

THE ILLICIT ANTIQUITIES TRADE AS A FUNDING SOURCE FOR TERRORISM: IS BLOCKCHAIN THE SOLUTION?♦

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INTRODUCTION

The illicit trade of stolen antiquities has saturated the art world for decades.¹ This kind of theft dates back to when the victors of wars seized cultural property as part of their spoils.² While the evolution of international relations and the increased value placed on cultural property have motivated international leaders to unite in an effort to end the industry of illicit antiquities trade, the industry thrives in modern times and serves as an incredibly lucrative source of funding for radical terror groups.³ Because the current systems available for tracing the provenance of antiquities are inadequate and there is insufficient regulation of the art market, the industry surrounding looted antiquities flourishes, and thus the trade of looted antiquities continues to serve as illicit funding for terrorist organizations.

The United States' efforts to end its part in the looted antiquity industry have been unsuccessful. In 1970, the United States ratified the United Nations Education, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the "1970 UNESCO Convention").⁴ In the ratification of the 1970 UNESCO Convention, the United States enacted a statute addressing the point of entry of imported antiquities, but minimally addressing the illicit trade after importation.⁵ This statutory scheme is insufficient to counteract the expansive industry surrounding the trade of illicit cultural property. Once a piece of looted artwork enters the United States art market, the nation's perceivable naiveté fuels the trade of antiquities, allowing antiquities to transfer hands until they are so far removed from their source that it is nearly impossible to identify their looted origins.⁶ The Holocaust Expropriated Art Recovery Act of 2016 (HEAR) codifies a statute of limitations for Nazi era looted artwork, in an effort to ensure justice for Holocaust victims and their heirs.⁷ The HEAR Act is exemplary of the changes necessary to protect victims of art theft and to ensure justice through congressional action. However, the HEAR Act only applies to Nazi era looted artwork, and Congress has failed to

¹ Predita C. Rostomian, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271 (2002).

² *Id.*

³ See Whitney Bren, *Terrorists and Antiquities: Lessons from the Destruction of the Bamiyan Buddhas, Current ISIS Aggression, and a Proposed Framework for Cultural Property Crimes*, 34 CARDOZO ARTS & ENT. L.J. 215, at 218–21 (2016).

⁴ See Rostomian, *supra* note 1, at 283; see also Christa L. Kirby, *Stolen Cultural Property: Available Museum Responses to an International Dilemma*, 104 DICK. L. REV. 729 (2000).

⁵ See Rostomian, *supra* note 1, at 283; see also Kirby, *supra* note 4.

⁶ See Heather Pringle, *New Evidence Ties Illegal Antiquities Trade to Terrorism*, NAT. GEOGRAPHIC (June 13, 2014), <http://news.nationalgeographic.com/news/2014/06/140613-looting-antiquities-archaeology-cambodia-trafficking-culture/>.

⁷ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

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codify a similar statute of limitations for other looted antiquity claims.

Likewise, the United States' antiquity industry has failed in its attempt to prevent the trade of looted cultural artifacts.⁸ Historically, auction houses, artwork buyers and dealers, and museums have all contributed to the industry surrounding the trade of illicit cultural properties.⁹ Culturally and historically valuable vases, sculptures, and scriptures are ripped from religious sanctuaries of various origin countries and, through a series of exchanges, delivered to the hands of prominent players in the legitimate American art industry.¹⁰ In the absence of federal legislation governing the antiquity industry, it is a completely self-regulated market.¹¹ This industry of self-governance promotes inherently broad governing principles with innate gray areas.¹² Thus, illicit antiquity traffickers profit off of sales within the legitimate antiquity industry, while participants in the legitimate market evade accountability.¹³

The absence of federal legislation governing regulation and recovery of looted artwork has left the states to decide claims of art ownership based on varying theories of recovery.¹⁴ Through cases addressing art and antiquity theft, two approaches to the statute of limitations have emerged and are implemented on a state-by-state basis:¹⁵ (i) the Demand Rule sets forth that the statute of limitations only begins to run when the original owner makes a demand for the antiquity from the good faith purchaser, and the good faith purchaser then proceeds to refuse the request for return;¹⁶ and (ii) the Discovery Rule provides that the statute of limitations begins to toll when the original owner knew or should have reasonably known of the whereabouts of the missing antiquity.¹⁷ Both theories require the original owner to exercise

⁸ See Rostomian, *supra* note 1, at 286–89.

⁹ See *id.* at 286–88; Robin Pogrebin and Kevin Flynn, *As Art Values Rise, So Do Concerns About Market's Oversight*, N.Y. TIMES (Jan. 27, 2013), <http://www.nytimes.com/2013/01/28/arts/design/as-art-market-rise-so-do-questions-of-oversight.html>.

¹⁰ See Candida Moss and Joel Baden, *Hobby Lobby's Black-Market Buys Did Real Damage*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/opinion/hobby-lobby-iraq-artifacts.html>; Derek Finchman, *Can Blockchain Technology Disrupt the Trade in Illicit Antiquities?*, 14 No.2 ABA SCITECH L. 4 (2018), <https://www.kiip.re.kr/webzine/1804/resource/file/Library02.pdf?ver=1>.

¹¹ See Rostomian *supra* note 1, at 288.

¹² See generally Erin Thompson, *Successes and Failures of Self-Regulatory Regimes Governing Museum Holdings of Nazi-Looted Art and Looted Antiquities*, 37 COLUM. J.L. & ARTS 379, 381 (2014).

¹³ See *id.*

¹⁴ See Rostomian, *supra* note 1, at 284–85.

¹⁵ See *id.*

¹⁶ See *Mirvish v. Mott*, 965 N.E.2d 906, 907 (2012); Lori J. Parker, *Proof of a Claim Involving Stolen Art or Antiquities*, 77 AM. JUR. PROOF OF FACTS 3D 259 (2017).

¹⁷ See Parker, *supra* note 16.

due diligence in seeking out the location of the stolen antiquity.¹⁸

The inconsistency of state law and the absence of any federal regulation, combined with the insufficient resources needed to both prevent and prosecute the trade of looted antiquities, enable the black market for illicit antiquities to thrive as a major funding source for terrorist groups, such as the Islamist militant group called the Islamic State of Iraq and Syria (“ISIS”).¹⁹ However, there is hope that such inadequacies may be resolved through the development of a blockchain for art provenance as a digitized system for tracing of art movement. The recent developments surrounding cryptocurrency and blockchain are expansive. Implementing a blockchain for antiquity provenance would have two main effects. First, a blockchain for antiquity provenance has the potential to thwart the industry surrounding the trade of illicitly-acquired antiquities in two ways: (i) inhibiting efforts to legitimize looted antiquities, and (ii) increasing the probability of returning the looted antiquities to their rightful owners. Second, a blockchain for antiquities provenance, while increasing the nation’s ability to track, intervene, and prosecute the purchase and sale of looted antiquities, will also serve as a roadblock for ISIS, which would otherwise profit off of the industry surrounding the trade of looted antiquities. If blockchains are created by art purchasers, auction houses, archeologists, and origin countries to record antiquity identification information, there is potential to completely disrupt the looted antiquity industry as a funding source for radical terror groups. While there are privacy concerns innate in the art community, a private blockchain for art provenance has the potential to preserve a sense of privacy in art transactions. While it may be impossible to completely halt such an illicit scheme, the implications of such a profound technological advancement are undeniable. Integrating a blockchain for antiquity provenance into the regulatory systems followed by museums, collectors, and dealers will set a standard of transparency in the art market, preventing purchasers from acquiring looted antiquities and inhibiting ISIS from profiting off of the illicit antiquity trade in America.²⁰

Part I of this Note discusses the history of the industry surrounding looted antiquities. This Part traces the process in which the looted antiquity enters the legitimate art market. Next, this Part analyzes how the art industry in the United States contributes to the illicit funding of ISIS, explaining the roles that art dealers, collectors, and museums play in this process. Lastly, this Part introduces the relevant legal doctrines

¹⁸ See Rostomian, *supra* note 1, at 285–86.

¹⁹ See *id.*; see also Bren, *supra* note 3, at 216.

²⁰ See Celestine Bohlen, *Escalating the War on Loot*, N.Y. TIMES (Mar. 11, 2016), <https://www.nytimes.com/2016/03/12/arts/international/escalating-the-war-on-looting.html>.

that set the stage for the thriving industry of looted antiquities, including the UNESCO 1970 Convention, the HEAR Act, and relevant common law. In Part II of this Note, there is a discussion of antiquity provenance and the inadequacies of the widely-adopted systems implemented for tracing antiquity provenance. Part III of this Note introduces the modern developments of the blockchain tracing system, discussing how blockchain functions as a digitized and decentralized tracing system with a specific focus on blockchain for art title registry. This Note concludes, in Part IV, by explaining how the blockchain for art provenance has the potential to serve as a tool for both preventing transfers of looted antiquities and prosecuting such illicit transfers. In turn, the adoption of the blockchain for antiquity provenance proposal will serve as a means of achieving the larger initiative of decreasing funding for terrorist groups.

I. LOOTED ANTIQUITIES IN THE LEGITIMATE ART MARKET

A. Antiquity Looting

Antiquity looting fuels an ongoing illicit industry, thriving especially during times of war and conquest.²¹ This practice is common and dates back in history, evidenced by (i) the Spanish Conquistadors, who looted Incan gold; (ii) Napoleon, who filled a museum with his conquests; (iii) locals who turned to looting during the First Gulf War; and (iv) more recently, the Taliban, which demolished the Buddhas of Bamiyam.²² In the Middle East, Al Qaeda and the Taliban, both radical terror groups, notoriously obtained funding through the trade of looted antiquities.²³ Today, radical organizations in the Middle East are capitalizing on the weakened state of nations such as Iraq and Syria.²⁴ ISIS, disregarding the significance of culture history, is illegally excavating cultural heritage sites with bulldozers and explosives and stealing ancient statuettes, dishes, and other prized cultural property.²⁵

ISIS has resorted to increasing the amount of funds it sources from the looted antiquity trade, in response to the United States' efforts to crack down on other potential ISIS funding sources.²⁶ ISIS has

²¹ See Hannah D. Willett, *Ill-Gotten Gains: A Response to the Islamic State's Profits from the Illicit Antiquities Market*, 58 ARIZ. L. REV. 831, 832 (2016).

²² See *id.*; see also Bren, *supra* note 3, at 216.

²³ See Heather Pringle, *ISIS Cashing in on Looted Antiquities to Fuel Iraq Insurgency*, NAT. GEOGRAPHIC (June 27, 2014), <http://news.nationalgeographic.com/news/2014/06/140626-isis-insurgents-syria-iraq-looting-antiquities-archaeology/>.

