

VISUAL ARTISTS BRUSHING WITH THE LAW: INTERNATIONAL LEGAL DIMENSIONS OF PROFESSIONAL PRACTICE

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INTRODUCTION

“Millions of artists create; only a few thousands are discussed or accepted by the spectator and many less again are consecrated by posterity. In the last analysis, the artist may shout from all the rooftops that he is a genius: he will have to wait for the verdict of the spectator in order that his declarations take a social value and that, finally, posterity includes him in the primers of Artist History ... and sometimes rehabilitates forgotten artists.”
- Marcel Duchamp, (1887-1968)¹

Seven decades after Duchamp’s insightful observations, most living artists throughout the world continue to have little or no bargaining power when dealing with greater power, wealth, and influence of cultural market gatekeepers in the contemporary art ecosystem.² Private and public collectors, patrons, and commissioners, plus art market professionals, continue to determine—collectively and individually—cultural and market values of artworks; they do so often, only after an artist’s death.

Visual artists operate today in a global art ecosystem, devoid of internationally harmonised art and artists’ laws and industry standards regulating artists’ interaction with much-needed gatekeepers. Moreover, unlike most authors and performers in leading creative industries (music, sound recording, film, and video) who have customarily formed collective associations to negotiate basic business standards with their collective industry gatekeepers, most visual artists are lone practitioners.

Being solo means that to survive—perhaps even thrive—in the contemporary art ecosystem, visual artists ideally need to acquire and apply appropriate tools to secure necessary transactions with individual art world gatekeepers. These artists especially need to exercise skilful use of suitable legal tools—as naturally as a painter uses a brush. Most art schools worldwide offer little or no education or training in such professional practices.

Part 1 of this paper explores artists’ engagement with exhibitors and buyers of completed works, commissioners of new works, and agents and dealers representing them in art marketplaces. Opportunities typically arise when using legal tools in the following principal contexts: A) primary sale contracts for still and moving and performative artworks; B) artists’ royalty payments on art resales; C) commissions for new artwork; D) artists’ representation contracts with art market professionals; E) artists’ estate planning for post-mortem administration; F) taxes on importers of artworks; G) AI and IP: authorship and originality; misappropriation and infringement; and H) censorship and freedom of expression.

Part 2 explores notable examples of artists exercising their exclusive right to determine the content of artworks and processes of creativity, especially the use of law as a fundamental element within subject-matter, or as a tool during the creative act. These include:

¹ Marcel Duchamp, lecture at the Convention of the American Federation of Arts: The Creative Act (Jan. 1957) (transcript available at the Alexina and Marcel Duchamp Papers).

² *Id.*

1. Andy Warhol's unorthodox ways of working in the 60s/70s/80s, which came back to legally bite his estate and foundation post-mortem, to date.
2. Sol LeWitt's authenticity certificates for wall drawings and structures for six decades from the 60s, the status of which was legally challenged, in this century.
3. Christo and Jeanne-Claude's practice of embracing the law for realisation of their site-specific public art projects around the world for six decades, from the 60s to the 20s.
4. Alan Smith's artwork entombing a sum of money in perpetuity, from the 1970s to date.
5. JSG Boggs' hand-drawings representing national currency notes used to pay for goods and services, in the 80s.
6. Carey Young's artworks exploring the relationship between the law and the constitutional identity of individuals, this century.
7. Alison Jackson's artworks exploring the theme of celebrity culture via still and moving images of celebrity lookalikes, from the 90s to date.
8. Banksy's disruption of art's cultural and market values, from the 90s to date.

I. BRUSHING WITH GATEKEEPERS

A. *Buyers*

i. Art Value Influencers

The cultural sector's valuation of new artwork typically involves "deciphering and interpreting its inner qualifications."³ This is an alchemistic process of subjective opinions expressed by a motley crew of influencers including fellow artists, art scholars and critics, public-facing art museum and gallery institutions, art biennales, and artist's foundations. Achievement of cultural value does not necessarily translate into market value, which often stimulates cultural influencers to seek out and consider new art and artists causing fiscal fuss.

The market sector's valuation typically involves objectively noting a work's past selling record, if any, and especially the latest price paid, then subjectively guesstimating its likely future resale price range. Market influencers include art advisors and agents, gallery dealers, art fairs, auction houses, private collectors, asset investors, patrons, and commissioners. Achievement of market value does not necessarily translate into cultural value, which often stimulates market influencers to look at new art and artists generating good cultural vibrations.

Why are artists poor?⁴ There are many customary reasons: contemporary artists self-fund autonomous work, rarely being commissioned or sponsored to originate, and are usually paid the lowest price when new artwork is first sold (astute purchasers' source and buy directly from artists, rather than pay premiums to art market professional dealers and auction houses). Consider this caustic

³ *Id.*

⁴ HANS ABBING, WHY ARE ARTISTS POOR? THE EXCEPTIONAL ECONOMY OF THE ARTS (2002).

observation by novelist Kurt Vonnegut: “The paintings by dead men who were poor most of their lives are the most valuable pieces in my collection. And if the artist really wants to jack up the prices of his creations, may I suggest this: suicide.”⁵ And sardonic comments of Thomas Hoving, Director of New York’s Metropolitan Museum of Art 1967/77, “[a]rt is sexy! Art is money-sexy! Art is money-sexy-social-climbing-fantastic!”⁶

Andy Warhol (1928-1987) famously married fine art with commerce, which he proudly and controversially noted: “Being good in business is the most fascinating kind of art . . . [m]aking money is art and working is art and good business is the best art.”⁷ Warhol did not learn business skills at art college, but serendipitously discovered and uniquely applied them via his mid-twentieth century Manhattan factory. Today’s art college students are unlikely to be as fortunate, especially when facing art business challenges in a contemporary art landscape that is now global in its reach—and is largely unregulated.

ii. *Wild West Ecosystem*

Twentieth-century growth of international trade spawned the development of specific industry-governed and funded regulatory frameworks harmonising standards of trading, transparency, health and safety, and dispute resolution mechanisms. Many such measures have been buttressed by national laws and international agreements, treaties, and conventions.⁸ There are now firmly established regulatory frameworks for international industries such as banking, fishing, pharmaceuticals, shipping, transportation, and sports.⁹ Is there a need for similar regulation of the international art industry? In other words, is it (as some have put it in recent times) like the old wild west—a self-built society without law enforcement, with just survival of the fittest?¹⁰

Few if any jurisdictions have enacted laws dealing specifically with art transactions: they are sales of goods, typically treated in law as such, in most cases second-hand. Accordingly, in locations where art is sold, art business traders are customarily required to comply with general trading laws. There have been few, if any, serious calls from the art industry and its clients to enact art-specific business transaction laws and regulations.

The question of self-regulation and, if not forthcoming, legislatively imposed regulation continues to be the “elephant in the room,” stomping through the offices of cultural institutions and art market professionals. Robust evidence has been regularly gathered on this matter in recent years by Deloitte and ArtTactic in their jointly

⁵ KURT VONNEGUT, *BLUEBEARD* 48 (1987).

⁶ Lynn Barber, *Art Struck*, *THE OBSERVER*, Mar. 19 2000, <https://www.theguardian.com/theobserver/2000/mar/19/life1.lifemagazine9>.

⁷ ANDY WARHOL, *FROM A TO B AND BACK AGAIN* 33 (1963).

⁸ See I PETROS C. MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE* (2015).

⁹ *Id.*

¹⁰ For example, *The Art Market Landscape: Five Essential Insights*, SOTHEBY’S INSTITUTE OF ART (May 31, 2023), <https://www.sothebysinstitute.com/news-and-events/news/the-art-market-landscape-five-essential-insights>.

published annual Art & Finance Reports.¹¹ These institutions conducted qualitative surveys of art market gatekeepers, including their art lawyers, each of which was asked to address issues “that pose the biggest threat to the reputation and functioning of the global art market.” There has been a consensus among those surveyed on the need for the art industry to “take self-regulatory action to address ... the greatest threats to credibility and trust in the art market,” not only in relation to dealings with older art and antiquities, but also with modern and contemporary works.¹² A key threat was highlighted by Karen Sanig, head of art law at Mischon de Reya LLP:

Reluctance to commit to writing, even a short written agreement, has to some extent enabled the eccentricities of the market to abound. A slightly more rigid approach to doing deals is starting to appear and ought to help solve some of the anomalies of the market that threaten its reputation ... [b]uyers and sellers ought now to require certain written warranties in relation to artworks as part of any transaction ... [t]he perceived threats to the art market are in many ways surmountable by exercising careful due diligence in art transactions and committing to written agreements ... the usual rules applied to the acquisition of large value assets – like checking ownership or the right to transfer ownership – are often forgotten.¹³

In this context, Sanig was referring to the Anglo-American common law contract formation approach, which generally does not require there to be a formally signed and sealed written instrument to create legally enforceable and binding contracts for sales of goods. However, most jurisdictions worldwide follow a Franco-style civil law approach, generally requiring some form of written documentation.¹⁴ Sanig was clearly suggesting that art sales conducted in Anglo-American jurisdictions should ideally be at least committed to writing, as would normally be the case in Franco-sphere jurisdictions. This modest and sensible suggestion is one that artists conducting their own first sales would be wise to consider adopting. When artists subsequently enter a contemporary art resale marketplace, which increasingly requires proof of authenticity and provenance, perhaps artists should explain to would-be buyers, who are reluctant to sign a written sale agreement, the benefits of being in possession of an artist-author signed document.¹⁵

Ignorance by art market professionals of business laws applicable to art transactions is the reasoning behind Sanig’s further significant suggestion that “there are few professional and qualification standards imposed on art market professionals ... one way to improve the current situation is to invest in educating art market professionals on behaviour that is illegal, and making it a requirement that they should inform themselves on the law.”¹⁶ The

¹¹ DELOITTE & ARTTACTIC, ART & FINANCE REPORT; A CLOSER LOOK AT THE GROWING ART & FINANCE INDUSTRY (4TH ED. 2016), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artandfinancereport-21042016.pdf>.

¹² *Id.*

¹³ *Id.* at 146.

¹⁴ See DUNCAN FAIRGRIEVE, THE INFLUENCE OF THE FRENCH CIVIL CODE ON THE COMMON LAW AND BEYOND (2007).

¹⁵ See CLARE MCANDREW, FINE ART AND HIGH FINANCE: EXPERT ADVICE ON THE ECONOMICS OF OWNERSHIP (2010).

¹⁶ DELOITTE AND ARTTACTIC, *supra* note 11, at 20.

same could be said for there being such education of students at art colleges.

At the heart of these art market gatekeeper surveys lies the question of whether commonly agreed problems and issues should be tackled through legislative intervention or through self-regulation by the art industry. Most consultees favored self-regulation, but could not agree on how such should be achieved since nothing appears to have been promulgated or planned for the foreseeable future.¹⁷ If the global art world continues to avoid or delay introducing effective self-regulation, governments may consider legislating sooner or later. As Pierre Valentin, head of art and cultural property law at Constantine Cannon LLP, said, “whilst it is difficult to see how an industry-appointed regulator could impose sanctions on industry members, this might be preferable to doing nothing at all.”¹⁸

In the absence of internationally harmonised art rules and regulations, cultural and market transactions between artists and gatekeepers are conducted within general business frameworks operating in applicable local, regional, state, or national jurisdictions. The next section considers engagement by artists with gatekeepers in a range of common art business transactions.

iii. Key Actors

Artists commonly conclude first sales verbally. In civil law jurisdictions, such transactions may not be legally valid if artists or buyers rely in future disputes only on proverbial “he said/she said” recollections.¹⁹ In common law jurisdictions, verbal transactions may be legally valid if there is sufficient probative evidence that a sale was concluded; but legal and business problems can and do arise from such so-called silent contracts. Consequences of silence can be profoundly damaging to the lives of both artwork and artist through their journeys into the future; to first and successive secondary buyers (and their heirs/estates); to art market professionals involved in transactions; to acquiring museum and gallery institutions; to investors; to authentication experts, researchers, and academics; and to conservators and restorers. However, in recent times artists who are comfortable with digital technology use it to record first sales transactions.

Furthermore, blockchain technology enables transactions to be recorded digitally. A growing number of artists and art market professionals, notably in the U.S., have been attracted to its use for first and subsequent sales of artworks.²⁰ Advocates of smart blockchain-supported contracts see them as being a unique, secure, and transparent mode of proving an artwork’s authenticity, current and future transfers of ownership, and allowing artists to exercise some control over new works they sell. However, in many jurisdictions such contracts may not currently be legally recognised, and therefore, not binding on buyers nor enforceable by artists. Some

¹⁷ *Id.*

¹⁸ *Id.* at 147.

