

# Art & Cultural Heritage Law Newsletter

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## Extending Anti-Money Laundering Laws to Art and Antiquities Dealers: Pros And Cons

Introduction By: Armen R. Vartian, Editor<sup>1</sup>

As we go to “press”, Congress has just passed the 2021 Defense Authorization Act, within which is a provision amending the Bank Secrecy Act to extend the BSA’s anti-money laundering provisions to any “person engaged in the trade of antiquities”, and directing appropriate U.S. Government officials to prepare implementing regulations. The Act suggests that regulations might require, among other things, identification of actual purchasers of antiquities (as opposed to their “agents or intermediaries”) as well as identification of all participants in the antiquities trade. The impact of such requirements on customary art-market confidentiality is obvious. Two prominent voices in the debate concerning AML issues and the art market are Tess Davis and Peter Tompa, whose kind contributions to our Newsletter appear below. ♦

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## Costly Regulations Should Be Imposed Based on Facts Not Advocacy

By: Peter K. Tompa<sup>1</sup>

The small businesses of the art and antiquities trade have suffered significant financial losses during the pandemic. Yet, the House recently passed legislation that foists onerous red tape and substantial costs on these small businesses in the name of “protecting them” from money laundering schemes.<sup>2</sup> Fortunately, the bills- which make “antiquities dealers” (however that may be defined) subject to the Bank Secrecy Act (BSA)- face bipartisan opposition from Senators worried that such costs are not warranted without real proof money laundering is a serious industry-wide problem. However, the bills’ sponsors have attempted to bypass legitimate opposition by attaching these provisions to a non-germane must-pass defense bill.

Caution is warranted given the shifting nature of justifications for such regulations. Initially, the legislation’s proponents, a coalition of archaeological advocacy groups and anti-money laundering (AML) compliance contractors, claimed the legislation was necessary to help keep items looted by ISIS

## Increased Regulation Deters Crime — and is Good for the Art Market

By: Tess Davis<sup>1</sup>

This fall, the Office of Foreign Assets Control (OFAC) joined a growing chorus in sounding the alarm that criminal misuse of the art market is threatening not only U.S. national security and economic integrity—but also responsible collectors, dealers, galleries, auction houses, and museums. In an October 30, 2020 advisory targeting art market actors, OFAC warned that America’s enemies have exploited the sector’s vulnerabilities to evade sanctions, and provided guidance for countering such threats. It highlighted known examples from Hezbollah, North Korea, and Russia.<sup>2</sup>

This past July, a bipartisan Congressional report had exposed that Russian oligarchs, brothers Arkady and Boris Rotenberg, had laundered millions through American auction houses and art dealers, evading U.S. sanctions on Vladimir Putin’s inner circle.<sup>3</sup> A Senate subcommittee had launched an inquiry into the effectiveness of these sanctions, which since 2014 have sought to counter Russia’s invasion of Ukraine and annexation of Crimea, due to a growing concern that blacklisted individuals like the

*Tompa, cont.*

terrorists off the market.<sup>3</sup> After those claims were debunked,<sup>4</sup> they cited reports that the art market was being exploited by criminals to launder money. Recently, they have latched onto a Senate report detailing a highly unusual set of facts involving Russian oligarchs evading sanctions by purchasing valuable paintings through shell companies and a Moscow-based art intermediary as the basis for regulating an entire industry.<sup>5</sup> In fact, Global Financial Integrity's report on transnational crime indicates that cultural goods account for no more than 0.1% of illegal activity.<sup>6</sup> Given the variety of industries where money laundering is thought to be a far more serious problem, it makes no good sense to single out these small businesses without further study.

Nor do claims that other industries like jewelers and bullion dealers already have to comply with similar rules, or that the art trade in Europe is covered, justify new regulations. Jewelry and bullion are liquid commodities that are inherently easy to launder. Art takes time to buy and sell, making it a poor vehicle for money laundering. In Europe, regulators acted hastily based on the supposed terrorism threat. Now that such claims have been debunked, that is a reason for Europe to rethink its own draconian regulations, not for the U.S. to follow suit based on the false premise that art and antiquities are a major terrorist funding source.

The costs also should not be underestimated. Proponents avoid speaking about such costs because they know how devastating they would be to businesses already operating in a very difficult business climate. Any regulation under the BSA would most likely be similar to that covering jewelers and bullion dealers.<sup>7</sup> Virtually all such viable businesses are covered given a regulatory threshold of \$50,000 per year in gross revenue. Once covered, jewelers and bullion dealers must spend thousands of dollars per year in compliance costs for an AML plan, and an independent audit, and considerable time on red tape. Such money, time and effort could very well drive marginal businesses under, particularly those operating part time. This is legislation we simply do not need without conclusive proof of a substantial industry problem. ♦

<sup>1</sup> Co-Chair ABA Art & Cultural Heritage Law Committee, Executive Director, Global Heritage Alliance. (<https://global-heritage.org/>)

<sup>2</sup> H.R.2514, Sec. 211- Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019--116th Congress (2019-2020); H.R.2513, Sec. 211 - Corporate Transparency Act of 2019-2020--116th Congress (2019-2020).

<sup>3</sup> See H. Res. 206— 116th Congress (2019-2020); *Looting and Laundering Art, Antiquities, and Financial Crimes*, The Antiquities Coalition (November 6, 2018), available at <https://theantiquitiescoalition.org/looting-and-laundering-art-antiquities-and-financial-crimes/> (last visited November 3, 2020).

<sup>4</sup> See "RAND Corp Report Demolishes Assumptions on Antiquities and Terror," Cultural Property News (July 30, 2020) available at <https://culturalpropertynews.org/rand-corp-report-demolishes-assumptions-on-antiquities-and-terror/> (last visited November 3, 2020).

