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PRIVATE ART COLLECTIONS - ORPHAN OBJECTS

**Exploratory Expert Group
Subgroup on definitions
Hybrid meeting
Rome, 3 March 2022**

UNIDROIT 2023
S70B/Orphan objects/EEG/Doc. 3
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SUMMARY REPORT

I. Background

1. Pursuant to the decision taken at the first meeting of the Exploratory Expert Group on 12 September 2022 (see Summary report in document UNIDROIT 2022 – S70B/Orphan objects/EEG/Doc. 2, paras. 2 to 10, 57 and 58), an informal subgroup met in Rome at the seat of UNIDROIT on 3 March 2023 to discuss the issue of the definition of “orphan objects” in advance of the next meeting of the Exploratory Expert Group as all agreed that providing a clear definition would reassure collectors, museums, dealers, and auctioneers when putting objects lacking provenance on the market.

2. At the September 2022 meeting, the Exploratory Expert Group discussed whether the terms “orphan” and “works” were appropriate or whether any other terms would be preferable. “Orphan” was preferred to “unprovenanced” or “of unknown provenance” and a consensus was found on the preferred term “*cultural objects*”, as it was in line with the 1995 UNIDROIT Convention¹ and EU Directive 2014/60/EU.² At the end of the discussion, the Chairperson indicated that the general consensus was that a preliminary use of “*orphan cultural object*” sufficed for the time being, as the term balanced specificity and inclusiveness, and that the discussion during that meeting would move forward using that term, noting that it was too early to have a final definition, and that one definition of “orphan cultural object” might not be sufficient. It was suggested that different elements be identified to make up the definition, with the idea being that if an object met one or more of these elements, it could be considered as an orphan cultural object. It was then decided that a subgroup on the definition would be set up, moderated by Prof. Marc-André Renold (Art Law Centre, University of Geneva) to discuss and come up with proposals for the next meeting.

II. Discussion

3. The meeting was opened at 9.30 a.m. by Ms Marina Schneider, UNIDROIT Secretariat, who welcomed the participants and gave the floor to Prof. Renold to moderate the discussion.

¹ [UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects](#), adopted on 24 June 1995.

² [Directive 2014/60/EU](#) of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast)

4. Prof. Renold reminded that the goal of this meeting was to come up with one or two alternatives for definitions, bearing in mind that a meeting was planned at the end of March. He introduced the discussion presenting proposals of definitions submitted in advance by participants:

- Definition given by Prof. Frigo in document "Orphan cultural objects. Essays of a definition" (thereafter "first document");
- Definition given in the document "Proposals of definitions of orphan cultural objects" (thereafter, "second document", where there are two proposals:
 - *"Orphan objects are those cultural objects that totally or partially have no documented provenance (e.g. no available or reliable archives)"*
 - *"Orphaned cultural objects refer to those objects of cultural heritage or art that do not have an identifiable provenance";*
- Definition submitted by Ms Van der Lande in "Draft proposal of the definitions for the purpose of the UNIDROIT Explanatory Expert Group on Orphan Cultural Objects" (thereafter, "third document"):
 - *"An orphan cultural object is a Cultural Object that has been legally held, whether in private or public ownership for many years or even centuries, but does not have demonstrable evidence of licit origin, sufficient to satisfy current standards of acquisition or import."*

Purpose of the definitions

5. Starting from the commentary made by Prof. Frigo in the final part of his document, Prof. Renold asked the participants whether the subgroup should suggest new ethical norms, amend conventions or create new tools. It was agreed that the c) and d) options ("*c) to propose a new international convention and/or d) to amend conventions already in force (namely UNIDROIT)*". reported in Prof. Frigo's document could be eliminated.

6. A member of the subgroup suggested that the result of this group could complement the Operational guidelines on the 1970 UNESCO Convention and could be prepared in cooperation with UNESCO at a later stage. Concerning the aim of the work, it agreed on option e) suggesting the creation of new guidelines for more effective due diligence regarding orphan objects.

Proposed definitions

7. Firstly, the subgroup dwelt on the definitions suggested in the second document:
- *Orphan objects are those cultural objects that totally or partially have no documented provenance (e.g. no available or reliable archives)*
 - *Orphaned cultural objects refer to those objects of cultural heritage or art that do not have an identifiable provenance.*

8. The subgroup expressed a preference for the first proposed definition and decided to continue the discussion on it.

Orphan objects are those cultural objects that totally or partially have no documented provenance (e.g. no available or reliable archives)

9. The subgroup raised the issue of the term '**objects**'. It was indicated that this term was used by the UNIDROIT Convention but that the term "cultural property", even if broader, was more generally

accepted, and used by the 1970 UNESCO Convention and the 2017 Nicosia Convention. A proposal was therefore put, adding the “movable” aspect and proposing an alternative to “cultural objects”:

For the purposes of an orphan cultural object is a movable cultural property as defined in Article 1 of the 1970 UNESCO Convention that totally or partially has no documented provenance.