¹⁹ FAIRGRIEVE, *supra* note 14.

²⁰ Cam Thompson, *Retract Royalties, Reduce Revenue: NFT Creators Are Suffering and so Are Marketplaces*, COINDESK (Nov. 4, 2022), <https://www.coindesk.com/web3/2022/11/04/retract-royalties-reduce-revenue-nft-creators-are-suffering-and-so-are-marketplaces/>.

jurisdictions enacted legislation recognising and regulating smart contracts, but most jurisdictions worldwide have yet to do so. Smart contracts and their successful operation ideally require universal jurisdictional recognition.²¹

iv. Still Physical Artwork

Physical artwork deteriorates over time, especially if made using non-traditional and ephemeral materials. Written sale contracts may provide future restoration/repair and/or replacement of material more efficiently. Separate written guidance for ongoing care and maintenance (including sound environmental conditions) may ideally be provided by artists, including instructions for safe transportation, assembly/disassembly, display, and storage. Silence on such matters at point-of-sale leaves artists and new owners without agreement on the best course of conduct to address future problems and exposes artwork to risks of neglect or inappropriate treatment.

When making first sales, artists sometimes agree to a percentage discount from their normal market price for an artwork (on the basis that a percentage of the purchase price would not be lost as a commission fee paid by artists to selling agents/dealers).²² And in return, artists may ask buyers to agree to a condition of sale, giving the artist (and/or their estate) first option to buy back the artwork at a fair market value in future. Some artists rely on a belief that they have an automatic legal right to buy-back even where there is no recorded agreement to do so—especially if there is a future rise in resale price. However, no jurisdictions to date appear to have legislated to give artists such automatic buy-back rights.

Myths and misunderstandings about artists' intellectual property rights in artwork are common among first-time buyers, many of whom erroneously believe they are buying not only an artwork, but also the right to reproduce or otherwise merchandise copies of it. It is good practice for artists to include in written contracts of sale "for the avoidance of doubt" provisions that the artist owns and retains copyright and all other intellectual property rights in the artwork, and that the buyer needs the artist's prior written consent for any reproduction or other merchandising of copies of the artwork (or versions of it) in any dimensions or mediums (mechanical or digital).

The contemporary art world's global reach substantially increases the likelihood that parties in the sale are based in different jurisdictions, in which case their respective interests are best served by including a term in the contract, agreeing to their choice of governing law in the event of future legal disputes and normal

²¹ See Daniel Drummer & Dirk Neumann, *Is code law? Current legal and technical adoption issues and remedies for blockchain-enabled smart contracts*, 35(4) J. OF INFO.TECH. 337 (2020); see also Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2018), <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/>.

²² See JJ Long, *When To Offer Discounts As An Artist*, JJARTWORKS (Feb. 2, 2019), <https://www.jjartworks.com/blog/when-to-offer-discounts-as-an-artist>.

business practice in most cross-jurisdiction business transactions in other international industries.²³

v. *Born-Digital Artwork*

In 2021, artworks minted via non-fungible tokens (NFT) flooded the contemporary art market.²⁴ There are two main types of art NFTs: (1) artworks born-digital and minted as NFTs by the original digital author; and (2) physical artworks that are digitally reproduced and minted as NFTs by anyone with access to them.²⁵ For example, Beeple (1981) was the original author and NFT minter of *Everydays: The First 5000 Days* in 2021,²⁶ Katsushika Hokusai (1760-1849),²⁷ was the original author of *The Great Wave off Kanagawa*, 1831, a physical print of which was acquired by London's British Museum in 2008, which minted it for sale as an art NFT in 2021.²⁸ Beeple undoubtedly owns copyright in *Everydays*, with exclusive legal rights to mint his image for sale. Any copyright in Hokusai's artwork fell into the public domain to be freely reproduced and used. However, if Hokusai were alive or had recently died, any copyright he owned would still require his licence to reproduce and mint and sell *The Great Wave* as an art NFT.

Buyers may also run risks. They may encounter copyright violation issues if a copyrighted work is minted without a licence. Similarly, they may have failed to appreciate that the acquisition of what they believe to be a unique art NFT does not include owning copyright in the image, which may mean that further versions of it may be minted and marketed by others. Such buyers may have a legal remedy against the online platform through which they first acquired the NFT. Such legal remedy exists for violation of a buyer's sale contract by the seller's failure to disclose or explain such limitations, or for misrepresentation or fraud, such as being misled into buying the NFT that was erroneously created and authenticated by the original artist-author. Art lawyers have warned potential buyers to interrogate the written terms and conditions of sale on NFT selling

²³ See Glenn West, *Making Sure Your "Choice-of-Law" Clause Chooses All of the Laws of the Chosen Jurisdiction*, THE HARV. LAW SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2017), <https://corpgov.law.harvard.edu/2017/09/18/making-sure-your-choice-of-law-clause-chooses-all-of-the-laws-of-the-chosen-jurisdiction/>.

²⁴ See AMMA & Artprice.com, *The Art Market in 2021* (25th ed. 2021), <https://www.artprice.com/artprice-reports/the-art-market-in-2021/the-art-market-in-2021>.

²⁵ See Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for \$69 Million*, N. Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html>.

²⁶ Michael Joseph Winkelmann, known professionally as Beeple, is an American digital artist, graphic designer, and animator known for selling NFTs. His *Everydays: the First 5000 Days*, is a collage of images from his "Everydays" series: sold on March 12, 2021, for \$69 million in cryptocurrency to an investor in NFTs. It is the first purely non-fungible token to be sold by Christie's. See <https://onlineonly.christies.com/s/first-open-beeple/beeple-b-1981-1/112924>.

²⁷ *The Great Wave off Kanagawa* is "possibly the most reproduced image in the history of all art ... and the most famous artwork in Japanese history," and influenced notable artists including Vincent van Gogh, Claude Monet and Utagawa Hiroshige. See Ellen Gamerman, *How Hokusai's The Great Wave Went Viral*, WALL STREET J. (Mar. 18, 2015), <https://www.wsj.com/articles/how-hokusais-the-great-wave-went-viral-1426698151>.

²⁸ Bender Grosvenor, *The British Museum Demeans Itself By Selling Its Works as NFTs – and Will Probably Live to Regret It*, THE ART NEWSPAPER (Feb. 09, 2022), <https://www.theartnewspaper.com/2022/02/09/the-british-museum-demeans-itself-by-selling-its-works-as-nftsand-will-probably-live-to-regret-it>.

platforms before bidding and purchasing.²⁹ These same art lawyers have highlighted the added risk of buyers' NFT accounts being hacked to steal their acquisitions and cite the ICT *caveat* along lines of "if it can be digitised, it can be hacked."³⁰ Born-digital artworks, first sold via digitally encrypted NFTs, face legal and business issues very different from those typically faced in still physical artwork's first sales. Nevertheless, first sales of both types of work ideally benefit from employing written sale contracts with appropriate terms and conditions.

vi. Film/Video Artwork

Buyers of film/video artworks are usually interested in following the traditional art acquisition practice: buying full ownership of the physical object or digital file carrying film/video data. It is important for both the buyer and artist to clarify at the point of sale the extent to which the buyer is also acquiring any rights/permission to show the work. Conflicts may arise where the artist assumes the buyer wants to own the film/video work only to view it privately, but the collector does not disclose plans to show the work publicly and charge viewers digitally. To avoid these kinds of difficulties, such matters should ideally be discussed before the sale, and be included in a written contract together with any other terms and conditions—as they are customarily dealt with in comprehensive written acquisition contracts by public-facing institutional collectors of artists' film/video works.³¹

A key issue for artists making audio-visual artworks is self-clarification of their creative intentions before negotiating with potential buyers. Whether, for example, the work is to be seen by a unique audience, by limited defined audiences, or by unlimited undefined audiences; and whether physical/digital ownership of a unique master is to be transferred to the buyer, or of only a numbered limited edition of copies of masters, or of an unlimited edition of copies of masters. Ideally, artists should use their self-clarified intentions, to settle with buyers' provisions for viewing, and/or transferring physical/digital ownership. Two areas of law are key considerations: copyright and contract.

International and national copyright laws give authors of film/video exclusive rights to prevent or authorise copying, public communication/performance, renting/leasing, editing, and authorship

²⁹ See *NFT Projects – Essential Legal Advice*, SAUNDERS LAW, <https://www.saunders.co.U.K./services/media-law/nft-projects-essential-legal-advice/>; see also *What Are The Legal Issues Concerning Non-Fungible Tokens (NFTs)?* ART LAW & MORE (July 8, 2021), <https://artlawandmore.com/2021/07/08/what-are-the-legal-issues-concerning-non-fungible-tokens-nfts/>; Cathrine Zhu & Louis Lehot, *A Checklist Of Legal Considerations For The NFT Marketplace*, CRUNCHBASE NEWS (Nov. 9, 2021), <https://news.crunchbase.com/fintech-e-commerce/a-checklist-legal-nft-marketplace/>.

³⁰ Int'l Monetary Fund [IMF], *Finance & Development: The Dark Side of Technology*, vol. 53 (Sept. 2016), <https://www.imf.org/external/pubs/ft/fandd/2016/09/wellisiz.htm>; see also Nathan Reiff, *Can Crypto Be Hacked?* (May 31, 2023), <https://www.investopedia.com/articles/investing/032615/can-bitcoin-be-hacked.asp>.

³¹ See Int'l Council Of Museums [ICOM], *Standards on Accessioning* (2020), <https://icom.museum/en/ressource/standards-on-accessioning-of-the-international-council-of-museums/>.

credits. Duration of film/video copyright varies widely worldwide. Some countries specify fixed years from public release date while others endure for the principal director's lifetime plus 25/50/70 years after death. In some jurisdictions, including the U.K. and E.U. countries, copyright lasts for the lifetime plus 70 years after the death of a last surviving co-author. Copyright laws envisage authors using written contracts for exploitation of their works. Contracts need not, but may, include transfer of ownership of physical/digital material holding the audio-visual data of the film/video, or may restrict a buyer's ownership and/or use of a work by including specific terms and conditions, such as territorial and/or temporal limits of such ownership/use. Selling ownership or granting copyright licences to use film/video can be a lucrative source of capital and income generation for the artist-author/copyright owner.³²

vii. Performative Artwork

Dematerialisation of contemporary art activity increased significantly in recent times and produced a range of performative art practices.³³ Every work is unique and will ideally require correlative legal and business arrangements constructed and implemented for its acquisition. For example, contracts can explain instructions for performance to ensure that the artist's directions and conditions for a work's performance are respected and adhered to, and that only those contractually authorised to enact the work may do so.³⁴ Ideally, such contracts work best when they are in a written agreement signed by all concerned parties. Additional contractual terms and conditions of sale may require that ownership is transferred uniquely to a collector/buyer or performance location/venue, meaning that the artist agrees not to sell re-enactment rights of the performative work to others.³⁵

International and national laws governing intellectual property rights in performances are complex. Working knowledge and understanding of such rights are alien to most performative visual artists, especially in the early development of their practices.³⁶ Performers' rights are akin to copyright and are automatically given

³² See *The International Documentation on Audiovisual works (IDA) and rights data management in the audiovisual sector*, WIPO (Oct. 26, 2022), https://www.wipo.int/meetings/en/details.jsp?meeting_id=72808.

³³ See Philip Barcio, *What Was The Dematerialization of Art Object?*, IDEELART (June 2, 2017), <https://www.ideelart.com/magazine/dematerialization-of-art>.

³⁴ For example, Tino Sehgal's (b.1976) 'constructed situations' require enactment of his choreographic instructions and scripted speech by performers – or 'interpreters' – approved and trained by the artist. Sehgal's constructed situations are enacted in real time, and in interaction with an audience inside a museum or a gallery. In contrast to ephemeral works of Performance Art, Sehgal's works are exhibited, like other exhibits found in a gallery or a museum, during the entire opening times of the exhibition's duration. See also Anne Midgette, *You Can't Hold It, But You Can Own It*, N. Y. TIMES (Nov. 25, 2023), <https://www.nytimes.com/2007/11/25/arts/design/25midg.html>.

³⁵ For example, Public Movement is a performative research body that investigates and stages political actions in public spaces, which in 2011 used a written contract to define the rules for performance of a work and to transfer the exclusive right to perform it in the Netherlands to the Van Abbemuseum for Contemporary ART in Eindhoven. See also PUBLIC MOVEMENT, <http://www.publicmovement.org/about/>.

