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Alternatives to the "Legitimate Ownership" of Art Heritage by B.S. Frey

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Alternatives to the “Legitimate Ownership” of Art Heritage

Bruno S. Frey*

Abstract

This article argues that inter-state disputes regarding the ownership of art heritage are not of prime importance from a societal perspective. Seeking to establish “legitimate ownership” absorbs much time and effort but is not always successful because it involves many political aspects beyond the purely legal realm. Even in situations where “legitimate ownership” is indeed identifiable, the relevant authorities still have to devote a considerable amount of time and money. The input of resources required should be compared to the many more pressing issues in international law, in particular issues relating to civil rights and military conflict.

Trying to establish “legitimate ownership” in art heritage is, in many cases, superfluous because there are viable alternatives. The most important one relies on the production of perfect replicas of the piece of heritage whose ownership is disputed. This possibility now exists thanks to the considerable technical progress in copying achieved with the help of computing. Moreover, the Internet democratizes and globalizes national art heritage, moving it closer to being a cultural heritage of mankind.

Instead of focusing on the determination of “legitimate ownership”, the alternatives mentioned above should be actively pursued. Producing exact replicas of art heritage and putting three-dimensional representations on the Internet should be actively supported rather than hindered by narrowly defined legal rules. At the same time, international loans of what is still considered “national” heritage should be encouraged.

1. Introduction

Disputes about ownership of art heritage exist in great number between private actors, between public and private actors and between public actors. This article focuses on state-to-state disputes which refer to objects of art stemming from a particular country but now being held in a museum of another country.¹ Particularly prominent are three cases in which the claimed “owners” are countries as a whole, and where the locations where the objects of art are held are famous national museums:

- 1) *Elgin Marbles*. This is a collection of Greek sculptures, many of them created by Phydias and his collaborators, removed between 1801 and 1812 from the *Parthenon*, the *Erechtheum* and the *Propylaea* on the Acropolis of Athens. The Earl of Elgin, then British ambassador to the Ottoman Empire, received permission from the Ottoman government to transport pieces to Britain by sea. In 1816 the marbles were thus bought by the British government and put on display in the British Museum. From the very

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¹ The article does not deal with private (in contrast to national) owners who lost or acquired a piece of cultural heritage in wars or as a consequence of political revolutions.

beginning, there was a lively public controversy on whether the removal was legally and morally acceptable. The Greek government made various efforts to have the Marbles returned, but without success.²

- 2) *Pergamon Altar*. This huge construction was erected during the reign of King Eumenes II in the first half of the 2nd century BC in Pergamon's Acropolis in Asia Minor. Between 1878 and 1886 the Acropolis was officially excavated with the participation of the Turkish government. A deal was made that all friezes detected could be transported to Berlin and become the property of its museums. In 1930, a special museum was built on the Museum Island in Berlin to host the Altar. This *Pergamon Museum* was constructed to reflect the gigantic size of the Altar. It was recently renovated and can be visited for an entry charge. Reportedly, the Turkish Minister of Culture unofficially demanded that the Pergamon Altar, as well as other pieces from the Acropolis, be returned – but the Berlin State Museums refused to do so.³
- 3) *Nefertiti Bust*. This icon of feminine beauty was probably created in 1345 BC by the sculptor Thutmose in Armana, Egypt. It represents the wife of Pharaoh Akhenaten. The bust was discovered by a German archeological team in 1912 and is now exhibited in the *Neue Museum* in Berlin. Since 1924, when the bust was first exhibited in Berlin, Egyptian authorities have claimed ownership of the bust and exerted various sorts of pressures to have it returned to their country. The relevant German authorities always refused, claiming that there is a legally valid treaty of 1912 concerning the division of the archeological finds.⁴

These three examples – many other examples immediately come to mind – illustrate that there is indeed much dispute about the legitimate ownership of major works of art. The views range from legally well-established ownership to the plundering of artifacts by foreign nations.

The following analysis takes a particular cultural economics point of view. The Economics of Art or Cultural Economics has become a field of its own within political economy.⁵ This article is *not* written by a lawyer but by an economist engaged and interested in the study of the arts. Not being a legal scholar, I emphasize *the social science aspects* of “legitimate ownership of cultural heritage”, and I do so using the economic approach.⁶ Nevertheless, the analysis may be useful for lawyers in several respects: First, it deals with the

² John Henry Merryman ‘Whither the Elgin Marbles?’ in John Henry Merryman (ed) *Imperialism, Art and Restitution* (Cambridge University Press 2006) 98-113.