10. The subgroup wished to keep the term “**cultural objects**” instead of “**cultural property**”, but accepted the suggestion to add the term “**movable**”. The subgroup also agreed to make the reference to the definition of “cultural objects” of the 1995 UNIDROIT Convention. It was also suggested to add to the definition the absence of “identifiable provenance” and a text was proposed for further discussion:

For the purposes of an orphan object is a movable cultural object, as defined in Article 2 of the 1995 UNIDROIT Convention, that totally or partially has no documented and/or identifiable provenance (e.g. no available or reliable archives).

11. Prof. Renold highlighted two issues in this proposed definition. The first issue at stake was to choose whether the term “**orphan**” or “**orphaned**” was more appropriate. The subgroup agreed on the term “orphan”.

12. The second question was raised on the terms “**totally or partially**”. A member of the subgroup warned that the use of “partially” could be understood as referring to fragments (*orfanelli*). Prof. Renold gave examples about Nazi-looted artworks for which the provenance was known before and after World War II, but with a gap during the war. According to him, objects with “holes” in their provenance are also orphan objects. Other members did not agree as those objects had archives and wondered whether a date for provenance should be inserted (for example the US art market used 1970 as a threshold for provenance research).

13. Prof. Renold wondered whether the subgroup should use **two definitions**: one for *totally* undocumented objects and one for *partially* undocumented objects (gaps in the provenance) as they could deserve two different regimes. The subgroup agreed to keep this in mind and for the time being to keep the expression “totally or partially” in the definition.

14. Later during the meeting, the subgroup went back on the proposal to have two definitions with two different regimes (research and due diligence) relating to (1) objects with no provenance, no history at all, and (2) objects with holes in the provenance (ex: the *Victorious Youth*, Getty Bronze, also known as *Atleta di Fano*, or *Lisippo di Fano*, nazi-looted art...). Several members agreed to keep two definitions. A member emphasised the difficulties to have two nearly identical definitions, and proposed to keep one single definition and build two different regimes if necessary. The subgroup agreed.

15. The subgroup then discussed the part in brackets of the definition: “**(e.g. no available or reliable archives)**”.

16. A suggestion was made to add more examples between brackets, like the publications, which were not necessarily included in the term “archives”. The subgroup agreed to add “or publications” to the definition for the time being. A member explained that for certain types of objects, there were no archives, but the history of restorations could date these objects and when they appeared on the market. She underlined that there were different kinds of proofs which could date the moment an object appears on the market or in private collections.

17. Another question was raised concerning the meaning of “**reliable**” and who would decide if an archive was reliable or a provenance was documented. Prof. Renold recalled that the definition had to remain general. A member suggested the creation of another subgroup to focus on archives

and on documents that could constitute proofs, with the help of search provenance experts and museums. It was noted that this issue concerned the regime more than the definition.

Definition used and proposed by the trade (third document)

18. The subgroup then discussed the proposed definition which appeared in the document submitted as used by the trade:

- *An orphan cultural object is a Cultural Object that has been legally held, whether in private or public ownership for many years or even centuries, but does not have demonstrable evidence of licit origin, sufficient to satisfy current standards of acquisition or import.*

19. The subgroup questioned parts of it which it found unclear such as "legally held", "ownership for many years or even centuries", "demonstrable evidence" and "current standards of acquisition or import". In the absence of a representative of the trade, the subgroup decided to leave it aside for the time being.

20. The subgroup also noted that the document submitted several other definitions (Antiquities, Archaeological object, Chance finds, Cultural object, Cultural property, Due diligence, Illegal, Illicit, Important (Of importance), Legal, Licit, National treasure or Provenance...). It raised the question of whether the Exploratory Expert Group should work on other definitions. It agreed that it would go beyond its mandate and that such proposals would be examined, if necessary, during further work.

21. Then some members emphasised the fact that **knowing the origin of an object was not enough** to say that it was not an orphan object, and it was suggested to add a second paragraph to the definition:

"The place or country of origin, whether known or not, is not a criterion to determine whether an object is orphan."

22. As the whole subgroup was not convinced that the addition was needed, it decided to keep this second proposed paragraph in brackets.

23. The subgroup also discussed whether **other terms of the definition should be also defined**, such as "archives" or "documented provenance". It was stressed that the Explanatory report of the 1995 UNIDROIT Convention should be used as a reference for definitions which had been eventually already made.

24. In conclusion, the subgroup agreed to submit for discussion to the next meeting of the Exploratory Expert Group (29 and 30 March 2023) the following definition of "orphan cultural objects":

For the purposes of, an orphan object is a movable cultural object, as defined in article 2 of the 1995 UNIDROIT Convention, which has totally or partially no documented and/or identifiable provenance" (e.g. no available or reliable archives or publications).