²⁴ See Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT. GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/#>.

²⁵ See *id.*

²⁶ See Pringle, *supra* note 23 (“The U.S. is freezing bank accounts and cracking down on false charities,” Livoti adds, “so ISIS has to go to alternative methods of financing.”).

attempted to justify its destruction of cultural sites by attributing its actions to radicalized religious beliefs and idol worship.²⁷ This rationalization is neither legally nor morally sound and does not justify its antiquity-looting scheme, which is used as a major source of financing for its militant ventures.²⁸ In 2014, Iraqi intelligence seized over 160 computer flash drives, containing detailed financial records of dead ISIS commanders.²⁹ The recovered financial records revealed that illicit antiquity trafficking was one of the most common financial transactions engaged in by ISIS.³⁰ It was reported that ISIS netted upwards of \$36 million from activities including the smuggling of looted antiquities and artifacts.³¹ Since the beginning of the Syrian civil war, ISIS is just one of the many radical groups that are capitalizing on the looted antiquity trade.³²

Research published by the Combating Terrorism Center at West Point demonstrates that terrorist organizations are keen to the financial opportunities surrounding the looted antiquity market, capitalizing on it from various angles.³³ There is research revealing that the looted antiquity scheme may involve shorter chains of traffickers than one would expect.³⁴ Studies on the looted antiquity trade in Cambodia demonstrate that there is very little distance between the criminal antiquity trafficker and the legitimate art collector.³⁵ According to the German intelligence agency, in 1999, Mohammed Atta, the Al Qaeda militant who hijacked and crashed American Airlines Flight 11 into the North Tower of the World Trade Center, attempted to sell Afghan artifacts to a German professor in order to purchase an airplane.³⁶ There is minimal detailed research on the trafficking networks in the Middle East, due to the high risk of such a venture. However, despite the sparse concrete research, the evidence of the connection between antiquity

²⁷ See Curry, *supra* note 24.

²⁸ *Id.*; see also Steven L. Myers & Nicholas Kulish, 'Broken System' Allows ISIS to Profit from Looted Antiquities, N.Y. TIMES (Jan. 9, 2016), <https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html>.

²⁹ See Pringle, *supra* note 23; see also Ben Taub, *The Real Value of the ISIS Antiquities Trade*, NEW YORKER (Dec. 4, 2015), <https://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>.

³⁰ Myers & Kulish, *supra* note 28.

³¹ See Pringle, *supra* note 23; see also Lindsey Lazopoulos Friedman, *ISIS's Get Rich Quick Scheme: Sell the World's Cultural Heritage on the Black Market—Purchasers of ISIS-Looted Syrian Artifacts Are Not Criminally Liable Under the NSPA and the McClain Doctrine in the Eleventh Circuit*, 70 U. MIAMI L. REV. 1068 (2016).

³² See generally Curry, *supra* note 24.

³³ See Pringle, *supra* note 23; Myers & Kulish, *supra* note 28.

³⁴ See Pringle, *supra* note 23; Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55 (2004).

³⁵ See Pringle, *supra* note 6; Szopa, *supra* note 34.

³⁶ See also Benoit Faucon, Georgi Kantchev, and Alistair MacDonald, *The Men Who Trade ISIS Loot*, WALL ST. J. (2017), <https://www.wsj.com/articles/the-men-who-trade-isis-loot-1502017200> (last updated Aug. 6, 2017, 7:28 PM).

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trafficking in the Middle East and terrorist organizations is still alarming.

ISIS insurgents enter and profit from the illicit trade of antiquities in one of three ways. The insurgent can (1) run a trafficking network, (2) facilitate the process of smuggling the antiquities in exchange for services, or (3) tax those who transport looted antiquities through his territory.³⁷ Trafficking networks are typically run by individuals who are involved in various criminal schemes, including prostitution and drugs.³⁸ In facilitating the process of smuggling, the trafficker photographs the item and sends the photo to a higher up in the chain of command, who will issue a price to the trafficker.³⁹ Upon acceptance of an offer, the antiquity then will trade hands, going higher up in the trafficking ring's chain of command from the smuggler to the "receiver," who then hands the antiquity to the dealer.⁴⁰ The dealer, typically positioned at the top of the chain of command and serving as the key to the looted antiquity trade, then conceals the looted origins of the item in order to sell the item to a legitimate purchaser.⁴¹ Effectively transferring the looted antiquity from the black market to the legitimate art market, the dealer is viewed as a portal between the criminal black market and the legitimate art buyers, dealers, and collectors.⁴² Once a dealer has successfully concealed the looted identity of an antiquity, it can be sold for hundreds of thousands of dollars.⁴³ Allegedly, the process of physically smuggling the looted art into the United States is surprisingly easy.⁴⁴ The dealers can transport the art into the United States through air cargo, professional courier services, or even by traveling with it in passenger luggage.⁴⁵ The trade of looted antiquities has been said to serve as ISIS's third or fourth most robust source of income.⁴⁶

³⁷ See Pringle, *supra* note 23; see also Faucon, Kantchev, and MacDonald, *supra* note 36.

³⁸ See Pringle, *supra* note 23; see also Faucon, Kantchev, and MacDonald, *supra* note 36.

³⁹ See Pringle, *supra* note 23. See generally Faucon, Kantchev, and MacDonald, *supra* note 36; Friedman, *supra* note 31.

⁴⁰ See Pringle, *supra* note 23. See generally Ammar Cheikh Omar, Richard Engel, and Aggelos Petropoulos, *Smuggler of Stolen Artifacts from Palmyra Speaks Out About ISIS' Illicit Operation*, NBC NEWS (Apr. 6, 2016, 3:00 PM) <https://www.nbcnews.com/storyline/isis-terror/smuggler-stolen-artifacts-palmyra-speaks-out-about-isis-illicit-operation-n551806>.

⁴¹ See Pringle, *supra* note 23; see also Faucon, Kantchev, and MacDonald, *supra* note 36.

⁴² See Pringle, *supra* note 23; Friedman, *supra* note 31; see also Faucon, Kantchev, and MacDonald, *supra* note 36.

⁴³ See Pringle, *supra* note 23; see also Faucon, Kantchev, and MacDonald, *supra* note 36.

⁴⁴ See Benoit Faucon & Georgi Kantchev, *Prominent Art Family Entangled in ISIS Antiquities-Looting Investigations*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/prominent-art-family-entangled-in-investigations-of-looted-antiquities-1496246740?mg=prod/accounts-wsj>.

⁴⁵ See *id.*

⁴⁶ See Chris Cooper, *Op. Ed.: Blockchain and the Battle for 'Blood Antiquities': Could Digital Currency Platforms Help to End the World's Deadliest Trade?* (Sept. 26, 2017), <https://dcebrief.com/op-ed-blockchain-and-the-battle-for-blood-antiquities-could-digital-currency-platforms-help-to-end-the-worlds-deadliest-trade/>.

B. *The Art Industry's Role*

The United States art market, a nearly entirely unregulated business arena, enables the looted antiquities industry to thrive. Much of the success of the industry surrounding looted antiquities can be attributed to funding from sales of looted art to legitimate art dealers, collectors, and buyers. America is one of the largest markets for stolen antiquities, due to the demand from both museums and collectors.⁴⁷ A criminal international art dealer stands to earn hundreds of thousands of dollars from a single sale to a legitimate art consumer.⁴⁸ The direct connection between looted Syrian antiquities and the legitimate art market is undeniable. The extent of this scheme is so extreme that even the International Council of Museums (ICOM) published an Emergency Red List of Syrian Cultural Objects.⁴⁹ Published with the goal of preventing the art community from purchasing looted antiquities, the list includes categories and types of antiquities that are most likely to be illegally obtained.⁵⁰ ICOM urges museums, collectors, and dealers to do extensive inquiry into the origin of acquisitions, and the list is intended to supplement those efforts.⁵¹

Private actors have also recognized the critical need for regulation of the looted antiquity industry. For example, the Art Loss Register (the "ALR"), a private company, serves as a database for works of art, cataloguing chain of title for art and antiquities. The ALR allows a claimant to register a claim for stolen antiquities.⁵² It also allows a claimant to monitor activity within the art and antiquity industry. The ALR goes so far as to notify a claimant, or even a seller, when good title cannot be passed in an art transaction. Individuals and large auction houses can check the ALR for an antiquity, prior to entering into a transaction, to ensure there are no registered claims on the piece.⁵³ However, this system only prevents the trade of looted antiquities once the antiquity has been registered on the ALR. More often, a looted antiquity is so far removed from its looted origin by the time it enters the legitimate market, either by way of ignorance or intentional concealment of its stolen nature within the art industry, that the rightful owner does not have knowledge of its presence in the United States.

⁴⁷ See Thompson, *supra* note 12, at 389.

⁴⁸ See Pringle, *supra* note 6.

⁴⁹ See *Emergency Red List of Syrian Cultural Objects at Risk*, INT'L COUNCIL OF MUSEUMS, https://icom.museum/wp-content/uploads/2018/05/ERL_SYRIE_EN.pdf (last visited Nov. 19, 2018).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *About Us*, THE ART LOSS REGISTER, <http://www.artloss.com/about-us>.

⁵³ *Id.*

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The current system of regulating the art industry in the United States perpetuates the looted antiquity industry.⁵⁴ Today, reputable art collectors, museums, and auction houses are all recorded as having either actively, or by way of ignorance, touched looted artwork.⁵⁵ Political agendas and disagreements within the art community as to antiquity acquisitions have contributed to insufficient regulation and enforcement.⁵⁶ It is imperative that the United States art community makes a significant change in its approach to antiquity acquisition, in order to prevent the acquisition of illicit antiquities and avoid contributing to the illicit antiquity trade as a source of income for ISIS.

1. Art Dealers

The most prominent United States-based art dealers are pivotal figures in the trading of looted antiquities, either intentionally or inadvertently serving looted antiquities to the legitimate art consumer on a silver platter.⁵⁷ The U.S. Immigration and Customs Enforcement (ICE) is currently investigating various American antiquity dealers under suspicion that they are aiding in the trafficking of looted antiquities into the United States.⁵⁸ Among those under investigation are long-time antiquity dealers Ali and Hicham Aboutaam, brothers and joint owners of Phoenix Ancient Art, an art dealing business that has notoriously dealt in looted antiquities.⁵⁹ In 2017, Ali Aboutaam was in Switzerland, when he was pulled over by Swiss police and arrested upon the discovery that Aboutaam was in possession of an ancient oil lamp without proper documentation of provenance.⁶⁰ Aboutaam was charged with falsifying customs documents, and he later pled guilty to falsely declaring an object to be of Syrian decent, when in reality it was from a looted Iranian cave.⁶¹ Aboutaam was fined \$5,000 for the violation, an amount that is a slap on the wrist relative to the value of one of the nation's leading ancient art dealers.⁶² In his defense, Aboutaam issued a statement asserting that the object was procured in good faith, without knowledge of its looted status, and that the mistake

⁵⁴ See Thompson, *supra* note 12, at 389.