³ Interview with the Turkish Minister of Culture, Spiegel Online, ‘Museum Wars: Ankara Demands Artifacts from Berlin’, 14 March 2013.

⁴ Kurt G. Siehr, ‘The Beautiful One Has Come – To Return’ in John Henry Merryman (ed) *Imperialism, Art and Restitution* (Cambridge University Press 2006) 114-134; Stephen K. Urice, ‘The Beautiful one has come – to Stay’ in John Henry Merryman (ed) *Imperialism, Art and Restitution* (Cambridge University Press 2006) 135-166.

⁵ David C Throsby, ‘The Production and Consumption of the Arts: A View of Cultural Economics’ (1994) vol 33 *Journal of Economic Literature* 1; David C Throsby, *Economics and Culture* (Cambridge University Press 2001); Ruth Towse, *A Textbook of Cultural Economics* (Cambridge University Press 2010); Bruno S Frey and Werner W Pommerehne, *Muses and Markets: Explorations in the Economics of the Arts* (Blackwell 1989); Bruno S Frey *Arts & Economics. Analysis & Cultural Policy* (Springer Verlag 2003); Bruno S Frey and Lasse Steiner, ‘World Heritage List: does it Make Sense?’ (2011) vol 17(5) *International Journal of Cultural Policy* 555.

⁶ This approach has been adopted by Gary S Becker, *The Economic Approach to Human Behavior* (Chicago University Press 1976); Bruno S Frey, *Economics as a Science of Human Behaviour* (2nd revised and extended edition, Kluwer 1999); Bruno S Frey, *Inspiring Economics: Human Motivation in Political Economy* (Edward Elgar 2001).

question as to whether the relevant authorities should put emphasis on heritage quarrels based on “ownership”. In particular, should they invest much effort in trying to determine who the “legitimate” owner is? Second, it discusses the difficulties that arise when trying to establish “legitimate ownership”. Do these costs justify the possible benefits of determining who the legitimate owner is? Third, alternatives are suggested to seeking to establish legitimate ownership. They consist in producing (perfect) copies and digitizing heritage. Fourth, the advertising effects due to the specific location of a piece of cultural heritage should be considered. In some cases, the location tends to make the determination of ownership less relevant. It is worth noting that even in legal instruments the concept of cultural heritage has increasingly been used instead of cultural property. For instance, this has happened with regard to indigenous cultural heritage,⁷ comprising objects such as human remains, funerary objects, sacred objects and objects of cultural patrimony related to the identity of a specific group. Indigenous cultural heritage constitutes another area where the concept of ownership is substituted by “cultural affiliation”, a more unorthodox concept.⁸ In some cases, cultural affiliation can replace proof of ownership, or proof that an object was stolen or removed without permission.

Section 2 identifies the costs of determining legitimate ownership of cultural heritage. Section 3 discusses two alternatives to establishing ownership, namely producing perfect copies and taking into account the possibilities offered by the Internet. Section 4 considers the advertising effect of cultural heritage located in a particular place. Section 5 concludes that these aspects should be considered rather than focusing exclusively on the issue of legal or legitimate ownership.

2. The Costs of Determining “Legitimate Ownership” of Art Heritage

In some instances, the legitimate ownership of a particular artwork is by no means obvious and cannot be easily established. The many disputes over dozens or even hundreds of years show how difficult it is to determine this issue. From a cultural economics perspective, it is useful to distinguish three types of costs that arise.

(1) *Defining what is “legitimate”.* The term “legitimate” goes beyond purely legal ownership, also involving moral considerations, such as equity, fairness, tradition and identity. Moreover, many political aspects play a role, such as the possible situation of dependency of a country in relation to an imperialist country endowed with strong diplomatic and military powers. This applies to Greece and Britain in the case of the Elgin Marbles, and to Turkey and Egypt and Germany, respectively, in the case of the Pergamon Altar and the Nefertiti Bust. What is “legitimate” also strongly depends on the time frame considered. How far should the ownership rights date back? This is an open question on which the parties involved are unlikely to reach a consensus.

(2) *Defining what “ownership” means.* Who owns ancient heritage? Is the respective government of the country of origin entitled to claim ownership? Can a museum that rightfully acquired a piece of heritage from a previous owner – such as the purchase of the Marbles from Lord Elgin by the British Museum – be forced to return the object?