- [*"The place or country of origin, whether known or not, is not a criterion to determine whether an object is orphan."*]

ANNEXE 1**List of participants**

- **Mr Manlio Frigo**, Professor of international law, Università degli Studi di Milano, Milan (online)
- **Ms Giuditta Giardini**, Lawyer and consultant, Antiquities Trafficking Unit, Manhattan District Attorney's Office (in presence)
- **Ms Artemis Papathanassiou**, Senior Legal Adviser at the Ministry of Foreign Affairs, Greece, and Coordinator of the UNGA Resolutions on the Return and Restitution of cultural property to their countries of origin (online)
- **Mr Marc-André Renold**, Professor at the University of Geneva, UNESCO Chair in international law on the protection of cultural property, Director Art-Law Centre of the University of Geneva (in presence)
- **Ms Isabelle Tassignon**, Curator, Archaeology and Ethnology Collections, Fondation Gandur pour l'Art, Geneva (in presence)
- **Ms Marina Schneider**, Principal Legal Officer and Treaty Depository, Unidroit (in presence)

- **Mr Lorenzo Venezia**, UNIDROIT Intern (in presence)
- **Ms Salomé Pluinage**, UNIDROIT Intern (in presence)

ANNEXE II**Documents submitted to the Sub-Group on Definitions for consideration**

Three documents were submitted prior to the meeting of the Sub-Group:

1. A proposal from Prof. Manlio Frigo
2. A document from the Secretariat developing Prof. Frigo's input
3. A draft proposal of definitions used by the trade

I. ORPHAN CULTURAL OBJECTS. ESSAYS OF A DEFINITION (Prof. Manlio Frigo)

1. The first thing to clarify in proposing a definition of the notion of orphan cultural objects is to clear the field of possible misunderstandings. This means eliminating possible doubts about the coincidence of this notion with similar notions which, however, do not fall within the area we intend to study. The notion that we propose to define does not include that of "orphan works" governed by international regulations that protect intellectual property rights. This category includes, for example, the Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of *orphan works* (emphasis added). The Directive starts from considering the existing - in both the Member States legislation and in EU law - rightsholders' exclusive rights of reproduction of their works and other protected subject-matter and of making them accessible to the public, highlighting that in the case of orphan works it is not possible to obtain a prior consent to the carrying out of acts of reproduction or of making available to the public. The Directive basically applies to certain uses by publicly accessible libraries, museums, archives, public-service broadcasting organizations of works published in the form of books, newspapers, magazines, cinematographic or audiovisual works protected by copyright or related rights¹. In this respect and in its effort of harmonization, the Directive states that "A work or a phonogram shall be considered an orphan work if none of the rightsholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightsholders having been carried out and recorded in accordance with Article 3" (i.e. the ways of carrying out a diligent research)².

The notion of orphan works therefore does not fall within the different notion of orphan cultural objects that we intend to define. Nonetheless, the provisions of the Directive contain a reminder of the fundamental importance of "diligent research" which also applies in our case.

2. Moving on instead to clarify what we intend to deal with, we can start from the notion of orphaned objects elaborated some time ago, mainly in an anthropological perspective. In fact, it is known that the term "orphan" has already been used to describe above all archaeological finds, declining the notion in three different ways³. The first involves the sale of a specific kind of fragmentary archaeological objects (such as the *orfanelli*, as referred to years ago by the Italian Carabinieri in a famous case concerning deliberately broken fragments of Greek vases). The second concern antiquities lacking information about their findspot (i.e. unprovenanced antiquities with "no declared or credible findspots", or "orphan without history"⁴). This second type is of particular interest as it mainly concerns objects resulting from non-archaeological excavations and focuses on the loss of archaeological context as a main character associated with orphaned objects. The third concerns

¹ See article 1 of the Directive.

² See article 2 of the Directive.

³ See R.M Leventhal, B.I. Daniels, "Orphaned Objects", Ethical Standards, and the Acquisition of Antiquities, in *Depaul J. Art, Tech, & IP Law*, vol. XXIII, (2013), 1 ff.

⁴ See C. Chippendale, D. W. Gill, Material Consequences of Contemporary Classical Collections", in *104 Am. J. Arch*, 463, (2000), at 467.

those “unprovenanced objects that museums, for legal or ethical reasons, decline to acquire”⁵. This represents a broad category of objects and is of particular interest because it allows a further possibility of expanding the notion in question. In fact, the analysis conducted by Leventhal to Daniels focuses on the 2008 Guidelines of the Association of Art Museum Directors (AAMD), subsequently amended in 2013, which invite museums not to acquire objects whose exit from a country before of 1970 or the successful export in compliance with the laws of the country in which they were located if after 1970.

3. Precisely starting from this third category of objects it is perhaps possible to broaden the investigation in order to include in the definition also objects other than those resulting from excavations (i.e. archaeological items) with the aim of including other kinds of objects, such as those attributable to the so called Nazi-looted art, or those coming from territories already subject to colonial domination. In this regard, the opportunity to recall in the definition the notion of cultural objects as defined by art. 2 of the UNIDROIT Convention of 1995 and related annex should be considered.

4. Eventually, I believe that we should finalize the work by raising the question of the purpose to which the search for a definition of the orphan cultural object is directed, e.g. one or more of the following purposes:

- a) to suggest new ethical norms,
- b) to broaden the scope of application of existing guidelines,
- c) to propose a new international convention and/or
- d) to amend conventions already in force (namely UNIDROIT)
- e) to add further tools and criteria for more effective due diligence
- f)

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II. PROPOSALS OF DEFINITIONS OF ORPHAN CULTURAL OBJECTS (developing Prof. Frigo’s input) ⁶

Introduction

The present document exposes the concept of orphan cultural object/*bien culturel orphelin* and suggests a possible definition to be discussed at the meeting of the Sub-group or the Exploratory Expert Group which will meet on 3 March 2023.

