing stronger enforcement mechanisms, policy reforms, and international cooperation as essential steps toward protecting India's cultural heritage from further exploitation.

I. UNMASKING THE ILLEGAL TRADE – THE IDOL THIEF IN CONTEXT

Kumar's book provides a granular examination of the global antiquities black market, centred on the notorious case of Subhash Kapoor. Once a respected dealer operating *Art of the Past* in New York, Kapoor engaged in an elaborate scheme to source stolen artefacts from India, launder them through fabricated provenance records, and sell them to prestigious museums and collectors. The chapters "*The Shadowy Trail*" (pp. 33–64) and "*A Dealer in the Dark*" (pp. 65–102) detail the scope of his operation, showing how the illicit art market functions within the legitimate commercial art world.

As I read these sections, I was struck by the level of sophistication involved in the theft and resale of antiquities. Kapoor and his network worked within existing legal loopholes, exploiting gaps in documentation, weak enforcement of provenance requirements, and the lack of international coordination on restitution. This exploitation is not unique to Kapoor—similar cases have played out in Greece, Egypt, and Italy. I found it compelling to

compare India's struggles with those of Italy, where the Carabinieri Art Squad aggressively pursues stolen cultural heritage, leveraging forensic archaeology and legal frameworks to ensure repatriation. Kumar's work asks why India has lagged in creating a similarly specialised unit.

The UNESCO 1970 Convention, which prohibits the illicit import, export, and transfer of cultural property, was adopted as a global response to rampant art theft. However, its effectiveness depends on national implementation. While Italy has used its legal provisions to recover over 874,163 artefacts since 1970, India's recoveries remain significantly lower, hovering around 350 documented cases. Kumar's case study of Kapoor's smuggling empire illustrates how ineffective coordination and diplomatic inertia hinder India's ability to reclaim its heritage at the scale seen in other countries.

Further, the book reveals how stolen idols, often looted from neglected temples, were smuggled out of India due to poor regulatory oversight. This raises concerns about property rights and cultural stewardship. Theories like John Locke's *labour theory* of property suggest that ownership is established through effort and use—by this logic, should cultural objects that hold spiritual and communal significance not belong to the communities that maintain them? Yet, as Kumar illustrates, these artefacts are commodified and treated as tradable assets rather than sacred or historical entities. His critique aligns with broader discussions in cultural property law, including the ongoing debate between cultural internationalism (which argues for global museum stewardship) and cultural nationalism (which supports repatriation to source countries).

II. The Legal Quagmire Of Antiquities Restitution

Kumar devotes "*The Laws That Failed*" (pp. 103–138) to analysing why India has struggled to prevent antiquities theft and secure the return of stolen objects. The Antiquities and Art Treasures Act, 1972 (AATA) serves as India's primary legal instrument in this domain, criminalising the unauthorised export of cultural property. However, as Kumar's analysis shows, enforcement remains woefully inadequate. AATA requires government registration of antiquities, yet compliance is low, and enforcement agencies lack the resources to monitor illicit transactions effectively.

Despite its stringent provisions, the AATA remains largely ineffective due to its outdated enforcement mechanisms. Unlike Italy, which has a dedicated Carabinieri Art Squad with an annual budget of €8 million, India's Idol Wing of the Tamil Nadu Police operates on a fraction of that funding. Kumar critiques this disparity, emphasising how underfunded and understaffed Indian agencies struggle to tackle large-scale smuggling operations.

However, India is beginning to recognise these gaps. In 2021, the Government of India announced the creation of a National Mission on Monuments and Antiquities, aimed at digitising and documenting cultural artefacts to prevent illegal sales. This aligns with efforts in countries like France and Germany, which have adopted digitised heritage tracking systems to curb illicit trade. Additionally, the CBI's Economic Offences Wing has increased its focus on antiquities smuggling, leading to the recovery of 44 stolen artefacts in 2022 alone.

One of the book's most significant revelations is the role of auction houses in laundering stolen artefacts. Recent cases, such as the seizure of antiquities from Christie's in 2022 linked with Kapoor's network, reveal how major players in the art world continue to enable illicit transactions. Kumar's research highlights how auction houses employ minimal scrutiny over provenance documentation, effectively legitimising looted artefacts. The Indian government's recent push for a provenance verification mandate for all auction sales, expected to be introduced in 2024, could mark a turning point in enforcing accountability in the art market.

At an international level, India has increasingly turned to diplomatic and legal channels for repatriation. In 2023-2024, 402 artefacts were returned from the United States alone, facilitated by strengthened bilateral agreements and growing political pressure on institutions holding looted heritage. However, Kumar's book clarifies that India's efforts remain largely reactive rather than preventive without stronger domestic enforcement.

III. Recent Developments And The Shifting Tide

In "*The Reckoning*" (pp. 139–172), Kumar details how India's approach to restitution is evolving. Over the past decade, the Indian government has successfully repatriated over 500 stolen artefacts from countries like the United States, Australia, and Canada. However, the process remains slow, largely reliant on diplomatic interventions rather than legal enforcement. While this marks progress, I find it deeply concerning that India still lacks a clear and enforceable strategy to prevent these thefts from occurring in the first place. This reactive approach ensures that India will remain vulnerable to heritage crimes unless structural changes are introduced.

One of the most significant shifts in India's approach has been strengthening international cooperation mechanisms. In 2022, India entered into Memorandums of Understanding with the United States and France, ensuring a streamlined process for identifying and reclaiming looted artefacts. Additionally, India has started working with the United Nations Office on Drugs and Crime to track illicit transactions and develop

standardised heritage protection protocols. While these international collaborations are necessary, they must be backed by domestic legal reforms. Without stricter acquisition laws and stronger penalties for offenders within India, external agreements will only provide partial solutions.

India's recent digital initiatives are also noteworthy. The development of a National Art and Antiquities Database, overseen by the Archaeological Survey of India, seeks to create a comprehensive record of cultural artefacts and monitor transactions. This is a much-needed step, given that the lack of documentation has historically weakened India's restitution claims. In the past, artefacts that lacked formal registration often ended up in Western museums under the guise of "undocumented finds," making legal repatriation nearly impossible. However, whether this database will be adequately maintained and enforced remains an open question.

Non-state actors remain instrumental in this evolving landscape. Organisations like the India Pride Project have embraced technology to track stolen artefacts using artificial intelligence and blockchain-based provenance verification, offering innovative solutions for identifying stolen heritage in private collections and museums worldwide. These efforts highlight a crucial aspect of heritage protection—public participation. Governments alone cannot safeguard cultural property; citizen engagement and pressure on institutions play a significant role. However, as Kumar's book emphasises, these developments reflect a growing awareness that heritage protection cannot be left solely to government agencies.

From my perspective, one of the most troubling aspects of India's cultural heritage crisis is the persistent lack of urgency. Even as more nations worldwide push for museum decolonisation and ethical returns of looted art, India remains slow in asserting its claims. Countries like Nigeria have been proactive in demanding the return of the Benin Bronzes, leveraging diplomatic pressure and international advocacy, leading to several institutions voluntarily returning artefacts. India, by contrast, still appears hesitant to take an aggressive stance, instead favouring passive negotiations. If India is serious about reclaiming its heritage, it must push for legally binding agreements rather than relying on diplomatic goodwill alone.

There is also a pressing need to address the ethics of museum acquisitions globally. While institutions have started adopting stricter acquisition policies, many still resist returning artefacts, citing legal complexities or claiming that repatriation would "diminish" global access to history. This argument, which Kumar indirectly critiques, is flawed in its assumption that historical artefacts should be centralised in Western institutions rather than

appreciated within their original cultural contexts. I believe India must challenge these outdated narratives and assert its position on the world stage as a country unwilling to compromise on the rightful return of its stolen heritage.

