

## SPECIAL QUESTIONS

To date, other questions have been raised as well:

- ▷ Should the possibility of reviewing the limit of the degree of kinship be considered, e.g., such as the third generation limit in Belgium? Should such a limitation be introduced in France (CIVS)?
- ▷ Should a deadline be defined within which the heirs must submit a claim? Is it necessary to introduce in France the same deadline as in the other countries?
- ▷ What should be done with recovered property if compensation has already been granted? Should property that has finally been found still be returned if the compensation already received is paid back? What authority should then receive that returned compensation?

## Conclusion

The conference held in Prague in June 2009 should help to further improve the understanding of the various restitution or compensation schemes introduced by the four Western European countries discussed above, evaluate the solutions they have envisaged, and investigate possible improvements in the activities which are at present undertaken by their leaders. Finally, we should consider whether the solutions adopted by these countries are transferable to other European countries.

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### FRITZ GRÜNBAUM'S STOLEN ART COLLECTION: LEGAL OBSTACLES TO RECOVERY<sup>1</sup>

Fritz Grünbaum was a famous Jewish cabaret performer and radio and film star in Vienna, Berlin, and Munich.

Fritz Grünbaum was born in Brno, Moravia on April 7, 1880. He was arrested on March 22, 1938 by the Gestapo and put into the Dachau Concentration camp. He died in Dachau, penniless, on January 14, 1941. His wife was deported to the Minsk death camp and died in 1942. Grünbaum amassed a collection of 449 artworks, including 81 Schieles, among them Egon Schiele's famous *Dead City*.

Today, *Dead City* is at Austria's Leopold Museum in Vienna. Fritz Grünbaum's Schieles are now at New York's Museum of Modern Art (the MoMA), the Morgan Library, the Art Institute of Chicago, Oberlin College, the Estee Lauder Trust, and concealed in many private collections. Austria's Albertina museum has a number of Grünbaum's Schieles. The Leopold has at least thirteen of Grünbaum's Schieles.

Despite the efforts of New York District Attorney Robert Morgenthau, who seized *Dead City* at the MoMA in 1998, and teams of researchers and lawyers in numerous countries, none of Fritz Grünbaum's works have been returned to his heirs. Austria has

<sup>1</sup> Documentation: <http://artstolenfromfritzgrunbaum.wordpress.com>.  
Sources: Lillie, Sophie. "A Legacy Forlorn: The Fate of Schiele's Jewish Collectors".  
Printed in: The Ronald Lauder and Serge Sabarsky Collections, Neue Galerie 2005.

violated Article 26 of its 1955 Austrian State Treaty with the United States by failing to return property stolen from Jewish victims of Nazism. Without Austria living up to its 1955 promises, the victory over Nazism will remain a sham. Without Switzerland and the USA renewing and making a reality the Clinton-era commitment to restitution of stolen property, the Washington Principles will remain empty promises.

Below, I have taken examples from the Grünbaum case to illustrate legal and practical obstacles to claimants of property stolen by the Nazis remaining in 2009.

- ▷ Inaction and Stonewalling
- ▷ Concealment and Cost
- ▷ Blaming the Victims
- ▷ Deception or Evasion
- ▷ Privilege
- ▷ Denial of Criminal Acts
- ▷ Laundering
- ▷ Confidentiality
- ▷ Holocaust Denial

### **Austrian Obstacles**

The seizure by D.A. Robert Morgenthau at New York's Museum of Modern Art of Grünbaum's *Dead City* and Schiele's *Portrait of Wally* and the Washington Conference are considered to be the impetus for the legislative reforms enacted in Austria in the late 1990s. Article 26 of the 1955 Austrian State Treaty requires Austria to return all property taken from Jews as a result of Nazi persecution. Austria's failure to return property to victims of Nazism is a breach of this Treaty, which is Austria's very constitutional foundation. After 59 years of Austria treating its commitment with contempt, it is clear that there is no political will within Austria to return property stolen from Jews.

Austria has perhaps in other cases recently engaged in restitution. Austria has made research efforts (unfortunately published only in the German language) and according to various reports has taken hesitating steps towards restituting stolen property. But in the Grünbaum case, Austria has violated the Austrian State Treaty and merely put up a pretense of restitution. In the many years of the Bush/Cheney Administration following the Washington Conference, Austria has done nothing to reconstitute Grünbaum's works to his heirs.

### **Inaction and Stonewalling**

One obstacle the Grünbaum heirs have encountered is a simple lack of action or cooperation from authorities. Despite claiming that it was going to research its collections and return stolen artworks, Austria has failed to do so. The Albertina museum has never even responded to a claim by Fritz Grünbaum's heirs for the return of Grünbaum's Schieles. Nor has Austria issued provenance reports on the Schieles in Austria's Albertina museum.

