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Working Group on Orphan Objects

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CURRENT STATUS OF THE WORKING GROUP DISCUSSIONS ON KEY ISSUES

1. During the third session of the Working Group on Orphan Objects (Rome, 17-19 March 2025), reports delivered by each Guideline's Sub-groups were discussed, enabling a more in-depth discussion of the preliminary Guidelines on Orphan Objects. In view of the fourth Working Group session taking place from 1 to 3 December, UNIDROIT is organising a Research Symposium on "Orphan Objects: Curatorial, Ethical, and Legal Aspects" on 1st December, aiming to gather top experts outside of the Working Group. They will reflect on stumbling issues of "orphan objects" and bring fresh perspectives to inform the Working Group in its work, which raises key curatorial, ethical, and legal dilemmas.
2. This document aims to enhance further reflection for all symposium speakers, participants, and observers of the Working Group, and to establish the current status of the project's deliberations and progress on each Guideline. The document is divided into two parts; the first develops the current position of the Working Group on the Symposium key issues, and the second presents the reviewed versions of the Guidelines.

I. Symposium key issues - Current status of the Working Group discussions

3. Each invited speaker has been asked to answer specific questions: a) undocumented objects, which, after research into their provenance, remain undocumented, and b) partially documented objects with a gap in their history. The following paragraphs aim to outline the current status of the Working Group's reflections on these key issues.

? What connections do you see between provenance research and due diligence?

4. When drafting both Guideline C and D on Due Diligence and Provenance Research, the main goal was to articulate how due diligence and provenance research were connected and what distinguished one from the other. A consensus was found that due diligence was to be addressed by the criteria already provided for in Article 4.4 of the 1995 UNIDROIT Convention, in a non-exhaustive way. While acknowledging the links between the two notions, it was also important for the Working Group to clearly distinguish them from a chronological point of view.

5. The designation of the entitled person to conduct provenance research and verify the information, if needed, like the potential acquirer, for example, would highlight the temporal

difference between provenance research and due diligence. Therefore, due diligence is not only an initial transfer-related requirement. If, after due diligence was performed, the object remained without (complete) provenance, more in-depth provenance research should be carried out.

6. The Working Group concluded that both concepts were interlinked, while not being identical. Current Guideline C on due diligence has been revised to underline the articulation between these notions.

? What elements would be needed, according to you, to make the presence of a particular object in a collection acceptable?

7. This question remains under debate within the Working Group, as it raises other unanswered key issues related to how far provenance research should extend, who should perform it, and whether the results of such research should be disclosed.

? Existing Best practices in your field/institution?

8. The Working Group acknowledged that these Guidelines aim to promote best practices for both those who already possess cultural objects and those who would like to acquire one. These Guidelines should explain in depth provenance research, especially since there are few methodology manuals available.¹ Moreover, provenance research has to be adapted regarding each cultural object, stressing that there is no existing universal methodology. It was suggested to reference existing online platforms and databases in the commentary as one example of best practices, highlighting an important opportunity to encourage market participants, particularly collectors and first-time buyers, to conduct provenance research for all objects in their collections.

9. Best practices were also discussed on who should be conducting provenance research. The Working Group underlined that museums and private collectors should engage in overall provenance research for all the objects that they have in their possession, by employing a person to conduct provenance research.

10. Best practices have also been addressed regarding dispute resolution. The Working Group agreed that the Guidelines should set best practices by including not only traditional judicial processes but also Alternative Dispute Resolution mechanisms..

? How not to exclude an orphan object from the “cultural heritage”?

11. The current project is precisely aiming to fight against the systematic exclusion of cultural objects without a complete or any provenance from the art market, exhibitions, and scientific publications.

12. Should all cultural objects be targeted by the project? Also archaeological objects?.

? What would you recommend the possessor do with an orphan object?