One of the most significant reforms India can implement is the introduction of stronger domestic legislation that criminalises theft and holds institutions accountable for failing to conduct due diligence. Western museums often rely on gaps in provenance laws to shield themselves from liability, and India must eliminate similar loopholes in its legal system. For example, many recovered artefacts are not properly reintegrated into their cultural or religious sites but instead placed in government storage facilities, where they are neglected. If repatriation efforts are to be truly meaningful, they must go beyond retrieval and ensure proper reintegration of artefacts into their rightful places.

CONCLUSION

At its core, *The Idol Thief* is a book about erasure—the erasure of identity, cultural memory, and justice. It is a searing indictment of the systemic failures that allow India's most sacred and historically significant artefacts to be looted, smuggled, and sold as mere commodities to the highest bidder. But more than an exposé, Kumar's work reflects the apathy of a nation that has, for too long, underestimated the value of its heritage. The idols stolen from temples and communities are more than just relics; they are spiritual, historical, and legal testimonies to India's civilisation. Their loss is not just a theft of physical objects but an assault on the collective memory of a people.

And yet, as Kumar demonstrates, this story is far from over. India stands at a crossroads, with an opportunity to reclaim not only its stolen antiquities but also its agency in shaping global norms around cultural property. There is an urgent need to move beyond token repatriation efforts and develop a comprehensive strategy that includes stronger provenance verification laws, increased funding for heritage protection agencies, and diplomatic assertiveness in restitution claims. The examples of nations like Italy and Egypt show that a proactive approach that blends legal action, intelligence gathering, and cultural diplomacy can yield meaningful results. India must follow suit or risk being perpetually reactive in the face of heritage crimes.

The growing recognition of cultural property rights on the global stage presents a moment of reckoning. As the world increasingly grapples with decolonisation and ethical museum practices, India must leverage these conversations to assert its rightful claims. The restitution of looted artefacts is not just about correcting historical wrongs but about reaffirming sovereignty over cultural narratives. It challenges the outdated argument that

ancient civilisations should be preserved in foreign institutions rather than in the lands where they were created.

However, repatriation alone is not enough. Recovered artefacts must be reintegrated meaningfully—returned to the communities from which they were stolen, placed in spaces that honour their cultural and religious significance, and safeguarded from future exploitation. Too often, repatriated idols and antiquities are left to languish in government storage facilities, stripped of the very essence that made them significant. This bureaucratic inertia dilutes the impact of restitution and undermines the efforts of those who fight tirelessly for their return.

A broader approach is necessary—one that incorporates legal, cultural, and technological advancements in heritage protection. Governments must prioritise educating local communities on the importance of cultural preservation to prevent future thefts. Local authorities should work closely with temple custodians, tribal elders, and heritage organisations to implement grassroots protective measures. Additionally, international collaboration is key—Interpol-backed task forces and AI-driven provenance tracking systems could significantly reduce illicit transactions. Legal deterrence must also be strengthened: harsher penalties for smugglers and financial disincentives for buyers who engage in the illicit antiquities market could alter the economic calculus of art crime.

India's legal framework on cultural heritage must evolve with its international advocacy. The Antiquities and Art Treasures Act of 1972 needs urgent reforms to close loopholes smugglers like Kapoor have exploited for decades. Stronger penalties, real-time tracking systems, and mandatory provenance research for museum acquisitions must be institutionalised. Additionally, India must strengthen its engagement with the global art market, demanding greater transparency from auction houses and collectors who have historically turned a blind eye to questionable acquisitions.

India has the opportunity to establish a precedent in the Global South by leading a regional alliance focused on the protection of antiquities. Countries in Asia, Africa, and Latin America face similar challenges related to their heritage, and a coordinated approach could strengthen efforts to restate cultural artefacts. Suppose Western institutions claim to uphold ethical collecting practices. In that case, they must be subject to rigorous legal scrutiny and bound by enforceable mechanisms, rather than relying solely on voluntary ethical standards, which often serve as mere performative gestures.

Furthermore, addressing the root causes of artifact smuggling is essential. Widespread poverty and lack of awareness in rural regions make heritage sites vulnerable to looters.

Government initiatives must integrate economic development plans with heritage conservation, creating sustainable models where communities benefit from cultural tourism rather than resorting to illegal trade. Kumar's book clarifies that the fight against antiquities theft is not merely a legal battle—it is a socio-political struggle that intersects with questions of economic inequality, neocolonial art ownership, and the ethics of cultural stewardship.

Kumar's book is an unequivocal call to action that underscores the imperative for India to assert dominion over its cultural legacy with urgency and strategic foresight. Historical precedent reveals that cultural identity, once fragmented through theft and displacement, is extraordinarily difficult to reconstruct in its original context. The protracted failure to address these systemic vulnerabilities in heritage protection will not only result in the continued commodification of India's sacred artefacts. Still, it will further entrench the asymmetries of cultural power that have long favoured colonial-era collectors and their modern institutional heirs.

The true legacy of *The Idol Thief* does not lie solely in the illicit trade it exposes but, in its potential, to galvanise a jurisprudential shift—one in which heritage is no longer relegated to the periphery of legal discourse but recognised as integral to sovereignty, identity, and justice. The longer India delays addressing the gaps in its heritage protection, the more its past will slip into the hands of those who see it as nothing more than a commodity. The true legacy of *The Idol Thief* is not just in the story it tells, but in the movement, it should inspire—a movement where heritage is not just a matter of history but justice.

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Lessons in Moral Rights from the Pfizer Mural Controversy

***Carla Frade de Paula Castro**

Works of art may attach to different mediums, such as canvas, wood, paper and even whole walls. When that medium is real estate, there might come a day when a landlord wants to make alterations to the building that might modify or damage the artwork. In that case, what legal tools can visual artists resort to in order to preserve their work? This article assesses one solution afforded under copyright law, and applies it to the recent controversy involving biopharmaceutical company Pfizer and a mural by Nikos Bel-Jon ("Pfizer Mural").

The Pfizer Mural is a massive, 14-by-36-feet modernist mural created by Greek-American artist Nikos Bel-Jon (1911-1966) to adorn Pfizer's global headquarters in New York. Featuring chemistry and medicine pioneers from Hippocrates to Louis Pasteur alongside large laboratory glassware, the mural depicts medical research through the ages, combining an ancient technique (mosaics) with modern materials such as tin plated steel and aluminum.

The Pfizer Mural, 1960, under white light. Photo from Bel-Jon's website.

Choosing Bel-Jon was not by chance, as he, like Pfizer, was also an innovator. The artist developed a technique called "painting with light," where he would use steel wool and fiberglass brushes to abrade metal "to reflect colored light in unexpected ways, so that, as the viewer moved, the mural

changed and the light danced." The mural was unveiled in 1960, and has since greeted Pfizer employees, visitors, and passersby, who could view it through the building's tall glass windows.

The Pfizer Mural, 1960, under colored light. Photo from New York Times article.

In 2023, however, Pfizer decided to move to a new building and leave the artwork behind, explaining that the money needed to relocate it would be better spent on "patient-related priorities." Since the new owners also did not intend to keep it, given that the building was being converted to residential use, an interior demolition permit was secured. After a preservationist learned of it, the demolition was halted and efforts began to find the Mural a new home. After attempts to have it donated to CUNY School of Medicine, Columbia University Irving Medical Center and individuals failed, largely due to the size of the mural and associated costs of storage and transportation, Pfizer eventually took it back and relocated it to one of its campuses in Connecticut. It is unclear whether it will ever return to public sight.