⁵⁵ See Rostomian, *supra* note 1, at 286.

⁵⁶ See Fiona Rose-Greenland, *How Much Money Has ISIS Made Selling Antiquities? More Than Enough to Fund Its Attacks*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/03/how-much-money-has-isis-made-selling-antiquities-more-than-enough-to-fund-its-attacks/?utm_term=.688708ab4de8.

⁵⁷ See David L. Hall, *Stolen Cultural Property: A Due Diligence Primer*, 35-3 DEL. LAW. 8, 8-11 (2017). See generally Rostomian, *supra* note 1.

⁵⁸ See Faucon & Kantchev, *supra* note 44.

⁵⁹ See *About Us*, PHOENIX ANCIENT ART, <https://www.phoenixancientart.com> (last visited Sep. 23, 2018).

⁶⁰ See Faucon & Kantchev, *supra* note 44.

⁶¹ *Id.*

⁶² *Id.*

was a clerical error.⁶³ Ironically, Phoenix Ancient Art also claims to guarantee “one of the antiquities trade’s most vigorous and stringent procedures of due diligence for establishing the provenance and ownership history of its objects.”⁶⁴ Despite the guarantee for a vigorous provenance search, Ali Aboutaam is one of three American art dealers on a list of fifteen dealers that French officials suspect to be involved in the trafficking of artwork looted by ISIS.⁶⁵

2. Auction Houses

Auction houses are no strangers to the illicit trading of looted antiquities. The most prominent auction houses, Christie’s and Sotheby’s, have found themselves in the midst of the illicit scheme.⁶⁶ Recently, Sotheby’s settled a lawsuit brought by the United States Attorney’s Office on behalf of Cambodia, based on allegations that Sotheby’s participated in trafficking a stolen tenth-century sandstone sculpture from Cambodia.⁶⁷ Prior to the suit, Sotheby’s expected to sell the antiquity for \$3 million.⁶⁸ Christie’s is recorded to have auctioned a statue in 2009 that antiquity experts identified as a statue that originally sat only a few feet away from the Sotheby’s sculpture at the original sight in Cambodia.⁶⁹ Both Sotheby’s and Christie’s have made good faith repatriation efforts, purchasing the artworks back upon discovery of their stolen origins and paying for the cost of returning both art pieces to Cambodia.⁷⁰ Disconcertingly, despite both Christie’s and Sotheby’s housing two suspiciously similar antiquities, both having been looted from Cambodia, neither auction house discovered the antiquities’ looted nature upon a provenance search prior to acquisition. By procuring the illicitly obtained antiquities, failing to identify their stolen origins, and selling the antiquities at auction, auction houses are further disseminating looted antiquities into the legitimate market and making it more difficult for source nations to locate them. Though auction houses may make good faith efforts, the provenance searches are insufficient to discover even seemingly obvious red flags.

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *See* Faucon & Kantchev, *supra* note 44.

⁶⁶ *See* Tom Mashberg and Ralph Blumenthal, *Christie’s to Return Cambodian Statue*, N.Y. TIMES (May 6, 2014), <https://www.nytimes.com/2014/05/07/arts/design/christies-to-return-cambodian-statue.html>.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

3. Museums

Many museums in the United States participate in perpetuating the illicit trading of looted antiquities. Museums in the United States typically acquire antiquities through purchase, donation, or loan.⁷¹ Museums are equipped with great resources to adequately search an antiquities provenance; thus, it seems inexcusable for a museum to have acquired looted antiquities in the first place.⁷² Due to the limited legislation governing the art industry, museums implement self-regulatory regimes that guide the level of precaution taken in acquiring antiquities.⁷³ The varying approaches museums take when it comes to acquisitions demonstrate that many museums still turn a blind eye and continue to permit and/or participate in the illicit industry surrounding looted antiquities.

Museums generally fall into one of the five schemes for approaching acquisitions.⁷⁴ First, “umbrella institutions,” such as the American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD), adopt policies similar to model codes.⁷⁵ Second, some museums, such as J. Paul Getty in Los Angeles and the Metropolitan Museum of Art (“the Met”) in New York City, adopt more stringent and aggressive acquisition policies in an attempt to prevent acquisition of looted art.⁷⁶ Third is the category of museums that generally address the topic by inserting into agreements a requirement of obtaining good title.⁷⁷ Fourth are the museums whose policies allow for acquisition of an object so long as “the acquisition has been published[,] and no one has made a claim for it.”⁷⁸ Finally, some museums have no policy addressing the matter, because they do not acquire antiquities.⁷⁹ Aside from the second approach, which aims to prevent acquisition of illicit antiquities in its entirety, many museum policies concern themselves with whether the acquisition will be protected in court, even if it was once stolen and smuggled into the United States.⁸⁰

⁷¹ See Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1001 (2010).

⁷² See Rostomian, *supra* note 1, at 287. See generally Thompson, *supra* note 12.

⁷³ See generally Thompson, *supra* note 12.

⁷⁴ See Rostomian, *supra* note 1, at 287.

⁷⁵ See *id.* See generally *About Us*, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/about-us> (last visited Sep. 27, 2018); *New Acquisitions of Archeological Material and Works of Ancient Art*, ASS'N OF ART MUSEUM DIRECTORS, <https://www.aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info> (last visited Sep. 27, 2018).

⁷⁶ See Rostomian, *supra* note 1, at 287.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Linda F. Pinkerton, *Museums Can Do Better: Acquisitions Policies Concerning Stolen and Illegally Exported Art*, 5 VILL. SPORTS & ENT. L.J. 59, 66 (1998). See generally Thompson,

The museums that are members of AAM or AAMD are bound by guidelines that call on museums to ensure that antiquities are returned to their rightful owners when a museum does not hold good title.⁸¹ The AAMD guidelines require that antiquities acquired by museums be accompanied by record of ownership from 1970 to the time of acquisition, leaving room for narrow exceptions to be decided on a case-by-case basis.⁸² Ideally, this guideline serves as a preventative measure for museums that would otherwise acquire illicit antiquities. Despite the commitment to just and fair resolution of looted art claims, adherence has been ineffective. Statistics show that museums in the United States have voluntarily returned as little as twenty-eight artworks in abiding by these guidelines.⁸³ Further, many member museums neither follow the guidelines nor fall within the listed exceptions.⁸⁴ It is evident that AAMD willfully accepts the museum's failure to fully comply with the guidelines set forth.⁸⁵ Some assert that the failure to comply with regulatory guidelines boils down to the general failure of self-regulatory regimes that lack crucial outside pressures on compliance, such as those pressures in repatriation cases of Nazi era looted artworks.⁸⁶ However, the most practical reason for the failure of museums to comply with such guidelines is cost.⁸⁷ Running an effective provenance search requires many hours and incurs large research expenses.⁸⁸ This cost is likely immensely higher when running a provenance search of an antiquity that has been looted, where the provenance has been strategically laundered by international criminal antiquity traffickers.

The Hobby Lobby case in 2014 is exemplary of the precise dilemma occurring in the absence of federal regulation of the art market.⁸⁹ In 2014, Hobby Lobby, a multimillion dollar craft store chain,

supra note 12; *New Acquisitions of Archeological Material and Works of Ancient Art*, *supra* note 75.

⁸¹ *See generally* Thompson, *supra* note 12; *New Acquisitions of Archeological Material and Works of Ancient Art*, *supra* note 75.

⁸² *See generally* Thompson, *supra* note 12, at 391.

⁸³ *See Resolved Stolen Art Claims, Claims for Art Stolen During the Nazi Era and World War II, Including Nazi-Looted Art and Trophy Art* 37–46, HERRICK FEINSTEIN LLP (Aug. 6, 2015), <http://www.herrick.com/content/uploads/2016/01/Resolved-Stolen-Art-Claims.pdf>.

⁸⁴ *See* Thompson, *supra* note 12, at 396–99.

⁸⁵ *See id.* at 398. *See generally* Elizabeth Betsy Keough, *Heritage in Peril: A Critique of UNESCO's World Heritage Program*, 10 WASH. U. GLOBAL STUDIES L. REV. 593 (2011).

⁸⁶ *See* Thompson, *supra* note 12, at 402.

⁸⁷ *See id.* at 399.

⁸⁸ *See id.* at 391.

⁸⁹ *See* Complaint, U.S. v. In re Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets, No. 17-3980 (E.D.N.Y. July 5, 2017), available at <https://www.justice.gov/usao-edny/press-release/file/978096/download>; Julie Zauzmer & Sarah Pulliam Bailey, *Hobby Lobby's \$3 Million Smuggling Case Casts a Cloud Over the Museum of the Bible*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/07/06/hobby-lobbys-3-million-smuggling-case-casts-a-cloud-over-the-museum-of-the-bible/?utm_term=.0791ddb05e3f.

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was in the process of developing a much-anticipated Museum of the Bible, which was promised to contain hundreds of biblical texts and artifacts, when the U.S. government seized thousands of ancient Iraqi artifacts that were illegally imported by Hobby Lobby. As a result, the store chain was fined \$3 million.⁹⁰ Hobby Lobby previously made a suspicious purchase in 2010, when it acquired 5,500 Mesopotamian cuneiform tablets (i.e., tablets featuring ancient cuneiform script) for \$1.6 million.⁹¹ The tablets were paid for via wire payments to seven different bank accounts. Even more suspicious was the fact that the items arrived in ten separate packages, labeled as ceramic tiles or clay samples, and were delivered to three different Hobby Lobby addresses. Hobby Lobby ignored some clear red flags, such as inconsistencies in the artifacts' provenance, misrepresentations of the artifacts' origins, and false statements on the invoices. Nonetheless, a \$3 million fine was nothing more than a bump in the road for the \$500 million museum, and museums continue to go unregulated, free to engage in illicit antiquity schemes.

Despite museums having vast resources at their disposal, the political contrast within the museum community as to ethics of antiquity acquisitions inhibits the establishment of a stringent regulation.⁹² Within the art community, there are great contrasts in opinion as to whether museums' interests should be in protecting cultural property, versus protecting the rightful owner.⁹³ These ethical contrasts inhibit change in the museum community and prevent growth towards justiciable returns of looted antiquities to their rightful owners.