At the outset it should be stressed that the use “orphan object/*bien orphelin*” is the short form of “orphan cultural object/*bien culturel orphelin*”. The fact that we are only talking about **cultural** objects excludes other types of orphan objects, for example orphan objects as understood in intellectual property law and governed by the applicable international and national regulations⁷. We are strictly in the field of cultural heritage law, more specifically, international cultural heritage law.

We need to bear in mind that the field of cultural heritage law is multidisciplinary. History and art are deeply connected, so that the concept of **provenance** plays a significant role: to know that a record of ownership of a work of art or an antique exists means that there is a sort of guide as to its

⁵ See R.M Leventhal, B.I. Daniels, 9.

⁶ Based on a draft prepared by Salomé Pluvinage and Lorenzo Venezia, interns at UNIDROIT, and reviewed by the UNIDROIT Secretariat, Isabelle Tassignon and Professor Marc-André Renold.

⁷ A definition can be found at article 2 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of works.

ownership, its authenticity and quality⁸. But the definition of provenance is uncertain: two interpretations of provenance coexist in international law, one relating, somewhat restrictively, to the State from which a cultural item has been exported, the other relating, more extensively, to the nature and history of ownership of the item⁹.

It is important to underline that orphan objects are not necessarily stolen objects: according to article 3 of the 1995 UNIDROIT Convention, *"a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place."* A stolen object may be orphaned, but an orphan object may not necessarily have been be stolen.

Last but not least, criminal activity may be involved: as a result, the history and provenance of orphan objects can be very intricate.

The many ways of defining orphan objects

The conference *What prospects for "orphan works"? Reflections on cultural goods without provenance, University of Geneva, 4th- 5th February 2021* brought together experts and professors from different parts of the world: through different case studies, Q&A sessions and interventions there has been an interesting discussion of what we should do with orphan objects.

As demonstrated during the conference, these objects are not only problematic for lawyers, but also for archivists, art historians, curators, archaeologists and art dealers. Moreover, it is possible to say that the number of cases presented during the event shows that the issue is a worldwide one. It is however pretty common that in Europe the discussion on orphan objects has referred to three different categories of objects: antiquities, Nazi-looted art and objects taken during colonialism from different areas of the world.

The need for a definition for orphan cultural objects has been taken into consideration also outside of this conference. UNIDROIT for example has brought together experts that discussed the idea of dealing with orphan objects. In particular Prof. Frigo, Prof. Renold, Ms Papathanassiou and Ms Giardini have shown interest at the Exploratory Expert Group for Private Art Collections - Orphan objects in September 2022¹⁰ to join a subgroup for the definition of orphan cultural object.

In Prof. Frigo's note about "Orphan Cultural Objects. Essays of a definition" he recalls three definitions of "orphan objects". The first definition refers to "orfanelli", as fragmentary archaeological finds. The second definition identifies orphan objects as "antiquities lacking information about their findspot" (i.e. unprovenanced antiquities with "no declared or credible findspots", or "orphan without history"¹¹). The third definition concerns "unprovenanced objects that museums, for legal or ethical reasons, decline to acquire". The notion of "orphan objects" is thus expanded and includes a broad

⁸ *"Provenance is a word that has migrated, in the past ten years, from the vocabulary of the art historian to a widespread currency. Researching provenance is a specialized discipline of art history fundamental to the mission of museums to document their collections. Establishing the history of ownership can authenticate a work, trace its influence, and provide insight into not just the interests and tastes of an individual collector, but of a culture. On a more fundamental level, document transfers between parties can form basis of legal ownership, and it is in this sense that the concept has of late been absorbed into the public consciousness.*

Recent popular awareness of art provenance is due, in part, to a number of highly publicized claims made by victims or heirs seeking the return of objects in museums, both in the United States and Europe, which had been confiscated by the Nazis and not subsequently restituted. Simultaneously, the coincidental appearance of a number of scholarly publications, which in turn can be traced, in general, to the opening of archives following the reunification of Germany and the dissolution of the Soviet Union as well as the declassification of WWII documents in the US, has contributed to a growing awareness of the scope and significance of Nazi looting of cultural property." See Yeide, Nancy H., *Provenance and museums*, 2004.

⁹ Provenance is defined in ICOM Code of Ethics for Museums as "The full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined.". The 2017 Council of Europe Convention on Offences relating to Cultural Property explains unlawful provenance at articles 7, 8 and 9.

¹⁰ UNIDROIT 2022 - S70B/Orphan objects/EEG/Doc. 2.

¹¹ See C. Chippendale, D. W. Gill, *Material Consequences of Contemporary Classical Collections*, in 104 *Am. J. Arch*, 463, (2000), at 467.

category of objects, with a direct reference to the AAMD Guidelines¹².

