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Lost, Found, and Lost Again? Crafting an Efficient Solution to Disputes over Stolen Art

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Introduction

High-profile crimes of art theft seem mysterious and intriguing in films like *Dr. No*, where James Bond discovers a stolen Goya painting, *Portrait of the Duke of Wellington*, hanging in the villain’s lair or in media reports like those surrounding the thirteen-painting heist from Boston’s Isabella Stewart Gardner Museum in 1990 (Famous Art Heists 2011). However, art theft is rarely commissioned by professional criminal overlords, as Hollywood films or sensational news reports suggest. Instead, most art thieves undertake theft for profit, selling the paintings through legitimate dealers and auctions. While extremely famous works are somewhat more likely to be held for ransom, missing pieces are often found in the possession of innocent buyers, who purchase such works without knowing they are stolen property (Liberty Puzzles 2011).

Despite the less-than-glamorous motives behind most art theft, this crime still intrigues economists and lawyers. Art has special properties; each piece is unique, and its value reflects its artist’s reputation and sentimental, historical, and social factors. In addition, a painting’s value tends to appreciate over time, unlike most consumer goods (Landes & Levine 2006, 20). These considerations make it difficult for courts to resolve art-related lawsuits (Landes & Levine 2006, 20). Confrontations between a stolen work’s rightful owner and an innocent buyer offer particularly interesting dilemmas regarding economically efficient solutions to such disputes.

New York, as the art capital of the world, has been the venue for many lawsuits between original owners and innocent buyers of stolen art. Thus, New York’s laws provide a baseline for economists to analyze the efficiency of laws governing these cases. New York’s current laws, which incorporate a demand and refusal rule with the possible defense of laches, unfortunately fail to provide art owners and purchasers an efficient set of incentives consistent with welfare
optimization. Economic analysis reveals that a contributory negligence standard based on duties to use art title and loss databases would be more efficient than New York’s current laws.

**Current New York Law**

*The Demand and Refusal Rule and Defense of Laches*

The 1991 case, *The Solomon R. Guggenheim Foundation v. Lubell* illustrates the application of New York’s current rule. When a Chagall painting was stolen from the Guggenheim Museum around 1965, the museum, fearing that publicizing the theft would drive the painting further underground, did not register the painting as stolen or alert the police. In 1967, Lubell purchased the piece from an authorized dealer and maintained possession of the work for about twenty years, not knowing it was stolen property.

The Guggenheim Museum learned of Lubell’s ownership in 1985 and brought suit against Lubell to reclaim the painting (Pollack 1991, 369). Although Lubell asserted that the museum could not reclaim the work because the statute of limitations had expired, the court upheld the demand and refusal rule. This rule states that the statute of limitations begins to run when the original owner discovers the whereabouts of his stolen property, requests its return, and is refused by the buyer (Jiménez 2009, 2). Additionally, even though the Guggenheim Museum’s search efforts were deemed inadequate, the court concluded that a diligence standard should not be applied because “It would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner” (Pollack 1991, 372). The defendant could have raised a defense of laches, claiming that the original owner “Unreasonably delayed in initiating an action and a defendant was prejudiced by the delay,” but this defense is rarely applied, since it is difficult to prove that a
delay is excessively burdensome (Reyhan 2001, 998). In sum, current laws establish a property rule awarding stolen art to original owners, except in rare cases when owners have given up their titles by unreasonably delaying filing suits (Jiménez 2009, 3).

*The Efficiency of Current New York Laws*

According to Posner, a defense of laches is efficient because depriving innocent buyer of his property after a lengthy period of time would greatly decrease his welfare, while the original owner, by not asserting his ownership rights quickly upon discovering the location of his stolen property, signals that his welfare gain from the property’s return would be small. Thus, it is efficient for the property to remain in the hands of the highest value user, presumably the innocent buyer (Posner 2011, 98).

However, in New York courts, defenses of laches are rarely successful, mainly because defendants must prove that this unreasonable delay, an inherently vague concept, greatly hindered their defense (Pollack 1991, 374). Thus, in practice, cases are decided by a property rule of questionable efficiency in favor of the original owner. By almost always returning stolen art to original owners, courts place all risk on buyers. Although criminal law establishes penalties for buyers who knowingly purchase stolen property, criminal law does not apply to purchasers who are ignorant that the piece was stolen (Rose 2010, 4). This may create an incentive for some buyers to be willfully ignorant of provenance. Nevertheless, most buyers, knowing that artwork found to be stolen property will be returned to original owners, will take high levels of precaution when purchasing artwork. These precautions include researching the history and title of potential purchases, typically using art databases (Jiménez 2009, 1-2). Some databases, like the National Fine Arts Title Registry, allow owners to register their title and update the listing if
the piece is stolen, helping owners prove their title and alerting others of thefts (National Fine Arts Title Registry 2004). Other databases, like the Art Loss Register, document only stolen art, creating a central forum for researching stolen art (Jiménez 2009, 1).

