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Alicja Jagielska-Burduk talks with Carla Shapreau, a Senior Fellow in the Institute of European Studies, University of California, Berkeley*

Carla Shapreau teaches Art and Cultural Property Law and is a Senior Fellow in the Institute of European Studies (opens in a new tab), University of California, Berkeley, where she is conducting cultural property research. Ms. Shapreau's legal practice has an emphasis in intellectual property, art, and cultural property law. She has represented a wide range of clients in the arts including museums, artists, collectors, academic institutions, non-profit entities, and galleries. Ms. Shapreau has written and lectured on a broad array of topics pertaining to arts and culture. In addition to her legal pursuits and academic research, Ms. Shapreau is also a violin maker.

Alicja Jagielska-Burduk (AJB): You have connected being an academic and a practicing lawyer. What is most fascinating in this combination? I assume one area of activity fuels the other? What are the pros and cons?

Carla Shapreau (CS): The pragmatic experience gained from practicing law greatly informs one as an academic, which for me include the roles of instructor, curator, and researcher. There is no "con" to applying a broader base of experience and knowledge to all of these roles, other than finding time for everything.

AJB: Your project Lost Music Project investigates the Nazi-era looting of musical material culture in Europe. What has inspired you to choose this area of research. Perhaps the fact that you are a violin maker and active member of the American Federation of Violin and Bow Makers and Violin Society of America.

CS: I did not intend to choose this area of research, but I had been conducting research regarding one particular alleged

* The issues regarding current status of the cultural heritage protection raised in the questions were consulted with Prof. Wojciech Szafrański.

Stradivari violin with an opaque Nazi-era history and in that process, I discovered that available resources to analyze this violin's history of ownership during the 1933-1945 period were essentially non-existent. Although there has been a resurgence in scholarly research regarding Holocaust-era looted art since the late 1990s, very little granular research had been conducted regarding Nazi-era musical material culture losses. It was because of this gap in reasonably accessible historical evidence that I began to search public and private archives in the U.S. and Europe for information on musical losses. The *Lost Music Project* is a research effort that seeks to reconstruct some of this lost history. My background as a violin maker and attorney both materially contribute to this project. In addition to sharing new research through publications and volunteering efforts to victims and their families, a goal of this project is to make information and historical records publicly accessible through some sort of digital humanities project.

AJB: Being a curator of the Ansley K. Salz Stringed Instrument Collection, Department of Music, University of California, Berkeley what is your opinion about museums operating at the Universities. In Poland several years ago, there was a boom for establishing museums at the University to memorize history of academia. There is even an association that gathers those museums and is supposed to lobby for new legal instruments given their special mission. Museums at the US Universities focus not only on the university's history, but also have art collections coming from donations, so their profile is different.

CS: Yes, in the U.S. many academic institutions, public and private, operate museums, collections within academic departments, and libraries with special collections that include archives, manuscripts, and other cultural holdings. These cultural objects are acquired through various avenues, including purchase, donation, and bequest and they are utilized for educational purposes, such as instruction and research, which benefit students, faculty, and the public at large.

AJB: What do you think about due diligence while buying works of art? What do you think of more strict due diligence level for active collectors/ regular buyers on the art market? I would like to refer to the case MAFG Art. Fund LLC v. Gagosian, et al., 30 N.E.3d 164 (N.Y. 2015), where a collector was expected to have a higher level of due diligence than a regular buyer.

CS: The issue of due diligence in purchase transactions involving works of art comes up under different legal theories and cases stand or fall on their specific

facts. In the case you mention, *MAFG Art Fund, LLC v. Gagosian*,[1] due diligence was relevant in the context of the tort theory of fraud. The element of the fraud claim that triggered analysis of due diligence was whether, or not, the sophisticated buyer "justifiably relied" on alleged false statements made by the gallery regarding the value of the artwork before sale. The five elements of a fraud claim under New York law consist of: "(1) misrepresentation of a material fact; (2) the falsity of that misrepresentation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance."[2] The court, among other things, dismissed the buyer's fraud claim against the gallery arising from alleged false statements of value stating, "As a matter of law, these sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence; for example, they did not ask defendants, 'Show us your market data.'"[3]

