



Annabelle Spence, Alessandro Chechi, Marc-André Renold

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Case Biccherna Panel – Anonymous Heirs and British Library

British Library – United Kingdom/Royaume-Uni – Spoliation Advisory Panel – Artwork/oeuvre d'art – Nazi looted art/spoliations nazies – Conciliation – Negotiation/négociation – Settlement agreement/accord transactionnel – Deaccession – Ownership/propriété – Procedural issue/limites procédurales – Unconditional restitution/restitution sans conditions – Financial compensation/indemnisation

In 2013, the British Library was contacted by the heirs of A.S. Drey, a Munich firm whose assets were sold off by Nazis in 1936. The heirs requested the return of the “Biccherna Panel”. As the law of the United Kingdom prevented the British Library from returning the Panel autonomously, the heirs lodged a claim with the Spoliation Advisory Panel. The Panel found in favour of the claimants, determining that the Panel had been forcibly sold, and should be returned. However, following negotiations, the heirs accepted compensation in lieu of return, allowing the Panel to remain in the British Library.

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ART-LAW CENTER – UNIVERSITY OF GENEVA

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art-adr@unige.ch – <https://unige.ch/art-adr>

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I. Chronology

Nazi looted art

- **December 1935:** The “Biccherna Panel” was at the gallery of A.S. Drey, a Munich firm run by Jewish shareholders.¹ Nazi officials conducted investigations into the firm’s finances, and fabricated information to justify the imposition of extortionate tax demands.²
- **June 1936:** Unable to meet the tax demands, the gallery’s assets were sold off during a two-day auction at the Aryanised Berlin auction house of Paul Graupe. The Panel was sold to an unidentified purchaser.³
- **24 June 1942:** The Biccherna Panel was sold at a Sotheby’s auction by Arthur Bendir.⁴ It was acquired by Henry Davis.⁵
- **1968:** Henry Davis donated the Panel to the British Museum.
- **1977:** Following Henry Davis’ death the work was transferred to the National Library as a part of a collection of bookbindings known as the Henry Davis Gift. The Board of the British Library thus acquired title to the Panel.
- **June 2013:** The claimants (the surviving heirs of the five former shareholders of A.S. Drey) contacted the British Library and requested the return of the Biccherna Panel.⁶ The British Library was unable to meet this request.
- **11 July 2013:** The claimants lodged a claim with the Spoliation Advisory Panel (SAP).⁷
- **12 June 2014:** The case came before the SAP. The Panel concluded the claimants’ moral claim was sufficiently strong as to warrant the return of the Panel.⁸

¹ Painted in 1488 by Guidoccio Cozzarelli, the panel was originally used to cover documents in the Palazzo Pubblico treasury in the city of Siena, Italy. Bartoli, “Lost and Found, The Biccherna Panel”, 2019.

² Biccherna Panel report, 2014, paras 1, 5.

³ Ibid., paras 4, 6.

⁴ Bartoli, “Lost and Found, The Biccherna Panel”, 2019.

⁵ Biccherna Panel report, 2014, para 6.

⁶ Ibid., para 27.

⁷ The Spoliation Advisory Panel was established by the UK Government’s Department for Culture, Media and Sport in 2000. It consists of a group of expert advisors, appointed by the Secretary of State, in accordance with section 3 of the Holocaust (Return of Cultural Objects) Act 2009. Article 2 of the Panel’s Rules of Procedure states: “The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object during the Nazi era (1933 to 1945) where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit [...]. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner”.

⁸ Biccherna Panel report, 2014, para 32.

II. Dispute Resolution Process

Conciliation – Negotiation – Settlement agreement

- The claimants wrote to the British Library in 2013, informing them of the Biccherna Panel's provenance, and requesting its return.⁹ They provided evidence of the findings of a case heard by the SAP in 2004, which concerned another item from the A.S. Drey collection, which was also sold at the 1936 auction.¹⁰ In this case, the SAP found in favour of the claimants and the item was successfully repatriated.¹¹
- The British Library claimed they had no idea the Panel had been forcibly sold by Nazis at the time they were contacted about by the heirs. This information was not provided when the Library acquired the Biccherna Panel in 1977, and had not come to light during cataloguing procedures conducted in 1984 and between 1979 and 2010.¹²
- The British Library engaged in amicable correspondence with the claimants acknowledging their role in the failure to identify the work's provenance. However, given restrictions placed on their ability to dispose of items in the collection by the British Library Act of 1972, the Library was unable to autonomously reach a decision as to the future of the Panel.¹³
- The case came before the SAP a month after the claimants and the Library began their correspondence.¹⁴ To support their claim, they provided the Panel with significant documentation, including: a formal declaration given in 1954 by a secretary of one of the firm's shareholders; a ledger collating the inventory of the firm's gallery at the time of the auction, including the cost of each item; a report by a historian from May 2013, which provided extracts from Reich Chamber of Culture files; and an agreement made between the firm's shareholders and the dealer who took control of the firm's business after its Aryanisation in 1936, which was concluded at the Restitution Agency of Upper Bavaria.¹⁵

⁹ Ibid., para 27.