### **Deception or “Evasion”**

Another obstacle to recovery of artworks stolen from Fritz Grünbaum is Austria’s creation of the “private” Leopold Museum, which is owned in the form of a foundation. By placing stolen assets into a foundation that it owns and claiming that the foundation is “private,” Austria has so far evaded its obligations under the Washington Principles.

Article 26 of Austria’s State Treaty forbids the Republic of Austria from owning artworks looted from Jews. By creating the Leopold Foundation to conceal its ownership, Austria has violated the treaty. Austria purchased a 50 percent interest in the Leopold Museum. Upon the death of Leopold and his wife, Austria will own 100 percent. Austria has exempted Leopold from a law requiring the return of stolen property.

Switzerland has simply turned its back on the issues of art looting and restituting artworks to the Jews and other Nazi victims from whom they were looted.

### **Laundering**

Switzerland has been used as a place to launder stolen art. On January 5, 1943, the Allied Powers warned Switzerland that transactions in property from Nazi-occupied territories would not give the acquirer good title. Swiss art dealers continued to avail themselves of a law that permitted an art dealer to acquire stolen property and to acquire good title after five years of the property being held in Switzerland. Shortly after the Allies vacated Vienna in 1955, the Swiss market was flooded with artworks stolen from Jews.

In 1956, 80 percent of Fritz Grünbaum’s Schiele collection was sold in Switzerland by Eberhard Kornfeld, who knew that *Dead City* was owned by Grünbaum. Kornfeld purchased the stolen Grünbaum works only weeks after selling a major part of the Albertina’s collection from Abertina director Otto Benesch. Switzerland has failed to investigate Kornfeld. Swiss legal experts still claim that Switzerland’s five year statute of limitations on laundering stolen property still applies. Apparently, the Swiss have changed this statute of limitations, but Swiss legal experts are still urging its application to Nazi looted artworks.

### **Concealment and Cost**

It is impossible to gain access to original provenance documents without the consent of the Swiss art dealers. Thus, when our handwriting experts found “massive doubts” regarding the handwriting in Eberhard Kornfeld’s provenance documents, our experts were effectively blocked from inspecting the originals by Kornfeld’s refusal to have handwriting experts from the Viennese police inspect the documents in Switzerland. For handwriting experts to compare original documents in Vienna and Switzerland it is necessary to transport them and their equipment (microscopes and scanners) at enormous cost. Given the blocking, even if we were willing to meet the cost, we were unable to obtain definitive proof of forgeries acceptable to a US court.

### **US Obstacles**

US museums, auction houses, and owners of Nazi-looted artworks have failed to live up to the Washington Principles. Under the Bush/Cheney Administration, the USA failed to create a restitutional commission, has permitted government-subsidized museums to cloak their activities in privilege and secrecy, and

has failed to compel museums to publish provenance and research collections.

Government-subsidized and tax-exempt museums have sued Jewish claimants seeking declarations of title to stolen Holocaust-era artworks in their collections. During and after World War II, US museums went on a spree of buying stolen Nazi-looted art. Despite such purchases of stolen property being considered a crime in the USA, the museums have failed to take responsibility for these crimes or to retribute the proceeds of these crimes. For the most part, the Department of Justice and local criminal investigators have done almost nothing to assist the victims of these crimes.

#### **Privilege**

US museums claim to be “private” in ownership when they wish to conceal information. They claim to serve the “public” trust when they reject claims to stolen property in their collections. They are generally tax-exempt entities and usually receive outright subsidies from the state or federal governments. Museums use the claim of “attorney client privilege” to conceal their research into the provenance of their collections. They hire outside lawyers. They then conceal this research from the public. This has happened in the Grünbaum case, particularly with Oberlin College’s research into the provenance of Schiele’s *Girl with Black Hair*. If claims are made, museums will often research and resolve the claims behind a wall of secrecy, meaning that the public will not receive any understanding of the scholarship in which they engage.

#### **Confidentiality**

Auction houses claim that the identities of purchasers and sellers of Grünbaum’s artworks are “confidential.” Thus, when served

with a subpoena, Sotheby’s, Christie’s and the Galerie St. Etienne obtained a court order blocking revelation of who was trafficking in the Schieles stolen from Grünbaum. These blanket assertions of confidentiality have made Grünbaum’s collection impossible to trace.

#### **Falsification**

US museums, colleges and auction houses routinely publish incomplete or falsified provenances. For example, we all know that Egon Schiele was an Austrian artist. We know that Eberhard Kornfeld, Rudolph Leopold and Jane Kallir have all said that the contents of Kornfeld’s 1956 Schiele sale came from Grünbaum’s collection. This was documented by Sophie Lillie many years ago in the scholarly literature. Yet a visit to Oberlin College’s website lists the earliest provenance as “Berne 1956.” A visit to the MoMA’s website shows “Gift of Otto Kallir” as the earliest provenances of other Schieles stolen from Grünbaum. Museums and colleges routinely publish these false and incomplete provenances of works entering the US after 1933 that were created before 1945. This falsification is rampant and violates the Washington Principles.

