Recovery of Nazi-Related Art: Legal Aspects Under German and U.S. Law Exemplified by the Gurlitt Case

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Recovery of Nazi-Related Art: Legal Aspects Under German and U.S. Law Exemplified by the Gurlitt Case

by MICHAEL REB HOLZ*

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I. Introduction

Since November 3, 2013, a case regarding Nazi-looted art—known as the “Gurlitt case”—gained the attention of media not only in Germany, but in the United States as well.¹ In 2012, the German government seized close to 1,500 pieces of valuable art in private apartments in Munich, Germany and Salzburg, Austria.² The owner of the apartments, Cornelius Gurlitt, inherited them from his father, who held the pieces of art throughout World War II despite peoples’ belief that the pieces were destroyed during the war.³ This case raises an interesting question of whether the original owners of the art works (or their heirs) can demand the return of the works, or whether Cornelius Gurlitt are entitled to keep them.

Part II of this article provides background of the Gurlitt case, and summarizes the relevant facts. Part III answers the question of how German law would resolve this case. Part IV analyzes how U.S. law would

resolve the main legal issues arising from cases involving Nazi-looted art. Finally, this article will conclude by comparing the approaches to this case under German and U.S. laws, and ultimately determine whether the *Gurlitt* case would be resolved differently under U.S. law.

II. Background of the *Gurlitt* Case

After the Nazis seized power in Germany in 1933, they began classifying certain artworks as “degenerate art”—which were pieces that contradicted what the Nazis considered to be real art. In 1937, the Nazis confiscated approximately 20,000 works of “degenerate art” with no formal legal basis. In 1938, however, the Nazi government enacted a law that served as a legal basis for present and foregoing confiscations. The 1938 law allowed the Nazi government to confiscate any degenerate artworks without compensating the former owners, regardless of whether an individual or museum owned them. In late 1938, the Nazi government went beyond confiscating degenerate art, and began expropriating all assets belonging to people of Jewish descent.

The Nazi government designated three potential destinations for expropriated art. Some degenerate art was housed in a museum specifically for degenerate art. The Nazi government kept the finest examples of non-degenerate art and planned to display them in an art museum dedicated to Adolf Hitler (“Führermuseum”) that was supposed to be built in his hometown of Liz, Austria. Hitler envisioned “Führermuseum” to become one of the world’s largest and most significant art museums. The Nazi government continuously looked for artworks appropriate to display in this museum regardless of the fact that it had not yet been built at the time. The majority of confiscated art, however, was sold to help finance the war.

4. Id.
5. Bohr et al., supra note 2.
7. Bohr et al., supra note 2.
8. Verordnung über den Einsatz jüdischen Vermögens [Decree on the Use of Jewish Property], Dec. 3, 1938 (Ger.).
9. From March 1938, Austria was part of Germany as a result of the Anschluss Österreichs.
11. Id.
The Nazi government licensed a certain number of people to sell art pieces abroad for government profit.\textsuperscript{13} Hildebrand Gurlitt—Cornelius Gurlitt's father—was one of these licensed sellers, and also worked as an art dealer at the time for the Führer.\textsuperscript{14} Since Hildebrand Gurlitt proved his knowledge of art by selling confiscated art pieces, the Nazi government placed him in charge of selecting the art collection for the Führermuseum.\textsuperscript{15} In this capacity, Hildebrand Gurlitt acquired art pieces on behalf of the Nazi government from sellers in Germany, as well as sellers living in then-German occupied European countries.\textsuperscript{16} In particular, he often went to Paris, France, to buy art pieces.\textsuperscript{17}

Because the Führermuseum was not built at the time, Hildebrand Gurlitt stored all the artworks he bought on behalf of the Nazi government in his private apartment.\textsuperscript{18} His apartment was located in a town occupied by U.S. troops at the end of World War II. U.S. investigators confiscated the artworks to determine the ownership.\textsuperscript{19} Hildebrand Gurlitt, however, convinced the American occupiers that he was the rightful owner of all of the artworks they found in his apartment, as they were part of his private collection.\textsuperscript{20} The investigators then returned the artworks to him.\textsuperscript{21}

Hildebrand Gurlitt died in 1956, and his widow died in 1968.\textsuperscript{22} Cornelius Gurlitt inherited the artworks, and they remained in his possession.\textsuperscript{23} For a long time, Cornelius Gurlitt lived reclusively, and no one was looking for the art pieces.\textsuperscript{24} People assumed they were destroyed during World War II.\textsuperscript{25} In the spring of 2012, however, prompted by allegations of tax fraud, German authorities searched Cornelius Gurlitt's apartment in Munich, Germany.\textsuperscript{26} In February 2014, they also searched his

\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.; Patricia Cohen, \textit{Documents Reveal How Looted Nazi Art Was Restored to Dealer}, \textit{N.Y. Times}, Nov. 6, 2013, \textit{available at} http://www.nytimes.com/2013/11/07/arts/design/documents-reveal-how-looted-nazi-art-was-restored-to-dealer.html?_r=0.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Bohr et al., \textit{supra} note 2.
\item \textsuperscript{19} \textit{SPIEGEL ONLINE INT'L}, \textit{supra} note 15.
\item \textsuperscript{20} Bohr et al., \textit{supra} note 2.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} \textit{SPIEGEL ONLINE INT'L}, \textit{supra} note 15.
\item \textsuperscript{25} Cohen, \textit{supra} note 14.
\item \textsuperscript{26} Bohr et al., \textit{supra} note 2.
\end{itemize}
apartment in Salzburg, Austria.\textsuperscript{27} It took the investigators three days to find all of the art pieces Cornelius Gurlitt was storing in his Salzburg apartment, and the state prosecutor confiscated his entire art collection.\textsuperscript{28} The prosecutor determined that Cornelius Gurlitt legally owned some pieces and returned those to him.\textsuperscript{29} In the meantime, the investigator published a list of all art pieces found in Cornelius Gurlitt’s apartments.\textsuperscript{30} Many of the former owners or their heirs are now demanding the return of these art pieces.\textsuperscript{31}

Originally, in an interview with the German news magazine, \textit{Der Spiegel}, Cornelius Gurlitt stated that he expected the investigators to return the remaining art pieces to him.\textsuperscript{32} He also stated that that he was not willing to return them voluntarily to their former owners unless the pieces are legitimately suspected of being looted art.\textsuperscript{33} In his opinion, however, only a small percentage of the art pieces found in his apartments could be suspected as looted art.\textsuperscript{34}

On May 6, 2014, Cornelius Gurlitt died.\textsuperscript{35} He made the art museum of Bern, Switzerland his sole heir.\textsuperscript{36} This article, however, will not take Cornelius Gurlitt’s death into account because the legal issues addressed here arise from the events that occurred prior to his death.

\textbf{III. Legal Aspects of the Gurlitt Case Under German Law}

This case raises three important legal issues under German law, which this section will address below. First, may the former owners or their heirs recover the looted art? Second, can Cornelius Gurlitt be held liable for criminal sanctions because he kept the art pieces in his apartments for

\textsuperscript{27} Id. Although the number of artworks found at Cornelius’s Salzburg apartment was far fewer than those found in his Munich apartment, they “may end up as valuable, containing artworks by Cézanne, Corot, Gaugin, Liebermann, Manet, Pissaro, Renoir and Toulouse-Latrec.” Philip Oltermann, Reclusive art collector Cornelius Gurlitt to return Nazi-looted works, \textit{The Guardian} (Mar. 27, 2014), http://www.theguardian.com/artanddesign/2014/mar/27/german-reclusive-art-collector-cornelius-gurlitt-nazi-looted-works.