However, since owners always win disputes against innocent purchasers, except in rare cases under a defense of laches, owners have less incentive to register their titles and update their art’s status if stolen than they would under a less favorable standard (Schwartz & Scott 2011, 2). This occurs because these actions rarely help owners find stolen property and may drive art further underground as thieves are forced to sell to unscrupulous buyers who do not care that the art is stolen and plan to hide it. The small number of owners who currently list their art in such databases illustrates these impacts of New York’s current rule (Jiménez 2009, 2). Overall, since owners take lower-than-optimal precaution, buyers are forced to adopt a second-best level of precaution that greatly exceeds buyers’ socially optimal precaution level, resulting in inefficiencies.

A New Negligence Rule

Creating Efficient Incentives

To minimize the sum of art theft’s social costs and costs of precautions, leading to a socially optimal level of art theft, courts should abandon the current property rule and establish a contributory negligence standard to decide cases in which original owners seek to repossess artwork from innocent buyers. Courts should base their negligence standard on owner and buyer use of art databases, such as the National Fine Arts Title Registry and Art Loss Register. These actions are now easy to observe and effective in diminishing the market for stolen art due to
advances in the availability of database technology since the 1991 *Guggenheim* case (National Fine Arts Title Registry 2004).

Under this proposed negligence rule, an original owner repossesses stolen artwork if he meets a negligence standard requiring him to register his title in databases and update these listings or if the buyer fails to meet his negligence standard requiring him to research potential purchases in databases. The buyer retains the art only when he meets his negligence standard, classifying him as a good faith purchaser rather than simply an innocent buyer, and the owner does not meet his negligence standard (Ginsburgh & Throsby 2006, 235).

When both parties are non-negligent, the owner should win the lawsuit. Under the opposite rule, the buyer would always take precaution to ensure he would always win. Knowing this, the owner would never take precaution because he could never win, thus making it difficult for buyers to effectively use databases. Art databases could even disappear entirely, as few, if any, owners would register their art, then making it impossible to enforce buyers’ negligence standards.

Similarly, when both are negligent, the owner should win. If the buyer were to win, the buyer would know that the owner would meet his negligence standard because only then could the owner win the suit. The buyer’s incentive to meet his negligence standard would then decrease, since he would always lose the case. Although the buyer would still have incentives to engage in research to avoid purchasing stolen art, these incentives would be lower than the socially optimal precaution level because the buyer would only consider his own valuation of the art rather than the art’s social value.
This contributory negligence rule establishes incentives for buyers and sellers to meet their negligence standards, minimizing the social costs of art theft and costs of precaution and bringing about a socially optimal level of art theft. Buyers will meet their negligence standard because people are not always rational, and so some owners may not meet their level of precaution. Therefore, buyers may have a chance of winning only if they meet their negligence standard. Additionally, meeting their negligence standard will help buyers avoid buying stolen art that may lead to lawsuits. Knowing that the buyer will meet his negligence standard, the original owner will meet his standard to ensure he can regain his art if it is stolen.

In addition to producing a socially efficient outcome, this rule is also privately efficient for buyers and sellers, because it allows the artwork to end up in the hands of the highest value user. The Coase Theorem states that when transaction costs are zero, or close to zero, initial allocation does not matter from an efficiency perspective (Coase 2003, 3-13). When a lawsuit arises between an original owner and an innocent buyer, transaction costs are low because there
are only two parties already engaged in negotiations as a result of the lawsuit. Therefore, no matter which property rights a court awards to owners and buyers in the interest of social welfare, the highest value user will ultimately acquire the artwork. This occurs because the losing party will purchase the artwork from the winner if the loser values the piece more than the winner. This proposed negligence rule brings about a socially efficient outcome in which the original owner repossesses his art from a good faith purchaser. However, the low transaction costs also allow a privately efficient outcome to occur.

*Theoretically Efficient Levels of Precaution*

It is theoretically possible to use the Brown Model to determine the efficient level of precaution that owners should be required to take by registering art and regularly updating listings and that buyers should be required to take by searching databases before purchasing artwork (Brown 1973.)