The "orfanelli" meaning can be excluded, as this is an informal way in Italy where the word "orfanelli" refers to fragments of archaeological objects, thus to a very specific kind of objects.

The two last definitions are quoted from Leventhal and Daniels' article¹³. The second definition raises the issue of the loss of archaeological context and thus concerns orphan objects from archaeologists' point of view. This definition might seem too specific as it focuses on the context and the findspot.

The third definition proposed focuses on the impossibility of acquiring those unprovenanced objects by museums based on museum deontology. This definition could be interesting as it deals with the issue of provenance, but it only focuses on museums' point of view.

In the conference *What prospects for "orphan works"? Reflections on cultural goods without provenance*, University of Geneva, organised by UNIDROIT, *Fondation Gandur pour l'Art* and Art-Law Center of the University of Geneva, (4th- 5th February 2021), some lecturers gave definitions of orphan objects.

Professor Renold spoke about "a cultural good that for any sort of reasons does not have a complete record of provenance".

Isabelle Tassignon said that "we have to distinguish some groups among the so-called "orphan objects": the "old" orphan objects for which there may be an archive, and the "recent" orphan objects, which come from illicit trade".

Antoinette Maget-Dominicé quoted Sophie Engelhardt's thesis called *Nachrichtenlose Kulturgüter [Dormant cultural objects]*¹⁴. According to Sophie Engelhardt, "orphan works are those whose owner can't be or can no longer be identified.". It should be pointed out that the chosen definition of orphan objects should address all the owners, and not only refer to objects which have lost their current ownership, but their ownership 'chain'.

According to Pierre Taugourdeau, there are two types of orphan objects. The first type is a "classical category", composed of objects which have lost the link with their author (in the intellectual property meaning of "author" as the right holder of copyright), or objects of collection which have lost the link with the person who created them (archaeological items for example). The second group of orphan objects is composed, from the art market point of view, by objects which have lost the link with their successive holders (owners, events such as exhibitions or auction sales...), i.e their ownership chain or their provenance. Pierre Taugourdeau recalled that provenance is one of the criteria for the authentication of an artwork, with the work's material and the signature or *la main de l'auteur*. He also referred to a broad meaning of provenance, extending over time, not only referring to the findspot. He concluded by giving his definition, stating that an "orphan object is an object with a fragmentary ownership chain".

The first definition of Pierre Taugourdeau looks like the Leventhal and Daniel's definition of antiquities lacking information about their findspot. However, the definition that is closer to international cultural heritage law is the second one.

Jean Claude Gandur spoke about "objects in the grey zone", or "objects that have been out of the country of origin for more than fifty years and for which there is no or no longer any material proof that they were part of a formerly made collection."

For Corinne Hershkovitch, orphan objects are those whose provenance is not sufficient. By provenance, she meant the history of the work's journey since its creation or discovery. She compared it to the term "origin", which refers to the authenticity of the work. Origin is therefore unchanging, whereas the notion of provenance evolves because it is enriched with each change of owner and movements of the object. Provenance may be unsatisfactory for various reasons that vary according to the nature of the cultural object (she gave the example of paintings whose provenance has holes during the World War II period, which could therefore make them Nazi-looted artworks).

¹² [Code of Ethics | Association of Art Museum Directors \(aamd.org\)](https://www.aamd.org/).

¹³ Richard M. Leventhal, Brian I. Daniels & "Orphaned Objects", Ethical Standards, and the Acquisition of Antiquities, Volume 23, Issue 2, Spring 2013, DePaul University, 2013.

¹⁴ Sophie Engelhardt, *Nachrichtenlose Kulturgüter*, Walter de Gruyter GmbH & Co.KG, 2013

So for her an orphan cultural object is an object whose provenance is fragmentary during a period of time when there is a particular risk of illegality.

Possible definitions

As a result of this research, two proposals of definitions of orphan objects may be submitted for discussion:

- "Orphan objects are those cultural objects that totally or partially have no documented provenance (e.g. no available or reliable archives)"
- "Orphaned cultural objects refer to those objects of cultural heritage or art that do not have an identifiable provenance"

These broad definitions have been chosen because there are several problems of definition relating to these objects which will be briefly explain in the next paragraph.

For the first definition, "*totally or partially*" have been added because many objects have a partially obscure history, i.e. lack of information. As for archives, several cases must be distinguished: 1. their absence; 2. the question of their validity if there are archives. Then, the term "*documented*" is used bearing in mind that when a cultural object has no documentation, different tools or criteria may be helpful, and have to be taken into consideration. In cases where there are no existing physical testimonies that can assure that the objects are in a certain place, we can still document the relation between an object and its owners if we consider other traces, symbols, oral traditions, and so on.

Main criteria to be taken into consideration for a definition

As said on the first meeting of the Exploratory Expert Group¹⁵, "[...] one definition of "orphan cultural object" might not be sufficient. It was suggested that different elements be identified to make up the definition, with the idea being that if an object met one or more of these elements, it could be considered as an orphan cultural object." Thus we identified some key elements that should be taken into consideration for the definition of orphan objects:

- **Provenance**

Provenance is one of the main issues since there are different definitions of this concept related to specific fields (in art, in history, in geography, in agriculture). Many participants of the conference were dealing with this term and trying to define their perspective on provenance while looking for a definition for orphan objects.