Therefore, on a fraud theory, under which the "reasonable reliance" of the buyer is an essential element, courts will and should examine whether the buyer reasonably relied on misstatements by the seller on topics such as authenticity, provenance, or value. If the buyer, is sophisticated, she will likely be held to a higher standard than an inexperienced buyer. But outcomes in such cases are unpredictable because a claim of fraud is a fact-intensive inquiry.[4] Courts "consider the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them."[5] The plaintiff will be expected to act reasonably to make use of means to discover the truth.[6] "A plaintiff cannot close his eyes to an obvious fraud, and cannot demonstrate reasonable reliance without making inquiry and investigation if he has the ability, through ordinary intelligence, to ferret out the reliability or truth about an investment."[7]

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1 *MAFG Art Fund, LLC v. Gagosian*, 123 A.D.3d 458, 459, 998 N.Y.S.2d 342, 343 (2014), *denying leave to appeal*, 25 N.Y.3d 901, 30 N.E.3d 164 (2015).

2 *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 311 (S.D.N.Y. 2013).

3 *Id.*

4 *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir.1997) ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.").

5 *Emergent Capital Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 195 (2d Cir.2003).

6 *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir.1997).

7 *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir.2006). In contrast, under a contract theory the buyer, sophisticated or not, is entitled to the benefit of the bargain, including any express or implied warranties, unless disclaimed by the seller. *Levin v. Gallery 63 Antiques Corp.*, 2006 WL 2802008, at *11 (S.D.N.Y. Sept. 28, 2006) and *Rogath v. Siebenmann*, 129 F.3d 261, 265 (2d Cir.1997).

The issue of pre-purchase due diligence may also play a significant role in ownership disputes over allegedly stolen art and the battle for title. In contrast to the MAFG Art Fund LLC decision, the New York federal trial court in *Republic of Turkey v. Christie's Ins., et al.* ruled that, "[a]s an ordinary purchaser, Steinhardt has no standalone duty to investigate, even if such a duty would attach to art dealers, museums, or other commercial actors."[8] Yet the purchaser, Michael Steinhardt, was a sophisticated antiquities collector. "In December 2021, the Manhattan D.A.'s Office concluded a multi-year, multi-national criminal investigation into Michael Steinhardt, one of the world's largest ancient art collectors, seizing 180 stolen antiquities valued at $70 million and imposing a first-of-its-kind lifetime ban on acquiring antiquities."[9]

On appeal, the Second Circuit in *Republic of Turkey v. Christie's Inc. et al.* reasoned that although the trial court concluded that Steinhardt was an "ordinary purchaser of art" and, therefore, under no duty to investigate the provenance of the artifact before purchase, the trial court nevertheless determined that Steinhardt *did* investigate the idol's provenance and "after contrasting Steinhardt's investigation into the Stargazer's provenance with Turkey's failure to act for over twenty-five years, we do not find that the district court abused its discretion in balancing the parties' respective diligence."[10]

The source for the lenient due diligence standard for ordinary purchasers is the New York commercial code and its definition of "good faith" for non-merchants, which only requires subjective "honesty in fact in the transaction or conduct concerned."[11] On the other hand, dealers and other "merchants" are held to a higher standard of good faith, which requires both honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade,"[12] including prov-

[8] *Republic of Turkey v. Christie's, Inc. et al.*, 2021 WL 4060357, at *11 (S.D.N.Y. Sept. 7, 2021), *affirmed*, 62 F.4th 64 (2d Cir. 2023).

[9] "D.A. Bragg: Two Antiquities Seized from Michael Steinhardt Returned to the People of Iraq," New York District Attorney Press Release, Jan. 18, 2022, https://manhattanda.org/d-a-bragg-two-antiquities-seized-from-michael-steinhardt-returned-to-the-people-of-iraq/

[10] *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 74 (2d Cir. 2023).

[11] *"'Good faith' means honesty in fact in the transaction or conduct concerned."* NY CLS UCC § 1-201(20)). See also, *Bakalar v. Vavra*, 819 F.Supp.2d 293, 306 (S.D.N.Y. 2011), *citing Graffman v. Espel*, 96 Civ. 8247(SWK), 1998 WL 55371, at *6 (S.D.N.Y. 1998) ("As a matter of law, the [purchasers] had no obligation to investigate the provenance of the Painting… [They] are not art dealers and are under no obligation to adhere to commercial standards applicable to art dealers.").