\textsuperscript{28} Id.

\textsuperscript{29} Id.


\textsuperscript{31} Bohr et al., supra note 2.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Id.


many years? Finally, may the German authorities keep the art pieces recently confiscated from Cornelius Gurlitt?

A. Former Owners' Potential Claims

Under German civil law, a person may demand a thing from another person only if there is a statutory basis for such a claim. In Gurlitt, section 985 of the German Civil Code\(^{37}\) (BGB) may serve as a legal basis for the former owners, or their heirs, to demand Cornelius to return the art pieces to them as the legal successors. Section 985 BGB allows a person to make a claim for restitution. The statute provides that “[t]he owner may require the possessor to return the thing.”\(^{38}\) Thus, the claimant may ask another person to return an item, such as a piece of art, if that person possesses the item but the claimant is the true owner.

In Gurlitt, the legal issue under section 985 BGB is whether Cornelius Gurlitt actually acquired ownership of the art pieces stored in his apartments. He could have acquired ownership in two different ways: (1) by means of legal succession, or (2) by adverse possession. If Cornelius Gurlitt actually acquired ownership of the majority of art pieces found in his apartments, the former owners could not assert a claim against him under section 985 BGB.

1. Acquisition by Means of Legal Succession by Law of Intestacy

Section 1922, subsection 1 BGB, states that “[u]pon the death of a person (devolution of an inheritance), that person’s property (inheritance) passes as a whole to one or more than one other persons (heirs).”\(^{39}\) Pursuant to this rule, the property of Cornelius Gurlitt’s parents passed to him directly after the death of his mother (the surviving spouse), by mere operation of law and without the need for any further real acts of transfer.\(^{40}\) Assuming that Hildebrand Gurlitt acquired ownership of the disputed art pieces when he took them into his possession—as he claimed to the U.S. investigators after World War II—they would subsequently have passed to his wife upon his death, and upon his wife’s death, to his son Cornelius Gurlitt.

Present day general content of sections 1922 to 1941 BGB that govern German law of succession remains unchanged over the past eighty years. Thus, the legal principle remains the same as when Cornelius Gurlitt’s

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38. Id.
39. Id. § 1922 (1).
40. WERNER F. EBKE & MATTHEW W. FINKIN, INTRODUCTION TO GERMAN LAW 275 (1996).
parents died. Under the principle of succession, Cornelius Gurlitt could not have inherited the art pieces unless his father legally acquired their ownership. The question then remains as to whether Hildebrand Gurlitt actually acquired ownership of the art pieces, and the answer depends on how he acquired certain artworks.

Hildebrand Gurlitt possessed three different categories of art. First, the Nazi government confiscated some of these pieces from people of Jewish descent. Second, the Nazi government confiscated other pieces—not from Jewish people exclusively—solely because they were considered to be degenerate art. Finally, Hildebrand Gurlitt possessed art pieces that he acquired on behalf of the Nazi government in order to set up the Führermuseum. The following sections III.A.1.a–d analyze whether Hildebrand Gurlitt could have legally acquired each category of art.

a. Acquisition of Art Pieces Considered “Degenerate Art”

The confiscation of degenerate art was based on a code enacted in accordance with the formal procedures of the “Weimarer Reichsverfassung,” which was the constitution of Germany during the Nazi regime. Thus, the Nazi government had—at least following the enactment of this code—a legal basis for these confiscations. The allied occupation repealed this code in 1968—after the end of World War II. Therefore, the Nazi government could legally expropriate the pieces that it considered to be “degenerate art” from their original owners.

This outcome does not change on the basis that the code is inconsistent with the current German constitution (Grundgesetz). This code is not completely unfair since it prohibited confiscations for the reason of political persecution, race, religion or nationality. By contrast, the confiscations made under this code concerned any person or entity who held degenerate art pieces regardless of one’s race or attitude.

However, one should not reach the conclusion that Hildebrand Gurlitt obtained title to these art pieces. Under section 1 of the Gesetz über die Einziehung von Erzeugnissen entarteter Kunst, “products of degenerate art can be confiscated in favor of the Third Reich.” Thus, title to the art

41. **GESETZ ÜBER DIE EINZIEHUNG VON ERZEUGNISSEN ENTARTETER KUNST**, supra note 6.
42. CARL-HEINZ HEUER, DIE KUNSTRAUBZÜGE DER NAZIONALSOZIALISTEN UND IHRE RÜCKABWICKLUNG, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2558, 2560 (1999) (Ger.).
43. HANS HENNING KUNZE, RESTITUTION ENTARTETER KUNST, SACHENRECHT UND INTERNATIONALES PRIVATRECHT 261 (2000) (Ger.).
44. HEUER, supra note 42, at 2561; PETER RAUE, DIE BESCHLÄGNAHMTE GURLITTBILDER-EINE BESTANDSAUFNAHME, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 2, 3 (2014) (Ger.).
45. Id.
pieces passed to the German government and not to Hildebrand Gurlitt. Although he was entitled to sell degenerate art on behalf of the German government, he could not have acquired ownership because he held the artworks as an agent of the government.

Since Hildebrand Gurlitt never acquired ownership, he had no right to pass the art pieces to his wife or his son upon his death. As the legal successor of the Third Reich, and as the rightful owner of the artworks, the German government can demand the return of the pieces. Further, under the 1998 Washington Conference Principles on Nazi-Confiscated Art, the German government has an obligation to identify art pieces that the Nazis had confiscated, publicize them, and return to their original owners. 47

b. Acquisition of Art Pieces Originally Owned by People of Jewish Descent

Beginning in 1938, the German government confiscated assets from people based solely on their Jewish descent. The Nazis made these seizures according to the decree on the use of Jewish assets. 48 As a consequence, the government confiscated art pieces regardless of whether they were considered "degenerate art." Although the Nazi government enacted this code in accordance with the formal procedures of the "Weimarer Reichsverfassung," it is still invalid because its sole purpose was to enforce the racist ideology of the Nazis. 49 Thus, the code was far from serving any aspect of fairness and could never reach a level of valid law. 50 As opposed to seizing "degenerate art," confiscating Jewish assets were based on a law that referred to aspects of race and equaled political persecution. As such, the Nazi government had no legal basis to seize art pieces with the sole objective of expropriating Jewish assets. 51 Accordingly, Hildebrand Gurlitt could not have obtained ownership of the art pieces that belonged to Jewish people, which, in turn, could not have passed to Cornelius Gurlitt.

c. Acquisition of Art Pieces Designated for Exhibition in the Führermuseum

Finally, Hildebrand Gurlitt bought art pieces in his capacity as the person in charge of setting up the Führermuseum. 52 In that position, he most likely acted as a commission agent. Under German civil law, commission agents acquire property

48. VERORDNUNG ÜBER DEN EINSATZ JÜDISCHEN VERMÖGENS, supra note 8.
49. HEUER, supra note 42, at 2561.
50. Id.
51. Id.
52. Id.
of the items they buy. The property is finally passed over to the principal when the principal actually receives the items.\(^{54}\) Section 383 of the German Commercial Code (HGB) is the only statute in German civil law that governs transactions on a commission basis.\(^{55}\) This section states: “A commission agent is a person who on a professional basis buys or sells goods or security papers on his own behalf for another person’s account (for the account of the principal).”\(^{56}\) “On his own behalf” means that the commission agent deals with the seller in his own name, and supports the result that a commission agent acquires title to the items he buys.\(^{57}\) This strictly literal interpretation of section 383 HGB has become the prevailing opinion in German literature.\(^{58}\)

Under the circumstances, Hildebrand Gurlitt lawfully acquired ownership of the art pieces he bought in his capacity as the person in charge of the Führermuseum. After his death, this ownership passed to his son, Cornelius Gurlitt.

d. Summing-up

People whose art pieces were confiscated because they were considered to be “degenerate art” lost their legal title. The title did not pass to Hildebrand Gurlitt but, instead, to the Nazi government. Thus, the original owners do not meet the statutory requirements, and cannot demand the return of this category of art from Cornelius Gurlitt under section 985 BGB.