In an article in the *American Journal of Archaeology*¹⁶, [Christopher Chippindale](#) and David W. J. Gill wrote:

"It is important to distinguish the two different and successive aspects to the story of an object, from its first ancient creation to its present possession and whereabouts, which are often treated under the ambiguous word "provenience" (usual in American English) or "provenance" (typically used in British English). Although the Oxford English Dictionary treats the words as exact synonyms¹⁷, there is some nuance in how the words are now used, of which Clemency Coggins¹⁸ remarks: "The differences are exemplified by the difference between the stark English *provenience*, meaning the original context of

¹⁵ UNIDROIT 2022 - S70B/Orphan objects/EEG/Doc. 2.

¹⁶ Christopher Chippindale and David W. J. Gill, "Material Consequences of Contemporary Classical Collections", in 104 *American Journal of Archaeology*, 463, 2000, p.467.

¹⁷ Note by the authors (p.467): "In the Oxford English Dictionary (section published in 1909, pages 1519-20), "provenance" is defined as "The fact of coming from some particular source or quarter; origin, derivation"; "provenience"; is stated as a synonym without its own or separate definition"

¹⁸ Clemency Coggins, "United States Cultural Property Legislation: Observations of a Combattant", *International Journal of Cultural Property*, 1998, in Christopher Chippindale and David W. J. Gill, op.cit.

an object, and the more melodious French *provenance*, used by the art world, which may include the original source but is primarily concerned with a history of ownership.”

This statement echoes the comment made by Marc-André Haldimann during the Geneva conference, according to whom there was a difference between provenance, as the traceability of an object's journey, and context, the physical findspot for archaeologists. To him, artworks with provenance but without context are not orphan works. He thus gave examples of objects coming from Renaissance collections or *Schatzkammern*.

In the report from the Eighth Session of the Subsidiary Committee of the Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 27 and 28 October 2020¹⁹, it was said that:

“It would therefore appear that two interpretations²⁰ of provenance coexist in international law, one defining, somewhat restrictively, the State from which a cultural item has been exported, the other relating, more extensively, to the nature and history of the item. That said, if we broaden the range of standards taken into account, provenance also appears to be broadly understood in the sense of the history of the object and its ownership, as evidenced by the ICOM (International Council of Museums) Code of Ethics for Museums²¹, which defines it as follows: “The full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined.”

This report also quoted the 2017 Council of Europe Convention on Offences relating to Cultural Property, which also refers to the concept of provenance²²: “[...] Legal provenance, on the other hand, would be characterized by a legal and unbroken chain of ownership, export and import of the object, which supports the definition of provenance according to Article 10(a) of the 1970 UNESCO Convention or the ICOM Code of Ethics for Museums^{23 24}.”.

It was thus made clear that a specific definition of provenance is needed for the definition of orphan objects. Indeed, it was often said that an orphan object is an object whose provenance is not sufficient. It tackles the issue of what is really a fragmentary provenance. Corinne Hershkovitch said that an object was orphan as soon as its provenance was fragmentary during a specific period when there was a risk of illegality. But others raised the issue of a “fragmentary” provenance. The definition

¹⁹ [Eighth Session of the Subsidiary Committee of the Meeting of States Parties to the 1970 Convention | UNESCO](#).

²⁰ “Article 7(a)2 of the Convention uses the concept to identify the State Party from which an object has been illegally exported, the acquisition of which must therefore be prevented by the “recipient” State Party. Provenance is understood here, then, as referring to the place from which the property was exported and/or in which it was created.

Article 10(a)3 of the Convention, regarding the obligation on the part of antique dealers to keep a register stating the provenance of each item of cultural property, proposes an alternative definition of the concept whereby provenance refers to a certain amount of information regarding the nature and history of the item. It is therefore a matter of establishing its traceability by keeping a record of all transfers of ownership pertaining to the item of property in question”.

²¹ ICOM Code of Ethics, p 29.

²² [Council of Europe Convention on Offences relating to Cultural Property - Culture and Cultural Heritage \(coe.int\)](#). See in particular articles 7, 8 and 9.

²³ ICOM Code of Ethics, Article 2.11 Repositories of Last Resort: “Nothing in this Code of Ethics should prevent a museum from acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility.”.

²⁴ ICOM Code of Ethics, Article 3.4 Exceptional Collecting of Primary Evidence: “In exceptional cases an item without provenance may have such an inherently outstanding contribution to knowledge that it would be in the public interest to preserve it. The acceptance of such an item into a museum collection should be the subject of a decision by specialists in the discipline concerned and without national or international prejudice (see also 2.11).”.

of orphan objects thus should refer to a specific way of understanding lack of provenance: from what level of this lack of provenance can an object be called an "orphan object?" Does a single hole during a non-problematic period make an object orphan? Must there be holes in the ownership chain specifically during a problematic period for an object to be orphan?