[12] Uniform Commercial Code § 2-103(1)(b) ("'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," https://www.nysenate.gov/legislation/laws/UCC/2-103).

enance due diligence if warranted. But the law varies by state and, for example, in California, ordinary purchasers and merchants are held to the same standard of "good faith," under its commercial code requiring both: "honesty in fact and the observance of reasonable commercial standards of fair dealing."[13]

U.S. common and statutory law favor the theft victim over the good faith purchaser,[14] although the purchaser may prevail under various defenses, such as the statute of limitations and the doctrine of laches. "A party asserting a laches defense must show that the plaintiff has inexcusably slept on its rights so as to make a decree against the defendant unfair. Laches … requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action."[15] The court in *Republic of Turkey v. Christie's Inc., et al.*, acknowledged that under a laches defense the court must take into account *both parties' due diligence*, "[D]efendant's vigilance is as much in issue as plaintiff's diligence… The reasonableness of both parties must be considered and weighed."[16] The court further remarked, "Unlike a mechanical application of a statute of limitations, a laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution."[17]

Public policy goals merit imposing a reciprocal due diligence burden on both the theft victim and the good faith acquirer in the context of an ownership dispute over stolen art. But this burden will and should vary based on the sophistication of the parties, the type of object, its value, the circumstances,[18] and the applicable law, which often varies from state to state.[19]

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13 California Commercial Code § 1201(20), *https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=COM&division=1.&title=&part=&chapter=2.&article=*.

14 Uniform Commercial Code § 2-403 (1), https://www.law.cornell.edu/ucc/2/2-403.

15 *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 193 (2d Cir. 2019). *See also*, *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

16 *Republic of Turkey v. Christie's et al,* 2021 WL 4060357, at *8 (S.D.N.Y. Sept. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023), *quoting*, Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S. 2d 618, 623 (1990). *See also*, *Howard Univ. v. Borders*, No. 20-CV-4716 (LJL), 2022 WL 11817721 (S.D.N.Y. Oct. 20, 2022).

17 *Republic of Turkey v. Christie's et al.*, 62 F.4th 64, 73-74 (2nd Cir. 2023), *quoting Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 196 (2d Cir. 2019).

18 *See e.g., O'Keeffe v. Snyder,* 83 N.J. 478, 499, 416 A.2d 862, 873 (1980) ("The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property."); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989), *aff'd,* 917 F.2d 278 (7th Cir. 1990) ("Determination of due diligence is fact-sensitive and must be made on a case-by-case basis.").

19 *See e.g., Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Naftzger v. American Numismatic Society*, 42 Cal.App. 4th 421, 425, 428, fn. 4 (1996).

AJB: The course you teach at the law Faculty Berkeley is Art and Cultural Property Law. The course description is very important in order to show what are the issues tackled during lectures. Is it a core course or elective one? Do you find such courses challenging for students? The course covers many issues from private to public law, together with international legal instruments, so it is a lot?

CS: The course I teach at the University of California, Berkeley, School of Law – Art and Cultural Property Law – is an elective course that attracts students at every level in the law school in our Juris Doctor and LLM programs. The class covers selected issues in U.S. statutory and case law, as well as aspects of EU and international law. We cover a range of selected interdisciplinary topics, including the development of the law of armed conflict as it applies to cultural property/heritage (for example the relevant Hague Conventions, the Rome Statute of 1998 and the ICC); the international art trade (including the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and its implementing U.S. legislation, the U.S. National Stolen Property Act, E.U. law on the import and export of cultural goods, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects); commercial transactions involving art dealers and auction houses and the U.S. Uniform Commercial Code; the battle for title to stolen art and defenses; museum law, including collection management legal issues; copyright law and the U.S. Visual Artists Rights Act. When time allows, we also cover the Native American Graves Repatriation and Protection Act and underwater cultural property/heritage law. Although the class can be challenging, Berkeley Law students are very engaged with the subject and the substantive law.