Hildebrand Gurlitt lawfully acquired the title to the art pieces that he bought in his capacity as the person in charge of setting up the Führermuseum and, ultimately, the ownership passed to his son Cornelius Gurlitt. Therefore, the former owners also do not meet the requirements of section 985 BGB to demand the return of such art pieces.

In contrast, people whose art pieces were seized solely on the basis of their Jewish descent never lost their title to those art pieces, so the original owners or their heirs still hold legal title. Accordingly, they can demand the return of these art pieces under section 985 BGB. Nevertheless, a further

\(^{53}\) Klaus J. Hopt, Baumbauch/Hopt, Handelsgesetzbuch § 383 no. 25 (36th ed. 2014) (Ger.).

\(^{54}\) Id.

\(^{55}\) Handelsgesetzbuch [HGB] [German Commercial Code], July 15, 2014, Bundesgesetzblatt [BGBL] § 383 (Ger.).

\(^{56}\) Id.

\(^{57}\) Tobias Lenz, Röhricht/Graf von Westphalen/Haas, in Handelsgesetzbuch: Kommentar zu Handelsstand, Handelsgesellschaften, Handelsgeschäften und besonderen Handelsverträgen § 383, no. 36 (4th ed. 2014) (Ger.).

\(^{58}\) Franz Häuser, in Münchener Kommentar zum HGB § 383 no. 23 (3d ed. 2013) (Ger.); Michael Martinek, in Oetker: Kommentar zum HGB § 383 no. 43 (3d ed. 2013) (Ger.); Hopt, supra note 53, at 25; Lenz, supra note 57, at 36.
inquiry is necessary under the German law of adverse possession, because
the original owners could still have lost their ownership under this doctrine.

2. Acquisition by Adverse Possession Under Section 937 BGB

The original owners of art pieces that were expropriated as Jewish
assets never lost their title to the goods to Hildebrand Gurlitt, but they (or
their heirs) could still have lost their ownership through adverse possession.
Under German law, a person may adversely possess property for a certain
period of time. This so-called acquisition by adverse possession ("Ersitzung") is codified in section 937 BGB, which provides:

(1) A person who has a movable thing in his proprietary
possession for ten years acquires the ownership (acquisition by
adverse possession).

(2) Acquisition by adverse possession is excluded if the acquirer
on acquiring the proprietary possession is not in good faith or if
he later discovers that he is not entitled to the ownership.

Cornelius Gurlitt had possessed the art pieces since his mother’s death
in 1968, which is clearly longer than ten years. Section 937, subsection 2
BGB, however, is the German “slayer” rule that requires that he acquire
them in good faith. The acquirer acts in good faith if he believed he
owned the item at the time he took possession. By contrast, an
acquisition is in bad faith if the supposed acquirer knew, or should have
known, that he could not legally acquire ownership of the items at the
moment he took them into his possession.

Moreover, the acquirer cannot claim that he acquired property in good
faith if his ignorance results from gross negligence. German civil law does
not define what constitutes gross negligence. It is assumed, however, that a
person acts grossly negligent when he violates the due diligence to an extremely
large extent while recklessly ignoring the ordinary standard of care.

Cornelius Gurlitt, who was born in 1932 and was already thirty years
old when he actually obtained the art pieces in 1962, was most likely aware
of the circumstances under which his father obtained them. Therefore,
Cornelius Gurlitt must have known that he could not fully own them at the

59. Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2002, BUNDESGESETZBLATT
[BGBL.] § 937 (Ger.).
60. Id.
61. CHRISTIAN BALDUS, MÜNCHENER KOMMENTAR ZUM BGB § 937 no. 27 (6th ed. 2013) (Ger.)
62. Id. § 937 no. 28.
63. PETER BASSENGE, PALANDT: BÜRGERLICHES GESETZBUCH § 937 no.1 (71st ed. 2014) (Ger.).
64. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 27, 1981, Neue Juristische
Wochenschrift [NJW] 2122 (1981) (Ger.).
time he took them into his possession.\textsuperscript{65} This is further evidenced by the fact that he kept the art pieces concealed from the public.

Most people who held positions of responsibility before or during World War II tried their best not to discuss the particulars of their activities with anyone after the end of the war. Cornelius Gurlitt, who was aware of the high value of the art his family obtained during this time, should have been suspicious as to its background. Even though people tended to be unwilling to talk about what happened before and during the war, Cornelius Gurlitt could have discovered the details behind the artworks if he made reasonable inquiries. Assuming he did not know concrete facts, he acted grossly negligent by not inquiring into how his father obtained the art pieces.

In a lawsuit regarding adverse possession, the claimant would bear the burden of proving that Cornelius Gurlitt did not obtain the property in good faith (i.e., that he was in bad faith when he obtained the art pieces).\textsuperscript{66} Taking the overall circumstances and above scenario into consideration, the claimants would most likely produce such evidence. By contrast, it would be up to Cornelius Gurlitt to prove that he nonetheless meets the requirements under section 937 BGB—including the good faith requirement—because a person who contends to have acquired ownership by adverse possession bears this burden of proof.\textsuperscript{67}

Unless Cornelius Gurlitt (or his heirs) can show he acquired the art pieces in good faith, he cannot satisfy the requirements under section 937 BGB. Therefore, he could not have acquired ownership of those pieces by adverse possession under German law. Instead, the original owners have kept the title to the art pieces.

3. \textit{Burden of Proof}

In a lawsuit under section 985 BGB, the claimants must prove that they are still the owners of the art pieces and that the art pieces are in the possession of the defendant, Cornelius Gurlitt. While the latter is easy to prove because the art pieces were found in Cornelius’s apartments, proving that the original owners (or their heirs) are still the rightful owners of the art pieces is more difficult. However, another statute in the German Civil Code makes it easier to produce this evidence.

Section 1006 BGB\textsuperscript{68} deals with the general presumption that the possessor of an item is its rightful owner. This presumption, however, does

\textsuperscript{65} RAUE, supra note 44, at 4.
\textsuperscript{66} BALDUS, supra note 61, § 937 no. 60.
\textsuperscript{67} BASSEGNE, supra note 63, § 937 no. 1.
not apply "to a former possessor from whom the thing was stolen or who lost it or whose possession of it ended in another way, unless the thing is money or bearer instruments." Additionally, "[i]t is presumed in favor of a former possessor that during the period of his possession he was the owner."

In Gurlitt’s case, section 1006, subsection 2 BGB would apply. As long as the original owners, or their heirs, can prove that they possessed the art pieces that eventually came into possession of Hildebrand Gurlitt (and later Cornelius Gurlitt), it is presumed that the original owners were direct possessors. Any documents or even family pictures showing that the claimants originally possessed the art pieces could serve as evidence to prove ownership under section 1006 BGB, as such items would constitute admissible evidence in court.