13. As setting best practices, the Guidelines intend to provide some guidance to all future acquirers and actual possessors of an orphan cultural object by framing key steps or actions to follow if needed. The work of identifying those particular key steps and actions is precisely the core of the Working Group discussions. So far, exercising due diligence, conducting provenance research, and

¹ See for exemple: *Leitfaden Provenienzforschung*, German Lost Art Foundation, 2019; *Recherches de provenance dans les musées II*, Association des musées suisses, 2022; *Provenance research into collections from a colonial context: A guide*, Cultural Heritage Agency of the Netherlands, 2025.

publicising the object on a certain platform have been the key recommendations (with no consensus yet as to the platform).

? What steps, if any, would you take towards the countries of origin, indigenous communities, or any group that could have been the owner of the objects?

14. The Working Group consensually highlighted that the Guidelines will not pre-determine the most appropriate course of action for affected parties, which may include individuals, institutions, or communities, but emphasized that the Guidelines have to take into deep consideration traditions of the communities from which they originate.

15. By drafting guidance for potential actions toward the countries of origin, indigenous communities, or any group that could have been the owner of the objects, the Working Group acknowledged the specific concerns related to Indigenous communities and their potential lack of visibility in the art market, access to digital platforms, or legal representation. It has been proposed that a person or institution in possession of an orphan cultural object is “encouraged” to engage in a public process, promoting transparency and accountability. Therefore, such a possessor could, via the potential platform, have direct access or contact with the relevant State or community of origin.

? To what extent would you consider a database/platform of these objects to be relevant?

16. The third session of the Working Group put forward the potential idea of creating a platform specifically designed for the physical and/or virtual presentation of the object. This procedure of publicising, embodied by the new Guideline F, would allow orphan cultural objects that have an unclear or incomplete provenance to be seen by the public, be subject to additional provenance information, and be known to potential claimants. The motivation behind the publicization of such objects on this platform by private collectors would be the manifestation of good provenance research, as well as a *prima facie* of engaging and acting in due diligence. Accessibility and visibility of such objects would give people the opportunity to provide further information or make claims about the object. A minimum period of visibility might be considered for any users, as well as a dual-input functionality. The value of such a platform would lie in long-term accessibility and the potential to add information in future transactions. The proposed platform would not confer legal legitimacy, thereby reducing the risk of manipulation.

17. It has been proposed to provide guidance by including an annex to the Guideline, which would define the aspects of this platform, as UNIDROIT has several instruments using electronic registries.

18. However, participants and observers of the Working Group have acknowledged the specific concerns related to Indigenous communities and their potential lack of access to digital platforms. Plus, this platform should respect relevant customary and religious practices. Indeed, the procedure should consider issues such as whether an object should be publicised with or without an image, especially when such an image may be deemed sensitive material, particularly in relation to Indigenous communities (specifically referring to human remains, ancestral remains, and sacred or secular objects). Concerns were also raised about the practicality and risks of allowing uploads to the platform without oversight, and the potential misuse of the platform.

? What would you suggest with a view to clarifying the object's provenance?

19. This key issue is still under debate within the Working Group. The main goal of this project is to fight against automatically putting objects without provenance in the dark, and preventing them from being subject to transaction or being scientifically studied.

20. However, clarifying an object's provenance may include a demonstration of elements coming from exercising due diligence, conducting provenance research, and disclosing transparently, in accordance with General Data Protection Regulation rules, the information identified.

II. Status of the Working Group's work on the Guidelines, commentaries, and remaining key issues

21. At the end of the third Working Group session, two main questions remained to be answered:

? What is the main audience targeted by the Guidelines (public-private institutions/museums and/or private collectors)?

? What term should be used for objects with incomplete provenance: "orphan cultural objects", "unprovenanced objects", "undocumented objects", "insufficiently provenanced", or "incompletely documented provenance"?

22. The Guidelines presented below are the reviewed versions of the Guidelines as presented in the Annexe III of Document 4 of the third session of the Working Group on Orphan Objects (Summary report).. Elements in square brackets indicate a lack of consensus on the proposal.

23. Each Guideline is followed by the proposed additions to each Guideline commentary and the remaining key issues to be answered.

A. Definition of an [orphan/insufficiently provenanced] cultural object

Text as it stood at the end of the third session of the Working Group:

The present Guidelines apply to movable cultural objects of importance, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which have no or incomplete provenance.