For situations like this, artists or their heirs may have a solution in moral rights, which are afforded by copyright legislation. We examine them next.

Copyright Law & Moral Rights

Copyright law is a body of federal law that grants authors exclusive rights, limited in scope and duration, over their original works of authorship. Copyright protection extends to a broad spectrum of artistic expressions — from paintings to photographs and sculptures – and attaches as soon as the work is fixed in a tangible form, with no formal requirement of registration.

In the United States, copyright law is secured by the Federal Constitution (1787), with the goal "to promote the progress of science and useful arts." To attain it, federal law (U.S.C. Title 17) grants copyright holders a set of economic rights that allows them to control how their work is used and to request compensation for it. The idea is that economic rights allow authors to derive a profit from their works, which in turn offers them incentives to keep creating.

Besides the Constitution, US Copyright Law is also informed by international treaties, the most relevant here being the Berne Convention for Literary and Artistic Works (1886 and subsequent alterations), which gives authors rights outside of their home countries. Among these are moral rights, a second set of exclusive rights that works in parallel to economic rights.

Article 6*bis* of the Berne Convention establishes two types of moral rights: attribution ("the right to claim authorship of the work") and integrity ("[the right] to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation"). For a long time the United States objected to this clause, which was among the reasons it hesitated to join Berne.

However, as the US became a major producer and exporter of cultural works in the 20th century, adhering to Berne became a pressing need, as it would enable it to more effectively tackle piracy abroad. It finally reversed its position in 1988 by adopting the Berne Convention Implementation Act. To conform with Article 6*bis*, Congress passed in 1990 the Visual Artists Rights Act (VARA), which officially introduced moral rights into federal legislation by adding section §106A to the Copyright Act.

VARA and artworks incorporated in buildings

Moral rights under VARA have two distinguishing features. The first is that they are only afforded to works of visual arts – defined as paintings, drawings, prints, sculptures, or photographs of which there are fewer than 200 copies, subject to a few exclusions –, with special protections afforded to works of recognized stature. While the statutory text does not define "recognized stature," case law has interpreted it to mean one that is "of high quality, status, or caliber that has been acknowledged as such by a relevant community."

As required by Berne, VARA establishes the rights of attribution and integrity. For purposes of the Pfizer Mural controversy, however, only the right of integrity is implicated. Pursuant to §106A(A)(3), an artist shall have the right "(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, … and (B) to prevent any [intentional or grossly negligent] destruction of a work of recognized stature."

The second distinguishing feature is that VARA contains special provisions for artworks incorporated in buildings. For this specific medium, artists may or may not be entitled to the integrity right based on whether artwork can be separated from the building without any damages to the former:

- If the work *can* be safely removed from the building, artists will be entitled as a general rule to the integrity right. However, if the building owner either (1) made a diligent, good faith attempt to notify the author of its intention to remove the artwork, without success; or (2) provided such notice in writing and the person so notified failed to remove the work or to pay for its removal within 90 days, then the artist shall not retain an integrity right.
- If the work *cannot* be safely removed from the building, artists shall not be entitled to an integrity right if they consented to the installation either (1) before VARA became effective, or (2) if post-VARA, in a written instrument signed by the artist and the building owner that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.

Another noteworthy feature of moral rights under VARA is that they can be waived by contract, although they cannot be transferred. As to their duration, moral rights will last for the author's life, if the work was created post-VARA, and for the life of the author plus 70 years if the work is pre-VARA but title to the work was still with the author when VARA came into effect.

The integrity right as applied to the Pfizer Mural controversy

A VARA analysis of any attached-to-a-building artwork dispute would make four inquiries: (1) whether VARA applies; (2) if so, whether moral rights were waived, (3) if not, whether the work

can be safely removed from the building, and (4) whether integrity rights are afforded to the artist. If we conclude the integrity right is available, then the artist would be entitled to sue to prevent its modification or destruction.

The first inquiry is a two-step analysis. The first step asks if the artwork meets the statutory definition of "work of visual art," while the second looks to whether any protection would still be active. As will be shown, both weight against Bel-Jon and his heirs.

As to the first inquiry, and although a mosaic mural is neither "a painting, drawing, print, or sculpture" in strict terms, it is possible to say that it is a hybrid between a drawing and a sculpture, as it consists of pieces of colored tiles (in this case, polished aluminum *tesserae*) arranged to form an image.

However, we need not reach a conclusion on this point, as the statutory definition contains an important exclusion: works made for hire, which §101 defines as either "(1) a work prepared a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned …, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." It is highly likely that the Mural meets the second requirement, since publicly available documents mention that the work was commissioned, and Bel-Jon's website lists the work as "copyrighted by Pfizer Pharmaceuticals."

Assuming that this was not a work for hire, the second step would also prevent the application of VARA: although the work was pre-VARA, title to it had already passed to Pfizer when VARA was enacted. As a result, Bel-Jon's heirs would not have standing to sue and the new building owners would be free to do what they pleased with it, including donating it back to Pfizer.

Had the first inquiry been positive, and in the absence of a waiver of rights, how would the last two have played out? The third step is straightforward: the artwork can be removed without any damages to it, which is demonstrated by its effective transfer to another Pfizer building. As a result, the fourth step leads us to inquire whether a notification of removal was given to the artist's representatives and, if so, whether they failed to remove the artwork within 90 days.

It is highly unlikely that acquiring a demolition permit from New York City put Bel-Jon heirs on notice, as this is an administrative document issued at the request of the developers and, at most,

would only be visible locally. In fact, that is exactly what happened: one of Bel-Jon's daughters was alerted of the demolition by a passerby, as the family never received any notification.

As such, and had the result of the first inquiry been different, Bel-Jon's heirs would have a claim to the fate of the mural under the integrity right, but only to the extent needed to prevent (or to request reparation for) its intentional distortion, mutilation or modification, if prejudicial to Bel-Jon's honor or reputation, or for its intentional or grossly negligent destruction, assuming it is a work of recognized stature – we argue it is due to its unique technique. It is unlikely that relocating it would lead to such results.

The Pfizer Mural case serves as a cautionary tale for artists who have or want to create art that is incorporated in a building. Understanding VARA's provisions will come in handy as artists negotiate clauses such as waiver of moral rights, work for hire, and any recognition that the removal of the work may lead to its modification or destruction. It may also inform their creative choices as to whether to make the artwork removable from the building or not, and it will certainly be useful to protect their work if damage occurs after completion.

For artists in a situation like Bel-Jon's heirs, where there are either no integrity rights available or the use that is being objected to is a non-damaging one, other legal tools, such as cultural heritage preservation laws, would need to be assessed.

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Investigating Bad Faith: John Lennon's Stolen Watch as a Criminogenic Collectible in the Art Market

Cover Image credit

***Konstantin Jänicke, **Maja Dehouck, and ***Anaïs Bayrou**

Introduction

Stolen high-value unique goods (HVUG), such as luxury watches and artworks, can sometimes mysteriously appear for sale. A notable example is the rare Patek Philippe 2499/100 gifted by Yoko Ono to John Lennon for his 40th birthday in 1980, shortly before his assassination. The

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watch, engraved with a personal message, remained with Ono after Lennon's death, until it was stolen by her former driver. The driver sold it to an intermediary, who transferred it to a German auction house. Eventually, the watch resurfaced in the hands of a collector, who submitted it for appraisal to a Geneva auction house in 2014. This alerted Ono and prompted a legal battle over ownership. On 14 November 2024, the Swiss Federal Court upheld Ono's claim to the watch.