On the other hand, Cornelius Gurlitt would not be entitled to rely on the presumption under section 1006, subsection 1 BGB because the second sentence of this subsection prevents the application of the presumption when an art piece was stolen from the former possessor. The German government confiscated a number of art pieces from their original owners against their will, so their possession terminated "in another way" under section 1006, subsection 1, sentence 2 BGB.

4. Prescription

Some claimants may still be original owners and satisfy the requirements of section 985 BGB to demand return of their property. German law, however, bars "claims for return based on ownership... after thirty years." A claim arising under 985 BGB must be commenced subject to section 200, subsection 1 BGB, which provides: "Unless another date for the commencement of limitation is specified, the limitation period of claims not subject to the standard limitation period commences when the claim arises."

Here, the original owners’ claims arose at the time they could have asserted those claims—when the Allies removed the Nazi regime after the
end of World War II in 1945. Hildebrand Gurlitt had the artworks in his possession at that time, so the original owners could assert claims against him. Moreover, under German law, limitations occurred thirty years from that time, or in 1975. Generally speaking, section 985 BGB prescribes such claims.

German civil law distinguishes between two types of objections against any form of claims (Einwendungen). On the one hand, a court must consider objections ex officio when it determines whether the claimant actually has a claim. On the other hand, German civil law recognizes objections that a court may consider only if the opposing party actually invokes such an objection (Einreden).

A German court will consider the prescription objection only if the opposing party invokes it. Thus, theoretically, Cornelius Gurlitt could abstain from exercising his right to object because of prescription, and the original owners could then force him to return the art pieces. Since Cornelius Gurlitt recently signaled that he was willing to voluntarily return at least those pieces suspected of being looted art, there might, in practice, be a slight chance that he partially abstains from exercising his right to object. Yet, in his opinion, only few art pieces could be suspected of being looted art. Thus, he would likely object to most of section 985 BGB audits of the tax authorities indicated that the plaintiff's accounting and balance sheet of the years from 1968 to 1970 were incorrect. The plaintiff did not assert a claim against the defendant until 1976. The court ruled that the claim was prescribed and therefore dismissed the case. It reasoned that a limitation period, which, in that case, was three years, started to run at the time when the plaintiff had the opportunity to assert a claim against the defendant for the first time from an objective point of view. It is irrelevant whether the plaintiff at that time already knew or not whether he had sustained damage. The opportunity to assert a claim accrues when the requirements of the claim's legal basis are met. In this case, such an event did not occur in 1973, when the tax authorities' audits indicated the defendant's wrongdoing but after the defendant had completed the incorrect accounting and balance sheet. The second case, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 2, 1971, Neue Juristische Wochenschrift [NJW] 979 (Ger.), is a case where the ruling of the court was exactly the same. In that case, the plaintiff and the defendant concluded a sales contract on turret lathes. The defendant who was the buyer refused to take over some parts of the lathes and to pay for them. The plaintiff then sued the defendant for the outstanding purchase price. The court held that the claim was prescribed and dismissed the case. It reasoned—as the court in the former case—that the limitation period starts to run when the claim accrues. A claim accrues when a claimant could assert it for the first time—in other words, when the plaintiff meets the requirements of the legal basis for the claim. In case of a sales contract, the seller meets these requirements as soon as the contract is concluded, as long as the parties have not agreed on special payment terms.

76. HEUER, supra note 42, at 2563.
77. See supra text accompanying note 72.
78. DIETER MEDICUS, BÜRGERLICHES RECHT 732 (22d ed. 2007).
79. Id.
80. RAUE, supra note 44, at 4.
81. Bohr et al., supra note 2.
82. See discussion supra Part II.
claims. Since Cornelius Gurlitt passed away, it is now his heirs’ decision whether to exercise that right.

According to the clear wording of the rules on prescription, the claimant’s actual or constructive knowledge of his claim at the time the claim arose is irrelevant to determining the limitations period. Under German law, a claim accrues at the time the claimant can assert the claim from an objective point of view, regardless of his subjective knowledge. Objectively speaking, the prescription period commenced in 1945 when the claim arose, even though at that time the original owners of the artworks did not—and likely could not—know that they were expropriated unlawfully.

Additionally, the rules on prescription are silent as to whether a court should deny a claim if the opposing party (the party that wrongfully possesses the artworks) knew that he was not the rightful owner. It is therefore irrelevant whether the opposing party was in good or bad faith when he took the items into his possession. Pursuant to the clear wording of the relevant statutes and case law, a German court will find that the claim is stale, even though Cornelius Gurlitt and his father most likely knew, or at least should have known, that they could not become lawful owners of the art pieces.

In any event, it would be erroneous to conclude that Cornelius Gurlitt or his heir could invoke the prescription objection. He and his father—whose legal position he took up after the latter’s death—knew, or at least should have known, that they did not obtain lawful title to the art pieces. The seizures based on the Nazis’ racist ideology are very serious violations of the law, and it is merely coincidence that the claimants did not manage to assert claims against Cornelius Gurlitt on time. It is therefore necessary for a court to prevent such an unjust outcome.

A court could reach a more fair result if it views the invocation of prescription as a misuse of rights under the general principle of good faith (Grundsatz von Treu und Glauben). This principle stems from section 242 BGB, which requires a person to act in good faith when performing an obligation. The application of this principle, however, is not limited to obligations towards another person arising from a legal relationship, such

83. See supra note 75 and accompanying text.
84. Id.
85. RAUE, supra note 44, at 4.
86. GÜNTHER H. ROTH & CLAUDIA SCHUBERT, MÜNCHENER KOMMENTAR ZUM BGB § 242 no. 198 (6th ed. 2012) (Ger.).
87. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], JAN. 2, 2002, BUNDESGESETZBLATT [BGBl.] § 242 (Ger.) available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html ("An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.").
as a contract. In German jurisdiction and legal literature, the legal concept developed from section 242 BGB, which states that a person must act in good faith when exercising his rights and fulfilling his obligations, and that he must also consider the other party’s legitimate interests. This general principle of law applies within the entire sphere of German law, not only to civil, but also to (German) criminal, public, and procedural law. Furthermore, the application of the principle of good faith is one way to correct unjust and unsavory results. Such corrections, however, can only be made on a case-by-case basis and the decision whether to make such a correction—meaning whether section 242 BGB shall be applied—is at the discretion of a competent court.

5. Application of German Law to the Gurlitt Case

After the relevant authorities of the Nazi regime seized the art pieces from people of Jewish descent, they were handed over to Hildebrand Gurlitt so he could sell them abroad. Thus, he obtained these art pieces unlawfully, and appropriating them would also be considered unlawful. This defect inhered in the art pieces while Hildebrand Gurlitt possessed them did not cease after his death, but instead passed to Cornelius Gurlitt. Therefore, the exercise of prescription in this case would be considered a misuse of rights. As a result, Cornelius Gurlitt should not be allowed to invoke prescription. Yet, as mentioned in Part III.A.4, a court has discretion to decide whether the principle of good faith applies in the Gurlitt case. Since the application is at the court’s discretion, no general rule applies to this case. It should be recalled, however, that the principle of good faith serves as a way to prevent unjust and unsavory results. The court should apply that principle in the Gurlitt case because Cornelius Gurlitt and his father knew, or should have known, that the disputed art pieces were wrongfully acquired. Therefore, it should be considered highly unlikely if a court refuses to apply the principle of good faith.

