COMMENT&ANALYSIS

Getting back art from Gurlitt's hoard

While the legal status of stolen or confiscated works is as yet unclear, there is hope for those who make claims for restitution

COMMENT
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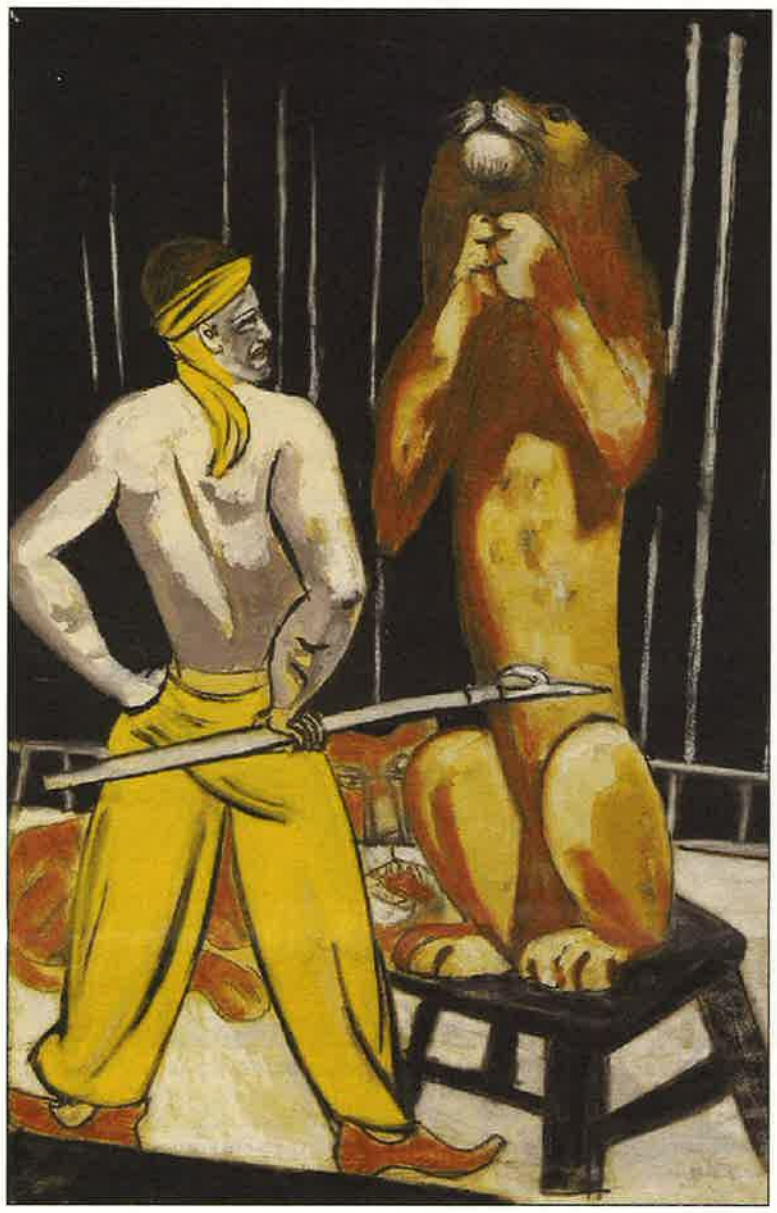
The facts leading to the recent discovery of a hoard of art in a Munich apartment are now well known. The collection, found in the home of Cornelius Gurlitt, a reclusive 80-year-old, was assembled by his father, Hildebrand, a collector who worked as an art dealer before, during, and after the Second World War. He and a handful of other art dealers were commissioned by the Nazis to sell works of art classified as "degenerate" that were seized by the Third Reich in 1937. Gurlitt did not sell all the works given to him but instead retained some. When he died in a car crash in 1956 he left the art to his wife Helene Hankel. When she died in 1967, their son Cornelius, inherited the collection.