24. Key issues still to be answered:

? What cultural objects are concerned by these Guidelines? Should certain cultural objects be excluded from this Guideline (such as archaeological objects, for example)?

? Can these cultural objects be categorised?

? How should they be categorised and according to which criteria (financial/cultural/scientific/... value)?

? Should the categories refer to a specific legal framework (e.g., the 1995 UNIDROIT Convention categories or otherwise)?

B. Due diligence

Text as it stood at the end of the third session of the Working Group:

1. Due diligence should be performed when the object is subject to a transfer or when the circumstances so require. Due diligence includes, but is not limited to, the criteria provided for in Article 4.4 of the 1995 UNIDROIT Convention.
2. For the purposes of this Guideline, "transfer" shall mean a change in ownership, possession, or physical location of the object.

3. *Due diligence should be performed by public and private institutions, collectors, and all actors dealing with cultural objects.*
4. *If, after exercising due diligence, the provenance of the object remains unknown or incomplete, continued attention should be given to the object, and the provenance research should be considered ongoing.*

25. To be added to the commentary (proposed during the third session of the Working Group)

- o Paragraph 1:
 - "when the circumstances so require": acquiring an object or reviewing collections; exhibitions which imply a transfer of physical location; publications; the legal status and/or the title of an object that requires due diligence, including, but not limited to, existing or new red flags' name, looting in a particular area, new conflicts or ongoing conflict, case law, trafficker archives on other relevant factors.
 - The Emil Bührle Collection at the Kunsthaus Zürich could serve as an example of circumstances (when a name from the object's provenance turned up in the anti-money laundering listing).
 - The circumstances could also imply an apparent change of circumstances, defined as "If after acquiring an object, there is a new set of circumstances (even if not proven before a court of law), a reasonable person should reconsider the transaction". It could underline that all findings should be documented and retained with the object.
- o Paragraph 2: The word "transfer" shall also be described as a change in physical location across international borders.
- o Paragraph 4:
 - Address relevant privacy laws in terms of sharing due diligence information, by whom should it be requested (by someone holding a legitimate interest in the information?).
 - Explain the legitimate interest.

26. Key issues still to be answered:

? How should the concept of due diligence be defined (Article 4.4 of the 1995 UNIDROIT Convention?)?

? What constitutes an "apparent change of circumstances" that triggers due diligence, and how should this be defined or addressed in the Guideline?

C. Provenance Research

Text as it stood at the end of the third session of the Working Group:

1. *Possessors of cultural objects should engage in provenance research, which is part of due diligence when [... to be completed during the next Working Group].*
2. *Provenance research is the process of searching for information related to the history and circulation of an object from its creation or discovery. Provenance research also endeavours to identify if the object has been subject, in the past, to any illicit transfer or similar action.*

3. *Provenance research should be conducted by a person who, considering all circumstances, has adequate technical knowledge and expertise in the relevant field, taking into consideration existing standards, if any.*
4. *The extent of provenance research depends on the specific case and the history of the object. It should aim to collect all reasonably obtainable documentation and information at the time of the search to evaluate their authenticity, provenance gaps, and undocumented transfers.*
5. *The results are only relevant at the time the provenance research is conducted.*

27. To be added to the commentary (proposed during the third session of the Working Group)

- o Previous Paragraph 2 of Guideline C. Provenance Research to go to commentary: "Complete and unbroken records of provenance are rare. The provenance of some objects may not be able to be verified in its entirety since their creation or discovery to their current location."
- o Previous Paragraph 3 of Guideline C. Provenance Research to go to commentary: (Due diligence and) Provenance research requires(s) extensive and comprehensive research that integrates various types of information. Conducting (due diligence) provenance research may confirm that the object is an orphan cultural object as defined in Guideline A.
- o Paragraph 3:
 - Provenance research should be conducted by someone independent, considering all circumstances, who has adequate knowledge and background to assess the problem.
 - Existing professional standards should be considered, given the financial and proportional stake.
- o Paragraph 4:
 - Give a reference to a methodology for conducting provenance research and a system to properly record the elements searched and the results obtained, and its independence.
- o Third sentence of the previous Paragraph 5 of Guideline C. Provenance Research to go to commentary: "This may include, among other actions, library research, consultation of public or private archives, document and scientific analysis, and exchanges with witnesses."
- o Paragraph 5:
 - Underline the link between providing funds for due diligence and provenance research and the concept of proportionality, as the costs are often significant.
 - Propose a method and structure of provenance research, and the extent of provenance research based on the specific object.
 - Stress the impact of the Guidelines on the rights of private individuals.