C. *United States Law*

1. UNESCO 1970 Convention

In 1970, UNESCO created a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The purpose of the 1970 Convention was to halt the looting of antiquities and archeological sites and to promote a general attitude toward the protection of cultural property.⁹⁴ At the General Conference in Paris, various nations recognized a need for international cooperation, in the effort to efficiently prevent illicit

⁹⁰ See Zauzmer & Bailey, *supra* note 89.

⁹¹ See Complaint, *supra* note 89; see also Press Release, U.S. Attorney's Office, Eastern District of New York, *United States Files Civil Action To Forfeit Thousands of Ancient Iraqi Artifacts Imported By Hobby Lobby* (July 5, 2017), available at <https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported>.

⁹² See generally Kreder, *supra* note 71.

⁹³ *Id.*

⁹⁴ See *id.* at 1003; Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 148 (2003); see also Keough, *supra* note 85.

trade of looted cultural antiquities.⁹⁵ Over ten years following the Convention, the United States ratified it in 1983 through the Convention on Cultural Property Implementation Act (CPIA), and effectuated the statute in 1986.⁹⁶ The CPIA implemented Articles 7 and 9 of the 1970 UNESCO Convention into domestic law.⁹⁷ The CPIA permits the President of the United States, upon request by a participating nation, to enter into a bilateral agreement with that nation to apply an import restriction on cultural property coming from that nation, where the foreign nation “contends that the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties.”⁹⁸ The import restriction prohibits importation of such materials into the United States in absence of a certificate from the source nation affirming the sanctity of the exportation.⁹⁹

Under the 1970 UNESCO Convention, much of the focus is on the source country taking preventative measures in the sale of illicit goods. Specifically, the exporting country must take proactive measures to inhibit the exportation of these looted cultural goods. This places most of the responsibility in preventing the sale of looted good on the source nation and fails to mandate action by the importer. Despite the intent of inhibiting the looted antiquity industry, the CPIA fails to mandate action on the part of the United States, leaving the states without guiding law.

The 1970 UNESCO Convention has been criticized for adopting what is often referred to as the “blank check” approach, prohibiting importation of antiquities that are exported in violation of the source nation’s law.¹⁰⁰ This approach is criticized, because it allows the source nation to define what qualifies as “illicit” goods, without any contribution from the antiquity industry.¹⁰¹ Some assert that the 1970

⁹⁵ See Marilyn E. Phelan, *Cultural Property: Who Owns It and What Laws Protect It?*, 74 TEX. B.J. 202, 205 (2011).

⁹⁶ See Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 302(5), 96 Stat. 2329, 2351 (1983); Rostomian, *supra* note 1, at 283; Friedman, *supra* note 31.

⁹⁷ See Phelan, *supra* note 95, at 205.

⁹⁸ See *id.*; see also Karin E. Borke, *Searching for A Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. 381, 412–13 (2003) (“Pursuant to Article 9 of the UNESCO Convention, the CPIA allows the United States to participate in international protection of cultural property by proving a means for source countries to enter bilateral or multilateral trade agreements with the United States, whereby United States Customs officers enforce import restrictions on the cultural property of the foreign nation. And in certain emergency situations, the CPIA authorizes the President to impose unilateral import restrictions on the cultural property of the requesting State. Pursuant to Article 7(b) of the Convention, the CPIA also provides for blanket protection of stolen cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party.”).

⁹⁹ See Phelan, *supra* note 95, at 205; Szopa, *supra* note 34; see also Borke, *supra* note 98.

¹⁰⁰ See Kreder, *supra* note 71, at 1003; Keough, *supra* note 85, at 599 (“At its best, the program is characterized as ‘teetering on its once sound foundations as its principles and priorities crumble under the weight of bureaucracy and outside influence.’”).

¹⁰¹ See Kreder, *supra* note 71, at 1003.

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UNESCO Convention took ten years to be enacted, because, in part, “[d]ealer, collector[,] and museum [interest-holders] sought, with some success, to limit the effect on the trade in cultural property that would follow[,] if the United States automatically acquiesced in the retentive policies of some source nations.”¹⁰² Evidently, the CPIA is insufficient to address the growing complexities of the illicit art trade.

2. The HEAR Act

The HEAR Act “allows claimants to file claims in federal court to recover artwork or other cultural property unlawfully lost during the Nazi era, or for damages for the taking or detaining of such artwork or cultural property.”¹⁰³ The HEAR Act provides a federal statute of limitations for Nazi era looted antiquities claims. The purported goal of the HEAR Act is to ensure that victims of Holocaust era looting and their heirs are able to hear their case on the merits, without facing immediate defeat by a statute of limitations procedural defense.¹⁰⁴

The HEAR Act allows claims commenced within six years following the claimant’s actual discovery of the identity and location of the artwork or cultural property and information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost.¹⁰⁵

The HEAR Act codifies a statute of limitations for Nazi era looted artwork, providing stability and predictability in the law governing recovery of looted antiquities. However, in its effort to strengthen the current law to aid victims of theft during the Holocaust, the HEAR Act clearly fails to provide protections for victims of theft unrelated to the Holocaust and Nazi era looting. Congress should enact legislation akin to the HEAR Act in relation to looted antiquities and artwork from the Middle East, in order to increase the possibility of obtaining justice and returning looted antiquities to their rightful owners. The absence of effective nationwide legislation governing the special circumstances surrounding trading of illicitly obtained cultural property from the Middle East has required states to make statute of limitations determinations on a case-by-case basis.¹⁰⁶ Under such an approach,

¹⁰² See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 844–45 (1986).

¹⁰³ See Rachel Sklar, *Holocaust-Era Art Restitution Claims: Is the HEAR Act a Game Changer?*, 12 REVISTA DE DERECHO PRIVADO 159, 183 (2017); Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

¹⁰⁴ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

¹⁰⁵ See Rachel Sklar, *supra* note 103.

¹⁰⁶ See Phelan, *supra* note 95, at 204. For a definition of “accrues,” see BLACK’S LAW DICTIONARY 20 (10th ed. 2014) (“The term ‘accrue’ in the context of a cause of action means to arise, to commence, to come into existence, or to become a present enforceable demand or

claimants may be inhibited from pursuing a claim of ownership, fearing that their claim has surpassed a statute of limitations and unwillingly accepting the loss of a prized antiquity.

3. Common Law

The American judicial system has systematically and overwhelmingly denied claims for recovery of looted art on procedural defenses, rather than on legal merits. Claimants face daunting, and often insurmountable, burdens when seeking restitution and recovery of their stolen artwork.¹⁰⁷ State court justices apply principles of equity in ascertaining whether or not a claimant is able to recover looted antiquities.¹⁰⁸ Equitable principles have been guiding state courts in their decision making for decades.¹⁰⁹ In *Brown v. Board of Education II*, Chief Justice Warren asserted that equitable principles are necessary in guiding a full and proper assessment of desegregation decrees, stating:

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in *Brown I*. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.¹¹⁰

Chief Justice Warren's rationalization for implementing equitable principals in the context of desegregation decrees also applies in the context of claims for recovery of stolen property. Courts have the power to balance the public's interest in the looted antiquities and artworks (the interest in accessibility to cultural property for both commemorative and educational purposes), versus the original owner's personal interest in regaining their private property.

The recovery of looted antiquities and artwork in the United States is predicated on the rule that no person or good faith purchaser can obtain good title to stolen property.¹¹¹ In seeking the recovery of stolen antiquities, a true owner can bring a claim of replevin, which enables

right.”).

¹⁰⁷ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010).

¹⁰⁸ See *Brown v. Bd. of Educ. Of Topeka, Kan.*, 349 U.S. 295, 300 (1955).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L & DIS. RES. 243, 252 (2006).

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the original owner to recover the artwork where it was wrongfully taken or unlawfully detained.¹¹² In an action for replevin, a state court requires that the owner make a demand for return of the subject item and the possessor make a refusal prior to bringing the claim.¹¹³ This is problematic in circumstances surrounding looted antiquities, because often the true owner faces difficulty locating the stolen antiquity in order to demand its return. As a looted antiquity enters the legitimate market, the traffickers make conscious efforts to disguise the looted antiquity, making it difficult, and more often impossible, for a true owner to locate the piece of art before the statute of limitations runs out.¹¹⁴

a. Statute of Limitations

The true owner of a piece of stolen property has the common-law right to reclaim that property, unless barred by the statute of limitations.¹¹⁵ There are two general categories of statute of limitations rules implemented in art restitution and recovery cases: the Discovery Rule and the Demand Rule. These rules differ from the traditional rules favoring the owners exclusively, recognizing “the mobility, concealability and financial value of art, while balancing the interests of both the original owner and the subsequent good faith purchaser.”¹¹⁶ Because antiquities are decades old and can remain in the black market for many years before they enter the legitimate market, the statute of limitations approach taken by a state can be outcome determinative.¹¹⁷

The Demand Rule states that the statute of limitations only begins to run when the original owner makes a demand for the antiquity from the good faith purchaser, and the good faith purchaser then proceeds to refuse the request for its return.¹¹⁸ This approach works in favor of the original owner, who will have a longer period of time to find the purchaser and bring a claim.¹¹⁹ However, this approach can be counteracted through a claim for laches, allowing a defense that the plaintiff unreasonably delayed the initiation of an action and the delay

¹¹² See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991); Parker, *supra* note 16.

¹¹³ See Parker, *supra* note 16.

¹¹⁴ See Pringle, *supra* note 23; Szopa, *supra* note 34.

¹¹⁵ See Kaye, *supra* note 111.

¹¹⁶ See Sklar, *supra* note 103.

¹¹⁷ See Parker, *supra* note 16. See generally Stephanos Bibas, *The Case Against Statute of Limitations for Stolen Art*, PENN LAW LEGAL SCHOLARSHIP REPOSITORY (1994).

¹¹⁸ See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991); Parker, *supra* note 16; Linda Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RESERVE J. INT'L L. 1, 3–10 (1990).