<sup>5</sup> *AC Founder and Chairman Deborah Lehr Advocates to Protect Art Market From Money Launderers in Op-ed*, Antiquities Coalition (August 21, 2020), available at <https://theantiquitiescoalition.org/ac-founder-and-chairman-deborah-lehr-advocates-to-protect-art-market-from-money-launderers-in-op-ed/> (last visited November 3, 2020).

<sup>6</sup> Channing May, *Transnational Crime and the Developing World* at xi (Global Financial Integrity March 2017).

<sup>7</sup> *Dealers in Precious Metals, Stones or Jewels Required to Establish Anti-Money Laundering Programs*, Financial Crimes Enforcement Network (June 3, 2005), available at <https://www.fincen.gov/news/news-releases/dealers-precious-metals-stones-or-jewels-required-establish-anti-money-0> (last visited November 3, 2020).

*Davis, cont.*

Rotenbergs were still finding "backdoors" into the American economy. Two years later, investigators concluded their fears were correct—due in part to loopholes in the regulation of the American art market, which had undermined not only the sanctions, but also U.S. foreign policy goals.<sup>4</sup>

The Rotenberg report and OFAC advisory underscore why the \$28.3 billion American art market<sup>5</sup> is called the country's largest unregulated industry. Art stands alone, among sectors of similar risk and size, in its exemption from the Bank Secrecy Act (BSA). This somewhat misnamed statute requires designated entities to assist the government in preventing and detecting financial crimes. What this means in practice varies, but includes reporting suspicious activity, performing customer due diligence, and keeping records. In addition to expected businesses like banks, it applies to sellers of precious metals, stones, jewels, automobiles, planes, and boats, as well as to casinos, real estate professionals, travel agencies, and pawn shops.

Had the Rotenbergs been dealing in any of the above goods or services, the BSA would have required the businesses involved to take basic steps to ensure the transactions were not covers for financial crimes. The art market's own best practices require similar safeguards (it is arguable whether these were followed).<sup>6</sup> Such actions may also soon be required by law: there are currently three bills before Congress that would apply the BSA infrastructure to the U.S. art market.<sup>7</sup>

Should one of these bills pass, many in the art market understandably fear not only an erosion in their business culture, which for centuries has been built on discretion, but also increased compliance costs in an economic recession. However, any regulations would only be crafted after an extensive "notice and comment" period, during which the art market would have ample opportunity to work with the government in tailoring effective rules. And comparable sectors have continued to thrive under the BSA, as has the European art market under similar measures, providing countless lessons from which to learn.<sup>8</sup>

Increased due diligence will protect not only U.S. interests, but also those of the art market, which itself was a victim of the Rotenbergs. That scandal reminds us there are major costs to inaction, including reputational harm, attorneys' fees, and potential civil criminal liability (as well as the painful knowledge of having unintentionally been a pawn of the Kremlin). And neither OFAC, nor Congress, nor the many others calling for strengthened self-regulation are seeking anything beyond good business practices in the 21st century.

To couch the proposed changes in political terms, the art market's policy of "don't ask, don't tell" has failed. Through the BSA or other means, it is time to move on to "trust—but verify." ♦

<sup>1</sup> Attorney Tess Davis serves as Executive Director of the Antiquities Coalition and helped to chair its Financial Crimes Task Force, a multi-stakeholder initiative working to protect the art market from criminal misuse. Their joint report, *Reframing U.S. Policy on the Art Market*, can be found at [www.theantiquitiescoalition.org](http://www.theantiquitiescoalition.org).

<sup>2</sup> U.S. Dep't of the Treasury, Art Advisory (2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201030>.

<sup>3</sup> United States Senate Permanent Subcommittee on Investigations, *The Art Industry and U.S. Policies that Undermine Sanctions*, Staff Report, 2020 at 10.

<sup>4</sup> Beyond the art market, loopholes flagged included how the Treasury Department collects beneficial ownership information, how it implements and announces sanctions, and the threshold for blocking companies owned by sanctioned individuals.

<sup>5</sup> Clare McAndrew, *The Art Market 2020*, Art Basel & UBS Report,

*Davis, cont.*

2020 at 36.

<sup>6</sup> For several years now, the art industry has made internal attempts to self-regulate and close some of the loopholes that make it vulnerable to criminals like the Rotenbergs. In January 2017, an interdisciplinary group of experts from the art market, academia, law enforcement, and customs launched the Responsible Art Market Initiative (RAM) to address their concern for the significant and evolving challenges of money laundering and terrorist financing, and their connection with the illicit trade in cultural property. This non-profit industry program supports art market businesses by providing them with a practical and ethical compass to navigate the increasingly complex and fragmented anti-money laundering and anti-terrorism financing frameworks within which they are required to operate. RAM has helped to draft country-specific guidelines for France, Italy, Germany, Brazil, and Uruguay, and is itself producing regulatory guidelines for the U.S. and U.K.

<sup>7</sup> HR 6395/S.4049 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Introduced 08/04/2020) HR: Adam Smith [D-WA-9] (Introduced 03/26/2020); HR 2514/S.2563 Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019 (Sec. 211) (Introduced 05/03/2019); and HR 2513/S.1978 Corporate Transparency Act of 2019 (Sec. 211) (Introduced 05/03/2019).

<sup>8</sup> The European Union has additional legislation to identify and protect their economy from money laundering. One of the pillars of the European Union's legislation to combat money laundering and terrorist financing is Directive (EU) 2015/849, recently updated in 2018 as EU Directive 2018/843 ("Fifth Anti-Money Laundering Directive"). See Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods (17 April 2019). The European Union's Sixth Anti-Money Laundering Directive (6AMLD) comes into effect for member states on December 3, 2020. The Sixth Anti-Money Laundering Directive strengthens and builds upon the Fifth Anti-Money Laundering Directive, by clarifying the existing legislation and regulator details, and strengthening the criminal penalties. See European Parliament and of the Council of Directive 2018/1673, art. 13, p. 1, 2018 O.J. (L 284). In December 2019, the UK government issued regulations that update the UK's existing anti-money laundering legislation and implement the new legislation in the European Union's Fifth Anti-Money Laundering Directive. Under The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, art market stakeholders such as art galleries and auction houses, are directly regulated for transactions related to the sale of a work of art.