#### **Legal Defenses: Statute of Limitations or Blaming the Victim**

Museums in the USA have taken to blaming the victims of Nazism for asserting claims belatedly and use statutes of limitation to avoid resolution of claims on the merits. Certain US jurisdictions require heirs to act within a “reasonable” time from discovering their losses. Such requirements impose unreasonable burdens upon descendants of Holocaust victims. In the case of Fritz Grünbaum, most of his immediate family was murdered. His sister lived in the Czech Republic under Soviet Communism that did not

permit private property claims to be pursued in multiple jurisdictions. Imposing legal defenses based on limitations is unfair, inequitable, and runs contrary to the Washington Principles, which urge that matters be resolved on the merits of whether or not the property was stolen.

#### **Equitable Defense: Laches or Denial of Responsibility for Receiving Stolen Property**

During World War II and immediately afterward, US museums were warned by the US government against acquiring artworks from Europe that did not have clear provenances<sup>1</sup>. Throughout the USA, purchasing stolen property is a crime. Thus, US museums purchasing or accepting as gifts artworks without provenance documentation were committing a crime or facilitating criminal actions after being warned not to do so.

In certain cases, US museums directly financed the Nazi war machine by buying through Nazi authorized dealers such as Karl Buchholz and Curt Valentin in New York, or indirectly through Theodor Fischer, August Klipstein or the FIDES Treuhand (a subsidiary of Credit Suisse) in Switzerland. The consequence of these criminal museum actions was that from 1945–2009, two generations of owners of property have been deprived of their rightful belongings.

Rather than accepting responsibility for these criminal actions and taking steps to remedy such actions by engaging in restitution, US museums have claimed that they hold stolen artworks as a matter of “public trust” and that such “public trust” requires them to hold stolen artworks if claimants do not prove

100 percent airtight evidentiary cases. Rather than serving the public trust, the museums, by asserting laches defenses, compound the injury to Holocaust victims and their survivors by continuing to display stolen works to the US and international public. Exhibiting stolen art and hiding provenances teaches the viewing public Holocaust denial and continues the decades-long deprivation.

#### **Equitable Defenses: Holocaust Denial**

US museums and holders of stolen property argue that they were good faith purchasers of artworks stolen from Fritz Grünbaum. Many of Schiele’s major collectors were murdered Jews. Schiele was virtually unknown outside Austria prior to WW II. During World War II and in its aftermath, government warnings, press reports, and general public consciousness of Nazi massacre and looting, in particular art looting, were widely reported. Yet museums and others argue that they were “good faith purchasers” when buying undocumented European artworks during and after WW II.

Auction houses such as Sotheby’s propagate the myth that the Holocaust and art looting were unknown in the USA until the mid-1990s when Lynn Nicholas published *The Rape of Europa*. In fact, government and news reports during and immediately following World War II clearly outline the vast looting of European Jews’ property. In 1947, *The New Yorker* published an extensive three-part series by Janet Flanner documenting the Nazis’ encyclopedic art looting activities. Hence, to claim that US museums and other purchasers were unaware of Hitler’s looting activities and particularly that, after 1947, a good faith purchase of un-provenanced European artworks was possible is a form of Holocaust denial.

<sup>1</sup> See, e.g., London Declaration of January 5, 1943; US State Department Bulletins.

### **Importations of Foreign Legal Defenses**

Museums and other holders of property stolen from Fritz Grünbaum hire foreign legal experts who claim that the Washington Principles should not be applied, that defenses such as Swiss and Austrian statutes of limitations should bar any claims to property stolen from Fritz Grünbaum in the United States. For example, Swiss attorney Alexander Jolles testified that once a lawsuit exists, the Washington Principles are not relevant under Swiss law. Thus, US museums and others claim that the unavailability of restitution remedies in Austria, Switzerland or Germany should bar restitution in the United States.

### **Systematic Extortion**

Museums who know that they do not have title to artworks often turn to US courts to avoid the question of restitution. We have seen this in the recent case of *Boston Museum of Fine Arts v. Seger-Thomschitz*. In that case, the judge avoided the question of whether Otto Kallir's acquisition of a Kokoschka in February 1939 from a Jewish man in Vienna gave Kallir legal title to the artwork. Rather than looking to the merits, the judge relied on technical defenses and dismissed the case.

In other cases, museums will pay money under a threat of subjecting the claimants to a total loss and huge legal fees. This is known as extortion.

### **Conclusion**

Austria cannot be permitted to continue to violate the 1955 Austrian State Treaty. Without substantial commitments from governments to restitute stolen artworks and providing without

providing expedited restitutional remedies, the promise of the Washington Principles to return stolen art that is now in the world's museums is an empty one. If Austria, Switzerland and the United States continue to avoid their obligations, the property stolen from Fritz and millions of other Jews will never be located and given back.