¹¹⁹ See Parker, *supra* note 16; Pinkerton, *supra* note 118, at 1, 3–10. See generally Bibas, *supra* note 117.

unfairly prejudiced the defendant.¹²⁰ Thus, the law still encourages the original owner to efficiently take action and protects the good faith purchaser from unreasonably delayed claims. In New York, the state courts can find that the purchaser does not qualify as an “innocent” buyer, as required to obtain a legitimate right to object, if the buyer failed to conduct a sufficient provenance search for the piece of art prior to acquisition.¹²¹

Alternatively, the Discovery Rule sets forth that the statute of limitations begins to toll when the original owner knew or should have reasonably known of the whereabouts of the missing antiquity.¹²² The Discovery Rule approach encourages the original owner to make reasonable efforts to locate the art.¹²³ Courts consider (1) the owner’s due diligence efforts to recover the artwork from time of the theft, (2) the means available to the owner to alert the art world of the theft, (3) whether the owner registered, or should have registered, the theft in order to put a reasonably prudent buyer of the art on constructive notice of the art being stolen, and (4) other relevant circumstances.¹²⁴ The Discovery Rule is implemented in order to require the plaintiff to actively search for the missing artwork, and the defendant must show both that they purchased the artwork in good faith and that they made their possession known to the general public.¹²⁵ The Discovery Rule is incredibly demanding, placing a heavy burden on the claimant in light of the principles of equity and the challenging nature of the duty of due diligence. However, both approaches require courts to consider all circumstances and whether the purchaser of the looted antiquity reasonably used due diligence in investigating the provenance of the piece.¹²⁶

b. Duty of Due Diligence

A key variable in ascertaining when a statute of limitations begins to toll is assessment of the level of due diligence completed by the parties in a claim of ownership of a looted antiquity. The duty of due

¹²⁰ Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc., No. 98 CIV. 7664 (KMW), 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999); Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc., 752 N.Y.S.2d 295, 296 (2002); see Parker, *supra* note 16; Pinkerton, *supra* note 118, at 3-10. See generally Bibas, *supra* note 117.

¹²¹ See Phelan, *supra* note 95, at 204; see also Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 291 (7th Cir. 1990). See generally Bibas, *supra* note 117.

¹²² See Parker, *supra* note 16; Pinkerton, *supra* note 118, at 2-3.

¹²³ See Parker, *supra* note 16; Pinkerton, *supra* note 118, at 2-3.

¹²⁴ See Parker, *supra* note 16.

¹²⁵ Sue Choi, *The Legal Landscape of the International Art Market After the Republic of Austria v. Altmann*, 26 NW. J. INT’L. & BUS. 167 (2005).

¹²⁶ Saltus & Saltus v. Everett, 20 Wend. 267 (N.Y. 1838); see Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Art Work*, 23 SEATTLE U. L. REV. 631, 634-35 (2000).

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diligence serves as a precaution for art buyers who would otherwise be purchasing stolen antiquities, risking claims for recovery by true owners and fueling the illicit antiquity trade.¹²⁷ While historically the duty of due diligence has been imposed on an out-of-possession owner seeking the return of property after the statute of limitations expired, art dealers, gallerists, collectors, and other art professionals also have a specific duty of due diligence when acquiring property to ensure they are purchasing good title.¹²⁸ The prevailing criterion for the duty of due diligence for acquirers of all movable property relies on “balance of equities,” where a purchaser must take reasonable precautions to avoid buying stolen property.¹²⁹

United States common law favors the true owner and prevents a purchaser from acquiring title, regardless of the purchaser’s ignorance of the stolen nature of an object or the purchaser’s good faith.¹³⁰ The purchaser is always subject to claims from the true owner, and thus potential purchasers have a duty to conduct due diligence prior to purchasing a piece of property.¹³¹ If the purchaser of a stolen property hopes to defeat a claim by the true owner, courts in the United States require a sufficient showing that the purchaser diligently researched to confirm he or she is obtaining good title.¹³²

All state courts consider the level of due diligence implemented by the purchaser in ascertaining the provenance of the piece, balancing the equities between the purchaser and the alleged true owner, in order to ascertain when the statute of limitations began to accrue.¹³³ Courts consider the precaution that the purchaser took in acquiring the artwork and the efforts the true owner made to report his losses and regain possession of the artwork.¹³⁴ In balancing equities, courts typically favor the victim of art theft.¹³⁵ Courts recognize the obstacles that victims of art theft face in locating their stolen property. Often, many years elapse before victims of art theft even recognize what pieces of art have been stolen, and when the victims do eventually recognize the theft, they often lack resources necessary to conduct a thorough search for their property.¹³⁶ The disadvantages that victims face are counteracted in part by the burden placed on the purchaser of the stolen

¹²⁷ See Phelan, *supra* note 126, at 639.

¹²⁸ See Pinkerton, *supra* note 118. See generally Alexandra Darraby, *Provenance—Legal Applications*, 1 ART, ARTIFACT, ARCHITECTURE & MUSEUM L. § 2.61 (July 2017).

¹²⁹ See Phelan, *supra* note 126, at 635.

¹³⁰ See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317 (1991); Phelan, *supra* note 126, at 633.

¹³¹ See Phelan, *supra* note 126, at 634. See generally Pinkerton, *supra* note 118.

¹³² See Phelan, *supra* note 126, at 634–35.

¹³³ *Id.*

¹³⁴ See generally *id.*

¹³⁵ See *id.*

¹³⁶ *Id.* at 635–36.

antiquity to demonstrate that he or she diligently searched to determine that the piece of art was not stolen.¹³⁷ Currently, purchasers of art can conduct due diligence by searching stolen art databases such as the ALR, consulting relevant experts, and consulting various institutions with relevant collections.¹³⁸ The affirmative defense of due diligence in barring claims based on statute of limitations is an important aspect of protecting legal ownership rights and the commercial expectations of good faith art collectors.¹³⁹

From an equity standpoint, there are various reasons why a duty of due diligence on the purchaser is favorable in acquisitions of art and antiquities.¹⁴⁰ Firstly, a vast number of looted artwork enter the United States annually, and most people are unaware that the majority of looted antiquities are sold in the legitimate market.¹⁴¹ Second, the magnitude of international art theft far exceeds that of losses reported to stolen art databases.¹⁴² This increases the need for purchasers to conduct due diligence in order to have any hope for returning the object to its owner.¹⁴³ Third, a due diligence requirement addresses the close relationship between the illicit art market and the legitimate art market.¹⁴⁴ Various individuals in the art world have attested to the fact that a very blurry line exists between legitimate and illicit art markets, which allows stolen art to be hidden, smuggled, and resold without a hitch.¹⁴⁵ Fourth, the remarkable speed at which such transactions occur makes a duty of due diligence favorable. A stolen antiquity can be stolen, smuggled, and resold, before information regarding the stolen art can be disseminated to potential buyers.¹⁴⁶ The duty of due diligence forces the purchaser to make an affirmative effort to seek out the information regarding the stolen property, increasing congruency between the purchaser's access to provenance for a piece of art and the speed at which a transaction occurs. Finally, the casual mentality that saturates the art industry further fuels the illicit antiquity trade.¹⁴⁷ The international art industry typically takes the "ask no questions" approach, which places in the hands of the purchasers the duty to ensure that they are not acquiring looted antiquities.¹⁴⁸ It is in the best interest of all parties that a purchaser conducts a thorough due diligence

¹³⁷ *Id.* at 636.

¹³⁸ *See generally id.*

¹³⁹ *Id.* at 638; *see* Pinkerton, *supra* note 118.

¹⁴⁰ Phelan, *supra* note 126, at 659; *see* Pinkerton, *supra* note 118.

¹⁴¹ Phelan, *supra* note 126, at 660–62.

¹⁴² *Id.* at 659.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 661.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 662.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

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investigation, because it decreases the risk of acquiring looted antiquities and prevents the antiquity from continuing to circulate in the legitimate market.¹⁴⁹

III. ART PROVENANCE

Provenance history is the chain of title, or history of ownership, for a piece of artwork and can play a key role in the due diligence investigatory process in acquiring art and antiquities.¹⁵⁰ The provenance history for an antiquity is instrumental in litigation matters, such as disputes over ownership, authenticity, and value.¹⁵¹ Moreover, provenance research is critical in documenting proof of ownership where a legal title is contested.¹⁵² Where the name of a suspicious person is found in a provenance record, that may raise questions as to whether the antiquity was stolen or misappropriated, warranting a diligent inquiry.¹⁵³ For source nations, the provenance history for an antiquity is critical in claims to recover works that are thought to have been exported in violation of export laws or patrimony.¹⁵⁴ Experts in the area have asserted that “higher provenance standards reduce the chances that law-abiding and legitimate institutions, collectors[,] and vendors contribute to the cycle of looting and destruction of archaeological sites—and the irreparable loss of historical context and information that goes hand in hand with looting.”¹⁵⁵ Currently, the art community’s approach to provenance is insufficient in preventing the trading of looted antiquities. This can be attributed to a variety of factors, including the lack of agreement on how to define “provenance,” what

¹⁴⁹ See generally *id.*; Pinkerton, *supra* note 118.

¹⁵⁰ See LYNN H. NICHOLAS, *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 47 (Elizabeth Simpson ed., 1997) (“Before we can search for lost object, we must know what they are and determine the exact circumstances of their displacement. We must discover if they were confiscated by governments, stolen by individuals, sold willingly or under duress, bartered for food, or simply hidden, forgotten, and randomly moved from place to place. Only when these problems have been solved can the process of restitution and compensation be undertaken, and then only on a cases-by-case basis, in which, inevitably, present-day political considerations and the emotional legacy of World War II will be major factors.”); *Provenance Guide*, INT’L FOUND. FOR ART RES. https://www.ifar.org/Provenance_Guide.pdf (last visited Oct. 7, 2017); Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART, TECH. & INTEL. PROP. L. 2, 221 (2009) (“A credible and documented provenance, or ownership history, stands as a kind of buffer zone at the intersection between an antiquities market that could function legally and legitimately, and the dirty and largely illegal business of site looting”); Darraby, *supra* note 128.

¹⁵¹ See Ronald D. Spencer & Gary G. Sesser, *Provenance: Important, Yes, But Often Incomplete and Often Enough, Wrong*, ARTNET NEWS (June 26, 2013), <https://news.artnet.com/market/the-importance-of-provenance-in-determining-authenticity-29953>.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *Provenance Guide*, *supra* note 150; Levine, *supra* note 150.

¹⁵⁵ See Levine, *supra* note 150; Darraby, *supra* note 128.

information comprises a provenance, how purchasers should treat gaps in information, and how provenance should be disclosed.¹⁵⁶

The International Foundation for Art Research (IFAR), a leader in the field of provenance research, provides a free provenance research guide that includes links to useful archives, image databases, dealer and sale records, and more.¹⁵⁷ According to IFAR's Provenance Guide, "an ideal provenance provides a documentary record of owners' names; dates of owners; methods of transference, i.e., inheritance, or sale through a dealer or auction; and locations where the work was kept, from the time of its creation by the artist until present day."¹⁵⁸ In theory, the provenance for a piece of art should include the chain of title listing every person who owned the piece of work since the work was created.¹⁵⁹ However, a majority of the time, the provenance for objects is incomplete and insufficient.¹⁶⁰ When viewing a provenance, one often finds a non-exhaustive list of owners and facts concerning the work's background, including past celebrity owners and prestigious exhibition venues where the work has been displayed.¹⁶¹ Such superficial information regarding an antiquity is relatively useless when it comes down to a claim of ownership.