(3) *The costs of the legal process.* Due to the problems mentioned with respect to establishing legitimacy and ownership, legal procedures will necessarily involve large

⁷ See, extensively, Christopher B Graber, Karolina Kuprecht and Jessica C Lai, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar 2012).

⁸ Karolina Kuprecht ‘The Concept of “Cultural Affiliation” in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights’ (2012) 19 *International Journal of Cultural Property* 33.

resources in terms of money and effort by lawyers. In addition, any ruling will be subject to strong interventions by the governments involved because the voters often come to consider a piece of heritage, even if originating in another country, as part of their *own* cultural heritage. Thus, the Germans exhibit a high degree of identification with the bust of Nefertiti, as do the British with the Elgin Marbles. Due to democratic and nationalist pressures, the governments on both sides will be forced to take a strong stand. Such stances tend to act against finding an agreement and certainly greatly extend the length of a legal procedure. Other legal issues can be of possibly much greater importance.

3. Alternatives to Establishing Legitimate Ownership

3.1 Producing Perfect Copies

Modern technology allows us to produce perfect copies of most, if not all, objects of art. If that is not yet possible, it will certainly be so in the near future.⁹ The copies produced appear to be identical to an observer, and the differences compared to the original can at best be identified by advanced physical methods irrelevant for a normal person. There are even cases in which the copy is “superior” to the original. For instance, a Swiss philanthropic foundation in 2003 produced an exact facsimile of the *burial chamber of pharaoh Tutmosis III*. The original burial chamber was in a critical condition due to changing temperatures and the carbon dioxide contained in the breath of the large number of visitors. The painted surfaces and the plasterwork were severely damaged so that it was difficult for visitors to clearly see and appreciate them. For the same reasons, an exact replica of the *royal tomb of pharaoh Tutankhamun* weighing nearly four tons is also planned and shall be placed in the Valley of the Kings.¹⁰

Even earlier treasures of mankind have been saved by replicas, in particular some prehistoric cave paintings. Two major examples are:

- The caves of *Altamira*, which are of major importance because they exhibit artistic expressions by Paleolithic man, which many experts at the time considered totally impossible. Discovered in 1880, over time the large numbers of visitors have damaged the paintings to such an extent that in 1977 the Spanish authorities completely closed the cave to the public. In 2001 a replica cave was opened nearby. It allows visitors to see the polychrome paintings better than in the original cave.¹¹

- The *Lascaux* caves also date from the Paleolithic age and contain paintings estimated to be 17,000 years old. The cave was discovered in 1940. Since then, the breath of the many visitors, the presence of light and the changes in humidity gravely damaged the paintings and led to the emergence of various types of fungus, which rapidly spread to the cave’s ceiling and walls and which still create tremendous problems. Since 1963 the cave has had to remain closed to tourists. Replicas of the Great Hall of the Bulls and of the Painted Gallery were erected close to the originals and were opened to the public in 1983.¹²

⁹ A prerequisite is that the owner of the original lends it out to produce the copy. This may not always be the case, for instance if the owner fears that the object could be damaged or because it may lose monetary value.

¹⁰ The Economist (ed) ‘Toot toot, King Tut’ 10 November 2012.

¹¹ Museo de Altamira. Museo Nacional y Centro de Investigación de Altamira. <http://museodealtamira.mcu.es/> Accessed 25 July 2013.

¹² Lascaux- Visite de la Grotte, available at <http://www.lascaux.culture.fr> Accessed 25 July 2013.

There are also many cases of more recent art heritage of which perfect copies have been produced. For instance, a large number of copies exist of Michelangelo Buonarroti's *Pietà* (1498–1499), a masterpiece of Renaissance sculpture, whose original is housed in St. Peter's Basilica in the Vatican. Indeed, in 1972 when the original was attacked by a vandal with a hammer and suffered considerable damage, the copy now in the Church of Our Lady of Sorrows in Poznań was used as a model for the reconstruction of the original. Another example is the *Wedding at Cana* by the late-Renaissance painter Paolo Veronese. Commissioned in 1562 for the Refectory of the Benedictine Monastery of San Giorgio Maggiore in Venice and plundered by Napoleon in 1797, it is now one of the masterpieces in the Louvre. In 2007, a faithful computerized facsimile of the original produced by a Swiss company was placed in its original place in the Refectory.¹³

The issue of copies also plays a large role in German literature.¹⁴ In his 1779 play entitled *Nathan der Weise* (in English, *Nathan the Wise*), German writer and philosopher Ephraim Lessing pictures the uniqueness of a wonderful and costly ring with special properties, which is a symbol of God's grace for those who believe in it. The owner of the ring, Nathan, has three sons whom he loves equally and promises to leave the ring to each of them. Therefore he has two replicas made and leaves three rings to his three sons. In the uncertainty as to whom of the brothers owned the original ring, a judge called upon to decide which ring is the original one decides that this is impossible and irrelevant to decide. Rather, each of the sons should live according to the meaning incorporated in the ring, namely to lead a life free of intolerance. This shows the power of copies going beyond the material aspect.