Based on the facts of this case, we ask: what drives collectors to acquire such objects in bad faith? To answer this question, we first conduct a legal analysis of the circumstances of the acquisition, focusing on elements indicating bad faith. Then, we apply the criminological framework of 'criminogenic collectibles,' developed by Mackenzie, Yates, Hübschle, and Bērziņa, to investigate the agentic qualities of HVUG that may drive individuals to commit or facilitate crimes. The theoretical approach further draws on Boltanski and Esquerre's framework for understanding the value of commodities, collectibles, and assets.

Examining Bad Faith: Key Elements of the Case

While not every HVUG meets the definition of cultural property under Article 2 of the 1970 UNESCO Convention, luxury watches undeniably represent a significant segment of the art market. Due to their desirability and portability, such items are particularly vulnerable to theft and looting. As a result, establishing a clear and reliable provenance, in the sense of dynamically tracing an item's history backward in time, is crucial. This process not only reinforces economic and legal value by substantiating authenticity but also mitigates risks and reduces the likelihood of future restitution claims or legal disputes over stolen property.

Good faith, under Swiss law, is a fundamental principle that underpins the assessment of the legitimacy of interactions between individuals. In the context of movable property, it constitutes a necessary condition not only for acquiring property rights but also for a possessor to obtain compensation in the context of restitution claims. For an example, a person who possesses a movable object peacefully, publicly, and continuously for a period of five years in good faith may acquire ownership—even if the possessor is not the rightful owner as stipulated by Article 728 I SCC (Swiss Civil Code). Another example can be found in Article 936 I SCC, which stipulates that an individual who has not acquired a chattel in good faith may be compelled to return it to the previous possessor upon request at any time. While good faith is initially presumed, this presumption can be overturned if it is found to be incompatible with

the level of care required by the circumstances, as referenced in article 3 SCC. In the context of the validity of a legal claim frequently hinging on the principle of good faith, ensuring that the item was lawfully obtained and has a clear ownership history may guard against claims of restitution, especially in the case of used items.

In the case, the Swiss Federal Court, due to its application of private international law—which will not be analyzed further in this article—and the collector's failure to invoke a relevant legal basis or meet the necessary conditions, did not have to assess the good faith of the seller and the collector to confirm Yoko Ono's ownership over the watch.

However, what particularly interests us is that the prior instance—the Court of Justice of Geneva—acknowledged the seller's bad faith under German law and raised questions regarding the collector's good faith. Consequently, the elements highlighted in this judgment offer valuable elements to our analysis. Firstly, the seller admitted to the German police that he harbored doubts regarding the provenance of the watch but failed to perform his due diligence. Secondly, he had previously been convicted in Germany for concealing 86 other items stolen or misappropriated by John Lennon's driver, and he later attempted to sell the watch to a tenant of a public establishment. Thirdly, the Court of Justice questioned the collector's good faith, highlighting the suspicious nature of his claim that he was a "world authority in the market for timepieces," yet he bought the watch at a price significantly lower (CHF 600,000 ≈ $630,000) than what the specialized auction houses estimated (CHF 4 million ≈ $4.5 million). Fourth, the parties had included a contractual provision acknowledging that the rightful owner or a rights holder could assert claims to the watch. Additionally, the personal inscription on the back of the watch, serving as proof of its previous ownership, could have provided a clue for further verification. Therefore, considering the specific circumstances surrounding the acquisition of the watch, a compelling argument can be made that a heightened standard of care was necessary to ensure compliance with the principle of good faith. In the acquisition of a high-value artifact with an identifiable history, good faith, —particularly for a professional collector well-versed in the industry—entails conducting thorough due diligence and maintaining a clear understanding of the object's provenance. This obligation is especially significant in the art trade, which, as recognized by the Swiss Federal Court, constitutes a commercial sector uniquely susceptible to the circulation of goods of dubious origin and, consequently, items burdened with legal defects. Given his familiarity with the luxury watch industry, the collector appears to have failed to exercise the level of due diligence that the circumstances required.

The ruling by the Swiss Federal Court did not establish definitive jurisprudence in Swiss law regarding the standard of diligence expected within the sector for high-value watches as it previously did with professional luxury used car dealerships, antique arm collectors and cultural property. However, it reaffirmed the inherent risks associated with purchasing such an HVUG without thoroughly verifying its provenance or dismissing it.

The following sections examine the motivations behind acquiring HVUG under questionable circumstances, despite the considerable legal and reputational risks associated with such transactions.

When Objects become Criminogenic Collectibles

Certain objects invoke desire, the intense feeling of wanting to possess them. Under normal circumstances, this means purchasing the objects in question or gaining possession through other legitimate means. However, when no legitimate means are available, collectors face the choice between refraining from possessing the desired object or engaging in illicit activity to obtain it. Arguably, the latter can be considered an irrational choice. So, why would collectors opt for such behavior?

In criminology, objects that lead persons to engage in illicit activities by "disturb[ing] reason" and leading them to make irrational choices are referred to as 'criminogenic collectibles' (pp. 2-3). Mackenzie, Yates, Hübschle, and Bērziņa developed this concept based on research in the markets for antiquities, fossils, and wildlife. This article applies this concept to John Lennon's watch and examines its criminogenic qualities.

Mackenzie et al. establish that criminogenic collectibles invoke "wonder, desire, and inquiry," and have a complex relationship with the "social, ethical, and legal structures" surrounding them (p. 2). They find that certain objects possess "agentic" qualities through which they "make people commit crimes" (p. 2). Furthermore, they find that such objects are often traded in spaces which, due to factors such as their atmosphere or (lack of) regulation, allow for illicit activities—calling these spaces 'irregularly regulated markets.' Thus, the criminogenic nature of collectible objects is established through the combination of three distinct factors. Firstly, there must be an inherent illicit element in obtaining possession of the objects. Secondly, the objects must invoke such strong desire that persons are willing to engage in illicit activities to

gain possession. Thirdly, the objects must exist in spaces allowing illicit activities. Considering the facts of the case, it can be established that the space in which the watch was traded allowed for illicit activities. Thus, our analysis focuses on the former two factors.

The illicit element

Illicitness comes in many shapes and forms. This element can, for example, arise from the object itself, its possession, trade, provenance, or the financial resources involved. Based on the facts of the case and the Court of Geneva's second instance ruling, we contend that the collector failed to meet the required due diligence standards when acquiring the watch. As a result, it is plausible to suggest that the collector purchased and possessed the watch in arguably bad faith. This would imply that his desire to possess this particular watch was so strong that he knowingly engaged with a potentially illicit aspect when acquiring the watch. Furthermore, he insisted on his ownership rights, even though Ono publicly said the watch had been stolen.

Invoking desire

To establish the desire-invoking element, we must shift focus from the object itself to the value it represents. Boltanski & Esquerre argue that collectibles invoke desire for two main reasons: their *collection form* and their *asset form*. Collectibles sit at the intersection of the "material and the social worlds" (p. 3). They may have significant material value, but social factors, such as the narratives attached to them, can intensify the desire they invoke. According to Boltanski & Esquerre, "The establishment of value through narrative links to people who have physically touched the object plays a central role in the collection form" (p. 41). In this case, the inscription on the watch's back, linking it to John Lennon, is a key factor in its desirability and value. It's not just a collectible, but a unique one. However, the collector himself stated, "I'm more of a Rolling Stones man," suggesting his purchase wasn't driven by a desire for a watch owned by Lennon, but rather by its potential as a profitable investment.