³⁶ See *Performers' Rights – Background Brief*, WIPO <https://www.wipo.int/pressroom/en/briefs/performers.html>; See also *Improving the Status of Performers: Efforts and Perspectives*, WIPO MAGAZINE (Nov. 2009), https://www.wipo.int/wipo_magazine/en/2009/06/article_0003.html.

by laws in most jurisdictions. Such laws give performers of all kinds, including performative visual artists, exclusive rights to authorise/deny actions such as recording of their live performances (so-called non-property rights), and making, distributing, renting, and loaning copies of such recordings (so-called property rights).³⁷

Performers' rights generally last for at least 50 years from the first public release of an authorised recording. Professional performers in other cultural media (music, dance, film, theatre) customarily give prior authorisation for live recordings of their performances through written contracts. These agreements are with potential producers and/or disseminators of such recordings that deal with the recording itself, any performer's fee, or the performer's share of economic rewards (royalties) that may be earned by future commercial showings, broadcasts, or other commercial communications of those recordings.³⁸ Performative visual artists could, and ideally should, do likewise, but few do so and thereby miss golden opportunities to generate future revenue.

Moreover, copyright laws in many jurisdictions give authors of performative artworks, who might also be performers, the rights to authorise or deny re-enactments of all or a substantial part of their work, and to restrict the recording, distribution, public performance, and public communication of their work. Such rights typically endure for the author-artist's life plus at least fifty years post-mortem. In this way, the whole of a performative artwork may be copyright-protected via its constituent elements of music, literature, film, choreography, drama, still visual art, and design.³⁹

B. Resellers

France's Ministry of Culture is currently researching, "the permanence of artistic royalties through smart contracts and other means, and on how blockchains communicate with each other."⁴⁰ It is apt that this research is being undertaken by France, where permanent artists' resale royalty rights were conceived just over a century ago. These rights were implemented not by contract law, but by "other means" legislation. Enacted in 1920 as *droit de suite* (right to follow), French citizen-artists were given automatic legal rights to receive payments of royalties each time their works were resold in France's art market.⁴¹ Over eighty nations developed and enacted versions of this law over the past century to benefit their artist-citizens, including common law jurisdictions⁴² where *droit de suite*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Dorian Batycka, *Twelve institutions join Web 3.0 fellowship—including Musée d'Orsay and Vienna's Belvedere Museum—to harness the power of blockchain*, THE ART NEWSPAPER (Feb. 17, 2023), <https://www.theartnewspaper.com/2023/02/17/global-museums-and-cultural-bodies-join-web-30-fellowship-to-harness-the-power-of-blockchain>.

⁴¹ United Nations Educ., Sci. and Cultural Org. [UNESCO], *The Resale Rights of Artists ("Droit De Suite")*, IGC(1971)/XI/4 (Apr. 9, 1997), <https://unesdoc.unesco.org/ark:/48223/pf0000111551>.

⁴² Notably: Australia, India, Ireland, Malta, New Zealand, and U.K.. See generally, Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists*, CISAC (June 2015), <https://www.cisac.org/media/3953/download>.

usually translates as the artist's resale right (ARR). In the U.S., ARR legislative proposals have been repeatedly rejected.⁴³

Before considering the U.S., it is valuable to reflect on why many other nations enacted ARR. Most artists first enter the marketplace in weak bargaining positions where it is hard to find interested buyers, and even harder to persuade willing buyers to also accept a contractual condition of sale requiring them to pay artists a share of proceeds of a subsequent resale. What is even more difficult than all of that is for artists to muster the courage and resources to enforce compliance with contractual resale conditions by defaulting resellers. Moreover, even if first buyers agree to resale conditions, contract laws in many jurisdictions do not give artists (or their estates after death) the right to enforce resale royalty compliance by second and subsequent buyers who are not a contracting party to the first sale—a legal difficulty often exacerbated by the location in foreign jurisdictions of first and subsequent resellers.⁴⁴

Such contractual shortcomings may be overcome by ARR legislation. Artists are automatically given ARR as an inalienable economic intellectual property right, so that they cannot sell, donate, or waive its enforceability. ARR endures this protection throughout an artist's life plus decades after death (enforceable by their estates). Royalty rates are standardised around four or five percent of the resale price, up to maximum rate cap. Private resales are excluded so that only art market professionals involved in resales are required to pay royalties, which may be recouped from buyers. National non-profit collecting entities receive royalties and remit them to their artist-members. Art market professionals may be judicially sanctioned for non-compliance.⁴⁵ ARR nations may sign reciprocal enforcement treaties with other nations operating similar ARR legislative frameworks. Treaty nations agree to collect the resale royalties from the works created by citizen-artists of other treaty nations and national collecting organisations remit receipts of foreign artists' royalties to each other accordingly.⁴⁶

Furthermore, national ARR legislation overcomes a widely recognised imbalance between the economies of visual artists and other creative authors. Visual artists, for example, do not typically derive principal income from selling reproductions of their artworks, but from sale of unique or limited-edition works to single first buyers—prices for which are usually lower than achieved by subsequent resellers. By contrast, most other creative authors (of original music, literature, photography, choreography, moving images, and so on) derive principal income from selling reproduction and dissemination of multiple copies of works to a hoped-for mass market. Accordingly, advocates for ARR contend that such innate economic imbalance is best redressed by national legislation.⁴⁷

⁴³ OFF. OF THE REGISTER OF COPYRIGHTS, *RESALE ROYALTIES: AN UPDATED ANALYSIS*, (Dec. 2013).

⁴⁴ See Sam Ricketson, *Toolkit on Artist's Resale Right*, WIPO (Mar. 8, 2023), https://www.wipo.int/meetings/en/docdetails.jsp?doc_id=602473.

⁴⁵ e.g., Anny Shaw, *Artist resale rights organisations launch U.K. High Court action against multi-millionaire art dealer and collector Ivor Braka*, THE ART NEWSPAPER (Mar. 18, 2022), <https://www.theartnewspaper.com/2022/03/18/artist-resale-rights-organisations-sue-art-dealer-collector-ivor-braka>.

⁴⁶ Ricketson, *supra* note 44, at 58.

⁴⁷ *Id.* at 10.

ARR in the U.S. has been explored by federal and state legislators many times since the 1970s, but (with one notable exception) has always been strongly resisted. Legislation was considered by Congress in 1978, 1986, 1987, 2011, 2014, 2015, 2018 and 2019, where each proposal failed.⁴⁸ Several U.S. state legislatures have also considered ARR proposals, but only California legislated via its California Resale Royalties Act in 1976 (CRRA). However, in 2018, a federal appeals court nullified the CRRA on the basis that its provisions were incompatible with federal law.⁴⁹ Amongst other things, the court cited the U.S.' longstanding federal "first-sale" legal doctrine which permits the owner of an artwork to resell it as they see fit without hindrance from the original artist-owner. This judicial precedent effectively confirmed that individual states cannot enact their own ARR framework.

Following this 2018 decision, U.S.-based artists and their lawyers searched for ways of achieving ARR by non-legislative means. They eventually focused on using blockchain technology to create NFT smart contracts with resale royalty conditions when first selling their works. Such first sale practices have flourished in the U.S. over the past year or so. However, recent reliable reports suggest increasing numbers of U.S.-based artists and their blockchain market platforms have begun to curtail the practice.⁵⁰ Given the apparent weaknesses of contractual resale royalty rights, champions of ARR favor a multilateral ARR treaty currently being proposed at the United Nations' World Intellectual Property Organisation.⁵¹ This proposal has gained support from current ARR legislative nations and others considering the idea.⁵² If such a universal ARR instrument achieved the agreement of most nations, perhaps the U.S. would subscribe to it, thereby giving U.S. citizen-artists inalienable rights to potential royalties from resales of their artworks around the global art market.

C. Commissioners

An ideal starting point, for successful realisation of commissions for new artwork, is the establishment of a mutual trust bond between artist and commissioner. Such bond is best embodied in a written agreement reflecting the inevitably unique nature of the work and its execution processes. Mutual understanding is of paramount importance and such an agreement need not be viewed as a legalistic straitjacket. Instead, the agreement should be viewed as a jointly constructed *aide-mémoire* and project management checklist to guide the parties through their respective responsibilities and rights during the commission process. There is no customary one-size-fits-all commission model contract.

A key challenge is often the tension between artists' confidence that they will be paid for delivering their artistic skill and labour,

⁴⁸ OFF. OF THE REGISTER OF COPYRIGHTS, *supra* note 43, at 6-8.

⁴⁹ *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1076 (9th Cir. 2018).

⁵⁰ Louis Jebb, *Blockchain platforms promise resale royalties and provenance tracking for physical artworks*, THE ART NEWSPAPER (June 13, 2023), <https://www.theartnewspaper.com/2023/06/13/blockchain-platforms-promise-resale-royalties-and-provenance-tracking-for-physical-artworks>.

⁵¹ Ricketson, *supra* note 42.

⁵² Ricketson, *supra* note 44.

versus commissioners' confidence that they have a right to reject new work. Such a dichotomy may be reconciled through artists' and commissioners' agreement provisions specifying an overall project timescale with key staging points, such as artists receiving interim payments for work done and expenditure made (and contingent provisions for slippages and/or variations). At each stage payment, commissioners should have opportunities to view completed work, make constructive suggestions, and approve progress to the next stage or terminate the remainder of the commission.

Artists and commissioners should ideally anticipate and discuss an artwork's potential future uses or abuses and make appropriate provisions accordingly. After a commissioned work's completion and full payment to the artist, problems may arise when commissioners decide a work should be modified and/or relocated. Respective rights and responsibilities of both the artist and commissioner in this situation should be provided for beforehand. For example, artists need clarification on who would be the owner of the work after execution, whether it is the artist, commissioner, funder, maintenance trust, or site owner. Additionally, artists need clarification on whether ownership transfers would revert back to the original artist if, in future, the work changes or relocates.

Artists' rights, over future uses of commissioned works they no longer own, may be strengthened by national and international intellectual property laws, most of which allow artists to exercise such rights through contracts in advance of new creations. Nevertheless, it is prudent to include provisions confirming an artist's statutory copyrights, moral rights, and resale rights over the work—perhaps with any agreed variations or licences. Virgin commissioners often misunderstand that commissioning and owning new work does not automatically buy rights to reproduce or otherwise commercially exploit the work or authorise others to do so.

A landmark case concerned Richard Serra's (b.1938) *Tilted Arc*, 1981: a large steel sculpture commissioned by the U.S. General Services Administration (GSA) and sited in Federal Plaza in New York City, several years after which GSA decided to remove it. Serra strongly objected and filed a lawsuit in 1986, claiming the sculpture was site-specific and removal would destroy its artistic integrity.⁵³ His lawsuit failed and the sculpture was removed. U.S. federal law did not then, but since 1991, does give U.S. artists the statutory moral right to prevent any intentional or grossly negligent destruction of their work, if it is of recognised stature.⁵⁴

D. Representatives

In Central and Eastern Europe and Russia, artists and gallery dealers did not rush into each other's arms following the collapse of Communism in the 1990s, and the development of free market economies. Artists in such countries were, and still are, mostly reluctant to have gallery dealers as their representatives. Instead, artists preferred to sell new work directly or consign to auction houses. In these ways, such artists seek to guard against what they see

⁵³ Serra v. U.S. General Services Admin., 667 F. Supp. 1042, 1045 (S.D.N.Y. 1987).

⁵⁴ Visual Rights Act (VARA) of 1990, 17 U.S.C. § 106A.

as the real risk of dealers influencing the content and form of their new work, to be more marketable, and to avoid paying up to fifty percent commission fees to dealers. Auction houses in such countries charge sellers consignment fees of less than ten percent of the hammer price. A conventional artist/gallery business deal is hard to find in such countries.