## American Hellenic Institute Stands Firm For Religious Freedom; Against Proposed MoU Between the U.S. and Turkey

By: **Elias Gerasoulis**<sup>1</sup>

The American Hellenic Institute (AHI), a non-profit public policy and advocacy center created in 1974, promotes the rule of law in U.S. foreign policy regarding the Eastern Mediterranean. In this respect, AHI, throughout its history, has been involved in promoting religious freedom in Turkey. In 1994, AHI was the first organization to raise with Congress and the Executive Branch the issue of religious freedom and protection for the Ecumenical Patriarchate in Istanbul and the reopening of the Halki Patriarchal School of Theology, discussed further below.

As such, we were deeply concerned in the fall of 2019 when we first learned of the *Request by the Government of Turkey to the Government of the United States of America Concerning the Imposition of Import Restrictions to Protect Its Cultural Patrimony Under Article 9 of the 1970 UNESCO Convention* (such proposed import restrictions, the "MOU"), which would impose import restrictions on archaeological and cultural property derived from the territory of Turkey. Our concerns were based on: (1) The government of Turkey's appalling record of persecuting religious minorities and converting or destroying rich cultural heritage (2) the MOU's *de facto* endorsement of Turkey's position that it has full control and "ownership" over cultural and religious heritage inside its country.

Turkey has a longstanding history of suppressing religious freedom of minorities and has made no real progress in addressing and im-

proving its record on religious freedom. The U.S. State Department's 2019 *Report on International Religious Freedom on Turkey* highlighted that despite the constitutional claims of providing various freedoms with regards to religion, the government of Turkey limited the rights of and mistreated minorities, such as "Armenian Apostolic Orthodox Christians, Jews, and Greek Orthodox Christians." The status of religious minorities in Turkey is further worsening because Turkish President Recep Tayyip Erdoğan and members of his Justice and Development Party (AKP) are openly challenging the 1923 Lausanne Treaty, which guarantees the rights of the aforementioned minorities in Turkey.

The Turkish government has mistreated its religious minorities even during the tenures of its former "secular" leaders, as evidenced by the pogroms in Turkey against the Greek minority during the 1950's. However, the state of religious freedom in Turkey has significantly deteriorated under its radical and rogue leader, President Erdoğan. President Erdoğan is different from previous Turkish leaders, insofar that he is grounded in the religio-nationalism of the Muslim Brotherhood. As such, he has taken steps to overturn Kemal Atatürk's legacy of secularism in Turkey, and is in part doing so through public conversions of formerly Christian monuments to Islamic centers. This has been most publicly exemplified by the re-

conversion of the Hagia Sophia and Church of the Holy Saviour in Chora, UNESCO-designated museums located in Istanbul, into mosques, in violation of the UNESCO convention and U.S. laws. In addition, President Erdoğan has destroyed UNESCO Heritage Sites where a significant number of religious and cultural minorities lived, including, but not limited to the Turkish city of Diyarbakir, where Turkey destroyed settlements and seized Christian churches, and the ancient Turkish town of Hasankeyf, the location of more than 300 archaeological sites.

Moreover, the Turkish government has tolerated assaults against its Greek Orthodox Christian religious minority and continues the illegal closure of the Greek Orthodox Halki Patriarchal School of Theology in Istanbul. These actions are not only against American values, but also American laws. Section 2804 of the FY98 Omnibus Emergency Supplemental Appropriations Act (PL 105-277) calls for the Turkish Government to safeguard the Ecumenical Patriarchate, its personnel, and its property, and to reopen the Halki Patriarchal School of Theology. Turkey

***These actions are not only against American values, but also American laws.***

also stands in violation of The International Religious Freedom Act of 1998 (IRFA).

In addition, the Turkish government actively persecutes Ecumenical Patriarch Bartholomew. The Ecumenical Patriarchate, located in Turkey, is the spiritual home of the world's oldest and

second largest Christian Church. Ecumenical Patriarch Bartholomew is the leader of 300 million Orthodox Christians worldwide. More specifically, the Ecumenical Patriarch has direct jurisdiction over the Greek Orthodox Archdiocese of America and thus is the spiritual and ecclesiastical leader of its 1.5 million adherents. As such, the Ecumenical Patriarch is, in a sense, also an American spiritual leader and should be afforded the protections of an American spiritual leader. Unfortunately, rather than safeguarding the Ecumenical Patriarch, the Turkish government has at times seized the Ecumenical Patriarch properties, and continues to deny the Ecumenical Patriarch's legal personality and international status. On multiple occasions, the European Court for Human Rights has ruled unanimously (including the Court's Turkish representative) in favor of the Ecumenical Patriarchate.

With respect to recent MOUs, the Department

of State unfortunately has not shared the specific text of what the MOUs say until they are published. However, it is clear that by acknowledging the Turkish government's right to control cultural heritage by repatriating it to Turkey under the terms of any MOU and 19 U.S.C. § 2609, the U.S. will both harm the interests of religious minorities within Turkey and embolden the Turkish government to continue its persecution. Any MOU between the United States and Turkey that authorizes import restrictions on archaeological or ethnological materials by necessity recognizes the Turkish government's rights to ownership or control of such artifacts. Erdogan's government would easily and predictably spin U.S. recognition of Turkey's rights to movable property subject to import restrictions as a *de facto* recognition of the Turkish Government's rights to all such property, including churches. The re-conversions of the Hagia Sophia and Church of the Holy Saviour in Chora, along with the Turkish government's

efforts to destroy or convert numerous minority cultural and religious sites, are clear displays of President Erdogan's obvious intentions.