The appeal of a collectible as a financial investment derives from the subjective value placed on it in high-end markets. From an actor-centered perspective, the valuation of the object, therefore, drives its criminogenic nature. While a standard Patek Philippe may be valued for its craftsmanship, a limited-edition model can fetch a substantially higher price due to rarity. The financial worth of Lennon's watch is, moreover, driven by its provenance and uniqueness. Collectors often pay a premium for items owned by celebrities or historical figures, as the associated narrative boosts the object's uniqueness. Though it is part of a rare series, its

uniqueness is amplified by its celebrity provenance. This Patek Philippe model is already highly valued, but the narrative of Lennon's ownership drives its value far above that of comparable watches.

Consider its price trajectory compared to a non-criminogenic piece without unique provenance: Yoko Ono purchased the watch for $25,000 in 1980, and its current sales value is estimated at $4.5 million. Even after adjusting for inflation ($25,000 in 1980 is about $83,950 today), the watch has increased more than 53 times in value. By contrast, a similar watch sold recently at a Sotheby's auction fetched only a quarter of Lennon watch's value. By contrast, the collector purchased the stolen Lennon watch for 600,000 CHF in 2013 (around $630,000). He was likely aware of and enticed by the potential future profit margin of roughly $3.8 million, as he claimed to be "a world authority on watches." Arguably, the illicit element attached to the sale of the watch allowed the collector to acquire it at a low price, facilitating the potential for a large profit. However, As Boltanski & Esquerre explain, "Value (...) refers to properties said to be inherent to the object in question; but it remains conjectural as long as the object has not passed the exchange test and found its price (p. 37)." The collector sought an indication of the watch's potential exchange value when he submitted it for valuation at an auction house, which alerted Yoko Ono to the watch's disappearance and sparked the lawsuit.

Conclusion

Based on our analysis, the watch in question can be considered a criminogenic collectible. Three distinct factors are involved in the criminogenic nature of the object. Firstly, the watch was stolen and, arguably, acquired and possessed in bad faith, showing an aspect of illicitness in the watch's provenance. Secondly, the object invoked a strong desire, prompting the collector to buy it despite the questionable circumstances surrounding its acquisition. The desire likely did not stem solely from its unique celebrity history or technical specificities (i.e., its collection form) but rather from its potential for future profit (i.e., as an investment). Moreover, it is possible that the illicit element of the watch may have enhanced its allure due to the increased profit margin. Thirdly, through the transactions involved in the case, it becomes evident that the space in which the object was traded allowed for illicit activity. Therefore, we conclude that the conceptual framework of criminogenic collectibles can apply to HVUG such as John Lennon's Patek Philippe.

The facts of this case underscore the pivotal role of due diligence in demonstrating good faith within some civil law systems. However, it is striking to note that, despite the reputational, financial, and criminal risks associated with failing to exercise due diligence in the market for HVUG, the conduct of some market participants reveals that these risks remain insufficiently effective as deterrents and the historical provenance of such items can contribute to their market ascension.

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Authenticity Over Aesthetics: The Psychosocial Construction of Value in Art

Cover Image credit

***Shira Fischer**

Introduction

The multibillion-dollar art market exists on the basis of an elusive and unknowable truth: authenticity. While the art market operates as though there is a truth that exists and can be ascertained through enough investigation into the provenance, consultation with connoisseurs, and forensic analysis, this is an assumption that is often proven wrong. Examples of the precarious nature of structuring an entire market around such a fickle concept are abundant and

shocking. Take, for example, even the most expensive painting in the world, da Vinci's *Salvator Mundi*, which has seen its price go from just $60 in 1958 up to $450 million in 2017 before losing its value overnight based on one authenticator's statement on its legitimacy. The impact of a determination works the other way as well, bringing the price of a painting sold for $22,000 in 2007 up to $150 million if determined to be authentic. A simple statement from one person that an artwork is not authentic can change everything, devaluing the artwork for that factor alone despite remaining visually identical. In most other areas, receiving new data that conflicts with our existing beliefs is often hard to fully integrate. However, with fine art, finding out that an artwork is fake can, and typically does, entirely flip our aesthetic appraisal of the piece.

This raises questions about why authenticity matters so much and how this concept has planted its roots so firmly in the art world, with the authenticity obsession's irresistible tentacles reaching through art history and academia, the art market, interpersonal power dynamics, legal transactions and disputes, and even our brains. The field of art, which has fascinated philosophers since the 5th century BCE, revolves around aesthetics: the nature of artistic taste and appreciation of beauty. From the aesthetic perspective, authenticity status should be entirely irrelevant to an artwork's beauty. Yet, finding out that an artwork is a counterfeit consistently diminishes evaluations of its aesthetic value. This suggests that other factors are at play, outweighing ideas about what is visually pleasing. Is there a role for both, or do artistic judgments actually involve entirely non-aesthetic considerations?

Consider, for example, the case of a purported Pollock painting—*Red, Black and Silver*—that Pollock's lover, Ruth Kligman, possessed after Pollock's death. Pollock's widow, Lee Krasner, who held the position of authority on authenticating her husband's works within the art world, refused to authenticate the work. This decision rendered the painting essentially worthless

in the art market. Years later, forensic analysis discovered a polar bear hair embedded in the paint, which aligned with a determination of authenticity because Pollock had had a polar bear rug in his home when the painting was alleged to have been painted. Despite that discovery, the provenance remains unclear, and the connoisseurs disagree, with a prominent expert stating that the work does not look like a Pollock. This disagreement among experts leaves the work in limbo, where it is not necessarily authentic yet also not inauthentic. Of course, throughout this conflict spanning decades, the underlying theoretical 'truth' remains the same, while the people caught up in the complex social networks that make up the art world simply change their minds.

The frequency of stories like this causes hesitancy for potential art sellers, especially combined with the frequency of lawsuits filed by angry purchasers against the seller or previous owner for supposedly circulating a forgery. Thus, an owner with doubts about an artwork's authenticity may be disinclined even to try to sell the work at all because that would involve wading into the morass of authenticity inquiries. Essentially, this leaves artworks in a similar position to Schrödinger's cat, simultaneously both authentic and inauthentic, frozen in this paradoxical state until someone with more authority or a more respected institution comes along and makes a statement.

This conceptual struggle, particularly when brought into the legal realm, has been a concern for many. Even in 1929, Judge Black recognized this in a New York Supreme Court case about an authenticity dispute over an alleged da Vinci painting, understanding that there might not be an absolute truth. Judge Black provided insight into the inner workings of the authentication process within the art market, which were similar to today, even back then, writing: "A new situation exists in the world of art….Frequently, as antiques passed from family to family or from government to government, their authenticity was frequently questioned.

Finally, the pendulum of artistic criticism swung slower and slower, until it usually stopped at an opinion which remained practically standard. But it was also subject to a renewal of criticism in books or in the press whenever a critic leveled his attacks at a certain work."

To make some sense of this confusing yet highly influential concept, this paper examines the multifaceted impact of authenticity on how people experience and perceive art, beyond an artwork's visual properties, into the interplay of emotional, cognitive, neurophysiological, social, and philosophical factors at play. Ultimately, this paper aims to reach a deeper understanding of how authenticity transcends the visual realm, unconsciously shaping our aesthetic experiences and engagement with art in profound ways. The art law implication is that this enormous web of complex interactions involved in art authenticity disputes makes legal intervention even more difficult than the current assumption would suggest.