Let:

- \( A \) = the cost of art loss to society
- \( x \) = a unit of precaution taken by the original owner to register their art in databases and update these listings
- \( w_x \) = the price per unit of \( x \), including time and money
- \( y \) = a unit of precaution taken by the buyer in searching such databases before purchasing art
- \( w_y \) = the price per unit of \( y \), including time and money
- \( P_{x,y} \) = the probability that the art is stolen
- \( L \) = the probability that the art is damaged, lost, or destroyed if it is stolen

\[
\min_{x,y} (A(LP_{x,y}))'' w_x x '' w_y y
\]
The first variable, A, is the social cost of art loss as a result of theft. When art is stolen, loss includes the risk of its loss, destruction, or damage. The tactics thieves use, such as cutting art from its frame, rolling the canvas to conceal it, or being careless during a getaway or when storing the piece may irreparably damage the work. In addition, thieves may abandon or destroy the art to prevent their own capture by law enforcement (Houpt 2006, 73). When the original owner is a museum, social costs are obvious, since society can no longer view the art firsthand or benefit from museum-based research on the piece. However, even when the owner is a private individual, society’s welfare decreases from the loss of a work. Legal owners often lend art to museums for exhibitions, allow scholars to perform research on their pieces, and may even donate their art to museums, typically in their wills (Reyhan 2001, 1028). When art is stolen, these benefits are lost to society. Although difficult to calculate, economists could estimate this term as a work’s appraised value, since a piece’s valuation often encompasses social and historical value.

The next term is the probability that art is damaged, destroyed, or lost, which equals the probability the art is stolen multiplied by the probability the art is harmed if stolen. This term depends on x and y because the probability that the art is stolen depends on x and y. If owners are more diligent about registering their artwork and updating listings or if they list the piece in more databases, the probability that the art will be stolen decreases. Similarly, the more a buyer researches a potential purchase, the likelihood that the art will be stolen decreases. This occurs because the market for stolen art shrinks as owners list their paintings and update listings and innocent buyers become good faith purchasers by researching potential acquisitions and refusing to purchase stolen property because of the criminal penalties associated with knowingly holding
stolen art. As demand for stolen art falls, its price will fall, making art theft less profitable and decreasing the number of art thefts (Houpt 2006, 7; Merryman 2008, 275).

Taking the first order conditions with respect to x and y, the result is:

\[
\begin{align*}
w_x & \# \ AL \left( \frac{P}{x} \right) \\
w_y & \# \ AL \left( \frac{P}{y} \right)
\end{align*}
\]

This model establishes that an owner’s negligence standard should be set such that the marginal cost of taking precaution by registering art in databases and updating entries equals the marginal benefit to society from this precaution. Additionally, the buyer’s standard should be set such that the marginal cost of taking precaution and researching potential purchases equals the marginal benefit to society from this precaution. If set at these efficient levels, the proposed negligence rule will minimize the social costs of stolen art and the costs of precautions, incentivize owners and buyers to meet their negligence standards, and bring about the socially optimal number of art thefts.

**Practicalities**

Although this model is theoretically and economically sound, it may be difficult to accurately determine the components necessary to solve the Brown Model. For instance, it would require extensive research to determine A, the social cost of stolen art, as some components of art, such as research, aesthetic, and historical value are hard to approximate. Although experts attempt to use these considerations to value works, their valuations vary widely and may not be accurate (Nicita & Rizzolli 2009, 293). Additionally, it is not clear what units should be used for x and y. Suggestions include the number of databases used for listing or searching, the time spent
on listing or research, or the amount of money spent. All these measures have drawbacks and would require research to determine which is best. Finally, economists could determine probabilities \( L \) and \( P \) based on crime statistics, but this risks underestimating the probabilities because art theft is underreported (Feldman & Burnham 1977, 703).

Even if these numerical values could be determined, courts will face difficulty in evaluating whether actors have met numerically specific levels of precaution. Therefore, it might be necessary to define optimal precaution less strictly, perhaps as “diligence” by buyers and owners, instead of setting strict numerical negligence standards from the Brown Model. Under this simplification, a court analysis of available evidence guided by the Brown Model would determine if actors engaged in “due diligence.” This would permit the legal system to approximate the numerically-based rule as closely as possible.

**Conclusion**

Lawsuits between innocent buyers and original owners have long raised difficult legal and economic questions. However, an economic analysis of New York’s current laws reveals that a contributory negligence standard should be used to decide such cases, as it will minimize the social costs of art theft and costs of precaution, bring about a socially optimal level of art theft, and also permit privately efficient outcomes. Although the Brown model can theoretically set optimal precaution levels, a simplified legal rule requiring parties to prove “diligence” in their duties may be a practical way to approximate this economically efficient solution.
Works Cited