There are several reasons why a perfect copy of an original is beneficial. Two are particularly important. First, copies can safeguard art historic values. Even if the original is destroyed in a war, a civil uprising, a terrorist act,¹⁵ a fire, or simply by bad handling, the esthetic value remains represented in the replica. The viewers – including art experts – often cannot distinguish whether a work of art is the original or the copy. In certain cases replicas are produced to preserve artifacts from pollution. For better preserving the statue of the David of Michelangelo Buonarroti, the Municipality of Florence has put a replica of the David in front of Palazzo Vecchio, while the original statue is preserved and exhibited at the Gallery of the Accademia di Belle Arti, also in Florence. Second, replicas may be in a better state than the original, which may have suffered from pollution, shifting temperatures or humidity. As mentioned above, this is the case for the Paleolithic paintings in the Altamira and Lascaux caves, or for the medieval globe in the Swiss National Museum in Zurich.¹⁶

A dominant position in art history holds that the original has a special and unique quality, which copies do not possess.¹⁷ The original art work has an “aura”.¹⁸ Though it is not visible, it is said to be real in the minds of viewers. I have assumed that it is possible to produce *perfect reproductions*, which – in most cases – is indeed possible today due to the

¹³ Fondazione Giorgio Cini, <http://siti.feem.it/worldcongress/othinf/cini.html>. Accessed 25 July 2013.

¹⁴ I owe this point to Andreas Spillmann.

¹⁵ Well-known objects of art, in particular those on the UNESCO List of World Heritage Sites, tend to attract damage by terrorists because of the great media attention this would attract. See Bruno S Frey, 'Federalism as an Effective Antidote to Terrorism' (2010) vol 6(3) Review of Law & Economics 489; Bruno S Frey and Dominic Rohner, 'Protecting Cultural Monuments against Terrorism' (2007) vol 18(3) Defence and Peace Economics 245).

¹⁶ Marie Cornu and Marc-André Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' 17 International Journal of Cultural Property (2010) 1–31.

¹⁷ See, more generally, Bruno S Frey, *Arts & Economics. Analysis & Cultural Policy* (Springer Verlag 2003).

¹⁸ Walter Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit* (4 ed Edition Suhrkamp 1963).

considerable advances in computer technology, in particular three dimensional scanning. Thus, it is not an art work's physical or esthetic aspects that matter, but rather the context and history of its creation. The latter define the quality of a work of art. It follows that the material aspect of the art object as such is not crucial. It may well be argued that a perfect copy is also able to reveal the context and history involved.

In line with the above reasoning, the cult of the original is also controversial in art history. Whether copies of a work of art are of lesser value or whether its reproduction is considered to be morally wrong differs greatly between cultures and time. Even in the Western world, replicating the work of other artists was considered an acceptable or even desirable activity in former centuries. The great Michelangelo forged a work by his master Domenico Ghirlandaio in order to demonstrate his own ability as an artist.¹⁹ There are even accounts of purchasers who welcomed a reproduction although they had bought the original already. The buyers of the bust of Lucrezia Donati were pleased to discover that it was a fake because they found it wonderful that an artist of such talent was still alive.²⁰

The discussion suggests that perfect copies in many instances may make it unnecessary to determine what the "legitimate ownership" is. Whoever has a reasonable claim can be given a perfect copy of the heritage object in question. There are several ways how this can be done. In the case of the Elgin Marbles, for instance, the parts of the Parthenon Marbles now exhibited in the British Museum can be replicated. The original and the perfect copy could be assigned by lot. Alternatively, one of the two parties can be chosen by lot and can then choose between the two identical Parthenon Marbles. If it chooses (by chance) the original, it acquires its ownership; if it chooses (by chance) the copy, the deal is also closed.²¹

3.2 Taking Account of Internet Availability

In recent years, most artworks and heritage sites have been digitized and are now available on the Internet. The quality is already good and will further improve in the future. Most likely, three-dimensional representations will be produced. The pictures can be readily, and in most cases freely, viewed. Any interested person can "visit" these heritage objects quickly and without having to expend much time or effort. Persons who have so far not entered museums may be attracted, leading to a desirable democratization of culture. As the Internet mostly surpasses the confines of nations, the representation of art heritage in that medium constitutes a move toward perceiving cultural resources as a common heritage of mankind.