- **Due diligence**

In our field the issue of due diligence is strictly connected to provenance research as "created" by Article 4(4) of the 1995 UNIDROIT Convention (see the [Explanatory Report](#) of the Convention). Also see the report of the Eighth Session of the Subsidiary Committee of the Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 27 and 28 October 2020²⁰ which states that:

" [...] due diligence is a single-purpose legal concept, which, whilst it may stem from another branch of law, refers to a behavioural obligation of vigilance on the part of the actors involved in the process of acquiring the object in question. It is often accompanied by an exhaustive or non-exhaustive list of elements to be verified, which extends beyond the search for the provenance of the object. For the time being, this obligation only applies under international law to establish whether or not the owner of a stolen or illegally exported item, who must return the said object, is entitled to compensation."

"Bearing in mind that the concept of due diligence refers to an obligation of vigilance on the part of the purchaser or any person involved in the transfer of ownership of a cultural object, it would appear that the search for provenance is one of the steps, if not the most important step, that must be taken in order to comply with the obligation of due diligence."

In this perspective, should due diligence be taken into account in defining orphan objects or does it only intervene at a later stage (the stage where the regime of the orphan object is to be determined)? Can an object be declared automatically as "orphan" without a minimum of provenance research? If we draw inspiration from the definition of orphan works in IP law (as suggested by many participants in the conference), it should be noted that orphan works are considered as such only once the diligent research carried out has not produced any results in finding right holders.

- **The exclusion of "orphan work" as defined by IP law**

The effort to find a proper definition of "orphan object" is not new. As said before, we are in the area of international cultural heritage law: this means that we have to exclude definition(s) that may be applicable in other branches. For example, orphan works are defined in the international and European intellectual property law.

Thus, the Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works declares that "a work or a phonogram shall be considered an orphan work if none of the rights holders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search."²¹ In the French *Code de la Propriété intellectuelle*, orphan works are defined by the article L113-10 as « *une œuvre protégée et divulguée, dont le titulaire des droits ne peut pas être identifié ou retrouvé, malgré des recherches diligentes, avérées et sérieuses* » [a protected and published work, the rights holder of which cannot be identified or found, despite diligent, proven and serious research].

In Prof. Manlio Frigo's note, he opens his analysis by saying that "The notion of orphan works therefore does not fall within the different notion of orphan cultural objects that we intend to define. Nonetheless, the provisions of the Directive contain a reminder of the fundamental importance of "diligent research" which also applies in our case."

In this perspective, it should be noted that orphan works definition and its framework in IP law can be a starting point for defining orphan objects. However, we should bear in mind that we are not in the same field, therefore an idea would be to exclude the definition of "orphan works" in the definition of orphan cultural objects. For example, a definition of orphan cultural objects could begin with

"subject to/excluding the definition of orphan works by, the orphan objects are..."

Conclusion

The lack of a precise definition is problematic: without definitions, the law is uncertain and risks to cause mistakes. One can say that the more one looks at information and sources for a definition, the more one realizes that the topic deals with sensitive issues that involve museums, art collectors, law enforcement agencies, lawyers and States.

There is no official/institutional definition of orphan cultural objects for the time being. A lot of information can be found about the meanings of provenance, about other issues around orphan objects, but never really a definition on the specific term "orphan object". Thus some problematic issues have been raised and the subgroup will have to choose how to deal with them, in order to adopt a new and workable definition of orphan cultural objects.

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III. Draft proposal of the definitions for the purpose of the UNIDROIT Exploratory Expert Group on Orphan Cultural Objects (used by the trade)

Before we embark on any further discussions, it is essential to establish a common understanding of the words and terms most commonly used in discussions on Cultural Objects. With any proposals impacting those trading in and owning Cultural Objects, it is particularly important to create a template for a lexicon of common language which would help avoid misunderstandings.

For the purpose of this project, we have chosen words and phrases that occur most frequently:

- Orphan Cultural Objects (rather than Orphan Works)
- Antiquities
- Archaeological object
- Chance finds
- Cultural object
- Cultural property
- Due diligence
- Illegal
- Illicit
- Important (Of importance)
- Legal
- Licit
- National treasure
- Provenance
- Waverley criteria

Our proposed definitions for the purpose of this proposal are:

- **Orphan cultural object**: A Cultural Object that has been legally held, whether in private or public ownership for many years or even centuries, but does not have demonstrable evidence of licit origin, sufficient to satisfy current standards of acquisition or import.

- **Antiquities**: Objects from ancient cultures that no longer have any archaeological context. (See endnote 5)

- **Archaeological object**: An ancient object, whose exact find context is known and that came directly from an excavation and so can convey knowledge about a past culture. ¹

- **Chance find**: An ancient object, found by chance during construction or agricultural activities. (In contrast to looted objects that are stolen from protected areas or excavation warehouses.)

- **Cultural object**: An object which gives information about the culture of its creator and user, and is likely to belong to one of the categories that are commonly used by the art market as formulated in endnote 6.