II. UNDERSTANDING VALUE

The value of an artwork is determined by a complex calculation of different factors. Primarily, external monetary market value is the factor that determines the price, or financial value, of artworks today. While the level of commodification of art that exists today has made economic concerns inseparable from other components of value, for the purposes of this exploration into the emotional weight of authenticity, we will limit our focus to cases beyond those in which purchasers are buying strictly for financial gain through future resale. Additionally, for the limited scope of this paper, we will accept the assumption that the market is not entirely artificial, with high price at least loosely correlating with some aesthetic merit and appeal.

Provided a buyer is not strictly purchasing art for investment purposes, aesthetic appeal should play some role in purchasing decisions. However, as we will see below, beyond this

typical representation of art valuation, a more personal and subjective component is missing from much of the legal scholarship that is rooted in the individual's emotional experience tied to psychological reactions to an artwork. Beyond the financial, external market, and social factors, there must be something happening differently in the mind while perceiving a painting that one has been told is "fake."

III. Research on the Aesthetic Experience

A. Philosophy

The philosophy of aesthetics is a topic that people have wrestled with for centuries. The various theoretical perspectives on aesthetic judgments offer different positions for the role of authenticity.

1. Formalism

The formalist theory, sometimes considered the 'radical aestheticism' view, emphasizes the pictorial properties of a work in isolation. The visual and structural elements of a piece—the colors, lines, forms, and composition—are sufficient for understanding a piece and ascertaining its aesthetic appeal. Under this theory, forgeries should hold the exact same value as the originals, and the forgeries are only devalued after word spreads that the piece is forged, largely due to "snobbery" because the piece has lost its prestige. The true aesthetic experience derives solely from the artwork's visual qualities, and any devaluation of a forgery stems from non-aesthetic considerations such as market value.

2. Essentialism

Essentialism in aesthetic theory can also be called the 'symbolic view,' which derives from a broader theory in psychology that people all have a fundamental tendency to think of certain objects as having unobservable and underlying "essences." For example, objects like a

wedding ring or a baby's blanket have a particular essence that could not be satisfied by even a perfect replica. In the art context, people do not derive aesthetic value from an artwork's appearance. Instead, people appreciate an artwork for what they believe it represents and what they associate with it. Art is an object that has symbolic value derived from when, how, and by whom it was made. An artist's touch is embedded into their work in a mystical or magical sense, leaving a piece of the artist contained within each painting. This belief that the painting takes on the creator's essence through physical contact can also be referred to as 'positive contagion.' This theory provides one explanation for why originals hold a higher value than forgeries or copies despite being visually identical.

3. Contextualism

Contextualism is another theory that leads to a similar result in terms of the devaluation of fakes, yet it draws value from original artworks in a less mystical way. Contextualism takes a historical approach to art appreciation, arguing that we cannot understand the art without its context. Factors, such as the historical period and the artist's life and intentions, shape an artwork's meaning and contribute to its aesthetic value. A piece of art is simply a historical artifact comparable to an archeological object found in history museums rather than art museums. This critical link between the painting and its historical context provides an explanation for why authenticity matters. A forgery disrupts this critical link, distorting our perception and misrepresenting history. Thus, under this theory, even a perfect forgery can be considered actually aesthetically worse than the original.

B. Cognitive and Behavioral Science

The results from empirical studies examining viewers' perceptions of the authenticity of fine art provide support for the concept of there being no underlying stable truth to an artwork's

authenticity status. The physiological responses of viewers are almost independent of the *actual* authenticity status of a work, with whatever external information is provided by someone with authority (the researchers in this case) dictating the viewer's perceptions and value judgments.

1. Psychological

Behavioral studies are the most prevalent type of empirical research into the influence of authenticity on art valuation and perception. These experiments mainly focus on measuring participants' behaviors and responses on various dimensions after presenting participants with artworks under different manipulated authenticity conditions. As expected, these psychological studies consistently found that people judge artworks labeled as fakes or copies less favorably than identical artworks labeled as originals. Receiving information about an artwork's authenticity status significantly negatively affects viewers' perceptions of the artwork's aesthetic value and quality, monetary value, as well as perceptions of the talent level of the artist.

Uniqueness. When participants believed a painting was a copy, they consistently rated the quality lower than when they believed the paintings were originals. Interestingly, when paintings were labeled as copies, participants showed decreased appraisal on both cognitive and emotional dimensions despite the 'copy' being physically identical to the 'original.' A study that conducted complex multivariate analysis and accounted for individual traits and proclivities of each participant found that participants with high levels of the factor "consumers' need for uniqueness" tended to devalue the quality of the paintings when they were labeled as 'copies' more strongly than other participants, suggesting that "the mere fact that forgeries are not unique influenced their evaluations." Additionally, in terms of artistic merit and talent, information about the alleged authenticity status of an artwork had a significant effect on artist-associated variables, including perceptions of the artist's talent level.

Effort. Another study controlled for the amount of effort, time, and materials required to produce an artwork, yet still found that the original artworks were considered more valuable than the duplicates. This effect was substantial, persisting even when the effort level for creating both the original and the copy was low. The researchers decided to create a condition where the effort required to produce the original was low while the effort required to produce the copy was high, leading to a result where the original and the copy were assessed as equivalent in value by participants. Theoretically, this result could be due to participants viewing both the original and the copy as representing the products of unique creative acts, with one of these unique creative acts resulting in the original piece and the other unique creative act using an entirely new process to replicate that first artwork. These findings do not support the hypothesis that original artworks are valued more than duplicates because they are perceived as requiring more effort and resources to produce (cost of production)." While people do assign some value based on the effort and materials that went into creating an artwork, that source of value "appears to be distinct from the special value afforded to original artworks," which suggests that "participants are sensitive to an artwork's process of creation when assessing its value and are not biased to always see original artworks as more valuable."

Contagion. One experiment tried comparing new conditions, where a duplicate painting was said to have been created by the original artist (as a reproduction) or by someone else (the same reproduction, just created by someone other than the original artist). As predicted under the Essentialism theory, physical contact with the original artist—'contagion'—had a significant impact, increasing the valuation of the duplicate created by the original artist compared to the duplicate created by someone else. Empirical support for the 'symbolic value' aspect of

'closeness' to the artist of the Essentialism aesthetic theory was reaffirmed throughout these psychological studies.

2. Eye-Tracking

One of the less common types of studies uses eye-tracking technology to monitor and record participants' eye movements while they view different artworks after being given different information about the piece. This type of data is useful because it can provide insight into art viewers' visual exploration strategies and patterns of visual attention when viewing an artwork. Eye-tracking studies offer the potential to test out the contextualist theory's proposal for why the aesthetic value of a copy is worse than the original: People inspect a painting more carefully in search of flaws after finding out that it is a forgery. Theoretically, viewers create a qualitative difference because "since the exercise, training, and development of our powers of discriminating among works of art are plainly aesthetic activities, the aesthetic properties of a picture include not only those found by looking at it but also those that determine how it is to be looked at."

This eye-tracking study, which showed digital versions of paintings by renowned artists under the condition of either original, copy, or fake, found that perceived authenticity did influence eye-scanning behaviors, meaning the authenticity status produced statistically distinct eye-tracking data. An important contribution of this study is the comparison across groups of participants, divided into 'art-naïve' and 'art-sophisticated' groups, generally finding that art expertise seems to moderate the impact of authenticity information on visual exploration and judgments. However, across both groups, ratings of the monetary value of the paintings were significantly greater when labeled 'original' than when the same work was labeled as a fake or

copy, reaffirming the general concept of artwork being devalued upon discovery that it is counterfeit.