¹⁰ See Caroline Renold, Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Pâté de Jambon – Anonymous German Heirs and Glasgow City Council," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

¹¹ Still Life report, 2004, para 36.

¹² Biccherna Panel report, 2014, paras 23-28.

¹³ Ibid., paras 8, 33.

¹⁴ The claimants asked to remain anonymous, as per their right under Article 8 of the European Convention on Human Rights. Ibid., para 2.

¹⁵ Ibid., para 14.

III. Legal Issues

Deaccession – Ownership – Procedural issue

- The ability of the British Library to legally remove the Panel from the collection and return it to the heirs required a determination of the SAP. The British Library is unable to dispose of items in its collection due to the operation of Schedule 1, Section 11(4) of the British Library Act 1972. According to this section, the Library may only dispose of an article transferred to them if the article meets a number of strict criteria. Although Section 11(4)(c) states that the Library may dispose of an item in its collection which it believes to be “unfit to be retained”, such items must be disposed of “without detriment to the interests of students”. Given the significant historical value of the Biccherna Panel, it is considered by the Library as an important artefact for further research and study. Therefore, the Panel could not be legally deaccessioned, unless the provisions of the British Library Act were overridden by those of the Holocaust (Return of Goods) Act 2009.¹⁶ Under this Act, prohibitions on disposal of items can be overcome in the case of the SAP finding a claimant to have a sufficient moral claim to an item.¹⁷ The SAP found the claimant’s claim to be sufficiently strong and, with nothing in the deed of gift prohibiting the transfer of the item,¹⁸ they saw fit to recommend its return.¹⁹
- In order to determine that the Biccherna Panel was fit to be returned, certain issues relating to its provenance required consideration by the SAP. The first issue was whether it had been subject to forced sale. In making their claim to the SAP, the heirs cited another 2004 case, in which the Panel concluded that the 1936 auction was an example of a forced sale.
- The SAP determined in the earlier case that in December 1935 Nazi officials subjected the gallery to a tax and foreign exchange investigation, which failed to yield any incriminating evidence. Dissatisfied, officials forced the gallery’s senior partner to sign a declaration falsely confessing that additional profits earned by the gallery between 1925-1934 should be subject to supplementary taxation. The shareholders were also accused of serious fictitious offences, and subjected to significant penalties. Although the firm had suffered losses since the start of the Nazi regime, officials reported that these were in fact profits, and required the payment of tax. Therefore, given the significant tax demands on the firm, they were forced to sell all its assets, including paintings, drawings, statues, armoury and furniture, at auction in 1936. The firm were not permitted to set prices for any of their items, and thus many were sold far below market value. Therefore, on the basis of this evidence, the Panel concluded in 2004 that the sale was forced, as a result of the extortionate tax demands.²⁰ The SAP upheld its previous decision in this case.
- The second issue the SAP was required to determine was which of the parties had the best title to the Biccherna Panel. The SAP considered the Panel’s chain of ownership, concluding

¹⁶ Ibid., para 8.

¹⁷ Holocaust (Return of Goods) Act 2009, Section 2.

¹⁸ Ibid., Section 2(6).

¹⁹ Ibid., Section 2(1)-(2).

²⁰ Still Life report, 2004, paras 12, 19-20.

that while the A.S. Drey shareholders were the legal owners of the painting prior to the auction, the auction did confer good title on the acquirer, which was then passed down to the Board of the British Library.²¹ Furthermore, they argued that even if the circumstances of the auction did not pass title to the purchaser, the sale of the Panel by Sotheby's in 1942 would have initiated a six-year limitation period.²² If this were the case, then the shareholders' original title to the Panel expired in 1948, resulting in good title passing to the Board of the British Library.²³