88. ROTH & SCHUBERT, supra note 86, § 242 no. 2.
89. Id.
90. Id.
91. Id. at no. 25.
93. Id.
94. RAUE, supra note 44, at 4.
95. Id.; HEUER, supra note 42, at 2564.
6. New Draft Law

Representatives of the state of Bavaria believe the present legal situation—which does not provide for a good faith requirement—is unsatisfactory as it cannot guarantee that the original owners of the art pieces are entitled to demand their return. The success of such a claim for restitution is uncertain because it largely depends on whether the rules on prescription would apply in each case. The representatives of the state of Bavaria have taken a federal legislative initiative, providing that a person may not invoke prescription if he seized the good in dispute from its original owner in bad faith. Thus, the main difference to the current language of the rules on prescription is that the opposing party cannot invoke prescription if the party was not in good faith when he or she took possession of the goods. The rationale behind this draft law is that a person who took possession of goods in bad faith is not worthy of the protection under the rules on prescription.

The question still remains as to whether this draft law will ever be validated. There are two primary reasons as to why this law may never take effect. First, with the application of the principle of good faith, there exists a possibility under German civil law to grant valid claims even where they are time-barred by strict application of limitations period. Therefore, one could argue that there is no need for a good faith requirement with regard to the statutes of limitations. Second, there is a legitimate reason for the current version of the rules on prescription, which is to create legal certainty after a certain period of time. Generally speaking, a limitation period of thirty years usually gives claimants enough time to assert a claim. Only under extraordinary circumstances, as in the Gurlitt case, the law would excuse a claimant's failure to assert a claim within this period.

B. Potential Criminal Sanctions

If Cornelius Gurlitt were still alive, he may also be held liable for criminal sanctions. After his mother's death in 1968, Cornelius Gurlitt took the art pieces into his possession, likely knowing that they could not rightfully be his. This conduct could be considered either fraud (Betrug) or an unlawful appropriation (Unterschlagung), which are criminal

96. The Freistaat Bayern is one of the sixteen states (Bundesländer) in the Federal Republic of Germany.
offenses. Under the German criminal code that governs unlawful appropriation, [w]hsoever unlawfully appropriates chattels belonging to another for himself or a third person shall be liable to imprisonment not exceeding three years or a fine unless the offense is subject to a more severe penalty under other provisions.” For example, a person who received stolen property meets the requirements of this criminal offense as follows:

Whsoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.

Criminal prosecution for both unlawful appropriation and fraud in Germany is, however, subject to the limitation period of five years. According to section 78a StGB, “[t]he limitation period shall commence to run as soon as the offense is completed.” Accordingly, the limitation period started to run in 1968 when Cornelius Gurlitt took the art pieces seized from people of Jewish descent into his possession, and expired five years later in 1967. Thus, the current statutory scheme would have allowed Cornelius Gurlitt to avoid any possible criminal liability.

C. Possibility for German Authorities to Keep the Art Pieces

If the German investigators retained the art pieces they seized from Cornelius Gurlitt, but returned them to him after some time, then another question arises: May the German government keep the art pieces so that they can later return them to the original owners?

1. The Washington Principles

Such an opportunity could arise from the Washington Principles that Germany signed in 1998. By this convention, German authorities are

101. Id. § 263(1).
102. A person who is found guilty for unlawful appropriation is liable to imprisonment not exceeding three years or a fine. Id. § 246(1). A person who is found guilty for fraud is liable to imprisonment not exceeding five years or a fine. Id. § 263(1). Thus, both unlawful appropriation and fraud are offenses punishable by a maximum term of imprisonment of more than one year but no more than five years, so that section 78, subsection 3, no. 4 StGB is the relevant statute concerning the determination of the limitation period for both offenses.
103. Id. § 78a (emphasis added).
required to help identify Nazi-looted art, find out their rightful owners and return the art pieces to them.\textsuperscript{105}

This convention, however, binds only public authorities (including public museums), not individuals.\textsuperscript{106} Only certain countries signed the \textit{Washington Principles} but failed to incorporate them into their legal systems.\textsuperscript{107} Thus, the principles have no binding effect on individuals living in those countries.

Accordingly, under the \textit{Washington Principles}, if art pieces in a public museum are identified as Nazi-looted art, the German government must make sure that they are returned to their original owners if representatives of the museum do not return them voluntarily. On the other hand, if, as in the \textit{Gurlitt} case, the German government identifies art pieces possessed by an individual as Nazi-looted art, the \textit{Washington Principles} do not apply to force the individual to return the art pieces to their rightful owners.

Assuming that Cornelius Gurlitt is still alive, the German authorities cannot require him to return the artworks to their real owners because he is an individual, and not a public authority. This outcome demonstrates the \textit{Washington Principles}' ineffective operation with regard to the Nazi-looted art remaining in private collections around the world.

2. \textit{Return after the End of the Seizure}

The German investigators seized the art pieces from Cornelius Gurlitt according to a criminal statute, which provides:

(1) Objects which may be of importance as evidence for the investigation shall be impounded or otherwise secured.
(2) Such objects shall be seized if in the custody of a person and not surrendered voluntarily . . . .\textsuperscript{108}

To return them, the investigators must first determine persons to whom they should return the artworks once the seizing order is terminated, and if they may return them to their rightful owners. Once a seizure is terminated, the investigators are required to return seized object to the

\textsuperscript{105} Id.
\textsuperscript{107} See \textit{Washington Principles}, supra note 47 ("In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.").
\textsuperscript{108} STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/.
person who possessed it immediately before the seizure. The situation changes if it is certain that the person did not lawfully possess the object. In that case, the investigators must return the object to its rightful owner.

The legal issue surrounding the ownership of the art pieces depends on whether the seized art pieces are considered property of their original owners, or of Cornelius Gurlitt. This is a very complex legal issue and one who is not acquainted with the requisite law may be unequipped to determine ownership appropriately. Therefore, it is unclear to the investigators whether Cornelius Gurlitt possessed the artworks lawfully, so there is no legal basis for them to return the art pieces to their original owners (or their heirs) after the seizure is terminated.

D. Conclusion to the Analysis of the Legal Landscape Under German Law

The German government seized three different categories of art pieces from Cornelius Gurlitt. The Nazi government confiscated some pieces because they were considered "degenerate art." Cornelius Gurlitt's father, Hildebrand Gurlitt, could have rightfully acquired the ownership of those art pieces because the Nazi government based these seizures on a code that has been considered lawful. Thus, Cornelius Gurlitt may be entitled to keep these art pieces under this logic.

Hildebrand Gurlitt bought other art pieces on behalf of the Nazi government in his capacity as the person in charge of setting up the Führermuseum. He thereby acted as a commission agent. Under German law, a commission agent acquires a lawful title to the chattels he buys. Therefore, Cornelius Gurlitt is entitled to keep these art pieces as well.

Finally, the Nazi government seized some art pieces solely because their owners were of Jewish descent. These seizures, however, are considered unlawful because the law under which the Nazi government confiscated such art pieces is now considered invalid under the current German constitution. Thus, Hildebrand Gurlitt could not have lawfully acquired the ownership of these art pieces. In this case, the original owners have a claim for restitution against Cornelius Gurlitt under section 985 BGB. But the statute of limitations could still bar their claims. In such a case, a court should still rule in favor of the former owners by applying the principle of good faith, which has its legal basis in section 242 BGB. The court should prevent Cornelius Gurlitt from invoking the prescription objection because it would contradict the principle of good faith. The court

109. SILKE RITZERT, in BECK'SCHER ONLINE-KOMMENTAR StPO § 94 no. 13 (18th ed. 2013) (Ger.).
110. MICHAEL GREVEN, in KARLSRUHER KOMMENTAR ZUR STRAFFPROZESSORDNUNG § 94 no. 24 (7th ed. 2013) (Ger.).
should recognize the claims for restitution, and order Gurlitt to return of the art pieces to their original owners.