Information about the existence of the collection only came to light in November. As we went to press, 384 of the works seized from Cornelius Gurlitt's apartment have been determined to be works classified as "degenerate" by the Nazis. A further 593 are suspected to have been looted by them. The website www.lostart.de has listed 356 of these works so far.

Can the heirs of former owners of these works make a valid ownership claim on them? Do they stand any chance of forcing Gurlitt to hand them over? The simple answer is yes, if they can prove their ancestors owned a specific work, that they have inherited the ownership claim, that ownership has not passed to Gurlitt under applicable laws, and that their claim has not run out of time.

There are no restitution laws in Germany requiring Gurlitt to return works to the heirs of dispossessed Holocaust victims. This means the party claiming restitution must rely on general principles contained in the German Civil Code. To apply those principles the provenance of each work must be considered first. How did it find its way into Gurlitt's collection? The ownership situation is different depending on whether a work is classified as "degenerate art" or falls into the category of Nazi looted art.



Max Beckmann's *The Lion Tamer* was sold at auction by Cornelius Gurlitt (above) for $1.2m in 2011

Forfeited art

"Degenerate art" includes works seized from German museums in 1937 and expropriated without compensation after the National Socialist Forfeiture Act of 1938. In total around 5,000 paintings and sculptures and 12,000 works on paper were taken by the Nazis in this way.

If works belonging to private collectors, which may have been on loan to museums, were taken as part of this purge, and they resurface in the Gurlitt collection, the question is whether the Forfeiture Act of 1938 is recognised as a valid legal instrument that has vested ownership in the German state. If so, the state may have lawfully transferred ownership of forfeited art to Hildebrand Gurlitt (either directly or indirectly).

The Forfeiture Act has never been declared invalid or void either by the Allies after the Second World War or by German courts. However, some believe that the Act should now be declared null and void because it violates German "*ordre public*" – in other words, it contravenes general principles of justice. If the Act were declared null and void, sales of "degenerate art" by the Nazi regime would be deemed invalid and the art would be treated as having been lost by, or stolen from, the dispossessed owner. Under the German Civil Code, if property was stolen from the owner or "lost in any other way", a purchaser in good faith from someone other than the owner does not acquire ownership. Accordingly, Gurlitt could not claim ownership of such works even if he could prove he acted in good faith (subject to the limitations below).

Forced sales

Works of art looted by the Nazis are in a different category. These are cultural objects that were stolen as a result of persecution by the National Socialists due to race, religion or political views. Jewish families were initially forced to sell their art collections "voluntarily" at grossly undervalued prices. From 1938 onwards, the Nazis systematically raided Jewish art collections in Germany; these raids were later extended to other countries.

Under German law, a forced sale may be treated as a sale under duress, or as a sale contrary to public policy. In the latter case, the sale is void (as opposed to voidable) as a matter of law. In this case, Hildebrand Gurlitt could not have acquired ownership of the works that had been forcibly sold, and he could not have passed ownership to his wife and then son, whatever their knowledge of the circumstances surrounding Hildebrand's acquisition of the works.

If the art was not sold but looted, German law deems the art to have been "lost" by its then owner, and neither the person taking it from the owner, nor anyone subsequently taking it from that person, acquires ownership, even if such persons acquired the art in good faith.

If Hildebrand Gurlitt bought art from international dealers, for example after the war, the circumstances of such acquisitions must also be investigated. Given his network of contacts, works acquired in this way may also have been looted by the Nazis.

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Gurlitt's defence

German law allows Cornelius Gurlitt to object to restitution claims. He can argue that he acquired ownership of works that were stolen, looted or bought at an undervalued price, through what is known as "adverse possession" even though his father may not have legally owned them. Under German law, a person acquires ownership of moveable assets if they exercise possession over them as if they were the owner for a period of ten years. However, he does not acquire ownership if he did not act in good faith when taking possession of the works in question or if he acquired the assets in good faith but later discovered that he was not their rightful owner. There must be serious doubts about Cornelius Gurlitt's good faith as he inherited the art collection directly from his parents, so must have known the circumstances in which the collection was assembled. He also hid it from the world for decades.