In India and South-East Asia, as economies have grown, so have their art markets. Newfound wealth of individuals and businesses in such territories has stimulated buying contemporary art, where the resales have achieved profitable returns.⁵⁵ Such new art markets have yet to establish customary trading practices or norms for artists and art market professionals including artist/gallery business deals. The situation is similar in other growing contemporary art markets, such as Greater China, Latin America, and parts of Africa.⁵⁶

Australia experienced a vibrant market for contemporary art, especially for work by indigenous peoples.⁵⁷ In particular, collaborations between indigenous artists and non-indigenous dealers have resulted in the establishment of a thriving market for a range of contemporary indigenous works sold in major cities. City dealers regularly visit indigenous artists in the outback to supply canvases and paints, where most live communally in relative poverty and generally poor conditions. Indigenous artists are often paid comparatively low fees for works they produce for dealers, who then ship them to cities for sale at comparatively higher prices.⁵⁸ Likened by many critics of such practices to slave labour, their prevalence led to the Parliament of Australia enacting the Resale Royalty Right for Visual Artists Act in 2009.⁵⁹ Non-indigenous contemporary artists also benefited from this Act, even though their relationship with gallery dealers tends to follow the typical framework now firmly established in the northern hemisphere.

Artist/gallery business frameworks in Western Europe and North America have been long-established.⁶⁰ They traditionally require galleries to actively promote their artists through exhibitions,

⁵⁵ See Jennifer Scally, *The art market in Asia: vibrant, dynamic and flourishing*, AXA XL (Apr. 24 2022), <https://axaxl.com/fast-fast-forward/articles/the-art-market-in-asia>.

⁵⁶ See CLARE MCANDREW, A SURVEY OF GLOBAL COLLECTING IN 2022, (2022), https://d2u3kfw92fzu7.cloudfront.net/A_Survey_of_Global_Collecting_in_2022.pdf.

⁵⁷ See Briar Williams, *Gold rush – it's boom times in the Australia art market*, BUSINESS DECK (Feb. 6, 2023), <https://businessdesk.co.nz/article/the-life/gold-rush-its-boom-times-in-the-australia-art-market>.

⁵⁸ See Tom McIlroy, *How some dealer exploit indigenous artists for big money*, FINANCIAL REVIEW (Dec. 2022), <https://www.afr.com/politics/federal/how-some-dealers-exploit-indigenous-artists-for-big-money-20221212-p5c5ja>.

⁵⁹ *Resale Royalty Right Act 2009* no. 125 (Austl.).

⁶⁰ See generally FRISCO LAMMERTSE & JAAP VAN DER VEEN, UYLENBURGH & SON: ART AND COMMERCE FROM REMBRANDT TO DE LAIRESSE 1625–1675, (Waanders Publishers in conjunction with the Rembrandthuis, Amsterdam 2006) (explaining that artist/gallery representation began in Western Europe around 400 years ago, and developed by trial and error through to today, as a business relationship fundamentally based on mutual trust). Rembrandt van Rijn (1606-1669) is often cited as a progenitor of modern and contemporary artist/dealer representation. As a young unknown artist, Rembrandt relocated from his hometown of Leiden in the then Dutch Republic (now the Netherlands) to the business and trade capital city of Amsterdam, to live in the house of an art dealer. The pair made a business arrangement whereby the dealer would broker sales and commissions for the artist, who in turn would work using a studio in the dealer's house, and would also tutor students-cum-assistants. This arrangement delivered the artist's only source of income for four years: 1631 to 1635. The dealer was Hendrick van Uylenburgh (1587-1661).

brokering first sales of new works and commissions, and sharing the proceeds of sales (often, though not always, equally). Artists may appoint more than one dealer to represent them exclusively or non-exclusively, in one territory or worldwide. Dealers rarely represent a single artist, except perhaps at the start of their dealing career, and most act for a stable number of artists. There is no ideal model contract for artist/gallery representation contracts and certainly no customary art industry standards or rules; every such relationship is unique.

Successful artist/dealer relationships are often likened to a marriage. The success of which need not be founded on the initial legal joining in wedlock, but on sustained mutual trust. The artist trusts that the gallery believes in the work, sales can be achieved at the right price, and the gallery regards the relationship as being long term to develop both the artist's market and cultural recognition. Moreover, artists rely on the gallery's greater knowledge and experience of the art worlds, both market and cultural, that many artists do not possess and in many cases, actively do not wish to acquire. The gallery trusts that the artist is professionally committed to producing quality work that will achieve sales and critical acclaim, and that their business and artistic advice will be welcomed by the artist.⁶¹ At risk of stretching the matrimonial analogy too far, artist/gallery representation agreements can be compared to pre-nuptial contracts contemplating the division of assets in the event of future divorce. In other words, written artist/gallery contracts could and should ideally make provisions for settling outstanding mutual rights and obligations at the point of their future "divorce," in addition to provisions framing ways in which the business relationship should operate when still viable. As with successful intimate relationships, challenges and conflicts arise and should ideally be faced and worked through. Artist/dealer agreements can facilitate doing so by anticipating and providing for typical rubbing points.

Artists and dealers often worry about how to end their business relationship. Artists want the option to quit a gallery's exclusive representation if the relationship is not working out as expected, or in the event they have a better offer of exclusive representation. Galleries do not want exclusively represented artists to quit, especially if they achieve significant market and cultural recognition. Poaching of such artists by "mega-galleries" is an occupational hazard for relatively smaller galleries.⁶² In this context, artists and galleries may be reassured to understand that in many jurisdictions, contracts for the performance of personal services may not be legally enforceable, even though the non-performing party may be legally required to compensate the other party for quantifiable financial loss or damage caused by such non-performance. Sound solutions for both parties may be provided via contract, such as either party may terminate the contract at will by serving written notice on the other party, giving a specified period for outstanding mutual (and

⁶¹ See, e.g., GALLERY DEALS-THE ARTIST/GALLERY RELATIONSHIP (ART LAW TV June 20, 2011).

⁶² See Gareth Harris, *Global mega-galleries are putting the squeeze on smaller operators*, THE ART NEWSPAPER (Nov. 4, 2013), <https://www.theartnewspaper.com/2013/11/05/global-mega-galleries-are-putting-the-squeeze-on-smaller-operators>.

any third party) rights and obligations being fulfilled. Such a notice provision may also apply if the artist dies while under contract.

Further issues may arise when galleries have cash-flow problems, perhaps leading to insolvency.⁶³ In such circumstances, artists may be owed their agreed shares of full purchase prices received by galleries for sold works. In this case, monies due to artists may be safeguarded by provisions in terms that the galleries hold such monies in trust for, and as agent of, artists. They cannot mix such funds into their own bank accounts for use to meet their expenditure commitments. A similar provision may provide that unsold consigned works are not owned as stock by galleries but are held in trust as the artist's agent. Such provisions are especially important when galleries' assets are audited in insolvency or bankruptcy proceedings. In these respects, a few jurisdictions have enacted legislation giving such protection automatically to artists and their estates, represented by dealers notably in New York state.⁶⁴

E. Inheritors

There has been significant recent growth in representation by art market professionals of the estates of artists who died in recent times. Such activity is fast becoming an established business specialism within the contemporary art ecosystem.⁶⁵ Agents and dealers offer art market skills and services to artists' heirs and successors, who frequently need professional help to handle artworks they have inherited. Such business relationships are likely to require long-term investment of resources by art market professionals before they achieve profitable returns from sales, which is perhaps why so-called mega-galleries are leading this new niche sector of the art world. Alongside such art industry developments, a growing number of initiatives have arisen focusing on artists' estates—whether from the perspective of living artists planning for posterity, or of heirs and successors inheriting artistic estate management responsibilities, both of which share similar needs for specialist information, knowledge, and skills.

In 2013, the U.K.'s Royal Academy published *The Artist's Legacy: estate planning in the visual arts*.⁶⁶ In 2015, the U.K.-based Art360 Foundation was established as an independent charitable entity "to meet the urgent needs of many visual artists and estates who need practical support and advice about managing their archives and legacies at a time of austere cuts to the arts."⁶⁷ In 2016, the Germany-based Institute for Artists' Estates was established as a research and management consultancy, together with its companion publication,

⁶³ See Laurel Wickersham Salisbury, *The Art of Bankruptcy: Consigned Artworks and Bankrupt Galleries*, CENTER FOR ART LAW (Oct. 24, 2019), <https://itsartlaw.org/2019/10/24/the-art-of-bankruptcy-consigned-artworks-and-bankrupt-galleries/>.

⁶⁴ N.Y. ARTS & CULT. AFF. § 12.01 LAW (McKinney 2012).

⁶⁵ See Sarah P. Hanson, *The great artists' estates race*, THE ART NEWSPAPER (May 16, 2017), <https://www.theartnewspaper.com/2017/05/16/the-great-artists-estates-race>.

⁶⁶ ROYAL ACADEMY OF ARTS, *THE ARTIST'S LEGACY: ESTATE PLANNING IN THE VISUAL ARTS* (2013).

⁶⁷ ART360Foundation, FACEBOOK (Oct. 18, 2018), https://www.facebook.com/Art360Fdn/photos/a.541246996313971/552974311807906/?paipv=0&eav=AFYTxJ9HV4f_mh7Qz-wpqfwxEmH6CBzQIR1z3I995cYfWg6oWG9ODWkZediacQ62nMk.

The Artist's Estate, a handbook for artists, executors, and heirs.⁶⁸ The U.S.-based Joan Mitchell Foundation initiated its Creating A Living Legacy (CALL) research project a decade or so ago “to provide support to older artists in the areas of studio organisation, archiving, inventory management, and through this work create a comprehensive and usable documentation of their artworks and careers.”⁶⁹ Thus, in 2018, CALL published an *Estate Planning Workbook for Visual Artists*.⁷⁰

CALL's *Workbook for Attorneys & Executors*, which offers guidance not only for artists' lawyers and executors, but also for artists themselves in planning for posterity.⁷¹ “Ars longa, Vita brevis” is the guide's mantra.⁷² Key issues that are explored include wills, trusts, how to establish artist-endowed foundations, and insights from artists about their own practices and views about legacy. The guide is in effect a *vade mecum* that can be dipped into at any point for reference.⁷³ Illustrations and comments from artists are peppered throughout, such as the introductory quotation from Native American artist Jaune Quick-to-See Smith: “Every artist, young or not so young, needs a will ... that allows for change over time and one that gives instructions about where the artwork should go upon the artist's demise. Artwork is different from cash or real estate.”⁷⁴

The guide's “Legacy” section explores two contrasting scenarios: one where artists die without having made plans and provisions for their legacy, and the other where an artist is young and emerging with an array of possible future opportunities. The “Artist Client” section offers guidance for any professional adviser, such as getting to know the artist client, framing the artist's legacy, and managing the estate while considering whether the artist's estate will include artwork collected from other artists. The “Estate” section is understandably the largest and includes essential topics such as inventory of works and related archival materials, storage and safeguarding, contractual agreements and relationships, appraisal and valuation, and non-art assets. Overall, this guide contains an abundance of knowledge and skills required for successful artists' estate planning, most of which commonly apply in most jurisdictions where artists are based. However, one complex matter in the guide may apply only to artists and their estates governed by Anglo-American common law jurisdictions. When deceased artists' estates are governed by civil law jurisdictions, freedom of testamentary disposition, which is familiar to the common law, is usually restricted so that blood relations including illegitimate children cannot be

⁶⁸ LORETTA WÜRTENBURGER, *THE ARTIST'S ESTATE: A HANDBOOK FOR ARTISTS, EXECUTORS, AND HEIRS* (2016).

⁶⁹ JOAN MITCHELL FOUNDATION, *ESTATE PLANNING WORKBOOK FOR VISUAL ARTISTS 5* (2015), <https://www.joanmitchellfoundation.org/uploads/pdf/CALL-EPW-I-2019.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Latin translation of the ancient Greek aphorism coined by Hippocrates (c.460-370 BCE) in his *Aphorismi*, loosely meaning “skillfulness takes time and life is short.” See HIPPOCRATES, *THE GENUINE WORKS OF HIPPOCRATES*, (Frances Adams, trans., Williams and Wood Co., 1946) (1849).

⁷³ *Vade mecum* translates to “go with me” in English.