If the U.S. Government agrees with the Turkish Government's proposal, President Erdogan will have the excuse that he needs to justify future conversion, destruction, or confiscation of minority religious sites and property. Rather than considering entering into cultural MoU agreements with the Republic of Turkey, we should look at ways to sanction Turkey for its violation of the UN Charter, UNESCO Convention, and U.S. laws, including IFRA, which obligates the President of the United States to take one or more of 15 enumerated actions toward a country that violates the Act. ♦

<sup>1</sup> Elias Gerasoulis is Director of Legislative Affairs for the American Hellenic Institute (AHI)

## Ninth Circuit Affirms Judgment that Spain's Thyssen-Bornemisza Collection May Keep Nazi-Looted Picasso

By: Amelia L.B. Sargent<sup>1</sup>

In an unpublished memorandum disposition filed August 17, 2020, the Ninth Circuit affirmed the United States District Court for the Central District of California's final judgment that the Kingdom of Spain's Thyssen-Bornemisza Collection Foundation (TBC) may keep Camille Picasso's *Rue St. Honoré, après midi, effet de pluie* (the "Painting"), because when TBC acquired the Painting in 1993 it lacked actual knowledge that the Painting previously had been stolen by the Nazi regime from its rightful owner.<sup>2</sup> Thus, as the district court found, TBC had acquired good title to the Painting under Spanish law. But also like the district court, the Ninth Circuit rebuked the TBC for taking a legal position seemingly counter to Spain's participation in international declarations on the return of Nazi-looted art.<sup>3</sup>

This is the fourth Ninth Circuit appeal in the long-winding, fifteen-year litigation between the Cassirer family and TBC. While the prior appeals focused on the myriad complex procedural issues, including issues of first impression that now routinely accompany Holocaust art cases in the United States — such as foreign sovereign immunity,<sup>4</sup> the statute of limitations,<sup>5</sup> and choice-of-law principles<sup>6</sup> — this appeal affirmed a final judgment on the merits from a bench trial held on December 4, 2018.<sup>7</sup>

As previously covered in this Newsletter,<sup>8</sup> the wartime provenance of the Painting is uncontested: The Nazi regime forced Lily Cassirer Neubauer to transfer the Painting in exchange for exit visas to leave Germany in 1939. Instead, the December 2018 bench trial focused on whether acquisitive prescription (adverse possession) principles under Spanish law applied such that TBC held good title to the

Painting by the time Cassirer's heirs brought suit.<sup>9</sup>

It was thus the third appeal ("*Cassirer III*") that truly sealed the Painting's fate, when the Ninth Circuit ruled that Spanish, not California, law governed the lawfulness of TBC's acquisition of the Painting. While California law follows the maxim that "a thief cannot pass good title," Spanish law provides that good title to stolen moveable property can pass after six years via principles of adverse possession. In 2015, the district court had previously found on summary judgment (which the Ninth Circuit affirmed) that TBC had possessed the Painting as an owner publicly, peacefully, and without interruption for more than six years as prescribed by Spanish Civil Code Article 1955.

The deciding question that the Ninth Circuit remanded for trial was whether an exception to Article 1955 applied to the situation at hand.

Article 1956 of the Spanish Civil Code provides that the six-year period of Article 1955 does not apply to "those who purloined or stole [the stolen property], or their accomplices or accessories [*encubridores*], unless the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations."<sup>10</sup> In *Cassirer III*, the Ninth Circuit interpreted Article 1956 as extending the period of possession from six to twenty-three years.<sup>11</sup> Thus, if TBC was an *encubridor* to the Nazi appropri-

ation of the Painting, good title did not pass.

At trial, the district court found that the TBC was not an *encubridor* to the Nazi appropriation of the Painting because it lacked "actual knowledge" that the Painting had been stolen at the time of purchase in 1993. Although TBC "benefitted from its possession of the Painting by displaying it at the Museum," the district court determined TBC lacked the "willful intent" or "willful blindness" necessary to indicate any actual knowledge.<sup>12</sup>

Apparently understanding that the application of Spanish law would be dispositive in the case, Plaintiffs' opening appellate brief in *Cassirer IV* took a bold gamble and requested as a threshold matter that the Ninth Circuit revisit its decision in *Cassirer III* en banc. Plaintiffs argued that

***While California law follows the maxim that "a thief cannot pass good title," Spanish law provides that good title to stolen moveable property can pass after six years via principles of adverse possession.***

the panel erred in holding that Spanish law governed their substantive claims, or that other legal principles and regimes pre-

cluded the application of acquisitive prescription under Spanish law.<sup>13</sup> The Ninth Circuit rejected Plaintiffs' argument because its prior holding was both law of the case and binding precedent.<sup>14</sup>

Plaintiffs also argued that district court applied the incorrect test to determine whether TBC had "actual knowledge" that the Painting was stolen; that the Painting's seller had actual knowledge of the Painting's origin which could be imputed to TBC (the seller being the foundation's name-

sake Baron Thyssen-Bornemisza); and that the record did not support the district court's finding that TBC lacked actual knowledge.<sup>15</sup> All of these were rejected as well, letting the district court's ruling stand.<sup>16</sup>