The most serious obstacle facing claimants is the 30-year rule. Under German law the possessor of stolen or looted goods can defeat an ownership claim if he has held the goods for 30 years, regardless of whether the victim of theft or loot was able to assert a claim during that period. In other words, the fact that the victim of theft or loot did not know the whereabouts of his property during the 30-year period is immaterial.

Cornelius Gurlitt has been in possession of the collection for more than 30 years; therefore, he may well succeed in arguing that ownership claims cannot be made. However, German courts may take the view that reliance on the 30-year rule by a possessor who is proved to have held works in bad faith is an "impermissible exercise of rights", because the rule was not designed to protect thieves. Accordingly, the outcome of ownership claims against Gurlitt is uncertain.

The 30-year rule does not extinguish the title of original owners; rather it is a defence that can be used by the current possessor of the works against restitution claims. However, the current possessor, in this case Cornelius Gurlitt, could choose to waive that defence. Early indications are that he will not do so, if we believe reports that he will fight attempts made to claim the collection.

Alternative solutions are now being considered. Proposals to set aside the 30-year rule, with retroactive effect, have been debated in the German press. Meanwhile, the Bavarian minister of justice has suggested amending the 30-year rule by allowing the claimant to defeat it if two conditions are met: first, the claimant must show that he lost the property through theft or looting and second, he must show that the current possessor acted in bad faith.

Claims outside Germany

Germany is not the only jurisdiction where ownership claims may be brought. If the heirs of the original owner brought their claim in the courts of another country, the courts of that country may apply different law, leading to an outcome that might be more favourable to the claimants. It is worth considering whether a claim brought in France or in England may have a better chance of success.

As early as 1941 the Free French, led by Charles de Gaulle, adopted a number of administrative orders that sought to denounce and condemn the systematic looting of works of art by the Nazis in occupied France. The main order from 21 April 1945 is still in force today.

The scope of looting covered by the order is broad: it encompasses seizures, forced transfers or apparent sales. All legal transactions contracted during the Second World War are presumed to have been coerced. The order voids all looting acts and provides for the restitution of the looted property to the original owner. Actions brought on the basis of this instrument are barred after 31 December 1949, unless the claimant can prove that he was materially unable to bring the action, for example he had not been able to ascertain the location of the looted art.

Under general French civil law, ownership claims against a bona fide possessor of stolen goods must be brought within three years of the theft. However, if the bad faith of the possessor is established, the action is not subject to any time limit. Accordingly, if the heirs of dispossessed owners of works of art in the Gurlitt collection can show that Cornelius did not hold the works in *good faith*, in principle, their claim is not barred under French law.

In England, the general principle is that one cannot acquire ownership of stolen or looted goods from someone who did not own the goods in the first place. Accordingly, one cannot take ownership from the thief, and no one deriving possession from the thief can acquire ownership. There are exceptions to that rule. One defence against the ownership claim of the dispossessed owner is the defence of limitation. If the current possessor can prove that more than six years have passed since the first acquisition in good faith after the theft or act of loot, he has a good defence against a restitution claim. If, however, no one in the chain of possession purchased the property in good faith, then in principle, title remains vested in the dispossessed owner without limitation in time.

In this case, assuming that English law applied, and that the heirs of the original owner can show that neither Hildebrand Gurlitt nor his wife and son acquired the disputed works in good faith, they may well succeed in their restitution claim.

The challenge for the claimant may be to persuade the French or English courts to accept jurisdiction over the restitution claim. In the European Union the default rule is that persons domiciled in one member state can only be sued in the courts of that state. Among exceptions are situations where the harmful event (such as the act of theft or looting) occurred elsewhere, or when the property is located in another jurisdiction. Depending on the facts of the case it may be possible to persuade the French or English courts to accept jurisdiction.

The success of a restitution claim brought in Germany is in doubt, unless the law is changed and it applies retrospectively. A claim brought in a French or English court may have a better chance of success.

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