3. Neuroscience

Brain imaging techniques—such as functional magnetic resonance imaging (fMRI) and electroencephalogram (EEG)—provide insights into the brain regions involved in processing information about art perception and the influence of authenticity information.

fMRI Research

One study utilized fMRI while showing participants Rembrandt portraits, some of which were genuine and some were copies, paired with differing information about their authenticity status. Unexpectedly, this study found that neither the information given to participants about authenticity status nor the actual difference between an authentic Rembrandt and a copy had any differential effect on activation in the visual areas of the brain.

However, being told that the painting in front of them was a copy (regardless of the actual authenticity of the painting) produced stronger responses in the frontopolar cortex (FPC) and the right precuneus. Activation of the precuneus is associated broadly with higher cognitive functions, such as consciousness or self-awareness, parts of memory, the experience of individual agency, and spatial processing. Thus, activation of the precuneus suggests that participants "were actively engaged in hypothesis-seeking about visual images," activating a broader neural network beyond just the cortical areas expected to activate for visual stimuli. Further, there was significant interaction between the FPC and one of the visual processing regions, the lateral occipital area (LOC), suggesting that the visual areas may be modulated by the FPC, meaning there is some sort of more complex activation of brain networks occurring than traditionally suspected. On its own, FPC activation relates to working memory. In this study,

the results from participants' brain activity when paintings were labeled as copies suggest that there is a greater functional interaction between executive functioning in the FPC and the sensory signals in the LOC. Interestingly, the only brain region activated by the label of 'authentic' paired with a painting was the orbitofrontal cortex, which is generally considered a reward center and is activated by monetary gain. This aligns with the unsurprising findings of other behavioral studies, which found that consistent with the economic realities of the art market, participants associate a higher monetary value to artworks they deem as 'originals' or 'authentic.'

EEG Research

After previous neuroimaging studies had suggested that aesthetic experiences are shaped through a complex integration of visual and contextual information, a new study using EEG attempted to investigate further because much of the actual neural mechanisms underlying that integration of information were unclear. This study used EEG to analyze the temporal dynamics of how the brain integrates visual and contextual information when making aesthetic judgments, and the results indicate that there is a rapid integration of those two types of information occurring in the brain. The modulations of neural activity during processing originated from the parietal regions, which are generally associated with visual processing.

The study found a larger amplitude during the second time range (202-286 milliseconds) in the 'authentic' condition than in the 'fake' condition, and those higher responses were significantly correlated with the aesthetic rating participants reported. Those findings align with previous research that presentations of subjectively 'pleasant' stimuli evoked stronger positive EEG waves than 'unpleasant' stimuli. The authors hypothesized that the contextual modulation is thus related to a memory process because participants evaluated the stimulus "by remembering the authenticity information at the beginning of each trial. If the information of 'genuine'

instruction was recollected, this would alter the target stimulus into the 'pleasant' stimuli (contextual effect). These 'pleasant' stimuli induced a larger amplitude" of the response in the authentic condition than in the fake condition.

The key finding is that the responses to visual factors occurred rapidly (within several hundred milliseconds after participants were shown the artwork). The quick integration of the contextual factors as well within this initial 200-300 milliseconds is consistent with the characterization of aesthetic experiences as being able to rapidly "perceive-feel-sense" an artwork rather than having an aesthetic experience as the result of deep contemplation over a long time.

IV. Developing a Model

Despite substantial research and literature existing across various areas of scholarship, the aesthetic theories, the psychological and neurological findings, and the economic realities of the fine art market all point in a range of different directions regarding human behavior surrounding art authenticity. Broadly, a prominent issue seems to be the apparent conflict between art, philosophy, and science. When scientists try to analyze art and its effect on viewers in granular scientific terms, they cannot help but ignore the ineffable 'magic' of art. The same goes for history and philosophy, with scientists unable to isolate variables and account for the somewhat unmeasurable and uncontrollable variables of social context and aesthetic meaning. These 'methodological' issues also go in the other direction; philosophical theories about why people care about art authenticity fail to capture enough to describe human behavior within any singular proposed explanation, yet each school of thought claims to discredit the others. While bringing knowledge from each of these areas together into a comprehensive framework to explain the

importance of authenticity may be quite difficult, there are ways to integrate the existing research into a more complete model.

A. The Constructivist Approach

A useful starting point is constructivism, which proposes that the meaning and value people attribute to artworks are not inherent properties, but are socially constructed. Under this theory, authenticity is a fluid and culturally constructed concept that can change over time and vary across societies, formed by expert opinions, market forces, and social norms. This model holds that "the market value of the artist and art products becomes a function of social definitions of reality that are learned and applied by individuals to create the individual's perception of reality," and then "these social definitions become the basis for 'symbolic exchange' within the context of the cultural meaning of consumption."

B. The Humanization of Objects & the Objectification of Humans

Still, authenticity is more than simply a "mutually agreed upon fiction." While there may not be an underlying definitive truth one way or the other, there are factors and dynamics going on that *are* very real. Theories about object agency can help explain more about what is going on beyond the approach to defining authenticity through the methodology of social construction. This object agency concept arises when commodities acquire social meanings through human interactions and market forces. This stems from the anthropomorphism of art, where people ascribe almost human-level characteristics to physical objects, such as artworks. For example, the treatment within the art world of artworks, as having life histories and writing biographies of them, plays into the temptation to anthropomorphize the material world. Whether this anthropomorphism is implicit or explicit, the "object biographies are socially constructed vehicles for the encapsulation, explanation and exploitation of commodified art." These object

biographies are a necessary part "of the attempts that people make to engage with objects, to array them, to profit from them, and to acquire them." These behaviors "are the structures through which the so-called 'social lives' of objects are constructed and lived." Our attempts to make meaning of these art objects actually become part of a recursive process that is inseparable from the "dialogue of human and object agency."

This concept—the humanization of objects—can also be reversed into the objectification of humans and social life. This viewpoint illustrates many of the difficulties discussed above in trying to understand the importance of authenticity using existing tools and models. Using an object-oriented viewpoint, as discussions of authenticity disputes in the legal context often do, "deplete[s] the sense of subjectivity in human agents, and present[s] instead a persuasive picture of objectified humans, directed by object networks." This further demonstrates that a more individualized approach is warranted, focusing on the multitude of interacting factors across external market realities, social constructs, historical context, and the emotional and psychological effects on a personal level. Under a more holistic view, the process of authentication can be seen as a "multi-sided negotiation" that is "generated in the relationship between people, things, and context and, in some way, even objects' materiality." By accepting the notion that our current conception of authenticity of art can be uncoupled from its materiality, with expectations for what is "authentic" changing at different times and in different contexts, we can explore a higher-level explanation that the perception of an artwork's authenticity "depends on the beholder's eyes and on their ability to create a connection to that specific object biography and materiality."

C. Desirescapes

Taking a step back from the value-determinative factor being authenticity in the binary sense, we can better study and understand seemingly irrational behavior within the art market under a more expansive and developed framework. A useful next step in developing this theory is the concept of people operating within a "desirescape." The desirescape is a "spatial array of myriad agentic objects" that cultivates desire among people to own artworks. Then, we can better understand behavior because "within this desirescape, people are conceived of as caught in a web of objects that not only generate and manipulate desire, but also disturb reason." This idea reflects the idea of a "lawscape," which is similar in that it is also a web "in which legal rules shape and permeate our social and physical environment entirely, making law 'real' in terms of it being something we actually physically and emotionally encounter in everyday life.