Like the district court, however, the Ninth Circuit admonished TBC and Spain<sup>17</sup> for what it viewed as the inconsistency of its litigation position with its moral obligations. The Ninth Circuit pointedly noted that Spain had previously agreed to the Washington Principles on Nazi-Confiscated Art and the Terezin Declaration on Holocaust-Era Assets and Related Issues, both of which called for participant countries to achieve "just and fair solution[s]" in remedying Nazi-era looting of art and cultural property.<sup>18</sup> The Ninth Circuit ultimately agreed with the district court that it could not order compliance with those declarations, saying, "It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations. But that is the state of the law."<sup>19</sup>

Plaintiffs filed their petition for rehearing and rehearing en banc on September 30, 2020, which was denied the petition on December 7, 2020. ♦

<sup>1</sup> The author submitted an amicus brief in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013) [*Cassirer I*] on behalf of the California Association of Museums in support of TBC while at a different firm, an amicus brief in the district court before trial on behalf of the Kingdom of Spain, and an amicus brief in the instant appeal, *Cas-*

*sirer v. Thyssen-Bornemisza Collection Foundation*, 824 Fed. Appx. 452 (9th Cir. 2020) [*Cassirer IV*]. The views set forth in this article are the author's own.

<sup>2</sup> *Cassirer IV*, 824 Fed. Appx. at 455.

<sup>3</sup> *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

<sup>4</sup> *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2020) (en banc) [*Cassirer I*]

<sup>5</sup> *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013) [*Cassirer II*]

<sup>6</sup> *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017) [*Cassirer III*]

<sup>7</sup> Findings of Fact and Conclusions of Law, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, CV 05-3459-JFW (Ex), ECF 621 (Apr. 30, 2019) ["Findings"].

<sup>8</sup> Amelia L.B. Sargent, *Spain's Thyssen-Bornemisza Collection Foundation Prevails at Trial to Keep Nazi-Looted Pissarro*, American Bar Ass'n Section of Int'l Law, Art & Cultural Heritage Law Newsletter, at 4-6 (Spring 2019).

<sup>9</sup> The district court also considered whether Baron Hans Heinrich Thyssen-Bornemisza possessed the Painting in good faith for at least five years under Article 728 of the Swiss Civil Code, such that he acquired good title and passed said title to TBC. The district court ultimately found the Baron lacked such good faith.

<sup>10</sup> Spanish Civil Code Art. 1956 (English translation).

<sup>11</sup> *Cassirer III*, 862 F.3d at 966.

<sup>12</sup> See Sargent, *supra*, note 8 at p. 6; Findings, *supra* note 7, at pp. 26-30.

<sup>13</sup> *Cassirer IV*, 824 Fed. Appx. at 455. Specifically, the Plaintiffs requested the Ninth Circuit revisit its holding that "(1) Spanish law governs their substan-

tive claims; (2) the Holocaust Expropriated Art Recovery Act does not bar Spain's acquisitive prescriptive defense; (3) Spain's Historical Heritage Law does not prevent TBC from acquiring the Painting by acquisitive prescription; (4) Spain's acquisitive prescription laws did not violate the European Convention on Human Rights; (5) and Spain satisfied the element of public possession necessary to establish acquisitive prescription under Spanish law." *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Cassirer IV*, 824 Fed. Appx. at 455-57.

<sup>16</sup> *Id.*

<sup>17</sup> The TBC is a state-run entity, and previously found to be an "agency or instrumentality" of the Kingdom of Spain.

<sup>18</sup> *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

<sup>19</sup> *Cassirer IV*, 824 Fed. Appx. at 457 n.3.

***"It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations. But that is the state of the law."***

## Frontiers in Art: Artistic Freedom as an International Human Right

By: Martin Aquilina<sup>1</sup>

### FREEDOM OF EXPRESSION/ARTISTIC FREEDOM

The freedom to express oneself is a fundamental human right that is an indispensable condition for the full development of the individual and of society. It is, in effect, a foundational pillar to a free and democratic society.<sup>2</sup> Freedom of expression is recognized in virtually all of the international and regional human rights treaties and is represented to some degree in nearly every constitution in the world. As for artistic expression, one can hardly discuss it in a legal framework without a nod to so-called cultural rights. Notwithstanding that the definition of culture presents some challenges, there is consensus in the literature that cultural rights are an integral part of human rights,<sup>3</sup> though the question of how and where cultural rights are to be integrated in the traditional taxonomy of economic, civil, social and political rights also presents some challenges.

One area where freedom of expression and culture intersect is in the realm of visual arts,

which are of universal importance to the human experience of creation. The *United Nations Educational, Scientific and Cultural Organization* ("UNESCO") defines artistic freedom as "the freedom to imagine, create and distribute diverse cultural expressions free of governmental censorship, political interference or the pressures of non-state actors. It includes the right of all citizens to have access to these works and is essential for the wellbeing of societies."<sup>4</sup> Like the broader freedom of expression, artistic freedom must be considered a human right.

Concerns regarding the freedom of expression tend to be focused on news media and journalism rather than artists and the arts, overlooking the fact that artists are at risk of human rights violations worldwide as a result of their artistic creations.<sup>5</sup> Perhaps more so than with journalistic information, artistic expression can be influenced and restricted by both state and non-state actors. While some restrictions are recognized and sanctioned by international or nation-

al law, others are not, thus tasking the international community with two questions: what is the value of art as personal and political expression and how does international law manage to balance the need to protect artists and their ability to create and critique while ensuring the protection of other important rights such as that the right to dignity or societal norms of decency.