⁷⁴ JOAN MITCHELL FOUNDATION, *ESTATE PLANNING FOR VISUAL ARTISTS: A WORKBOOK FOR ATTORNEYS & EXECUTORS* (2018), at 9, <https://www.joanmitchellfoundation.org/estate-planning-for-visual-artists-attorneys-executors>.

wholly excluded from inheriting. Artists' estate planning in such jurisdictions needs to take such statutory obligations into account.⁷⁵

The guide's section on "Copyright" highlights provisions often not understood by U.S. artists and their advisers.⁷⁶ This is because U.S. copyright law includes complex mechanisms allowing artists to reclaim their full copyright interests many years after contracting them away, and it is important for estate planning attorneys to know about and plan for this option. U.S. artists' reclamation rights are inalienable. Artists regaining their full copyrights can have great appeal when a U.S. artist has signed away their reproduction and merchandising rights on unfavorable terms (at an earlier stage in their career because back then they needed the money and had little or no bargaining power). U.S. copyright laws give such artists a five-year window during which they can terminate the rights they signed away in prior years.⁷⁷ Because the legal formula for calculating the termination window is complex, termination and regaining rights are often overlooked by artists and occasionally by their advisers. Nevertheless, U.S. artists' estate planning ideally should explore whether termination and acquisition of full copyrights should be exercised, and the right time to do so. For example, the guide explains that if an artist gave or sold publishing rights to a publisher on or after January 1, 1978, a five-year termination window to reclaim those rights begins forty years after the publication date.⁷⁸ U.S. artists' copyright lasts for life plus seventy years post-mortem, and can therefore run for decades after reclamation.⁷⁹ These provisions are unique to the U.S.

Copyright reclamation and reversion rights are also present in the legislation of fifty-five percent of the member states of the United Nations, most commonly as "use it or lose it" clauses, enabling creators to rescind the transfer of copyright if their work is not being issued or being made available to the public.⁸⁰ Following the implementation of the E.U.'s Digital Single Market Directive 2019, a use it or lose it measure is currently being enacted in the national legislation of all E.U. member states.⁸¹ The strongest form of this type of legislation is time-based reversion rights, which apply to all copyright works regardless of whether they are being used by the rights' holders. Such measures are most prevalent in common law countries, including the U.S., and are currently being legislatively proposed in the U.K..⁸²

With aims and objectives like CALL, Art360 Foundation recently launched a free app designed "to make archiving and cultural preservation skills available to all," which was pilot-tested working with artists and their estates to research, identify, and meet their estate

⁷⁵ JOAN MITCHELL FOUNDATION, *supra* note 69.

⁷⁶ *Id.* at 29.

⁷⁷ Copyright Act of 1976, 17 U.S.C. § 203.

⁷⁸ *See id.*; *See also* JOAN MITCHELL FOUNDATION, *supra* note 69, at 29.

⁷⁹ 17 U.S.C. § 203.

⁸⁰ Joshua Yuvaraj, *Reversion laws: what's happening elsewhere in the world?* THE AUTHOR'S INTEREST (Apr. 4, 2019), <https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/>.

⁸¹ Council Directive 96/9, 2001/29, art. 53(1), 62, 114, 2019 O.J. (L 130) (EC).

⁸² *Rights reversion and contract adjustment*, U.K. INTELLECTUAL PROPERTY OFFICE (Feb. 6, 2023), <https://www.gov.uk/government/publications/economics-of-streaming-contract-adjustment-and-rights-reversion/rights-reversion-and-contract-adjustment>.

planning and management needs.⁸³ The app delivers a tool that is “simple to use and breaks the process of archiving into manageable stages.”⁸⁴ A step-by-step approach is offered for “the effective management of physical and digital assets, with advice on how these can be maintained and protected, enabling artists to determine a method and pace that suits them.”⁸⁵ Legacy creation and management are sensitive and complex subjects. These initiatives bring them to the fore and offer artists practical help and support.

F. Importers

Import taxes have been featured in civilisation for millennia.⁸⁶ Worldwide laws governing border-crossings of foreign-sourced artworks from one tax jurisdiction into another are extensive and complex. The following survey explores key art world jurisdictions.⁸⁷ Import tax is normally payable before physical crossings of borders by foreign-sourced artworks. Payment is made directly to border control authorities and is customarily calculated as a percentage of the market value of the artwork, plus the cost of packaging, transport, and transit insurance. Transactional agreements made between trading parties usually specify whether payment will be made by the seller/exporter or buyer/importer, or agents for either of them.

The United States, United Kingdom, and Greater China were the leading countries in the global art market in 2022, together representing eighty percent of the total market value of art sales.⁸⁸ The U.S. accounted for forty-five percent, demonstrating its decades-long position as the global art market leader, a status that has undoubtedly been influenced by its generally longstanding exemption of art from import taxes.⁸⁹ Greater China accounted for seventeen percent in 2022, operating an art import tax rate of around thirteen percent into its mainland territories.⁹⁰ It is noteworthy that China’s “one country, two systems”⁹¹ current constitutional principle allows Hong Kong and Macau to continue operating with no import tax regimes. Hong Kong’s zero art import tax rate has undoubtedly influenced its favoring art marketplace, which closely competed with London as a world-leading art market city in 2022. New York City continues to be the market leader. The U.K. accounted for eighteen

⁸³ Art360 Foundation, THE NATIONAL ARCHIVES (Feb. 5, 2024), <https://webarchive.nationalarchives.gov.uk/ukgwa/+https://www.nationalarchives.gov.uk/archives-sector/projects-and-programmes/arts-archives/case-studies/art360-foundation/#>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ “No duties are to be paid in our city by anyone either on exported or imported goods. No one is to import frankincense or any other foreign produce of that sort relating to sacrifices to the gods, or purple, or any coloured dyes not produced in the country, or anything associated with any other profession that requires imported goods but serves no necessary purpose.” PLATO, LAWS bk. VIII at 847B (D. Horan trans., *The Dialogues of Plato - A New Translation* by David Horan ed., 2008) (c. 360 B.C.E.), <https://www.platonicfoundation.org>.

⁸⁷ Note: tax regimes and rates cited were those published as operating at the time of writing, and may have changed since.

⁸⁸ McAndrew, *supra* note 56.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Meg Shen & James Pomfret, *In Hong Kong, Xi says ‘one country, two systems’ is here to stay*, REUTERS (July 1, 2022), <https://www.reuters.com/world/china/hong-kong-deploys-massive-security-xi-set-swear-new-leader-2022-06-30/>.

percent in 2022, during its second full year outside the European Union.⁹² Its art import tax regime continues to operate at the same five percent rate as before Brexit, although now requiring the tax to be paid on art imports from the remaining twenty-seven E.U. member states.⁹³

The European Union's twenty-seven member states together accounted for twelve percent of the global art market in 2022 and continues to be a significant global art trading hub.⁹⁴ Under the E.U.'s harmonised tax regulations, member states must collect at least five percent import tax if art first enters the E.U. in that state, but may impose higher rates if they wish. The 2023 rates are as follows⁹⁵:

1. 5% Croatia, Cyprus, Malta
2. 5.5% France
3. 6% Belgium, Portugal
4. 7% Germany, Latvia
5. 8% Luxemburg, Poland
6. 9% Bulgaria, Estonia, Lithuania, Netherlands, Romania
7. 9.5% Slovenia
8. 10% Czech Republic, Finland, Italy, Slovakia, Spain
9. 12% Sweden
10. 13% Austria, Greece
11. 13.5% Ireland
12. 18% Hungary
13. 25% Denmark.

No further import tax is payable if art moves between E.U. member states.⁹⁶ For example, an artwork located in the U.S. destined for Denmark may first enter the E.U. in neighbouring Germany (where seven percent import tax is payable), then re-transported to Denmark, free from import tax. Like many other tax jurisdictions worldwide, including the U.K., the E.U. import tax regime also has special arrangements for art imported into the E.U. for temporary, not-for-sale exhibiting, and/or touring purposes. For example, no import tax is payable if repatriated within two years of being temporarily imported, and such arrangements facilitate lending of artworks between public-facing cultural institutions worldwide.

Worldwide, a minority of jurisdictions either do not operate import tax laws, or have very low rates.⁹⁷ Furthermore, many states/countries operate "special economic zones," where trading laws differ from the rest of the state/country. Import and other taxes are suspended or lowered at a port of entry or a relatively small geographical zone within a jurisdiction. These are variously called a *porto franco*, free port, free zone, foreign-trade zone, bonded area, or a foreign-trade zone. Over the past decade, art market participants increasingly use free ports as an economically efficient way to exhibit to would-be buyers, safely store artwork for an unlimited period at

⁹² McAndrew, *supra* note 56.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *VAT rules and rates*, EUROPEAN UNION, <https://europa.eu/youreurope/business/taxation/vat/vat-rules-rates/> (last visited Feb. 2, 2024).

⁹⁶ *Id.*

⁹⁷ Evgeniya Morozova, *14 countries with no income tax: where to move to minimise the tax burden*, IMMIGRANT INVEST (May 1, 2023), <https://immigrantinvest.com/blog/tax-free-countries-en>.

minimal expense, and to complete sales.⁹⁸ Service fees for doing so are commonly significantly lower than import and sales taxes that would otherwise be payable. In these ways, artwork physically enters the zone import tax-free, where it can be sold sales-tax free, but buyers may be liable to pay any taxes required for shipping the tax-free purchased art into an art import-tax jurisdiction.⁹⁹

Regular exporters or importers of artworks customarily hire a special international art transporter, who advises and helps them comply with any art import tax liabilities in transit and at final foreign destinations. The most widely used tool for dealing with artworks being transported across jurisdictional tax borders to reach a final foreign destination is the International Carnet-ATA/Admission Temporaire passport. This is a goods/merchandise international customs document permitting tax-free temporary export and import of non-perishable goods moving across most of the world. The ATA Carnet system is a unified customs declaration document that is presented at every territorial border crossing point and can be used throughout seventy-eight countries in multiple trips over its one-year validity period. The scheme is jointly administered by the World Customs Organization and International Chamber of Commerce.¹⁰⁰

G. Androids

i. AI Art Tools

Commercial use of Artificial Intelligence (AI) in the contemporary art ecosystem became a hot legal topic in 2023.¹⁰¹ The recent rapid growth and popular use of AI art tools has already prompted several significant legal controversies. In January 2023, an unprecedented lawsuit was filed in the U.S. by three U.S.-based visual artists.¹⁰² It is a class-action against three companies, each alleging that claimants' artworks were used to train an AI visual art tool to power "text-based image creation" – thereby violating each

⁹⁸ Graham Bowley & Doreen Carvajal, *One of the World's Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html>.

⁹⁹ *OECD Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones*, OECD, Oct. 21, 2019, <https://www.oecd.org/governance/risk/recommendation-enhancing-transparency-free-trade-zones.htm> (Examples of free ports/zones noted for significant art business activity include: Beijing Free Port of Culture and Shanghai Pudong District, China; Delaware Freeport, U.S.; Geneva, Switzerland; Luxembourg; Monaco; and Singapore).

¹⁰⁰ *The WCO Joins the International Chamber of Commerce (ICC) to celebrate the 60th Anniversary of the ATA Carnet*, World Customs Org., June 27, 2023, <https://www.wcoomd.org/en/media/newsroom/2023/june/the-wco-joins-the-icc-in-celebrating-the-60th-anniversary-of-the-ata-carnet.aspx?p=1>.

¹⁰¹ See Sarah Shaffi, 'It's the opposite of art': why illustrators are furious about AI, THE GUARDIAN (Jan. 23, 2023), <https://www.theguardian.com/artanddesign/2023/jan/23/its-the-opposite-of-art-why-illustrators-are-furious-about-ai>.

¹⁰² Nicole Clark, *Artists sue AI art generators over copyright infringement*, POLYGON (Jan 17, 2023), <https://www.polygon.com/23558946/ai-art-lawsuit-stability-stable-diffusion-deviantart-midjourney>, (detailing three copyright infringement cases involving AI generators. Kelly McKernan is one claimant, a fine art practitioner who also creates watercolor and acrylic gouache illustrations for books, comics, and games. Karla Ortiz is second claimant, a fine art practitioner who is also a leading film and entertainment industry concept illustrator. Sarah Anderson is third claimant, a cartoonist and illustrator).

artist's copyright. The three companies the lawsuit are against are: Stability AI, a London-based company offering its Stable Diffusion AI digital tool that enables users to generate "professional-quality images with a simple text prompt," Midjourney, a San Francisco-based company that uses Stable Diffusion to power text-based image creation; and DeviantArt, a Los Angeles-based online community for artists that offers its own Stable Diffusion-powered generator called DreamUp.¹⁰³ Within a week of the U.S. class-action's filing, Getty Images filed a lawsuit, also against Stability AI in the U.K.¹⁰⁴ The claim is that Stability AI "unlawfully copied and processed millions of [Getty's] images protected by copyright and the associated metadata"¹⁰⁵ to train its AI model. Responding to these lawsuits, Stability AI's spokesperson said, "[p]lease note that we take these matters seriously. Anyone that believes that this isn't fair use does not understand the technology and misunderstands the law."¹⁰⁶ A fair use copyright violation defense by Stability AI may well feature in the U.S. class-action but is unlikely to be available to defend Getty's separate U.K. lawsuit.