Often in the course of litigation over an artwork's authenticity, the question arises: why did the buyers not ask more about the provenance or conduct their own simple internet search before making the purchase? The psychological research helps to explain this as resulting from powerful subconscious phenomena that stem from the immense influence of authenticity information provided by someone with authority. As the empirical studies have consistently found, merely being told an artwork was authentic became integrated into viewers' perceptions of the work and increased valuations. These results are evidence of physical manifestations in viewers from the belief in an attribution of authenticity. Essentially, "we all want to be duped" in order to uphold our belief in our connection to something real, so "[w]e only see the beauty because we are looking for it."

E. Parasocial Relationships in Fine Art

All of this seems to suggest that some of authenticity's significant power stems from the purchaser's desire to buy an artwork being rooted in the deeper desire for a physical totem to represent the connection between buyer and artist. Once purchased, the buyer is able to become a part of the art object's "life story" or "biography," by becoming a step in the artwork's provenance, inextricably linking the buyer to the developing history of that artwork forever. This urge to become part of the relationship between art and the artist seems similar to the dynamics of parasocial relationships. Generally, the term parasocial relationship has come to mean any one-way relationship in which one person, often a viewer or audience member, develops a false sense of intimacy with someone else, through exposure to the performer's public or fictional persona, often by viewing their media or art. Despite the novelty of using the term in this way, it could provide a helpful explanation for some of the 'irrational' purchasing and litigation behavior surrounding fine art purchases. Interestingly, the neural patterns related to viewing art and making aesthetic judgments with the context of authenticity information share some similarities with the neural activity related to parasocial relationships. Both are associated with activity in the prefrontal cortex—specifically, the ventromedial prefrontal cortex for parasocial relationships and the frontopolar cortex and orbitofrontal cortex for aesthetic judgments.

Theoretically, the viewer of an artwork connects to the piece, then subconsciously assumes that the artist has a similar connection to the artwork, allowing the viewer to make the next subconscious leap, moving beyond just that one artwork and projecting the connection onto the artist as a person. The viewer is then operating under the influence of the feeling of a shared emotional bond. Any relationship, real or imagined, would then come with the expectation of a debt that is owed to uphold one side of the relationship and maintain consistency in how that

individual has presented themselves. Of course, in the sense of parasocial relationships, this is all entirely one-sided. In the art world, artists either know or hope that there is or will be an audience out in the world that will be perceiving, connecting with, and purchasing their art. However, the identity of the individual purchasers will be entirely unknown for any of the major artists beyond the first sale or so. Yet, purchasers certainly claim to 'fall in love' with an artwork or feel that it is 'speaking to them' and are called to buy it. This is tied to the anthropomorphism of artworks, as discussed above. Even in less extreme forms than feeling called to purchase an artwork, people often discuss artworks as representing the mind of the artist, with the use of common phrases about different works being "in conversation" with each other. In this instance of a viewer feeling pulled to buy an artwork, the buyer is anthropomorphizing the piece and what it represents, mistaking it for allowing the buyer to have a "relationship" with the piece and with its author. The human feels an emotional connection to the artwork, and the artwork cannot and, therefore, does not reciprocate, leaving the buyer in an entirely one-sided relationship.

Conclusions and Implications

Art appreciated purely for aesthetic merit appears to be a bygone myth based on the ever-growing body of scientific research into the psychological machinations of art appreciation. It seems impossible to even study aesthetic evaluations of art at this point in human history, where the commodification of art has long superseded aesthetics. Any study would have to accomplish the herculean task of figuring out how to control for the deeply ingrained gut instincts about economics and social status that contaminate our aesthetic experience. These external market factors and moral associations have been socially conditioned into us without us realizing that it has seemingly irreversibly hijacked the way we experience art. Essentially, the concept of art

appreciation is based on the idea that viewing artworks triggers an experience, and that experience is a neurological effect, similar to the feeling of seeing a loved one's face, tasting food, or taking a drug. However, if the experience triggered in our brain is affected by these external factors, signaling how we should interpret artwork subconsciously within milliseconds, how can we ever form a purely aesthetic consideration? Our brain chemistry will reflect the amalgamation of our individual psychological and sociological factors in combination with whatever contextual information we receive. Any clues about what we think we *should think* about an artwork have measurable and tangible effects on the electrical impulses in our brains, as repeatedly found in the neuroscientific studies discussed above.

In light of this substantial body of research supporting the concept that aesthetic assessments, at worst, essentially do not exist and are instead reliant on determinations of authenticity or, at best, are quite significantly mediated by authenticity information, we would expect to see prioritization given to the authentication process. If art appraisals exist on the binary between aesthetics and authenticity, it seems that authenticity determinations are winning out, overriding our ability to form personal evaluations of art based on aesthetic merit. Maybe artworks were never meant to provide pure aesthetic experiences and were always inextricably linked with sociological baggage, destined to exist as objectified symbols of social status or an externalized measure of self-importance. In that case, talented art authenticators would be highly regarded and their thoughtful determinations respected. People would seek the truth and act rationally by confirming an artwork's authenticity before purchasing. But there is more going on. Authenticity serves as a proxy for complex social phenomena, which alters our perceptions and forms a feedback loop, where culture, psychology, emotions, economics, and the allure of the 'magic' of art all play a hand in shaping behavior, often in irrational ways.

If there were a clear underlying truth that authentication inquiries were simply seeking out and revealing, it would seem more realistic for courts to handle these cases. However, considering this immense complexity in the emotional weight of authenticity, the reasonableness of turning to the legal system to do this is questionable. Requesting that courts parse through and come to an equitable determination within the restraints of existing legal frameworks and operating abilities seems unwise. As courts themselves have already identified, prompting many to refuse to provide an authentication determination, the legal system is too far removed from the insular and complex art world, leaving judges incapable of making properly informed decisions. Further, as often happens "in some of the more difficult 'corners' of the law, legal doctrine has developed more to protect the economic and market concept of authenticity" rather than being able to account for the myriad of emotional, cognitive, and social factors and cultural structures that are equally as involved as the economic and market considerations.

This conversation about art authenticity is becoming increasingly relevant as both fascination with and disregard for forgeries grow. Even museums—often very powerful determiners of an artwork's aesthetic merit, serving as the trusted institutions that curate society's shifting artistic tastes—are becoming unabashedly fascinated with forged art. A recent trend among respected museums has been organizing exhibits dedicated to counterfeit art. At the same time, criminal law enforcement around the world has been working to track down and prevent the circulation of counterfeit art. In November of 2024, a network of European art forgers was discovered, with over 2,000 forged artworks seized, worth $212 million in economic damage. Meanwhile, in the United States, our President's art collection has been proven to contain several notable forgeries. With the potential of a fake Renoir hanging in the White House, the future possibilities for the importance of art authenticity are wide open.

Without the assurance of aesthetic merit as a guiding light, the unknowability of authenticity makes reaching certainty about an artwork's value even more unlikely. As the research across disciplines suggests, evaluations of artwork are shaped by the relative importance of various economic, historical, emotional, neurophysiological, and social factors. In an area so devoid of true objectivity, we can benefit from a deeper understanding of the constructed importance of authenticity in art and, in turn, its impact on our assessments of art. While the art market often operates under an ideal assumption that there is some singular truth underlying inquiries into authenticity that can be obtained and accepted, the reality is much less clear. In actuality, the authenticity of artworks is a fluid concept that depends on mutable and context-specific elements. In addition to helping explain some of the seemingly irrational or difficult aspects that arise in disputes over authenticity, this more comprehensive model can also recognize the inescapably subjective nature of aesthetic judgments and the countless influences that construct our perception and valuation of art.

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