Researching provenance for an antiquity can be difficult, time consuming, and costly.¹⁶² It requires persistence, attention to detail, and creativity.¹⁶³ Researchers are often searching for records that may be non-existent. Even the extant records pose problems due to their condition and the difficulty of locating them.¹⁶⁴ Often archives that store the records necessary to complete a provenance are decrepit and have suffered damages due to wars or natural disasters.¹⁶⁵ Further, some antiquity purchasers do not store such records, and others never created the records in the first place.¹⁶⁶ When a researcher finds extant records, the reliability of such records is still questionable where the records provide unclear, incomplete, incorrect, or conflicting information.¹⁶⁷ Dealers rarely attempt to verify information they report in a provenance, allowing many looted artworks to move through the market.¹⁶⁸ Some records also leave much unanswered, where an entire collection is

¹⁵⁶ See Phelan, *supra* note 126, at 688.

¹⁵⁷ See *Provenance Guide*, *supra* note 150.

¹⁵⁸ *Id.*

¹⁵⁹ See Spencer & Sesser, *supra* note 151.

¹⁶⁰ See *Provenance Guide*, *supra* note 150, at 1; Spencer & Sesser, *supra* note 151.

¹⁶¹ See Spencer & Sesser, *supra* note 151.

¹⁶² See generally *Provenance Guide*, *supra* note 150.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; Levine, *supra* note 150.

¹⁶⁶ See Levine, *supra* note 150. See generally *Provenance Guide*, *supra* note 150.

¹⁶⁷ See Levine, *supra* note 150. See generally *Provenance Guide*, *supra* note 150.

¹⁶⁸ See Phelan, *supra* note 126, at 689.

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recorded without identifying the individual pieces of art within the collection.¹⁶⁹

The process of a provenance search is further complicated in the case of looted antiquities. For looted antiquities, forgers create false documents, in order to intentionally confuse the historical records.¹⁷⁰ Because of this, IFAR urges researchers to avoid simply accepting records as valid and instead critically evaluate records themselves.¹⁷¹ A researcher should evaluate each record independently, because incorrect provenance information can be repeated by various sources.¹⁷² Further, the IFAR Provenance Guideline asserts that if a record from a secondary source cannot be verified as legitimate, the researcher must make note of this and the source of the information.¹⁷³

Despite the great value placed on diligent investigation into provenance by some, an AAMD policy on provenance allows member museums to take a subjective approach to a provenance inquiry. On June 4, 2008, the AAMD released its New Report on Acquisition of Archeological Materials and Ancient Art (the “New Report”), in an effort to create more rigorous standards for provenance searches prior to acquisitions of ancient art and archeological materials.¹⁷⁴ Guideline E sets forth that “[m]ember museums normally should not purchase a work[,] unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.”¹⁷⁵ However, Guideline F of the New Report provides an express loophole for museums to evade abiding by the deceptively stringent provenance research requirements:

The AAMD recognizes that even after the most extensive research, many works will lack a complete documented ownership history. In some instances, an informed judgment can indicate that the work was outside its probable country of modern discovery before 1970 or legally exported from its probable country of modern discovery after 1970, and therefore can be acquired. In other instances, the cumulative facts and circumstances resulting from provenance research, including, but not limited to, the independent exhibition and publication of the work, the length of time it has been on public display[,] and its recent ownership history, allow a museum to make

¹⁶⁹ See generally *Provenance Guide*, *supra* note 150.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ Kreder, *supra* note 71, at 1019.

¹⁷⁵ See *New Report on Acquisition of Archaeological Materials and Ancient Art*, ASS'N OF ART MUSEUM DIRECTORS (June 4, 2008), <https://aamd.org/sites/default/files/document/Antiquities%20Guidelines%20with%20Intro%2006.08.pdf>.

an informed judgment to acquire the work, consistent with the Statement of Principles above.¹⁷⁶

On January 29, 2013, the AAMD issued a revision to the New Report that provided more specific variables to consider when acquiring antiquities and archeological materials that lack a complete post-1970 provenance.¹⁷⁷ The revisions urge member museums to consider (1) the circumstances surrounding past independent exhibitions of the art, (2) past publications of the art, (3) the circumstances surrounding any public displays of the art, (4) prior owners of the art and claims made against them in regards to the art, and (5) any communication between the current or prior owners of the art and the country of modern discovery.¹⁷⁸ Despite these specifications, the loophole that had materialized in the New Report still exists, permitting museums to acquire works of art despite incomplete provenance. The explicit loophole for acquiring looted antiquities in the AAMD guideline is just one example of the failures of the art community's regulatory regime guiding provenance searches in acquisitions. When combining this explicit loophole with the other inherent limitations discussed earlier, a provenance search becomes a difficult feat, which provides the perfect port of entry for illicit antiquities entering the legitimate market. However, there is an opportunity to overcome such obstacles through the development of blockchain—a means of digitally tracing the movement of antiquities within the art market.

IV. BLOCKCHAIN

A. Background on Blockchain Technology

Blockchain, a seemingly complex technology well known for its application in cryptocurrencies such as Bitcoin, in its simplest form, is a public ledger.¹⁷⁹ It is a decentralized digital database, often serving as an alternative tool for recording chain of title.¹⁸⁰ Blockchain is rooted in the attachment of a coin, or “block,” to its owner.¹⁸¹ An owner is

¹⁷⁶ *Id.*

¹⁷⁷ See *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, ASS'N OF ART MUSEUM DIRECTORS (revised 2013) (January 29, 2013), <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ Peter B. Campbell, *Archeology and Blockchain: A Social Science Data Revolution?*, *GUARDIAN* (Oct. 2, 2017, 7:20 AM), <https://www.theguardian.com/science/2017/oct/02/archaeology-and-blockchain-a-social-science-data-revolution>.

¹⁸⁰ See Bernard Marr, *A Complete Beginner's Guide To Blockchain*, *FORBES* (Jan. 24, 2017, 12:37 AM), <https://www.forbes.com/sites/bernardmarr/2017/01/24/a-complete-beginners-guide-to-blockchain/#6b4d88f66e60>.

¹⁸¹ See Roger Aitken, *How Blockchain Technology Is 'Disrupting' The Art Economy As We Know It*, *FORBES* (Aug. 17, 2017, 11:47 AM),

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assigned a coin associated with a “block,” and “blocks” are ordered records containing a timestamp and a link to the previous block.¹⁸² Each person who owns a block also has access to a copy of all other assets in a blockchain, “creating a peer-to-peer asset and transaction registry network.”¹⁸³ A block can only be edited retroactively by its owner or any other individuals who possess the key necessary to access and edit the file.¹⁸⁴ Every copy of the distributed blockchain is kept in sync; if one block is changed, that change is reflected throughout all of the blockchain copies.¹⁸⁵ Thus, blockchain creates a network where all transactions, ledgers, or transfers of ownership are distributed and replicated on owners’ computers throughout the network. Blockchains are secure, because information generally cannot be altered or manipulated without approval by the network.

For Bitcoin, blockchain serves as an alternative method for transferring the cryptocurrency, offering a unique decentralized option for transferring value that does not rely on integration with a bank.¹⁸⁶ Typically, in making a transfer of funds, a third party intermediary, like a bank, will transfer the funds, which can take up to three days.¹⁸⁷ Blockchain replaces the usual third party intermediary, serving as a tool for recording transactions, establishing identity, and forming contracts.¹⁸⁸ Blockchain allows owners to send any value stored in their section of a blockchain to anyone in the world, merely by giving the private access key to that person.¹⁸⁹ From a financial perspective, blockchain is preferred over using a third party intermediary, because the third party intermediary likely charges a fee for its services.¹⁹⁰

Blockchain offers increased traceability and security, performing the same functions that a bank would perform in a transfer, such as identity verification and recording transactions, faster and more accurately.¹⁹¹ One expert opined:

The security is built into a blockchain system through the distributed timestamping server and peer-to-peer network, and the result is a database that is managed autonomously in a decentralized way. This

<https://www.forbes.com/sites/rogeraitken/2017/08/17/how-the-blockchain-is-disrupting-the-art-economy-as-we-know-it/#25d0e47174fe>.

¹⁸² See Marr, *supra* note 180.

¹⁸³ See Campbell, *supra* note 179.

¹⁸⁴ See Marr, *supra* note 180.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*; see also Richard Bradley, *Blockchain Explained... In Under 100 Words*, DELOITTE: PERSPECTIVES, <https://www2.deloitte.com/ch/en/pages/strategy-operations/articles/blockchain-explained.html> (last visited Nov. 15, 2017).

¹⁸⁷ See Bradley, *supra* note 186.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Marr, *supra* note 180.

makes blockchains excellent for recording events—like medical records—transactions, identity management, and proving provenance. It is, essentially, offering the potential of mass disintermediation of trade and transaction processing.¹⁹²

Because no one can edit a blockchain without a corresponding key, blockchain is secure in establishing identity in transfers.¹⁹³ Theoretically, it is possible for a key to be stolen, and the thief could then gain access the blockchain.¹⁹⁴ However, short snippets of computer code “can generally be kept secure at very little expense,” significantly decreasing risk of a breach in the blockchain.¹⁹⁵

B. *Blockchain and the Art Industry*

Beyond cryptocurrencies, blockchain technology has a variety of applications within the art industry. In recent years, blockchain has been integrated into the art industry as a system for title registration, offering increased traceability of art movement and verifying ownership.¹⁹⁶ Beyond the practical advantages to blockchain are financial advantages. Blockchain for art and antiquities provides the art community with a means of transferring antiquities without the expensive corporate middleman.¹⁹⁷ Owners will receive the full profit from the sales of a piece of work by avoiding paying the cost of service for transferring through a major corporation.¹⁹⁸ Buyers will also see the benefits of avoiding the middleman, where the prices of a work do not reflect the usual costs associated with such a transfer.¹⁹⁹ Despite the multitude of benefits blockchain poses, concerns exist as to whether the technology behind blockchain is sufficient to retroactively record chain of title for antiquities. In light of the potential advantages and the current limitations of blockchain technology, the future development of blockchain technology to incorporate retroactive transfers is imperative to secure antiquity provenance and ensure safe transfers within the antiquity industry.