28. Key issues still to be answered:

- ? How should the concept of provenance research be defined?
- ? How far back should provenance research go (especially for antiquities and archaeological objects)?
- ? Should provenance research be exercised under certain requirements and conditions?
- ? Should a risk assessment framework be put in place (prioritising researching the provenance of the highest-risk cultural objects first)?
- ? Should the Guideline distinguish the person conducting the research from the person who commissioned it?
- ? Should the scope of provenance research be limited to professionals, or could it be conducted by others apart from qualified or certified researchers?
- ? In case of limitation to professionals, should the Guideline (or its commentary) give a clear definition of who qualifies as a provenance researcher or a qualified or certified researcher/expert in the field?
- ? Should provenance research be an ongoing obligation after due diligence, and how frequently should it be conducted if documentation remains incomplete?

D. Evidence

Text as it stood at the end of the third session of the Working Group:

All elements relating to the provenance and due diligence performed are to be retained and shared. They should accompany the object at any time and be shared in case of a transfer.

29. To be added to the commentary (proposed during the third session of the Working Group)

- General ideas:
 - Explain, as the 1995 UNIDROIT Convention clearly does, that possessors need to demonstrate due diligence to be compensated.
 - Limitations that might occur in relation to passing on information.

30. Key issues still to be answered:

- ? Under what conditions should provenance research and due diligence information be shared (regarding legitimate interest, legal restrictions, or privacy concerns)?
- ? With whom should provenance research and due diligence information be shared (only with the future possessor)?
- ? What constitutes acceptable proof of the due diligence and provenance research exercise?
- ? Should the Guideline address how provenance research and due diligence information could be submitted to a jurisdiction?

E. Publicizing an [orphan cultural object]

31. This Guideline was previously named "*Clearing*" [or publishing] an orphan cultural object, and was renamed during the third session of the Working Group.

Text as it stood at the end of the third session of the Working Group:

1. *A person or institution possessing an [orphan cultural object] may submit it to a publicizing process.*
2. *This could involve the physical and/or virtual presentation of the object on a platform specifically designed for this process.*
3. *[Respect should be given to the sensitivity of certain cultures.]*
4. *Issues connected with the provenance or due diligence of an [orphan cultural object] should be put before an [international advisory body].*

32. Key issues still to be answered:

- ? What registry model and governance structure should be adopted for the platform?
- ? Should the platform include a vetting committee or not, and how would this committee be financed and structured?
- ? Should the platform include the possibility of a "physical presentation" for each object publicised?
- ? How should the sensitivity of certain cultural objects be addressed in the publicising process? Should an alternative be proposed for these sensitive cultural objects?

F. Dispute resolution

Text as it stood at the end of the third session of the Working Group:

In addition to the procedures normally available under national law, the parties may agree to submit a dispute relating to the provenance or due diligence of an [orphan cultural object] to negotiation, mediation, conciliation, or international arbitration. When resorting to such an alternative dispute resolution mechanism, the parties should make all relevant information and documentation available.

33. To be added to the commentary (proposed during the third session of the Working Group)

- o General ideas:

- Parties engaging in ADR should disclose all relevant information concerning the object in question. Incomplete disclosure could significantly disadvantage one party, often the claimant. This is especially important in processes where legal representation or formal discovery mechanisms are absent.
- In order to keep the Guideline as simple as possible, the specifics of each proposed form of ADR relating to cultural objects should be kept to the commentary.
- A dispute should be resolved according to a certain legal system (applicable law for an individual conducting an alternative dispute resolution should be added).