***Like the broader freedom of expression, artistic freedom must be considered a human right.***

### THE IMPORTANCE OF ARTISTIC EXPRESSION

Art is a vessel of personal and political expression, as it serves as a means for persons to express their individual and collective thoughts and feelings, triggering the recognition of one's own humanity.<sup>6</sup> In addition to helping alleviate the artist and audience's own anguish, visual art may memorialize human rights abuses and suffering, providing a means of witnessing and

distributing shame as well as accountability.<sup>7</sup> For example, Pablo Picasso's *Guernica* exposed the brutality that civilians were subjected to through aerial bombings during the Spanish Civil War;<sup>8</sup> Morris Kestelman's *Lama Sabachthani* captures the suffering of Jews that took place in occupied Poland during the Holocaust;<sup>9</sup> and since 2006, Bosnian artist Aida Šehović has organized a public monument known as *'Što te Nema?* to memorialize the 8,372 victims of the Srebrenica massacre during the Balkan wars.<sup>10</sup>

While it is often the case that art is created to be beautiful, inspirational or decorative, artists often consider it necessary to challenge the status quo and societal complacency. Art then becomes a medium through which the artist seeks to establish an understanding between individuals or communities and the observer. Alongside the audience or an artist's inner feelings and emotions, people can thus share political ideas or question their world.<sup>11</sup> However, "art with a mission" can be disconcerting for the audience.<sup>12</sup> Farida Shaheed, a UN Special Rapporteur in the field of cultural rights, indeed noted that "artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centers."<sup>13</sup> Art has a tested history of being part of protestation, including by denouncing human rights abuses and inspiring individuals to advocate for human rights causes.<sup>14</sup> In this sense, artistic expression is an invaluable indicator of democratic health.<sup>15</sup>

In sum, be it for individual or communal self-fulfillment, communication, political messaging, or *l'art pour l'art*, artistic expression is crucial for the maintenance of vibrant societies that broaden perspectives on political, cultural and social issues.<sup>16</sup>

## LEGAL INSTRUMENTS THAT PROTECT FREEDOM OF EXPRESSION

Artistic freedom requires protection and a means of adequately balancing other competing rights, societal concerns, and individual interests.

### International Instruments and the Freedom of Expression

The International Bill of Human Rights consists of the *Universal Declaration of Human Rights* ("UDHR"), the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), and the *International Covenant on Civil and Political Rights* ("ICCPR"), which all address freedom of artistic expression to a degree or another.

The UDHR was adopted by the UN General Assembly in 1948 as a non-binding declaration that does not impose mandatory reporting upon its signatories. Article 19 stipulates that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas

through any media and regardless of frontiers."<sup>17</sup> Article 27 of the UDHR provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."<sup>18</sup> Together, these two provisions enshrine the protection to be given to both the transmission and reception of artistic expression.

The ICESCR mirrors the UDHR in its Article 15, which recognizes the right of everyone to not only participate in cultural life but also to enjoy the benefits garnered from that participation. Parties under the ICESCR must work to promote the conservation, development and diffusion of science and culture and to "respect the freedom indispensable for scientific research and creative activity."<sup>19</sup> As for the ICCPR, its protection of freedom of expression includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [the individual's] choice."<sup>20</sup>

The ICESCR and the ICCPR both pack a little more punch than the UDHR however as signatory nations are required to submit reports every five years, in the case of the former, to the Committee on Economic, Social and Cultural Rights and, in the case of the latter, to the United Nations Human Rights Committee, tracking their conduct against the respective instruments.

### International Instruments and Artistic Expression

UNESCO is a specialized agency of the United Nations tasked with, *inter alia*, "fostering cultural diversity, [and] intercultural dialogue."<sup>21</sup> Artistic freedom appeared as a distinct right for the first time in the UNESCO 1980 Recommendation Concerning the Status of the Artist (the "1980 Recommendation"), where it was affirmed that art plays an essential role in the life and development of the individual and of society and that States therefore have a duty to "protect, defend and assist artists and their freedom of creation."<sup>22</sup> Despite its non-binding nature, the 1980 Recommendation remains so far the principal standard-setting instrument specifically dedicated to the status of the artist.

The 1980 Recommendation does not mandate the adoption of legislation to improve the situation of artists. However, some Member States, such as Canada, Burkina Faso, Lithuania, and Morocco, have chosen to do so. Laws relating to the status of the artist generally aim to achieve the following two objectives:

- a) acknowledging the important role that artists play in every human society; and
- b) encouraging creative expression and ensur-

ing equitable treatment for professional artists by developing appropriate measures which respond to their unique circumstances and the atypical manner in which they work.<sup>23</sup>

The commonality between these laws is to define what is a professional artist, to recognize artistic associations, and to outline the rights and responsibilities of such associations. They offer security of tax status and access to grants, prizes and social security.<sup>24</sup> For example, the Canada Revenue Agency (CRA) has adopted special practices which acknowledge the specific nature of

the timeframe artists require to become profitable.<sup>25</sup> There are special deduction rules for salaried artists as well as the ability to carry these forward to future years. CRA officials also have flexibility to extend the tax assessment period for professional artists.<sup>26</sup> Other states, such as Croatia, Slovenia and Togo have health insurance, pensions, disability and unemployment benefits for registered artists.<sup>27</sup>

The 1980 Recommendation has been augmented by other international instruments. Most notably, UNESCO's 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the "2005 Convention") further recognizes governments' rights to introduce policies to promote cultural expression. It advocates the necessity of governmental protections towards both the economic and cultural dimension of arts ensuring training, social security, employment, income and tax conditions and mobility and freedom of expression while simultaneously upholding values, social inclusion and the individual's sense of belonging.<sup>28</sup>

Under the 2005 Convention, parties are recommended to adopt any such measure that nurtures and supports artists and others in the creation of cultural expressions. The 2005 Convention has helped some nations recognize that their policies are outdated and lead to the broader adoption of frameworks in places such as in Ethiopia or Zimbabwe. For example, in 2018, 250 cultural professionals gathered in Addis Ababa to attend public consultations organized by UNESCO and the Ethiopian Ministry of Culture and Tourism to discuss steps to implement cultural policies that adhere to the 2005 Convention.<sup>29</sup> Zimbabwe, after ratifying the 2005 Convention in 2008, launched the "Cultural Lens Index", which is an amalgamation of qualitative and quantitative monitoring frameworks and is designed to encapsulate Zimbabwe's compliance with the 2005 Convention.<sup>30</sup>