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See* Press Release, Deloitte, Deloitte Develops Blockchain Proof of Concept to Solve Traceability Issues in Art (May 13, 2016), <https://www2.deloitte.com/lu/en/pages/technology/articles/blockchain-proof-concept-solve-traceability-issues-art.html>; *Distributed Ledger Technology Services*, DELOITTE (2017), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/lu-blockchain-services-21092017.pdf>; Aitken, *supra* note 181; Jason Bailey, *Why Use Blockchain Provenance For Art?*, ARTNOME (Jan. 29, 2018) <https://www.artnome.com/news/2018/1/26/why-use-blockchain-provenance-for-art>.

¹⁹⁷ *See* Aitken, *supra* note 181; Bailey, *supra* note 196.

¹⁹⁸ *See* Aitken, *supra* note 181; Bailey, *supra* note 196.

¹⁹⁹ *See* Aitken, *supra* note 181; Bailey, *supra* note 196.

1. Blockchain and Art Provenance

Of the various industries where blockchain technology is applicable, the art industry is no stranger to blockchain technology, and various startup companies have developed blockchain programs for art provenance. Ascribe, a Berlin-based startup, has created a program where artists can create a certificate of ownership for their artwork.²⁰⁰ Through this program, the provenance for each piece of art can be viewed from the distinct cryptographic ID assigned to the work.²⁰¹ Monegraph, a startup, is using blocking for digital verification of art, which allows creators of digital artwork to receive a blockchain key and value to be stored in a Namecoin wallet.²⁰² Namecoin uses Bitcoin technology as a base for its decentralized value registration and transferring system, allowing online artists to store certifications of ownership for their artwork.²⁰³ This decentralized blockchain for art provenance offers security against an illegitimate person claiming ownership of a piece of work.²⁰⁴ Such blockchain-backed systems are quickly beginning to appear in the art industry.²⁰⁵ Codex, a company that has secured participation from more than five thousand auction house partners, aims to launch a system of provenance searching that creates a “decentralized, blockchain-backed title registry for the art market.”²⁰⁶ Mark Lurie, a founder of Codex, asserted that “in the long term, [they] expect the ability to prove provenance to dramatically increase confidence in authentic items, and thus in the value.”²⁰⁷

Blockchain for art provenance has also sparked the interest of large service firms, such as Deloitte.²⁰⁸ At the 2016 ICT Spring summit in Luxembourg, Deloitte’s blockchain development team revealed its newly developed application, named ArtTracktive, which serves as an alternative means of tracing provenance of fine art.²⁰⁹ Partner and technology leader at Deloitte Luxembourg, Patrick Laurent, explained:

The [b]lockchain distributed ledger can trace the journey of artworks. When this technology is used in the art market, all events in the life cycle of an artwork are recorded and traceable. The application addresses one of the main concerns in the art market today, namely

²⁰⁰ See Wassim Bendella, *How Blockchain Is Changing the Art World*, FOUND. FOR ECON. EDUC. (June 11, 2017), <https://fee.org/articles/how-blockchain-is-changing-the-art-world/>.

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ *See* Bailey, *supra* note 196.

²⁰⁶ *See* Sarah P. Hanson, *New Art Registry Will Use Blockchain Technology*, ART NEWSPAPER (Jan. 30, 2018, 6:00 PM), <https://www.theartnewspaper.com/news/new-art-registry-will-use-blockchain-technology>.

²⁰⁷ *Id.*

²⁰⁸ *Distributed Ledger Technology Services*, *supra* note 196.

²⁰⁹ *See id.*

the fragile documentation related to the provenance and movements of a piece of art.²¹⁰

ArtTracktive enables galleries, artists, and owners to access a distributed ledger of a provenance and transportation history for art and antiquities.²¹¹ The application manages all interactions between involved parties, from the artists to freight forwarders, customs, galleries, and museums, until the art reaches the buyer.²¹² ArtTracktive validates the movement of a piece of art through consensus, where the full history of a piece of art is securely recorded in a publically accessible system, without use of a third party.²¹³ All transfers “are validated by miners, specific nodes in the blockchain network, which use a programmed consensus to verify, authorize, validate, and record transactions. Blockchain technology can also leverage so-called ‘Smart Contracts,’ in which terms are implemented in a computer language and can execute themselves when specific conditions are met.”²¹⁴ Consensus protocol is “[t]he process by which a network of nodes confirms the record of previously verified transaction, and by which it verifies new transactions.”²¹⁵ Transactions are non-repudiable, making the provenance fixed and permanent.²¹⁶ Therefore, ArtTracktive avoids the downfalls of paper-based recordation of art transactions, such as the fraudulent documentation of authenticity.²¹⁷

2. Block and Antiquity Provenance

Introducing blockchain for provenance of antiquities has the potential to prevent the United States art industry from contributing to the illicit funding of radical terror groups. In a blockchain for antiquities, the original owner—likely an academic institution, the government of a country of origin, or an excavator—is assigned a single block, and the key would grant access to the piece of property, art, or antiquity within that block.²¹⁸ The subsequent transfer of the access key for a particular block would equate to a transfer of ownership of the piece of work within the block.²¹⁹ The most recent block in a blockchain that is not transferred or spent is the current owner.²²⁰

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See* Allison Berke, *How Safe Are Blockchains? It Depends.*, HARV. BUS. REV.: TECH. (March 7, 2017), <https://hbr.org/2017/03/how-safe-are-blockchains-it-depends>.

²¹⁶ *See* Deloitte, *supra* note 196.

²¹⁷ *See id.*

²¹⁸ *See* Cooper, *supra* note 46.

²¹⁹ *See id.*

²²⁰ *See id.*

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In practice, a blockchain for an antiquity can be created by the source nation, an agency devoted to protecting antiquities, such as IFAR, or a private owner. Then, when that antiquity is brought to the United States' border or sold to a legitimate participant in the United States art market, the blockchain would be updated to show it was legitimate. Contrarily, a looted antiquity would have no such record, and it would be much more difficult to forge a record than it is under the current system of provenance recordation.²²¹

The proposal to implement a blockchain system for antiquity provenance is complex and triggers a variety of concerns. While the applications of blockchain for provenance of newly created arts its clear and realized, blockchain for provenance of antiquities, an ancient piece of work often bearing a long and convoluted chain of ownership, is much more complex. Because the current status of available blockchain technology does not function retroactively, it is significantly more difficult to create a blockchain today that reflects both future and past owners of an antiquity. To implement a blockchain for antiquity provenance, it would first require rigorous and diligent research into and recordation of the ownership history of an antiquity. Following the provenance search process, blockchain can then serve to verify and protect the data from alteration or manipulation and record the chain of title for the antiquity going forward. However, still we have the same concern over whether the retroactively obtained information is valid in the first place. Artory Inc., founded by Nanne Dekking in 2016, is a digital art and antiquity archive that is founded on the value of transparency in art transactions.²²² Dekking purports that “what is known about a work of art, academically and commercially, and about its provenance should be inseparably linked to that work of art.”²²³ Artory, and its goal of transparency, “should ‘neutralize’ intermediaries who were until now able to choose the facts and interpret and present them in a certain way.”²²⁴ Artory proposes to provide digitally accessible, essential, and reliable data collected from the public domain, such as auction houses, exhibition catalogues, and academic and general publication, as well as through license agreements or partnerships with professional data collection services. Importantly, each party issuing title to a piece of work is vetted by an independent committee of professionals.²²⁵ This offers greater assurance that the title

²²¹ See Campbell, *supra* note 179.

²²² *About Us*, ARTORY, <https://www.artory.com/about-us/> (last visited Aug. 3, 2018); see Nanne Dekking, *The Art Market: From Chain of Trust to Chain of Transparency*, AUTHENTICATION IN ART, <http://authenticationinart.org/pdf/papers/nanne-dekking-speech.pdf> (last visited Nov. 19, 2018).

²²³ Dekking, *supra* note 222, at 7.

²²⁴ *Id.*

²²⁵ *The Registry*, ARTORY, <https://www.artory.com/about-the-registry/> (last visited Aug. 3, 2018).

for each piece of work in the Artory archive is valid and legitimate. Further, the reliability of data obtained by a company founded on and consistently striving toward transparency, such as Artory, is undeniably greater than data procured by biased parties such as auction houses, museums, and dealers.

Artory proposes to use blockchain technology, along with other security measures, as means of secure data storage system.²²⁶ If technological development allows it, a decentralized database, such as Artory, could be linked to a blockchain, preventing the unauthorized manipulation of the retroactively obtained data, while ensuring that the future recorded transactions are valid and secure. This has the potential to serve as a significantly more reliable means of provenance recordation and, in turn, could enable a new standard for due diligence in art transactions.

3. Privacy Concerns

Parties to antiquity transactions frequently demand privacy and discretion, hoping to keep the transactions hidden for a variety of reasons.²²⁷ Antiquity collectors who are selling off pieces from their collections out of financial necessity may desire to keep these transactions concealed out of concern for their reputation.²²⁸ Thus, blockchain for antiquities may face resistance from the antiquity community, due to the innate secrecy of the antiquity world. However, the privacy concerns surrounding a blockchain for antiquity provenance may be remedied through a private blockchain.

Generally, blockchains can exist publically or privately. Bitcoin relies on a public blockchain, where anyone can view or add transactions to the recording system.²²⁹ Public blockchains also have a one- to two-hour waiting period before transactions are considered fully verified, which inhibits those who desire fast-paced transactions.²³⁰ This delay poses a threat of vulnerability to the system, in that a transaction may initially appear to be verified, but is not.²³¹

Privacy concerns may be avoided through the use of private blockchain networks. A private blockchain is an alternative to the public blockchain and offers operators a higher degree of control over

²²⁶ *Id.*

²²⁷ See Phelan, *supra* note 126, at 688.

²²⁸ See *id.*

²²⁹ See Berke, *supra* note 215. See generally Ronald L. Chichester, *Blockchains Explained*, TXCLE ADVANCED BUS. L. 3.2 (2016).

²³⁰ See Berke, *supra* note 215.

²³¹ See *id.*; Julia Michalska, *Blockchain: How the Revolutionary Technology Behind Bitcoin Could Change the Art Market*, ART NEWSPAPER (Jan. 15, 2018, 1:08 PM), <https://www.theartnewspaper.com/analysis/blockchain-how-the-revolutionary-technology-behind-bitcoin-could-change-the-art-market>.

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transaction verification and participant behavior.²³² A private blockchain can exist where “nodes simply point in a private network[,] and the blockchain acts similarly to a distributed ledger.”²³³ Private blockchains give the owner a greater degree of control, where the owner can choose who serves as a node and has access to read the ledger, submit transactions, and verify transactions.²³⁴ The blockchain system operator is entrusted to make the security decision as to selecting nodes.²³⁵ The operator must be selective in choosing trustworthy nodes, such as the transparency driven Artory, because nodes will be responsible for both verification and communication of the newly verified transactions to the entire network.²³⁶ The increased direction and control available through a private blockchain network will cater both to the desire for privacy in art transactions and the need for traceability of art transactions.