Permitted uses in U.K. and U.S. copyright laws are similar, but not the same, and can potentially produce different judicial results in each trial against Stability Diffusion's AI tool. The U.S. copyright courts use four broad criteria for deciding whether a use is fair, providing flexibility to arrive at a just evaluation of each case.¹⁰⁷ U.K. copyright legislation adopts a more restrictive approach, whereby defendants are required to satisfy copyright courts that their use fits squarely within at least one of several specified "permitted acts." Some acts are only permitted if they are also "fair dealing" for specific purposes, including: private study; criticism, review, quotation, and current news reporting; caricature, parody, or pastiche; educational instruction and examination; and non-commercial research, which is potentially the most relevant for AI.¹⁰⁸ Whether a purpose is fair requires a court to assess whether the dealing damages the copyright-protected work's actual or potential economic market, similar to the United States. Accordingly, in Getty's London lawsuit, Stability AI may encounter difficulty in defending its Stable Diffusion AI tool on the ground of fair dealing "for the purpose of non-commercial research."

However, there is a further permitted act specified by U.K. copyright law that does not require a defendant to prove fair dealing such as text and data mining (TDM), an automatic analysis or process of large amounts of text or data using custom-made scripts looking for patterns and discovering relationships or trends that are not usually visible through normal reading.¹⁰⁹ Under U.K. copyright law, TDM is permitted only "for the sole purpose of non-commercial

¹⁰³ *Id.*

¹⁰⁴ Sam Tobin, *Getty asks London court to stop U.K. sales of Stability AI system*, REUTERS, June 1, 2023, <https://www.reuters.com/technology/getty-asks-london-court-stop-uk-sales-stability-ai-system-2023-06-01/>; see also Matthew Butterick, *We've Filed a Lawsuit Challenging Stable Diffusion, a 21st-Century Collage Tool that Violates the Rights of Artists*, STABLE DIFFUSION LITIGATION (Jan. 13, 2023), <https://stablediffusionlitigation.com>.

¹⁰⁵ Clark, *supra* note 102.

¹⁰⁶ *Id.*

¹⁰⁷ 17 U.S.C. §107 (West 2015).

¹⁰⁸ Copyright, Designs and Patents Act, (1988) §§ 29 and 30, Current Law, 48 and 49 (Eng.).

¹⁰⁹ *Id.*, § 29A.

research,” which is likely again to pose difficulties for Stability AI. In the U.S., copyright law at the time of writing has no such specific TDM defense available, which means that Stability AI and its two co-defendants will most likely rely on the four fair use criteria to defend themselves.¹¹⁰

Beyond the U.S., some countries have recently considered amending their own national copyright laws to permit TDM research for commercial purposes without a copyright owner’s prior consent—an understandably controversial issue.¹¹¹ The E.U., for example, is currently considering changing E.U. copyright law so that copyright owners may “opt out” of commercial (but not scientific or cultural) TDM uses.¹¹² Against which change E.U. copyright owners argue that an “opt in” to commercial use would be more just and fair. Towards the end of 2022, the U.K. government proposed changing copyright law to permit TDM of digital formats of all creative works, including visual artworks, for commercial purposes without prior consent of authors/copyright owners of such works, but withdrew that proposal in February 2023.¹¹³ There is evidently increasing controversy and ambiguity worldwide about the current legality of commercial data mining of copyright-protected creative works.¹¹⁴ Legislators and courts will need time to catch up with the rapidly developing AI innovations in order to provide fair and balanced legal certainty that can be applied both nationally and internationally. Meanwhile, the outcomes of the two current lawsuits, by U.S. artists and Getty Images, could prove to be landmark steps towards achieving clarity.

ii. AI Art Authorship

Do Androids Dream of Electric Copyright? This allusion to the title of Philip K. Dick’s 1968 dystopian novel, on which the 1982 film *Blade Runner* was based, is the playful title of a scholarly paper about authorship of computer-generated art.¹¹⁵ Published in 2017 and written by Andrés Guadamuz, reader in intellectual property law at the U.K.’s University of Sussex, the discourse prefigures practical concerns now emerging in the contemporary art world surrounding

¹¹⁰ See Krista Cox, *Text and Data Mining and Fair Use in the United States*, ASS’N OF RSCH. LIBR., (June 5, 2015) <https://www.arl.org/wp-content/uploads/2015/06/TDM-5JUNE2015.pdf>.

¹¹¹ See Sean M. Fiil-Flynn et al., *Legal Reform to Enhance Global Text and Data Mining Research*, 378 SCIENCE 6623, Dec. 1, 2022, <https://www.science.org/doi/pdf/10.1126/science.add6124>.

¹¹² Answer Given by Mr Breton on Behalf of the European Commission, EUR. PARL. DOC. (E-000479/2023(ASW)) (2023), https://www.europarl.europa.eu/doceo/document/E-9-2023-000479-ASW_EN.pdf.

¹¹³ EUR. PARL. DEB. (727) (Feb. 1, 2023) 152, <https://hansard.parliament.uk/commons/2023-02-01/debates/7CD1D4F9-7805-4CF0-9698-E28ECEF7177/ArtificialIntelligenceIntellectualPropertyRights> (remarks of Sarah Olney and Damian Collins).

¹¹⁴ See Martin Adams, *An Update on our Text and Data Mining: Demonstrating Fair Use Project*, AUTHORS ALLIANCE, (April 28, 2023), <https://www.authorsalliance.org/2023/04/28/an-update-on-our-text-and-data-mining-demonstrating-fair-use-project/>.

¹¹⁵ See Kenneth Turan, *From the Archives: ‘Blade Runner’ Went From Harrison Ford’s ‘Miserable’ Production to Ridley Scott’s Unicorn Scene, Ending as a Cult Classic*, LOS ANGELES TIMES (Oct. 5, 2017), <https://www.latimes.com/entertainment/movies/la-et-mn-blade-runner-2-turan-19920913-story.html>.

AI.¹¹⁶ This is further developed by following the March 2023 publication by the U.S. Copyright Office guidance: *Works Containing Material Generated by Artificial Intelligence*.¹¹⁷

The guidance clarifies that work containing wholly AI-generated material may not be copyright-protected, if it was not the product of “human authorship,” but, where a human selects or arranges or modifies AI-generated material in a sufficiently creative way, “the resulting work as a whole constitutes an original work of authorship” and copyright protection may apply.¹¹⁸ The U.S. is a world-leader in the development of both AI technology and intellectual property law, and this latest AI copyright guidance is likely to influence the thinking of most other jurisdictions that have yet to address AI copyright authorship.¹¹⁹ However, several other jurisdictions have already addressed the matter. These jurisdictions include Hong Kong, India, New Zealand, and the Republic of Ireland, each of which jurisdictions followed the U.K.’s pioneering legislative lead.¹²⁰

In 1988, the U.K.’s Copyright Designs and Patents Act included then unique provisions dealing with four categories of work:

In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken ... the work is generated by computer in circumstances such that there is no human author of the work.¹²¹

Accordingly, the copyright owner of a computer-generated artistic work in U.K. law is the undertaker of “the arrangements necessary for the creation of the work.”¹²² This terminology is precisely the same as how the Act defines a “producer” in the context of determining an author/copyright owner of a film or sound recording.¹²³

Even though such U.K. provisions prudently anticipated the need to give special copyright protection to computer-generated works, artificial intelligence technology was not as developed in 1988 as it has become in recent times. It is therefore understandable that legitimate questions are now emerging as to whether such provisions are fit for more sophisticated AI purposes today, thirty-five years after their original enactment. Such questions are of interest and importance not only in the U.K. and four other kindred computer-generated copyright jurisdictions, but also in the U.S. and the wider copyright world that will undoubtedly be looking for appropriate solutions to AI authorship challenges. A key question is whether the U.K.’s special computer-generated copyright provisions are at odds with copyright law’s paramount requirement that a literary, dramatic,

¹¹⁶ Andres Guadamuz, *Do Androids Dream of Electronic Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works*, INTELLECTUAL PROPERTY QUARTERLY (2017) 2, <https://deliverypdf.ssrn.com/delivery.php?ID=397083094070024090093103085119031025033019063049002037010087019109110122064082003105123000022020108121118069081097102028005120098042069049011113021066093010115100077081066091118090110091115119029084024029121074112016007072068119068076004027068105087&EXT=pdf&INDEX=TRUE>.

¹¹⁷ Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, (March 16, 12023) (to be codified at 37 C.F.R. pt. 202).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Guadamuz, *supra* note 106.

¹²¹ Copyright, Designs and Patents Act, *supra* note 98, § 9(3).

¹²² *Id.*

¹²³ *Id.* § 178.

musical, or artistic work is the original expression of a human mind.¹²⁴

The “human mind” copyright doctrine is featured in most intellectual property regimes worldwide, adherence to which may perhaps explain why so many countries have not been attracted to adopting the U.K.’s arguably non-human approach.¹²⁵ In the U.S. for example, the U.S. Supreme Court ruled as early as 1884 that copyright protection excluded works created by “non-humans” (when dismissing a claim that cameras, not photographers, were image-makers), a legal precedent evidently influencing the U.S. Copyright Office’s recent guidance.¹²⁶ E.U. copyright law adopts the same approach, albeit couched in a different language. The expression of an “author’s own intellectual creation reflecting his [sic] personality” is a fundamental requirement for a work’s copyright protection.¹²⁷ In Spain, “the author of a work is the natural person who creates it”¹²⁸ and in Germany, “copyright protects the author in his [sic] intellectual and personal relationships with the work.”¹²⁹ In Australia, courts have authoritatively declared that works are not covered by copyright if they “lack human authorship.”¹³⁰

Guadamuz’s scholarly discourse on this complex subject concludes by referring to the central theme of Dick’s novel. Artificial entities, which are “replicants” of humans, may have no built-in awareness that they are machines and not sentient beings, yet their actions may manifest human traits, making it difficult or impossible for people to distinguish a human from a replicant. Artistic works wholly generated by AI tools may proliferate into the future and continue to pose problems for the world’s copyright law, of which most nations to date have largely rejected, or not yet considered, AI generated works being copyright-protected. Perhaps the U.K.’s 1988 current legislative approach might offer a widely acceptable way forward, if suitably amended to display the human originality copyright requirement for computer-generated artistic works, just as it has already enacted in the case of copyright for films and sound recordings.

H. Censors

Do the laws of freedom of speech apply to images? How do laws recognise cultural differences between different jurisdictions? Should everything be allowed to be publicly exhibited? If not, how do we regulate? How do politics play a part in all of this?¹³¹ Many nations and states are not liberal democracies but are undemocratic authoritarian or totalitarian regimes, whose restrictions on freedom of

¹²⁴ See *Artificial Intelligence and Copyright*, WIPO MAGAZINE (October 2017), https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

¹²⁵ *Id.*

¹²⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884).

¹²⁷ See *Artificial Intelligence and Copyright*, *supra* note 112.

¹²⁸ See Shireen Smith, *The copyright status of AI-generated works*, INTERNET FOR LAW. NEWSL. (Sept. 6, 2022) <https://www.infolaw.co.uk/newsletter/2022/09>.

¹²⁹ Guadamuz, *supra* note 106.

¹³⁰ Smith, *supra* note 116.

¹³¹ Key questions addressed at a semi-public panel discussion of visual art censorship at the U.K.’s Royal Society of Arts in 2002, with contributions from Sandy Nairne, Director of Programmes at Tate; James Fitzpatrick of the US law firm Arnold and Porter; Norman Rosenthal, Exhibitions Secretary, Royal Academy of Arts; and artist Jake Chapman. Source: Henry Lydiate’s contemporaneous notes.

expression—artistic or otherwise—are often capricious and sometimes brutal. In the post-digital era, artistic works—not only but especially visual images—can be distributed instantly and worldwide, thus posing far greater risks of censorship than in previous eras. But even in repressive regimes, such as the former Soviet Union (U.S.S.R.) and today’s Russian Federation, Middle East, and Far East jurisdictions, artists may find ways and means of exposing politically unacceptable works to the public. However, enormous constraints and even punishments may be imposed on them for delivering the “shock of the new.”¹³²

Political, economic, social, technological, ethical, and legal factors all influence and affect behavioural norms that may be acceptable within societies during their evolution, but which are nowadays considered repugnant. For instance, the divine right of monarchs to rule, the slave trade, slavery itself, colonisation, subjugation of women, and child labour. However, just as the values of an era change, so does the context in which artistic expressions are received. Classical Greco-Roman artefacts graphically portraying sexual acts, which might normally offend contemporary laws and moral values, are now treasured in the scholarly collections of museum and gallery institutions worldwide. Michelangelo’s (1475-1564) large-scale Sistine Chapel fresco, *The Last Judgement*, 1541, graphically depicting the seven deadly sins was subsequently “revised” to cover naked figures that had become unacceptable to different values obtaining only two decades later.¹³³ Charles Dodgson’s (1832-1898, aka Lewis Carroll) photographs of six-years-old Alice Liddell,¹³⁴ Balthazar Klossowski’s (1908-2001, aka Balthus) portraits of naked or partly naked girls,¹³⁵ and Edgar Degas’s (1834-1917) sculpture of a 14-years-old girl scantily clad for dance¹³⁶ were each subjected to severe adverse public criticism of their chosen subject matter when exhibited respectively in the late nineteenth and early twentieth centuries.