- **Cultural property**: Movable cultural property (also called cultural objects) which, on religious or secular grounds, is specifically designated by a state as being of importance for archaeology, prehistory or history, whose export would constitute an appreciable impoverishment of the national cultural heritage, and which belongs to the Article 1 of the UNESCO Convention 1970 listed categories. ²

- **Due diligence**: The steps necessary to ensure, as far as reasonably possible, that an item you wish to acquire is lawfully owned and has not been illegally exported or illegally removed from its country of origin or discovery. This can involve checking documentation and stolen art databases.

- **Illegal**: Forbidden by law (Cambridge dictionary)
- **Illicit**: Forbidden by law, rules or custom
- **Important**: of great value, whether historical/cultural/artistic or financial
- **Legal**: Allowed by law (Cambridge dictionary)
- **Licit**: Allowed by law (Cambridge dictionary) **National treasure**: "An artefact regarded by a nation's laws as being emblematic of a its cultural heritage or identity – and has been specifically designated as such under Article 5(b) of the 1970 UNESCO Convention" (see also Waverley Criteria)
- **Provenance**: The known collecting history of an object, either recorded in writing or anecdotal. ⁴
- **Waverley Criteria**: The Waverley criteria are used in the United Kingdom to determine whether an object should be considered a national treasure on the basis that the object's departure from the country would be a significant loss to that nation's cultural heritage on one or more of the following grounds. The criteria are tested through the following questions:
 - Is it closely connected with our history and national life?
 - Is it of outstanding aesthetic importance?
 - Is it of outstanding significance for the study of some particular branch of art, learning or history?

Art market definitions: Art market definitions should be adopted in any discussions on Cultural Objects ⁵ to avoid confusion over what constitute Antiquities and what constitute Cultural Objects among Art Market collecting fields. ⁶

END NOTES

¹ We agree with archaeologists that once the exact circumstances of discovery of an object have been lost, the precious context – its value for archaeology – is lost as well. For archaeology, orphan objects are no longer important since the exact find context is unknown, and so the object ceases to have an archaeological value and becomes known by the market as an **antiquity**.

A [judgment](#) of December 11, 2012, of the Highest German Financial Court in Munich illustrated this very well:

*"Archaeological objects within the meaning of the Regulation (EC) on the export of Cultural goods (Reg. No. 116/2009) are only those that have a value for archaeology, that is, man-made objects that have the ability to convey knowledge about past cultures, especially about their customs, the technical and artistic level of development at that time as well as political and social structures, religion and more like that. Objects that **at most illustrate existing knowledge** about past cultures, therefore have no value for archaeology and are not "archaeological objects" or finds."* (translated from German, emphasis added)

² (This definition is based on UNESCO 1970 Art.1, combined with the clarification of "specifically designated", based on UNESCO Art.4 b, about the listing of cultural property "*whose export would constitute an appreciable impoverishment of the national cultural heritage*".) Both phrasings have been accepted by state parties of UNESCO 1970. France, the UK and Belgium have added value thresholds as defined in the EU Council Directive 93/7/EEC.

³ Due diligence is an obligation to an effort or action, not an obligation for result. In other words, due diligence is the process of carrying out the right checks; it is not an obligation to find the desired results, which is often not possible. UNIDROIT Art.4. (4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

⁴ When the trade talks about "provenance", it refers to the collecting history of an object. Antiquities have been collected for hundreds of years, with some collections forming the basis of public museums; others have changed hands multiple times over the years and have potentially long collecting histories that unfortunately often have been lost.

When archaeologists talk of “provenance”, they often refer to the exact find spot of an object, something that is rarely known for privately owned antiquities. (See definition for Archaeological Object)

In the art world, the word provenance was originally used for Old Master Paintings; following the uninterrupted chain of ownership of a painting from creation, through multiple owners to the current owner, was the best guarantee that the painting was indeed from a certain old master and not a modern fake.

⁵ The Art Market definition of Antiquities is restricted to the following: Objects from ancient cultures in Europe, especially around the Mediterranean, North Africa and Western Asia, that are kept in private and museum collections.

6 Art Market collecting fields that include Cultural Objects are as follows: 19th Century & Orientalist Paintings; Aboriginal Art; African Modern & Contemporary Art; African, Oceanic & Pre-Columbian Art; American Furniture & Decorative Arts; Antiquities (Ancient Art); Arms and Armour; Australian Art; Books & Manuscripts; British Ceramics; Carpets, Rugs & Tapestries; Chinese Ceramics & Works of Art; Chinese Paintings; Clocks; Coins, Medals and Banknotes; European Ceramics; Furniture (English & European); Glass; History of Science & Technology; Impressionist and Modern Art; Indian, Himalayan & Southeast Asian Art; Islamic and Indian Art; Japanese Art; Jewellery; Lapidary Works of Art; Latin American Art; Marine Pictures & Works of Art; Modern & Contemporary Middle Eastern Art; Modern & Contemporary South Asian Art; Modern British & Irish Art; Modern Decorative Art & Design; Native American; Natural History; Old Master Paintings; Photographs; Post-War and Contemporary Art; Prints & Multiples; Private & Iconic Collections and House Sales; Russian Paintings and Works of Art; Scientific Instruments; Sculpture and Works of Art; Silver; Watches