V. BLOCKCHAIN FOR ANTIQUITY PROVENANCE WILL IMPEDE THE
LOOTED ANTIQUITY TRADE AS AN ILLICIT FUNDING SOURCE FOR
TERRORISM

Blockchain for antiquity provenance has the potential to remedy many of the current problems surrounding provenance research, creating a roadblock for the illicit art and antiquity trade and inhibiting terrorist organizations, such as ISIS, from profiting off of looted antiquities.²³⁷ By increasing transparency and cutting off the illicit art dealer from the legitimate art market, blockchain has the potential to serve as a valuable tool in the fight against radical terror groups.

A. *No Buyer, No Market*

Blockchain for antiquities will increase traceability of looted antiquities, putting all future potential buyers on notice and triggering the dissipation of the illicit antiquity dealer’s market. Blockchain technology can be used to create a provenance for an antiquity, which might otherwise go unrecorded, and enable the government to locate the exact point in the United States where the antiquity entered the legitimate antiquity market.²³⁸ A doctoral researcher of ancient economic history explained:

²³² See Berke, *supra* note 215; Michalska, *supra* note 231.

²³³ See Bradley, *supra* note 186.

²³⁴ See Berke, *supra* note 215.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See Bendella, *supra* note 200; Michalska, *supra* note 231. See generally Scott Reyburn, *Will Cryptocurrencies Be the Art Market’s Next Big Thing?*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/arts/cryptocurrency-art-market.html>.

²³⁸ See Cooper, *supra* note 46; Michalska, *supra* note 231; Bailey, *supra* note 196. See generally Reyburn, *supra* note 237.

It is the traceability of ‘blood antiquities’ which would allow investigators to determine where suspicious antiquities were sourced and under what circumstances. Through following the unalterable chain of wallets recorded in the [b]lockchain back to an original owner, investigators can quickly and efficiently determine where the artifact in question entered the legitimate market. Through tracing and closing off the avenues through which ‘blood antiquities’ make it onto the legitimate market, investigators can stem the supply of such antiquities and ensure that those with a perfectly legal interest in importing antiquities can have confidence in the artifacts in their possession.²³⁹

Prosecutors can trace the provenance to the source, which may in fact be the dealer in an illicit antiquity trafficking ring.²⁴⁰ Prosecutors will then notify the art community of the identity of the illegitimate dealer. At a minimum, locating and recording an illegitimate antiquity dealer puts the art community on notice of the dealer’s precarious nature. The art community will be less inclined to procure antiquities from that dealer out of concern that the rightful owner may one day claim ownership, and the buyers will have little ownership rights, because they were on notice of the dealer’s illegitimate nature when purchasing the piece. Inevitably, cutting off the dealer’s connection to the United States’ art buyer will result in the collapse of that dealer’s market in the United States.²⁴¹ Collapsing the antiquity dealer’s market cuts off the radical terror organizations’ access to the legitimate antiquity market in the United States. While the radical terror groups may attempt to sell that work elsewhere, or move through a different dealer, the piece of work will be entered into a national register which puts other nations on notice as well.

B. *Art Industry Involvement*

It is imperative that the art community adopts blockchain as a new system of recordation for antiquity provenance in order to remedy the current instability of tangible documentation, which can be lost or destroyed. Blockchain for antiquity provenance promotes accountability in the art community, where the absence of a sufficient and exhaustive provenance may otherwise be the blame for acquisition of looted antiquities.

Umbrella organizations, such as AAMD and AAM, should amend their guidelines to mandate that participating museums use blockchain to securely record provenance for all previously acquired antiquities and all antiquities acquired in the future. Museums will shift their systems

²³⁹ Cooper, *supra* note 46.

²⁴⁰ *See id.*

²⁴¹ *See id.*

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of title recordation, which may be costly upfront, due to the cost of dissecting the archives for previously procured artwork. However, in the long term, the blockchain for antiquity provenance will save museums from costly litigation over ownership rights and settlements.

Suspicious gaps or insufficient provenance histories in blockchains for antiquities are undeniable red flags, inhibiting members of the art community from acquiring such pieces out of either ethical concern or fear of legal ramification. By relying on a blockchain provenance, antiquity purchasers will significantly decrease the possibility of acquisitions being seized under suspicion of stolen origins and losing the money paid for such an acquisition. Manhattan prosecutors recently seized a 2,300-year-old vase from the Met. The vase, for which the Met originally paid \$90,000 in an auction at Sotheby's in 1989, was seized based on evidence that it was stolen from Italy by antiquity looters in the 1970s.²⁴² The Met lost out on the \$90,000 it paid in 1989 for a vase that is worth substantially more today. Christos Tsirogiannas, a lecturer with the Association for Research Into Crimes Against Art, published an article in *The Journal of Art Crime* in 2014 raising his suspicion that the Italian vase housed by the Met was stolen.²⁴³ Tsirogiannas allegedly sent the Met evidence of the vase's stolen origin, but never heard back from the museum.²⁴⁴ When the information was later sent to a Manhattan prosecutor who specializes in art crime, Tsirogiannas' suspicions were confirmed, as it was "abundantly clear that this rare object had been stolen."²⁴⁵ Tsirogiannas' evidence suggested that the vase was stolen from Italy by looters and ended up in the hands of a man who has since been convicted of conspiring to traffic various ancient antiquities, many of which are now displayed in museums.²⁴⁶ A blockchain can prevent incidents like this, where purchasers acquire looted antiquities despite suspicious previous owners. The digitized system tracing the movement of art will expressly indicate a questionable previous owner and would compel a purchaser to address the issue or face possible legal ramifications.

The benefits of blockchain for antiquity provenance stand true in private blockchains, despite the lack of transparency. Judith Pearson, the President of the Breckenridge Private Asset Management Group and the co-founder of Aris, a leading art title insurer, has explained, "the art market has flourished because of the lack of transactional standards and

²⁴² See Tom Mashberg, *Ancient Vase Seized From Met Museum On Suspicion It Was Looted*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/arts/design/ancient-vase-seized-from-met-museum-on-suspicion-it-was-looted.html>.

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.*

transparency.”²⁴⁷ A chain of title for a piece of artwork need not be publically accessible, because the recordation is in itself immensely beneficial to a provenance researcher.²⁴⁸ In acquiring an antiquity, it is likely that the blockchain containing a provenance will be disclosed upon request, because the viability of the deal may depend on it. For transactions dealing with art and antiquities, blockchain provides significantly increased reliability, and it will be accessible if need be, whether it is in the public domain or obtained through judicial mandate for purposes of determining ownership rights.²⁴⁹

C. Increased Successful Prosecution of Claims

Prosecutors can use the blockchain for antiquity provenance in order to evidence an insufficient due diligence investigation in acquiring art and antiquities. As mentioned, an art purchaser is always subject to claims from the true owner, and thus potential purchasers have a duty to conduct due diligence in searching provenance prior to purchasing a piece of art.²⁵⁰ If the purchaser of a stolen antiquity hopes to defeat a claim by the true owner, United States’ state courts require a sufficient showing that the purchaser took adequate steps in confirming he or she is obtaining good title.²⁵¹ The scope of a duty of due diligence is guided by the availability of resources in identifying stolen artifacts.²⁵² The “balance of equities” principle guiding the scope of due diligence investigation “supports a broader standard of inquiry.”²⁵³ Because a blockchain for antiquity provides a far more reliable and exhaustive provenance for antiquities than the outdated system currently in place, state courts will likely find that blockchain for antiquity provenance falls within the scope of the duty of due diligence. Therefore, antiquity purchasers will have a duty to review all transfers within a blockchain attached to an antiquity in the due diligence process. However, some members of the art community continue to purchase from dealers, despite the dealers’ recorded history of trading looted antiquities.

Despite the continued efforts towards validating only legitimate transactions, it is inevitable that an invalid transaction may slip through the cracks and end up on a blockchain. Still, it can be beneficial to have an illegitimate transaction recorded on the blockchain, because in balancing “the steps the possessor took to avoid acquiring stolen property against the steps the theft victim followed when reporting the loss,” along with other equities, the court will undoubtedly consider the

²⁴⁷ See Michalska, *supra* note 231.

²⁴⁸ See Berke, *supra* note 215.

²⁴⁹ See *id.*

²⁵⁰ See Phelan, *supra* note 126, at 634.

²⁵¹ See *id.* at 634–35.

²⁵² See *id.* at 689–90.

²⁵³ See *id.* at 694.

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evidence of a suspicious transaction or dealer in a retroactively recorded blockchain.²⁵⁴ In ownership claims of stolen property, where the possessor of the antiquity asserts that he or she met the duty of due diligence, prosecutors can counter that the duty of due diligence was not met, where there exists a record raising reason for suspicion in the chain of title.²⁵⁵ Therefore, the mere existence of a blockchain with a suspicious transaction or dealer can aid in seeking justice for true owners and inhibiting terrorist groups from profiting off of antiquity transactions in the United States.

CONCLUSION

Blockchain for antiquity provenance has the potential to transform the antiquity market's means of tracing ownership, increasing efficiency, preventing purchasers from participating in the illicit scheme, and, in turn, inhibiting the initial transfer of looted antiquities into the legitimate market. Further, the blockchain for antiquity provenance will serve as evidence in prosecuting claims against illegitimate purchasers, ensuring justice for rightful owners and preventing future purchasers from tactfully evading their duty of due diligence. Implementing a blockchain for antiquity provenance will create a roadblock between the looted antiquity dealers and the legitimate United States art market. By cutting off the United States art market, radical terror organizations that profit off of such transactions will face a huge financial loss. While there are privacy concerns innate in the art community, implementing a private blockchain for antiquity provenance has the potential to preserve a sense of privacy in art transactions. The implications of such a profound technological advancement are undeniable. Blockchain for antiquity provenance must be implemented by the art world universally in order for it to meet its full potential. In the United States, the absence of federal regulation of the art market, in conjunction with historical participation in such a lucrative industry, warrants immediate attention. Implementing the blockchain for antiquities has the potential to not only protect antiquity purchasers from engaging in illegitimate acquisitions and to fill a gap in an area of business that is unregulated, but also to impede the threat our nation faces from terrorists.

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²⁵⁴ See *id.* at 658–94; see also *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir. 1990) (suggesting that “those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last-minute phone calls.”).

²⁵⁵ *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 294.