IV. Comparative Analysis of Nazi-Looted Art Cases Under United States Law

Unlike the Gurlitt case—in which the art pieces have remained in the possession of the same person (or his heirs) for the past eighty years—many other Nazi-looted art cases involve art pieces that changed hands several times since the Nazi government seized them from their original owners. This section will analyze whether the original owners of Nazi-looted art pieces (or their heirs) could have valid claims under U.S. law against the current possessors.

A. The Original Owners' Legal Basis for a Claim

Under U.S. law, the rightful owner of a chattel who lost possession of it can pursue an action for recovery of such chattel. If the owner intends to retrieve the chattel, he will file an action of replevin, and if such action is successful, the defendant will be forced to return the chattel or pay its current fair market value to the original owner. In order to succeed with an action of replevin, the plaintiff has to prove the following four elements: (1) his own title to the chattel; (2) the defendant’s wrongful taking or detention of the chattel; (3) the defendant’s retention of the chattel at the time of the lawsuit and after the plaintiff unsuccessfully asked for its return; and, (4) damages. Courts, however, will deny an action of replevin if the defendant asserts the rights as a good faith purchaser.

By contrast, the owner can choose to ask for a writ of trover if he does not want to recover possession of the chattel, but of the damages for the wrongful taking of the chattel instead. If such action is successful, the defendant will only get a monetary judgment and the defendant is entitled to keep the chattel. Such trover is considered a forced sale, which

111. See, e.g., Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010).
112. RESTATEMENT (SECOND) OF TORTS § 219 & cmts. a–b (1965); id. § 220 cmts. a–b.
113. BARLOW BURKE, PERSONAL PROPERTY IN A NUTSHELL 78 (3d ed. 2003).
114. Id. at 83.
115. Id. at 84.
116. Id. at 359.
117. Id. at 105.
118. Id.
119. Id at 107.
becomes effective when the wrongful taking takes place.\textsuperscript{120} The defendant, as the buyer of that forced sale, acquires the plaintiff’s (the seller in that forced sale) title to the chattel.\textsuperscript{121} By choosing a trover action, the plaintiff is deemed to have given up his right to the chattel.\textsuperscript{122} The measure of damages is the fair market value of the property at the time and place taken.\textsuperscript{123}

The statute of limitations for both action of replevin and writ in trover does not start to run until the true owner has demanded the return of the chattel, and the chattel’s actual possessor has refused to return it.\textsuperscript{124}

1. Application to the Nazi-Looted Art Cases

The primary goal of the original owners of Nazi-looted art pieces is most likely to retrieve the art pieces. They should consequently file an action of replevin. As a threshold matter, a plaintiff must prove that they are still considered the owners of the art pieces, which may be a difficult task for them. On the contrary, it is easy for them to satisfy the other three requirements of an action of replevin: That they still have title to the art pieces, the defendants’ taking and detention of them was wrongful, the defendants refuse to return them (assuming that they are not willing to return them), and damages.

When analyzing the question of ownership, a distinction must be drawn between two different kinds of cases: (1) cases in which the Nazi government’s confiscation is considered lawful; and (2) cases in which the confiscation is considered unlawful, meaning the original owners kept title to the art pieces.\textsuperscript{125} This distinction affects whether any succeeding possessors of the art pieces could have acquired valid title to them under U.S. law.

2. Doctrine of Void and Voidable Title

The general “void title rule” states that the actual possessor of a chattel cannot acquire its title if the true owner did not intend to transfer.\textsuperscript{126} Accordingly, if someone took a chattel into his possession to which he did not have title, and the true owner never intended to transfer the title, the true owner remains the owner of the chattel. The void title rule applies

\textsuperscript{120} Id. at 106.
\textsuperscript{121} Id. at 107.
\textsuperscript{122} Id. at 106.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 83.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 239–40.
even if a thief sells a chattel to a good faith purchaser. In turn, someone who purchased a chattel in good faith from a thief, or from a third-party who obtained it from a thief, cannot acquire a valid title to this chattel. In fact, the original owner never loses its title in this case.

In contrast, a possessor of a *voidable* title to a chattel can lawfully acquire its ownership. Where the original owner is willing to part from a chattel but the purchaser deceives him during the course of the sale, the original owner has nevertheless shown that he intends to sell the chattel to that person. The purchaser in this case obtains a voidable title to the chattel, which turns into an absolute title when he transfers the goods to a third person as long as he or she is a good faith purchaser.

In *Phelps v. McQuade*, the Appellate Division of the New York Supreme Court dealt with the distinction between void and voidable title. In that case, a person appeared under a false name and pretended he was interested in buying jewelry while alleging financial responsibility. The plaintiffs then sold jewelry to him upon credit, and after they handed it over to him, he sold the jewelry to the defendant. The plaintiffs brought an action of replevin against the defendant. The court ruled in favor of the defendant and dismissed the case, holding that the defendant was a good faith purchaser. The court reasoned that, “when the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as the person’s identity or responsibility.” If, however, the vendor has no intention to sell goods, the title does not pass. Thus “[i]t is purely a question of the vendor’s intention” whether a title passes or not. If the seller had correspondence with a person before the actual sale and, by the time of the sale, another person showed up pretending he was the person with whom the seller had corresponded, the seller did not intend to sell his goods to the person.

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128. *Id.*
129. *Id.*
130. *BURKE, supra* note 113, at 244.
131. *Id.*
132. *Id.* at 244–45.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 442.
138. *Id.*
139. *Id.*
140. *Id.*
standing before him, so no title passed. But the court reasoned that the plaintiffs intended to sell their jewelry to that person standing before them since there was no correspondence with anyone else.

Thus, whenever the original owner intends to transfer title to the person who received the property, the latter obtains a voidable title, even though he deceived the original owner. By contrast, any thief of a chattel obtains a void title because, in that case, the original owner did not intend to part from the chattel. As a consequence of a void title, the original owner of the good remains the true owner regardless of whether, if at some point, a good faith purchaser obtains the good.

3. Application of the Doctrine of Void or Voidable Title to the Nazi-Looted Art Cases

The German government’s unlawful confiscations would grant the purchaser a void title because confiscation without a lawful legal basis is considered a theft. In such cases, no title passes to the person who takes the chattel from the original owner. Under U.S. law, neither the Nazi government nor any succeeding possessor of the art pieces that were seized illegally could have acquired their ownership. Moreover, the original owners have kept the title and could file an action of replevin against the current possessors of these art pieces.

For lawful confiscations, the German government acquired valid titles to those art pieces. It, however, handed the them over to Hildebrand Gurlitt and some other art dealers who had a license to sell them abroad. By doing so, the government expected them to actually transfer the art pieces to other art dealers or licensees so the art pieces were turned into money. So when the government handed the art pieces over to these persons, it intended to part from the goods. But it did not intend to sell them to Hildebrand Gurlitt and the other licensees. They could not obtain titles to the art pieces, but the doctrine of voidable title should apply to any transfer of the goods starting from when Hildebrand Gurlitt and the other licensees sold them. Because any person who succeeded Hildebrand Gurlitt and his colleagues as a possessor of the art pieces can be considered a good faith purchaser, such a person would obtain a valid title under U.S. law.