In the U.S., there have been longstanding “culture awards” wrangles, involving right wing politicians allied with the religious right to lobby against the freedom of artists to express themselves through their works.¹³⁷ The U.S. Constitution’s First Amendment guarantees freedom of speech,¹³⁸ but does not offer artists the right to financial support or subsidy, nor does the Constitution prevent government officials discriminating against artists (in the giving of financial awards) on the grounds of the “unacceptable” nature of their

¹³² ROBERT HUGHES, *THE SHOCK OF THE NEW: ART AND THE CENTURY OF CHANGE* (2d ed. 1991).

¹³³ See Carlo Pietrangeli, et al., *THE SISTINE CHAPEL: THE ART, THE HISTORY, AND THE RESTORATION* (1986).

¹³⁴ See *Lewis Carroll’s Haunting Photographs of Young Girls*, PHOTOGRAPHY NEWS (Jan. 2015), <http://www.photography-news.com/2015/01/lewis-carrolls-haunting-photographs-of.html>.

¹³⁵ See *Balthus Show Revives Debate on Lolita-esque Works*, REUTERS (Aug. 13, 2008), <https://www.reuters.com/article/us-art-balthus/balthus-show-revives-debate-on-lolita-esque-works-idINL1458011220080813>.

¹³⁶ Edgar Degas, *The Little Fourteen-Year-Old Dancer (La Petite Danseuse de Quatorze Ans)* (sculpture), at National Gallery of Art, Washington, D.C., 1879-1881; see Anastasiia S. Kirpalov, *Why Did Edgar Degas’ Little Dancer Cause Such a Scandal?* THE COLLECTOR (September 17, 2022), <https://www.thecollector.com/why-did-edgar-degas-little-dancer-cause-scandal>.

¹³⁷ See GRAHAM THOMPSON, *AMERICAN CULTURE IN THE 1980S* (Martin Halliwell et al. eds., 2007).

¹³⁸ U.S. Const. amend. I.

works.¹³⁹ Such conflicts can be set against a lack of any historical tradition in the U.S. of federal funding for the arts—the National Endowment for the Arts (NEA) was established only in 1965.¹⁴⁰ Which brings up another question: should public money be spent on contemporary works of art that the public finds offensive?

In the late 1980s, the NEA contributed funding to a major retrospective of Robert Mapplethorpe’s (1946-1989) work, which included the artist’s so-called “X files” made up of explicit sexual and homosexual photographs. This incident triggered the “culture wars,” in which the appropriateness of exhibiting a range of Mapplethorpe’s work dealing with racial and gender issues, and his photographs of children, was fiercely debated.¹⁴¹ Other artists’ works soon became caught in the cross-fire, causing a reportedly “Congressional firestorm,” calling for the NEA’s abolition.¹⁴² As a result, the NEA was completely re-structured, its federal funding halved, its ability to fund artists directly, severely constrained, and Congress narrowly avoided voting for its abolition.¹⁴³ Key takeaways learned from this “ten-years’ war” include: recognition that censorship never works because people will always want to see artwork and judge for themselves; censorship “sells” (visitors/newspapers/broadcasts); there is still a powerful religious right in the U.S., of which there remains a long tradition of conservatism, yet an equally strong belief in the freedom of expression; images of gay sex will continue to outrage a significant section of the public; so-called “kiddie porn” will continue to be unacceptable to the public generally, courts of law in particular; and let people see work and judge for themselves— in a free society, only individuals should judge what is acceptable.¹⁴⁴

Context is important when evaluating the appropriateness of exposing images to the public, whether such a judgement is made by artists, arts administrators, or law enforcers. Time and place, contemporary social and moral values, and more are all relevant to contextual judgements, as is the context in which such works are made and offered for public viewing. Other difficult contextual matters may influence those making judgements about the appropriateness of creating or showing such work. Legal considerations may include, for example, the distinction in some jurisdictions between obscenity and indecency. Obscenity may require proof that a viewer of the image is likely to be offended by an image, whereas for indecency, the question may be whether the image is in and of itself indecent.¹⁴⁵ Furthermore, some jurisdictions, particularly in liberal democracies, have provisions enabling a

¹³⁹ *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT’L ARCHIVES (last reviewed February 8, 2022) <https://www.archives.gov/milestone-documents/14th-amendment>.

¹⁴⁰ 20 U.S.C §§ 781-790, 951.

¹⁴¹ See Elizabeth Kastor, *Funding Art That Offends*, WASH. POST (June 7, 1989) <https://www.washingtonpost.com/archive/lifestyle/1989/06/07/funding-art-that-offends/a8b0755f-fab9-4f7f-a8ef-2ccad7048fe2/>.

¹⁴² See Margaret Quigley, *The Mapplethorpe Censorship Controversy*, POL. RSCH. ASS’N. (May 1, 1991) <https://politicalresearch.org/1991/05/01/mapplethorpe-censorship-controversy>.

¹⁴³ *Id.*

¹⁴⁴ Liam Rector & Susan Wyatt, *The Culture Wars*, Ams. FOR THE ARTS (December 1990) <https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/the-culture-wars>.

¹⁴⁵ See FCC, *Obscene, Indecent and Profane Broadcasts*, FCC (2019), <https://www.fcc.gov/guides/obscenity-indecency-and-profanity>.

defense to be mounted. In the case of obscenity, it is often a defense to show that the work was possessed or published for the purposes of art, science, learning or other worthy purpose. In the case of indecent images of children, it may be a defense to show that the work was possessed or shown for a “legitimate reason.”¹⁴⁶ Thus, in such cases, an established gallery showing work of respected artists may succeed with such defenses. Like the U.S. Constitution’s First Amendment, the 1950 European Convention on Human Rights gives artists the legal right to freedom of expression, even in relation to work that is shocking or disturbing.¹⁴⁷ Almost all countries with territories in Europe have acceded to the Convention, with the exceptions of Belarus and Russia.¹⁴⁸

In more culturally enlightened jurisdictions, legislation may exclude public-facing art galleries and museums from prosecution for displaying criminally offensive images so long as they are “visible only from within.”¹⁴⁹ In such cases, an important and difficult responsibility falls upon gallery directors to strike an appropriate balance between their right to show work they consider worthy of public exposition and their duty to society not to cause offence or harm.¹⁵⁰ Given the increasing reliance by most of the world on digital technology for communications, social media platforms have become essential for supporting the practices of artists and related art-world professionals. When using such platforms, it may be difficult for artists to navigate rules, policies, and practices of such platforms that unilaterally censor communication of their images, which explains why Don’t Delete Art (DDA) published a guide in 2021, to help artists mitigate and/or avoid online censorship impositions.¹⁵¹

DDA is a 2020, New York City-based, coalition of arts and free expression dedicated to fighting against “digital gatekeepers controlling the world’s largest social media platforms that have enormous power to determine what content can freely circulate and what should be banned or pushed into the digital margins.”¹⁵² In particular, “not only is content removed because of overly restrictive and sometimes unclear community guidelines, but, unbeknownst to users, material vaguely defined as objectionable is made to disappear from search and/or explore functions, and hashtags.”¹⁵³ DDA contends that such censorship has a dire effect on the work of emerging artists, those living in repressive regimes and, in general, on all those artists who have no museum or gallery representation. Thus, there is a high risk that their artwork be erroneously removed,

¹⁴⁶ See Laurence Cuny, *Freedom & Creativity: Defending art, defending diversity*, UNESCO (2020), <https://unesdoc.unesco.org/ark:/48223/pf00000373357.locale=fr>; The Crown Prosecution Service, *Indecent and Prohibited Images of Children*, THE CROWN PROSECUTION SERVICE (Dec. 20, 2018), <https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children>.

¹⁴⁷ European Convention on Human Rights, Nov. 4, 1950, Eur. Ct. H.R. Human Rights (2013).

¹⁴⁸ Alice Donald & Joelle Grogan, *What is the European Convention on Human Rights?* U.K. IN A CHANGING EUROPE (June 24, 2022), <https://ukandeu.ac.uk/explainers/the-european-convention-on-human-rights>.

¹⁴⁹ E.g. Indecent Displays (Control) Act 1981, C. 42 (U.K.).

¹⁵⁰ Int’l Council of Museums, *Museums do not need to be neutral, they need to be independent*, ICOM (January 6, 2019), <https://icom.museum/en/news/museums-do-not-need-to-be-neutral-they-need-to-be-independent/>.

¹⁵¹ Don’t Delete Art, *Manifesto*, DON’T DELETE ART (2023), <https://www.dontdelete.art>.

¹⁵² *Id.*

¹⁵³ *Id.*

and whole accounts deleted with thousands of followers lost. With no possibility of appeal, artists are fearful, powerless, and opted to censor themselves. DDA recently published an Art and Law guide, which is founded on key principles and practices that should ideally be adopted by all social media platforms.¹⁵⁴

Publicly sited physical artwork will continue to engage and sometimes outrage spectators. The law is not responsible for that dialogue and has no part in it, except when freedoms of the society in which the art is placed are threatened by it. Over time, publicly viewed artwork may fall out of step with the society in which it exists and causes public comment, discussion, and debate. The latter can take the form of new artistic expression, which itself could be new publicly sited artwork. Removing artwork that challenges or inflames any public sensibilities also obliterates the catalyst for continuing engagement with those issues. The law should ideally protect the public and artwork from violent disagreement and vandalism, but the freedom to protest and respond, artistically or otherwise, is not for the law to prohibit any more than it is for opponents of arguments to prohibit, silence, or cancel.

II. CREATING WITH LEGAL BRUSHES

A. *Anti-Retinal Fountain-Head*

Genius. Anti-artist. Charlatan. Impostor! Since 1914, Marcel Duchamp has been called all of these. No artist of the twentieth century has aroused more passion and controversy, nor exerted a greater influence on art, the very nature of which Duchamp challenged and redefined as concept rather than product by questioning its traditionally privileged optical nature. At the same time, he never ceased to engage, openly or secretly, in provocative activities and works that transformed traditional artmaking procedures.¹⁵⁵

Henri-Robert-Marcel Duchamp was born in Normandy, France in 1887, which was six years after Pablo Picasso in Spain. Duchamp was a painter, sculptor, chess player, and writer. He is widely regarded as a leader of revolutionary developments in the visual arts from the first decades of the twentieth century, to date. By the start of the First World War in 1914, he had rejected the work of many of his fellow artists such as Picasso and Henri Matisse (1869-1954) and deemed their work as "retinal," intended only to please the eye. He wanted art to engage with the intellect. His idea was not welcomed by his peers in France, so he decided to emigrate to the U.S. where he believed his views would be better received.¹⁵⁶

¹⁵⁴ See Nat'l Coal. Against Censorship, *Don't Delete Art Releases Guidelines for Artists to avoid Social Media Censorship*, NCAC (March 12, 2021), <https://ncac.org/dont-delete-art-censorship-resource>; Aimee Dawson, *Don't delete art! Project documenting censorship on social media launches manifesto*, THE ART NEWSPAPER (March 3, 2023), <https://www.theartnewspaper.com/2023/03/03/dont-delete-art-project-documenting-censorship-on-social-media-launches-manifesto>.

¹⁵⁵ See DAWN ADES, NEIL COX & DAVID HOPKINS, *WORLD OF ART: MARCEL DUCHAMP* (2021).