On the one hand, it may be claimed that *actually* experiencing a cultural heritage site in person evokes additional qualities not reproducible by an Internet presentation. On the other hand, many objects can be even better and more carefully viewed online since in reality, sometimes thousands of visitors wish to see an object at the same time. For instance, the *Mona Lisa* is regularly visited by a large crowd. This overcrowding has negative consequences for those wishing to see Da Vinci's painting as well as other paintings in the same room.

¹⁹ David M. Wilson, 'Preface', in: Mark Jones (ed), *Fake? The Art of Deception* (British Museum Publications 1990) 9.

²⁰ Mark Jones (ed), *Fake? The Art of Deception* (British Museum Publications 1990) 15.

²¹ Greece would put the (original or copied) Marbles into the New Acropolis Museum, together with other slabs from the Western part of the Parthenon frieze, which were removed in 1993 because of the damage caused by acid rain and air pollution. Another copy of all these parts could be produced and put back to the Parthenon.

The Internet revolution makes art heritage (or at least the large majority of objects older than “life plus 70 years when copyright protection ends”) available in great quality and at low cost to wider circles of society. It thus tends to make the establishment of “legitimate ownership” less important – if not unnecessary. Internet availability moreover tends to raise, rather than lower, the number of visitors who wish to see further objects of the respective culture. They want to see in reality the objects previously viewed on the screen.

4. Advertising Effect

The question of who owns a particular piece of heritage is largely irrelevant if whoever owns it does not seek to change the location of the object. Take the example of the Nefertiti Bust now in the *Neue Museum* in Berlin. Even if the ownership was transferred from Germany to Egypt, the Egyptian government might well find it advantageous to leave the bust in Berlin because it is an effective advertisement to visit the many wonderful heritage sites in Egypt, such as Luxor or the Valley of the Kings. Nations actively lend out part of their art heritage to other countries in order to stimulate tourism or to further goodwill. For instance, Michelangelo Buonarroti’s *Pietà* was shipped to New York in 1964 to become the main attraction of the Vatican pavilion at the 1964 New York World's Fair, where it was viewed by millions of people.²²

The advertising effect suggests that ownership is not of major importance and need not necessarily be determined. If, for instance in the case of the Nefertiti Bust, ownership is transferred to Egypt but that country decides to lend it to the museum in Berlin indefinitely, there is no material change – although there may be a distributional consequence. Many solutions are imaginable, *e.g.*, that a piece of art heritage is lent out by the owner for a specified period, with a charge being levied for that service. If the advertising effect is substantial, the owning country has an incentive not to ask for a high compensation.

Conclusions

This article argues that the ownership of art heritage is not of prime importance from the point of view of society. Seeking to establish “legitimate ownership” absorbs much time and effort and may not be successful because it involves many political aspects beyond the purely legal realm. Even if “legitimate ownership” was indeed identifiable, the relevant state authorities would still have to devote a considerable amount of time and money to the process. Many more pressing issues exist in international law requiring state attention.

Trying to establish “legitimate ownership” in art heritage is, in many cases, superfluous because there are viable alternatives. The most important one relies on the production of perfect replicas of the piece of heritage whose ownership is disputed. This possibility now exists thanks to the considerable progress realized in copying techniques with the help of computing. Moreover, the Internet democratizes and globalizes national art heritage, moving it closer to being a cultural heritage of mankind as a whole. The UNESCO List of World Heritage Sites is a step in this direction. Finally, the ownership issue is of reduced relevance because having a piece of a nation’s art heritage exhibited in another country can have a favorable advertising effect for the former.

²² <http://saintpetersbasilica.org/Altars/Pieta/Pieta.htm>. Accessed 25 July 2013.

Instead of focusing on the determination of “legitimate ownership”, the alternatives mentioned above should be actively pursued. Producing exact replicas of art heritage and putting three-dimensional representations on the Internet should be actively supported. At the same time, art loans and international cooperation in the cultural sector should be furthered in conformity with the idea that cultural heritage is the heritage of mankind.

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