141. Id. 142. Id. 143. See, e.g., Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982) (stating that under New York law, "a purchaser cannot acquire good title from a thief"). 144. Cohen, supra note 14.
4. Good Faith Requirements

A buyer should meet several requirements to be considered a good faith purchaser under U.S. law, including the definition at common law. The doctrine of good faith purchase is codified in section 2-403(1) of the Uniform Commercial Code (the “UCC”). Besides, the UCC contains a definition of a “buyer in ordinary course of business” that also refers to good faith purchases.145 Finally, some courts have dealt with the definition of a “good faith purchaser,” particularly in the context of the sale of antiquities.146

The good faith purchaser rule is a general principle at common law. To determine whether a person qualifies as a good faith purchaser, a court must consider whether the purchaser “gave a fair or reasonable value for the chattel,”147 whether he honestly believed that he was acquiring the title to this chattel, and whether the overall circumstances caused him to question the seller’s title.148

5. Definition of “Good Faith Purchaser” Under the UCC

The UCC defines a “good faith purchaser” as “[a] purchaser of goods who acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with a voidable title has the power to transfer a good title to a good faith purchaser for value.”149

In Porter v. Wertz, the court interpreted a previous UCC definition of a good faith purchaser.150 There, the plaintiff owned a painting that he loaned to a person who was actually named “Von Marker” but who pretended to be named “Peter Wertz.”151 After he obtained the painting, Von Marker used the real “Peter Wertz” to sell the painting to the defendant, an art dealer who did not make any inquiries regarding Mr. Wertz’s background.152 The defendant later resold the painting, and the plaintiff sued Mr. Wertz and the art dealer defendant for return of the painting or for damages.153 The court held in favor of the plaintiff,

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145. U.C.C. § 1-201(b)(9) (West 2013) (“Buyer in ordinary course of business means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind . . . .”) (internal quotation marks omitted).
147. BURKE, supra note 113, at 247.
148. Id.
149. U.C.C. § 2-403(1).
150. Porter, 416 N.Y.S.2d at 259.
151. Id.
152. Id. at 256.
153. Id. at 255–56.
reasoning that when the defendant bought the painting from Wertz, he did not act as a good faith purchaser. The court explained that the defendant did not act in good faith because he never made any investigations to determine whether Mr. Wertz was an art dealer or a person in the business of selling goods of that kind (which he was not). The court found that he did not make any inquiries into whether the painting's true owner authorized Mr. Wertz to sell it. Under the present UCC definition of a good faith purchaser, a court would likely also hold in favor of the plaintiff because since he only loaned the painting to “Van Marker.” “Van Marker” did not obtain a valid title to it, and could therefore not transfer title to the painting to a third person.

6. Case Law Regarding Antiquities

Several decisions have dealt with the definition of “good faith purchaser” in the context of the trade of antiquities. Old art pieces may be antiquities, so these decisions may be helpful to define the good faith requirement in the context of the trade of art pieces. For example, the United States Court of Appeals for the Seventh Circuit held that the buyer might lack good faith if the sale took place at an unusual location. Thus, the place of the sale is an important factor when determining the existence of good faith in an art case context because an active concealment of the location could indicate the buyer’s fraudulent intent. Besides, another court held that the location of the antiquity or the composition of an antiquity might require more in-depth research so that a buyer can be qualified as a good faith purchaser.

A good faith purchaser may, therefore, have a duty to conduct research into the buyer if the circumstances of the case raise serious doubts on whether the seller has a valid title to the art piece. Moreover, as the Seventh Circuit held, a buyer must scrutinize the seller’s statements regarding the origin of an artwork if it appears doubtful. Thus, certain circumstances would warrant that a good faith purchaser should not rely on the seller’s statements about how he apparently obtained an art piece, but the buyer should inquire more into the origin of its acquisition.

154. Id. at 259.
155. Id.
156. Id. at 257.
158. Autocephalous Greek-Orthodox Church, 717 F. Supp. at 1392.
159. Id.
160. Id.
161. BURKE, supra note 113, at 278.
Besides, one could argue that a buyer might lack good faith if the time of the sale is considered unusual, meaning that not only the place but also the time of a sale matters when defining good faith in transactions of art pieces.\(^\text{162}\) Under U.S. law, no standardized requirements exist for a buyer of an art piece so that he can be qualified as a good faith purchaser. The circumstances of each particular case would determine what he is supposed to do.\(^\text{163}\) Nevertheless, he is required to scrutinize the seller’s statements regarding the art piece’s origin, and to inquire in case the circumstances of the sale seem unusual.

7. Acquisition of Ownership of a Chattel by Adverse Possession

As in German civil law, U.S. law provides a way to acquire ownership of a chattel by adverse possession. If a person other than the true owner of chattel has possessed it for a certain period of time, the possessor is considered to be the owner from the time he took the chattel into his possession.\(^\text{164}\) Therefore, a buyer of an art piece could become its owner even if he was not a good faith purchaser.

However, as opposed to German civil law, where adverse possession is considered a certain kind of acquisition of ownership, acquisition by adverse possession in the United States is considered a result of the application of the statutes of limitations.\(^\text{165}\) As a consequence, this issue will be discussed in detail in the next paragraph on prescription in general.

B. Statute of limitations

The seizures of the Nazi-looted art took place in the 1930s. The question thus remains as to whether the true owners of art pieces, who have kept their titles, are still entitled to file an action of replevin, or the statute of limitations bar such claims.

Rules on prescription can be found in all state codes.\(^\text{166}\) For example, the New York Civil Practice Law and Rules includes a provision regarding the limitation period, which states:

“The following actions must be commenced within three years:

* * *

3. an action to recover a chattel or damages for the taking or detaining of a chattel . . . .”\(^\text{167}\)

\(^{162}\) A court in the United Kingdom came already to the conclusion that the time of a sale matters in the context of a good faith purchase, see Reid v. Metropolis Police Comm’r [1973] 2 All E.R. 97.

\(^{163}\) Derek Fincham, Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities, 37 SYRACUSE J. INT’L L. & COM. 145, 177 (2010).

\(^{164}\) BURKE, supra note 113, at 338.

\(^{165}\) Id. at 340.

\(^{166}\) Id.
Most states have a limitations period of two to six years that bars a claim for recovery of personal property, including art.\textsuperscript{168} Once time-barred, the true owner cannot file an action against the actual possessor of the chattel anymore, and the title passes to the latter.\textsuperscript{169}

Although the statutory language may be clear, determining the time from which the statute of limitations begins to run, i.e., when the cause of action accrues, is difficult.\textsuperscript{170} Courts have mainly used two doctrines\textsuperscript{171} to determine when a limitation period starts to run—demand and refusal, and the delayed discovery rule—which both have a great impact on the art trade.\textsuperscript{172}

1. **Doctrine of Demand and Refusal**

   The doctrine of demand and refusal applies only when the possessor is a good faith purchaser, and the true owner’s actions determine whether his claim has been established.\textsuperscript{173} This doctrine requires that the original owner demand the return from the possessor, and that the latter refuses to return the chattel.\textsuperscript{174} Only when the possessor refuses to return the chattel, does his action become wrongful so that the true owner’s claim accrues and the limitation period begins to run.\textsuperscript{175} If he does not ask the actual possessor to return the chattel, the limitation period does not start to run, regardless of whether he knows or could have known the identity of the actual possessor.\textsuperscript{176}

2. **Delayed Discovery Rule**

   Contrary to the doctrine of demand and refusal, the discovery rule delays the running of the limitation period until the true owner discovers, or reasonably should have discovered, the underlying facts of her claim by exercising due diligence.\textsuperscript{177} It was mainly developed in medical