Other countries have adopted new legislation or created new regulatory bodies to support artistic activities (e.g. national councils on the arts and culture involving participation from professionals, public funds to support cultural activities, etc.) such is the case of Burkina Faso, Estonia, Georgia, Kenya, Palestine, Senegal, Slovakia,

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Togo, and Tunisia.<sup>31</sup>

### III. Supranational Instruments

Various supranational instruments provide aspirational protections to artistic freedom similar to those previously outlined. Article 10 of the European Convention on Human Rights (the “ECHR”) is the cornerstone of freedom of expression protection in Europe and asserts that freedom of expression is a fundamental right subject to certain restrictions that are “in accordance with the law” and “necessary in a democratic society.”<sup>32</sup> These restrictions include: interests of national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or the rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.<sup>33</sup>

For its part, Article 11 of the Charter of Fundamental Rights of the European Union (the “EU Charter”), states that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” whereas Article 13 provides more particularly that “the arts [...] shall be free of constraint.”<sup>34</sup>

Article 9 of the *African Charter on Human and Peoples' Rights*, Article 13 of *The American Convention on Human Rights*, and Article 23 of *The Association of Southeast Asian Nations Intergovernmental Commission on Human Rights* all provide similar protection to artistic expression through the broader lens of freedom of expression.

### IV. National Instruments

National constitutions may address the question of artistic freedom by enshrining either negative or positive rights for citizens. “Positive rights” can be described as an individual’s claim to something, while “negative rights” are a call for the prohibition of some action or the right not to be interfered with. Oftentimes, a positive right will be enunciated as a goal to be achieved through direct state intervention.<sup>35</sup> A few examples from various national constitutional orders are provided below.

#### Negative Rights

The *Canadian Charter of Rights and Freedoms* is a fundamental part of Canada’s Constitution through which individuals are guaranteed a broad range of freedoms, including freedom of thought, opinion and expression. In the *Irwin Toy Ltd.* case,<sup>36</sup> the Supreme Court of Canada was asked to decide whether a law that curtailed advertising aimed at children infringed upon the advertiser’s right to expression. The Court held that freedom of expression is a

notion that is to be construed liberally and broadly. In its decision, a majority of the Court ruled that “whether political, religious, artistic or commercial, freedom of expression should not be suppressed except where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.”<sup>37</sup> The Court considered the scope of expression, defining it broadly as any activity that “attempts to convey meaning”. However, it excluded activities that are “purely physical and [do] not convey or attempt to convey meaning” as well as activities that take on a violent form.<sup>38</sup>

While Article 20 of the Constitution of the Republic of Colombia guarantees the right to freedom of expression, its Article 71 deals more directly with artistic expression by stipulating that “the search for knowledge and artistic expression are free to be pursued.”<sup>39</sup> Perhaps such a provision was considered necessary as Article 20, part of the *Fundamental Rights* section, is apparently geared to freedom of the press, stating “every individual is guaranteed the freedom to express and diffuse his or her thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass communications media [...] There is no censorship.”<sup>40</sup> Thus, although “freedom of expression” is a fundamental right, the Colombian constitution emphasizes the facet thereof that relates to

**Article 11 of the Charter of Fundamental Rights of the European Union states that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” whereas Article 13 provides more particularly that “the arts [...] shall be free of constraint.”**

freedom of speech. Nevertheless, should a violation of the freedom of artistic expression occur, Article 71, which forms part of the Constitution’s palette of social, economic and cultural rights, is in place as protection.

#### Positive Rights

The Romanian constitution deserves to be noted as it specifically protects freedom of creation and expression of thoughts, opinions or beliefs by words, writing, in pictures, by sounds or any other means of communication. Moreover, it contains the obligation to preserve the national culture and promote Romanian cultural and artistic values throughout the world, though it does place explicit limits on the author or producer of a public artistic performance in the forms of defamation and civil liability.<sup>41</sup>

Similarly, the Bulgarian Constitution notes that “the State shall establish conditions favourable to the free development of science, education and the arts, and shall assist in that development. It shall organize the conservation of all national monuments of history and culture.”<sup>42</sup>

A final example of a positive constitutional right

is that of the Greek constitution, which describes more broadly that “art and science, research and teaching, shall be free and their development and promotion shall be an obligation of the State.”<sup>43</sup> ♦

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<sup>2</sup> Emily Howie, “Protecting the human right to freedom of expression in international law”, (2018) 20:1 *International Journal of Speech-Language Pathology* 12-15 at 12.

<sup>3</sup> See for example Francioni F., Culture, Heritage and Human Rights: An Introduction, in: Francioni and Scheinin, *Cultural Human Rights*, pp. 1-15; General Comment No. 21 E/C.12/GC/21, adopted by the Committee on Economic, Social and Cultural Rights at its 43<sup>rd</sup> session (1999), at para. 1. See also Universal Declaration on Cultural Diversity, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001, at Article 5.

<sup>4</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), *Artistic Freedom* (Paris: UNESCO, 2019) at 2.

<sup>5</sup> European Union Agency for Fundamental Rights: *Exploring the Connections Between Arts and Human Rights : Report of high-level expert meeting Vienna, 29 – 30 May 2017*, (Luxembourg: European Union Agency for Fundamental Rights, 2017) at 7.

<sup>6</sup> Srirak Pliapat, *The State of Artistic Freedom 2019: Whose Narratives Count?*, (Copenhagen: Freemuse, 2019) pg 6; Foreign Affairs Council, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, (Brussels: Council of the European Union, 2014) at 1.