- Thirdly, and most importantly, the SAP considered moral rights to the Panel. The SAP was unable to determine who purchased the Panel at the 1936 auction, and the full chain of custody before the Panel was auctioned at Sotheby's. It is unclear if the purchaser and donor, Henry Davis, was ever aware of the Panel's full provenance, as there are no records indicating that an investigation was made into the provenance of items in his collection. When the gift was made to the British Museum in 1968, the collection inventory provided to the Museum only contained information regarding the immediate provenance of each item. The British Library's Board submitted that generally, when a collection is gifted, the focus of assessments is the suitability of the collection as a whole for the institution, and the quality of the items, rather than their provenance. The Board further submitted that typically, enquiries into the provenance of an item are conducted based on risk, and tend to focus on the most valuable items, which are more likely to be of significant interest to spoliators. In the case of Henry Davis' gift, the items in his collection were considered low risk given that they were predominantly purchased from local dealers. The SAP conceded, in light of this information, that the British Library's policy of adopting a risk-based approach to provenance investigations is justified, given the volume of works in their collection, acknowledging that the gap in the Panel's provenance was unlikely to have been identified in the absence of the claimant's raising the issue, or a stricter review of the collection's provenance. The claimants argued they had placed the Biccherna Panel on the German Lost Art Database in 2008, however the Library argued that, as the database is largely made up of artworks as opposed to bibliographic material, it does not regularly search the database, and was thus not aware of the claim.²⁴
- In light of the above three issues, the SAP was also required to consider the most appropriate remedy to be adopted. The Library indicated that their preferred remedy would be one which would allow the work to remain in the British Library. They submitted that the Panel forms a part of a "remarkable" collection of bindings, which is the subject of extensive research into the various ways in which books and documents have been treated in a range of practical and cultural settings, as well as the patronage of Pandolfo Patricci in Siena. They submitted that the Panel itself was of particular importance, as two forgeries of the work were created. The Library also submitted that retaining the work would ensure it could be kept in optimum environmental conditions, would be cared for by expert conservators, and would be available to the wider public, both through its display in the

²¹ Biccherna Panel report, 2014, para 22.

²² Limitation Act 1939, Section 2.

²³ Biccherna Panel report, 2014, para 22.

²⁴ Ibid., paras 6, 22-25, 27-28.

Library, and through loans to other institutions. The SAP stipulated that one of their primary operating principles is that the importance of a spoliated object to a national collection, or the integrity of a particular gift or collection is not a fundamental consideration.²⁵

IV. Adopted Solution

Unconditional restitution – Financial compensation

- On 12 July 2014, the SAP concluded that the claimants had an adequate moral claim to the Panel, and thus it should either be returned to them, or they should be compensated accordingly. The SAP left it to the parties to decide which method they preferred.²⁶
- The British Library accepted the ruling, however, in a press release issued on the day of the decision, they stated that, as the SAP found it acceptable for the library to pay compensation in lieu of return, they would make every effort to retain the Biccherna Panel in order to ensure its availability for research and to keep the Henry Davis Gift intact.²⁷
- Following this statement, the British Library was able to come to an agreement with the heirs. The Library provided the heirs with monetary compensation, in lieu of restitution.
- As a result, the Biccherna Panel remains on display in the British Library Treasures Gallery to this day, with a note to inform visitors of its troubled past.²⁸

V. Comment

- The outcome of this case raises the question of whether, in all cases, restitution and return are the best option to resolve spoliation claims. In this case, the outcome represented a win-win situation as the claimants received financial compensation, but the British Library was able to retain the Biccherna Panel, allowing it to be kept in optimal conditions, available for the public to enjoy, and researchers to study.
- However, this is not the case in all situations. It can be argued that, in some cases, returning significant artefacts to the heirs of their original owners can be damaging to the items both physically, and in relation to their use for research. Peters argues that some restitutions create what he describes as a “barren return”, “zero-sum solutions” in which there is little to no mutual gain for parties involved. He argues that rather than placing the interests and property rights of parties at the forefront, it is also important to consider the best interests of the cultural property itself. Therefore, considerations such as how well the item will be cared for, and its availability as a learning tool should also be considered as a part of the work’s best interests. Although the SAP makes recommendations on the basis of moral rights, and does not consider elements such as a work’s role as a part of a collection, more

²⁵ Ibid., paras 18-20.

²⁶ Ibid., para 34.

²⁷ “The Biccherna Panel – Spoliation Advisory Panel report published”, 2014.