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\textsuperscript{167} N.Y. C.P.L.R. 214 (McKinney 2015).
\textsuperscript{168} BURKE, supra note 113, at 341.
\textsuperscript{169} Fincham, supra note 163, at 189.
\textsuperscript{170} BURKE, supra note 113, at 349.
\textsuperscript{171} U.S. law recognizes a third doctrine—the doctrine of adverse possession. This doctrine focuses on the character of the current possessor’s possession to judge whether the true owner’s action is timely. Fincham, supra note 163, at 191. However, in O’Keeffe v. Snyder, discussed infra Part IV.B.2, the New Jersey Supreme Court refused to apply the doctrine of adverse possession and instead applied the discovery rule. 416 A.2d 862, 870 (N.J. 1980).
\textsuperscript{172} Fincham, supra note 163, at 191.
\textsuperscript{173} Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1163 (2d Cir. 1982).
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 1163–64.
\textsuperscript{177} O’Keeffe v. Snyder, 416 A.2d 862, 873 (N.J. 1980). California, for example, has adopted the delayed discovery rule. CAL. CODE CIV. PROC. § 338 (c) (2014).
malpractice cases, as well as in dealing with negligence cases.\textsuperscript{178} Most of these cases involved the injured party and an alleged wrongdoer.\textsuperscript{179} In \textit{O'Keeffe v. Snyder}, where the New Jersey Supreme Court refused to apply the doctrine of adverse possession and instead applied the discovery rule,\textsuperscript{180} the court reasoned that, where the plaintiff demanded the return of a stolen painting, the discovery rule would provide a more satisfactory result than the doctrine of adverse possession since it would shift the focus from the conduct of the possessor to the conduct of the owner.\textsuperscript{181}

Under \textit{O'Keeffe}, a court should determine, among other issues, whether the true owner used due diligence to recover the art pieces at the alleged time of the theft or thereafter, and if at the time of the alleged theft, whether an effective method was available to the owner to alert the art world.\textsuperscript{182} Furthermore, a court should determine if there is any possibility to register the stolen art pieces with any organization so that a reasonably prudent purchaser of art would notice that someone other than the possessor is its true owner.\textsuperscript{183}

A defendant as the possessor of a chattel, may, by contrast, invoke the doctrine of laches in case the plaintiff, as the true owner of the chattel, has delayed filing a lawsuit.\textsuperscript{184} This doctrine, operating as a check against the discovery rule, allows the defendant to raise an "affirmative defense to temper the expansion of limitation periods."\textsuperscript{185} A court then considers whether the facts of the case demonstrate an unreasonable delay of the true owner's claim.\textsuperscript{186}

In \textit{Solomon R. Guggenheim Foundation v. Lubell}, the court ruled that, where an art piece was stolen from a museum, it would be almost impossible to set a "reasonable diligence requirement that could take into account all [possible] variables and that would not unduly burden the true owner."\textsuperscript{187} Moreover, the owners of stolen property should not be held to a single standard because many other factors, such as the value of the property stolen, the way in which it was stolen, and the kind of

\begin{itemize}
  \item \textsuperscript{178} Patty Gerstenblith, \textit{The Adverse Possession of Personal Property}, 37 BUFF. L. REV. 119, 141 (1989).
  \item \textsuperscript{179} Id. at 144.
  \item \textsuperscript{180} \textit{O'Keeffe}, 416 A.2d at 870.
  \item \textsuperscript{181} Id. at 872.
  \item \textsuperscript{182} Id. at 870.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Fincham, \textit{supra} note 163, at 198.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Fincham, \textit{supra} note 163, at 197.
  \item \textsuperscript{187} Solomon R. Guggenheim Found. v. Lubell, 77 N.E. 2d 426, 430 (N.Y. 1991).
\end{itemize}
institution from which it was stolen, impact how a true owner may recover stolen property.\footnote{188}{Id.}

3. Conclusion

Different approaches determine when a limitation period starts to run in a stolen art context. While the discovery rule is the predominating rule, the doctrine of demand and refusal has been strongly reaffirmed in New York, which is the most important state with regard to stolen art.\footnote{189}{Fincham, supra note 163, at 198.} Given that Nazi-looted art pieces have an international background and changed hands multiple times, litigants would have difficulty determining which law would apply in which court. Pursuant to the traditional lex situs doctrine, the object’s location determines the appropriate statute of limitations.\footnote{190}{The lex situs doctrine was applied in Kunstsammlungen zu Weimar, 536 F. Supp. 829 at 845–46.} Thus, it may be impossible to extract a common rule that would cater to all of the true owners’ claims. However, in cases like the Gurlitt case, it seems to be appropriate to apply the discovery rule. First, this rule has already been applied to cases relating to stolen art before. Second, and most importantly, it provides a fairer result as the limitation period does not start to run before the art pieces’ true owner knows or could have reasonably known about the facts relating to the case.

V. Conclusion

Under German law, the original owners of art pieces seized during the Nazi regime only because the owners were of Jewish descent would meet the requirements of a claim under section 985 BGB. This section allows an item’s true owner to demand its return from its current, unlawful possessor, against Cornelius Gurlitt. Strict application of the rules on prescription, however, prescribes such a claim.

At first sight, this result might be considered unsatisfactory. The original owners or their heirs may never recover the art pieces, even though they suffered great injustice when the Nazis confiscated the art pieces. By application of the principle of good faith under section 242 BGB, however, a court can achieve individual fairness. The principle of good faith is aimed at adjusting results that contradict the common sense of justice, and thus makes it possible to grant valid claims even where they are time-barred by strict application of limitations period.
Nevertheless, courts have discretion to decide whether the good faith principle is applicable. This case-by-case approach would inevitably disadvantage the original owners or their heir.

Under U.S. law, the original owners whose art pieces were expropriated only because they were of Jewish descent could also demand their return from Cornelius Gurlitt through an action of replevin. The statute of limitations could still bar such a claim, and different courts will apply different rules to determine when the claim actually accrued or a cause of action arose.

Finally, Cornelius Gurlitt or his father could not have obtained a valid title to these art pieces that were seized by the Nazi government because they were considered degenerate art. However, if such piece were transferred to a good faith purchaser, such purchaser would have acquired valid title to it.

As with German law, U.S. law does not have a bright-line test to determine whether the original owners can recover the art pieces that were expropriated solely because they were Jewish assets. The statutory limitation periods in most states are only a few years so that most claims fall outside that period, unless a court decides to rule otherwise.

From the claimants' practical perspective, the legal consequence under U.S. law may be as bleak as under German law. It may even be more uncertain for claimants under U.S. law because American courts have the choice of several doctrines to apply to determine when a limitation period starts to run. By contrast, under German law, the sole question is whether a court will apply section 242 BGB.

On the one hand, from a strictly legal perspective, there is a remarkable difference in how the results under German and U.S. law are reached. Under German law, the general rule is that the claims are prescribed, i.e., the claims exist by sole application of the substantive law, but they are no longer enforceable. The claimants must rely on the courts to make use of an exception to the rule. On the other hand, no clear default rule exists under U.S. law to determine the commencement of a prescription period. In other words, it is not clear under substantive U.S. law whether the claims even exist.

As a final conclusion, it is to be said that, between the results under German and U.S. law, there is a remarkable theoretical difference in legal terms that in practice, however, does not have significant consequences because, under both jurisdictions, the claimants cannot be sure of their legal outcomes.