<sup>7</sup> European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights : Report of high-level expert meeting Vienna, 29 – 30 May 2017*, (Luxembourg: European Union Agency for Fundamental Rights, 2017) at 12.

<sup>8</sup> European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights : Report of high-level expert meeting Vienna, 29 – 30 May 2017*, (Luxembourg: European Union Agency for Fundamental Rights, 2017) at 12.

<sup>9</sup> Imperial War Museum, *Artists' Responses to the Holocaust* (July 4, 2018), online: <https://www.iwm.org.uk/history/artists-responses-to-the-holocaust>.

<sup>10</sup> Aida Šehović (July 11, 2006) *Bašćaršija, SARAJEVO, Bosnia and Herzegovina* online: <https://www.aidasehovic.com/stotenemasarajevo-2006>.

<sup>11</sup> Srirak Plipat, *The State of Artistic Freedom 2019: Whose Narratives Count?* (Copenhagen: Freemuse, 2019) pg 6.

The works of Manitoban Cree artist, Kent Monkman, critique Canada's societal foundation. His works have dealt with modern day or historical manifestations of colonialism, all through the prism of his own indigenous perspective. In particular, his "Protector Series" is a damning condemnation of the violence incurred by protectors at the Dakota Access Pipeline Protests at the hands of government officials. Such artwork brings the concerns and views of traditionally silent voices to the world; Jessica Wong, *'Big, bold, audacious' Kent Monkman artworks 'at home' at the Met, says curator* (December 17, 2019), online <https://www.cbc.ca/news/entertainment/kent-monkman-met-new-paintings-1.5395216>; European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights : Report of high-level expert meeting Vienna, 29 – 30 May 2017*, (Luxembourg: European Union Agency for Fundamental Rights, 2017) at 12.

<sup>12</sup> Elena Tănăsescu, "Artistic Freedom and its Limitations" (2011) 1 *Revista Română de Drept Comparat* 9-53 at 26.

<sup>13</sup> Garry Neil, *Full Analytic Report (2015) on the implementation of the UNESCO 1980 Recommendation concerning the Status of the Artist* (Paris: United Nations Educational, Scientific and Cultural Organization, 2015) at 41.

<sup>14</sup> European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights : Report of high-level expert meeting Vienna, 29 – 30 May 2017* (Luxembourg: European Union Agency for Fundamental Rights, 2017) at 12.

<sup>15</sup> Srirak Plipat, *The State of Artistic Freedom 2019: Whose Narratives Count?* (Copenhagen: Freemuse, 2019) at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No

13, UN Doc A/810 (1948) Article 19.

<sup>18</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) Article 27.

<sup>19</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, at 3, Article 15.

<sup>20</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) Article 19.

<sup>21</sup> UNESCO, *UNESCO* (2010), online: <https://unesdoc.unesco.org/ark:/48223/pf0000188700> at 4.

<sup>22</sup> UNESCO, *1980 Recommendation concerning the Status of the Artist*, 27 October 1980, 21st Session, 21 C/Resolutions pg 149.

<sup>23</sup> Garry Neil, *Full Analytic Report (2015) on the implementation of the UNESCO 1980 Recommendation concerning the Status of the Artist*, (Paris: United Nations Educational, Scientific and Cultural Organization, 2015) at 2.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> Under Canadian income tax principles, in order for income to qualify as business income, a characterization which inter alia permits the artist to deduct expenses, a taxpayer's activity must show "a reasonable expectation of profit." Thus, an aspiring artist runs the risk of being considered a hobbyist rather than a business owner, which will deprive him or her of a beneficial tax regime.

<sup>26</sup> Garry Neil, et al., *Status of the Artist in Canada: An Update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist*, (Ottawa: Canadian Conference of the Arts, 2010) at 18.

<sup>27</sup> Garry Neil, *Full Analytic Report (2015) on the implementation of the UNESCO 1980 Recommendation concerning the Status of the Artist*, (Paris: United Nations Educational, Scientific and Cultural Organization, 2015) at 5.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> UNESCO *Diversity of Cultural Expressions, Putting in motion a new vision for Ethiopia's*

*cultural policy*, (May 14, 2019), online: <https://en.unesco.org/creativity/news/putting-motion-new-vision-ethiopia-cultural-policy>

<sup>30</sup> Paul Damasane, Zimbabwe 2016 report, (Harare: National Arts Council of Zimbabwe and Ministry of Rural Development, Preservation and Promotion of Natural Culture and Heritage, 2016)

<sup>31</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), *Reshaping Cultural Policies: Advancing Creativity for Development*, (Paris: UNESCO, 2018) pg 38.

<sup>32</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 Article 10.

<sup>33</sup> *Id.*

<sup>34</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02 Article 11, Article 13.

<sup>35</sup> For a discussion of the distinction between these rights, see Ran Hirschl, *"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights, in an Emerging Neo-Liberal Economic Order*, *Human Rights Quarterly*, Volume 22, Number 4, November 2000, pp. 1060-1098.

<sup>36</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927.

<sup>37</sup> *Id.* at 1009.

<sup>38</sup> *Id.* at 978.

<sup>39</sup> Constitución Política de Colombia [Colombia], 27 October 1991 Article 71.

<sup>40</sup> Constitución Política de Colombia [Colombia], 27 October 1991 Article 20.

<sup>41</sup> Elena Tănăsescu, "Artistic Freedom and its Limitations" (2011) 1 *Revista Română de Drept Comparat* 9-53 pg 15 [6]; *Constitution of Romania*, Monitorul Oficial, Part I, No. 233 dated 21 November 1991 Article 30.

<sup>42</sup> Constitution of the Republic of Bulgaria, 13 July 1991, Article 23.

<sup>43</sup> *The Constitution of Greece* [Greece], 18 April 2001 Article 16.

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