²⁸ Bartoli, “Lost and Found, The Biccherna Panel”, 2019.

should be done to encourage the Panel to consider a work's future, in the knowledge that cultural property should be dealt with in a manner that reflects its status as the "interest of all humankind".²⁹

- A related issue is the question of whether British museums should be able to voluntarily deaccession items from their collection, especially those which have been misappropriated. In the UK, 85.5% of museums have a policy which addresses disposal or deaccession of objects. Such policies generally conform to accepted standards in the sector and are influenced by museum governance.³⁰ However, regardless of the policies of individual museums, there is a general presumption against museum deaccession in the UK, as many museums in the UK are "creatures of statute", and require statutory authorisation to enable deaccession to occur. This is due to the operation of the Museums and Galleries Act 1992, which prevents the return of works unless by an act of Parliament.³¹ This is largely motivated by generally accepted notion that pieces should remain in a museum collection, as they belong to the "domaine public".³² In light of this, it is clear that the movement of objects to and from museums is complex, and governed by numerous principles. Especially in the UK, the need to cooperate with government policies to ensure the funding necessary to continue the operation of museums, resulting in limits on their flexibility and ability to consider the validity of claims to their items. As to whether UK museums should be able to deaccession items in their collection voluntarily, there have been pushes for greater independence by organisations such as the National Museums Directors' Conference (NMDC).³³ While museums should be granted a degree of freedom in their ability to dispose of their collection as they please, requiring external permission from an additional body, governmental or otherwise, does provide an important safeguard, and ensures that claims can be considered impartially, through a weighing up of arguments presented by both sides. While the moral claims of those who have been dispossessed of cultural property are in some cases sufficiently strong to justify deaccession, as previously discussed, there is also a clear justification for museums retaining items subject to spoliation claims in order to ensure their continued protection and contribution to research. Strict governmental controls may not be the most appropriate means of ensuring a just outcome in all cases, however the reasoning underpinning them is sound, prioritising the needs of the many against the needs of the few, and ensuring that the cultural heritage of mankind can be experienced by the greatest number of people. Furthermore, in cases where the decision is made to return a disputed item to a claimant, this should only take place after museums and other advisory bodies have received assurances that the items will be appropriately cared for, and potentially also available for use in future research.

²⁹ Peters, "Complementary and Alternative Mechanisms Beyond Restitution", 2011, pp. 65, 68, 177.

³⁰ Davies, "Disposals: Debate, Dissent and Dilemma", p. 382.

³¹ Range, "Deaccessioning and Its Costs in the Holocaust Art Context", p. 661.

³² Schönenburger. *Restitution of Cultural Assets*, p. 159.

³³ Range, "Deaccessioning and Its Costs in the Holocaust Art Context", p. 663.

VI. Sources

a. Bibliography

- Davies, Peter. “Disposals: Debate, Dissent and Dilemma” in *Museums and disposals debate*, ed. Peter Davies (Edinburgh: MuseumsEtc, 2011).
- Peters, Robert. “Complementary and Alternative Mechanisms Beyond Restitution: An Interest-Oriented Approach to Resolving International Cultural Heritage Disputes.” PhD diss., European University Institute, 2011.
- Range, Daniel. “Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain”, *Texas International Law Journal* 39 (2004): 655-673
- Schönenburger, Beat. *Restitution of Cultural Assets* (Switzerland: Stämpfli Publishers Ltd, 2009).

b. Legislation

- British Library Act 1972.
- Holocaust (Return of Cultural Objects) Act 2009.
- Limitation Act 1939.

c. Documents

- Report of the Spoliation Advisory Panel in Respect of a Painted Wooden Tablet, *The Biccherna Panel*, Now in the Possession of the British Library, 2014, <https://www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-in-respect-of-a-painted-wooden-tablet-the-biccherna-panel> (accessed 16 July 2019).
- Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of Glasgow City Council, 2004, <https://www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-a-painting-now-in-the-possession-of-glasgow-city-council> (accessed 16 July 2019).
- Caroline Renold, Anne Laure Bandle, Raphael Contel, Marc-André Renold, “Case Pâté de Jambon – Anonymous German Heirs and Glasgow City Council,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

d. Media

- Bartoli, Antonia. “Findings from the Bindings: Nazi Era Spoliation Research at the British Library IV – Lost and Found, The Biccherna Panel”, *Untold Lives Blog*, 11 July 2019, <https://blogs.bl.uk/untoldlives/2019/07/findings-from-the-bindings-nazi-era-spoliation-research-at-the-british-library-iv-lost-and-found-the.html>, accessed 17 July 2019
- “The Biccherna Panel – Spoliation Advisory Panel report published”, 12 June 2014, accessed 17 July 2019, <https://www.bl.uk/press-releases/2014/june/the-biccherna-panel-spoliation-advisory-panel-report-published>.