¹⁵⁶ *Id.*

Duchamp created *Fountain* (1917)¹⁵⁷ over a century ago, which was chosen by prominent artists and art historians as the most influential artwork of the 20th century.¹⁵⁸ It is a porcelain urinal (*pissoir*) inscribed with "R. Mutt 1917," and was sent for exhibition in response to an open invitation to any artist who paid the entry fee of one dollar. The exhibition was put on by the newly formed New York City-based Society of Independent Artists, of which Duchamp was a board director (which is why he inscribed a pseudonym on the piece to hide his true identity). There was no jury to decide which works were worthy of being shown. Over two thousand works were submitted. After much debate about whether *Fountain* was or was not art, the society's board of directors voted against showing the piece and hid it from public view during the show.

Duchamp immediately resigned from the society's board. Since then, *Fountain* has raised controversial questions about creativity, authorship, originality, and the very nature of visual art and what it could be. It swept away the traditional boundaries of what art had been until 1917.¹⁵⁹

B. Intellectual Engagement

Duchamp's first and last live television interview was broadcasted four months before he died in October 1968. The interview was conducted by the BBC's then doyenne of U.K. cultural broadcasting, Joan Bakewell. She recalled the encounter fifty years later:

He was very good company. He was clearly incredibly intelligent. He was full of smiles. He was quite flirty; he was very French; he had the charm of a Frenchman. He wasn't in a hurry, he didn't try to sell you an idea, he wasn't pitching his outlook or anything; he was just there to share things with you, and I found that very welcoming.¹⁶⁰

Q and A excerpts from a transcript of the unique event are illuminating and instructive¹⁶¹:

Q. You attacked what you called "retinal" painting. Can you define it?

A. Yes, of course. Everything since [Gustave] Courbet [1819-1887]¹⁶² has been retinal. That is, you look at a painting for what you see, what comes on your retina. You'd add nothing intellectual about it... A psychoanalytical analysis of painting

¹⁵⁷ See Nell Frizzell, *Duchamp and the pissoir-taking sexual politics of the art world*, THE GUARDIAN (November 7, 2014), <https://www.theguardian.com/commentisfree/2014/nov/07/duchamp-elsa-freytag-loringhoven-urinal-sexual-politics-art>.

¹⁵⁸ See BBC News, *Duchamp's urinal tops art survey*, BBC NEWS (December 1, 2004), <http://news.bbc.co.uk/2/hi/entertainment/4059997.stm>.

¹⁵⁹ See ADES ET AL., *supra* note 142.

¹⁶⁰ Ben Luke, *What was it like to conduct Marcel Duchamp's only live television interview*, THE ART NEWSPAPER (June 8, 2018), <https://www.theartnewspaper.com/2018/06/08/what-was-it-like-to-conduct-marcel-duchamps-only-live-television-interview>.

¹⁶¹ *Id.*

¹⁶² Jean Désiré Gustave Courbet was a French painter who led the Realism movement in 19th-century French painting. Committed to painting only what he could see, he rejected academic convention and the Romanticism of the previous generation of visual artists. See JAIME JAMES, *THE GLAMOUR OF STRANGENESS: ARTISTS AND THE LAST AGE OF THE EXOTIC* (2016).

was absolutely anathema then. You should only look and register what your eyes would see. That's why I call them retinal: since Courbet, all the Impressionists¹⁶³ were retinal, all the Fauvists¹⁶⁴ were retinal, the Cubists¹⁶⁵ were retinal. The Surrealists¹⁶⁶ did change a bit of that, and Dada¹⁶⁷ also, by saying: "Why should we be only interested in the visual side of the painting? There may be something else."

Q. Perhaps the most famous work of yours is the work *The Large Glass*¹⁶⁸ on which you spent eight years, and some years prior to that thinking about it. This was bringing an intellectual approach into a work of art which no one had seen for many years. There is in fact a published text, which was published sometime after the Glass was not finished, but was abandoned.¹⁶⁹ Do you wish the Large Glass to be appreciated with the text, to inform it?

A. Yes, that's where the difficulty comes in, because you cannot ask a member of the public to look at something with a book in his hand and follow the diagrammatic explanation of what he can see on the glass. So, it's a little difficult for the public to come in, to understand it, to accept it. But I don't mind that, or I don't care, because I did it with great pleasure; it took me eight years to do part of it at least, and the writing and so forth. And it is for me an expression, really, that I had not taken from anywhere else, from anybody or any movement or anything, and that's why I like it very much. But don't forget that it never had any success until lately.

Q. The anti-art movement of Dada was proved to be in the interest of art, because it regenerated and revived and freshened people's attitude to it. Do you anticipate that your own contribution when the final reckoning comes will have in fact contributed to something called art?

A. I did in spite of myself, if you wish to say... But at the same time, if I had abandoned art, I would completely have been not even noticed... There are probably 100 people like that who

¹⁶³ The seminal Impressionists were notably young, and included: Frédéric Bazille (22), Armand Guillaumin (22), Pierre-Auguste Renoir (22), Claude Monet (23), Paul Cézanne (24), Alfred Sisley (24), Édouard Manet (31), and Camille Pissarro (33). See Thames & Hudson, *World of Art* (2020), <https://issuu.com/thamesandhudson/docs/spring2020worldofart>.

¹⁶⁴ Notable Fauvists: André Derain, Raoul Dufy, Henri Matisse, Jean Puy, and Georges Rouault. See *id.*

¹⁶⁵ Pablo Picasso, Diego Rivera, and Max Weber. Also notably, Cubist works were first exhibited in the United States in 1913 at the landmark Armory Show in New York City. See *id.*

¹⁶⁶ Notable Surrealists: Giorgio de Chirico, Max Ernst, Joan Miró, Francis Picabia, Salvador Dalí, Luis Buñuel, Alberto Giacometti, and René Magritte. See *id.*

¹⁶⁷ "Dada is the groundwork to abstract art and sound poetry, a starting point for performance art, a prelude to postmodernism, an influence on pop art, a celebration of anti-art to be later embraced for anarcho-political uses in the 1960s and the movement that lay the foundation for Surrealism." See FRANCIS PICABIA, *I AM A BEAUTIFUL MONSTER: POETRY, PROSE, AND PROVOCATION* (Marc Lowenthal trans., 2012).

¹⁶⁸ Marcel Duchamp, *The Bride Stripped Bare by Her Bachelors, Even (The Large Glass)* (sculpture), PHILADELPHIA MUSEUM OF ART (1915-1923), <https://philamuseum.org/collection/object/54149>.

¹⁶⁹ Duchamp intended the *Large Glass* to be accompanied by a book, in order to prevent purely visual responses to it. His notes for the book describe that his "hilarious picture" is intended to depict the erotic encounter between the "Bride," in the upper panel, and her nine "Bachelors" gathered timidly below in an abundance of mysterious mechanical apparatus in the lower panel. See CALVIN TOMKINS, *DUCHAMP: A BIOGRAPHY* (1996).

have given up art and condemned it and proved to themselves that art is no more necessary than religion and so forth. And who cares for them? Nobody.

Q. In terms of the activities of the Dada group other than painting, the sort of happenings that they devised are in fact happening again: they are called “happenings” today. Do you ever see or engage in these events or feel any fellow feelings about them?

A. I love the happenings; I know Allan Kaprow¹⁷⁰... and it’s always amusing. And the point that they have brought out so well, an interesting one, is that they play for you a play of boredom... It’s very interesting to have used boredom as an aim to attract the public. In other words, the public comes to a happening not to be amused but to be bored. And that’s quite a contribution to new ideas, isn’t it?

Q. When you set out to challenge all the established values, your means were shock. You shocked the Cubists, you shocked the public, you shocked the buying public. Do you think the public can be shocked anymore by anything?

A: No, it’s finished, that’s over. You cannot shock the public, at least with the same means. To shock the public, we would have to do I don’t know what. Even that thing with the happenings, boring the public, doesn’t prevent them from coming - the public comes and sees anything that Kaprow does, or Oldenburg¹⁷¹ and all these people. And I have been there, and I go there every time. You accept boredom as an aim, an intention.

Q. Do you regret the loss of shock or do you think it’s the artists’ fault that the public simply always expect to be shocked?

A. No, but the shock would be of a different character... probably the shock will come from something entirely different - as I say, non-art, “anart”, no art at all, and yet something would be produced. Because after all, the word art etymologically means to do, not even to make, but to do—and the minute you do something you are an artist. In other words, you don’t sell your work, but you do the action. Art means action, means activity of any kind.

Q. So, everyone...?

A. Everyone. But we in our society have decided to make a group we call artists and a group we call doctors, which is purely artificial.

Q. In the 1920s, you proclaimed art is dead. It isn’t, is it?

¹⁷⁰ Allan Kaprow (1927-2006) was an American painter, assemblagist and a pioneer in establishing the concepts of performance art. See The Art Story, Allan Kaprow, THE ART STORY, (last visited May 3, 2024) <https://www.theartstory.org/artist/kaprow-allan/>

¹⁷¹ Claes Oldenburg (1929-2022) was a Swedish-born American sculptor best known for his public art installations, typically featuring large replicas of everyday objects. See Charles Darwent, *Claes Oldenburg obituary*, THE GUARDIAN (July 18, 2022), <https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary>.

A. Yes, well, that is what I meant by that. I meant that it's dead by the fact that instead of being singularised, in a little box - so many artists in so many square feet - it would be universal, it would be a human factor in anyone's life; to be an artist, but not noticed as an artist.

Duchamp is buried in Normandy, France, with the epitaph: "*D'ailleurs, c'est toujours les autres qui meurent!*" (Besides, it's always the others who die).¹⁷² The annual *Prix Marcel Duchamp* was established in 2000, and is awarded to a young France-based artist by the Association for the International Dissemination of French Art.¹⁷³

C. Notable Examples

Duchamp's influence has grown exponentially since his death. The 1960s generation of art college students, many of whom were tutored and mentored by Duchamp's fellow artists and friends,¹⁷⁴ embraced his removal of traditional boundaries of visual art. Not only did the sixties generation develop their art practices with such non-traditional thinking in mind, but they also became tutors and mentors of subsequent generations of art college students¹⁷⁵ around the art world.¹⁷⁶ In these ways, Duchamp's baton has been handed on, and is likely to continue being passed on in art's relay race towards unbounded creative acts. Notable examples are now explored.

¹⁷² See Tomkins, *supra* note 168.

¹⁷³ The Marcel Duchamp Prize aims to highlight the creative abundance of the French scene at the beginning of the twenty-first century and to support artists in their international career. The prize distinguishes one laureate among four French artists or artists living in France, working in the field of plastic and visual arts: installation, video, painting, photography, sculpture, performance and so on. Like the important artist who lends his name to it – and with the complicity of the Marcel Duchamp Association, which supports this initiative – it distinguishes the most significant artists of the French scene of their generation and encourages all new artistic forms that stimulate creation. See Ass'n for the Int'l Diffusion of French Art (ADIAF), *The Marcel Duchamp Prize*, ADIAF, <https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary> (last visited Sept. 2, 2023).

¹⁷⁴ Such as U.K. artist Richard Hamilton (1922-2011), who held a teaching post in the Fine Art Department of Durham University at Newcastle Upon Tyne, U.K., from 1953 to 1966. Among the students Hamilton tutored in this period were Rita Donagh, Mark Lancaster, Tim Head, Roxy Music founder Bryan Ferry, and Ferry's visual collaborator Nicholas de Ville (who became Professor of Fine Art at Goldsmiths College University of London, where among his students was Damien Hirst – currently the highest paid living U.K. artist). Hamilton's influence can be found in the visual styling and approach of Roxy Music. He described Ferry as "his greatest creation". Ferry repaid the compliment, naming him in 2010 as the living person he most admired, saying "he greatly influenced my ways of seeing art and the world." Hamilton curated the first British retrospective of Duchamp's work, for which he made a copy of *The Large Glass* and other glass works too fragile to travel from the U.S. The exhibition was shown at the Tate Gallery in 1966. See Norbert Lynton, *Richard Hamilton obituary*, THE GUARDIAN (Sept. 13, 2011), <https://www.theguardian.com/artanddesign/2022/jul/18/claes-oldenburg-obituary>.

¹⁷⁵ *Id.*

¹⁷⁶ Notably, for example, China-born Ai Weiwei (b.1957), who lived in the U.S. from 1981 to 1993, where he was exposed to and greatly influenced by the works of Marcel Duchamp and Andy Warhol, and began creating conceptual art by altering readymade objects. He is arguably the most well-known living contemporary artist originating from China. See Vanessa Thorpe, *Ai Weiwei on China, free speech – and a message for London*, THE GUARDIAN (Oct. 4, 2020), <https://www.theguardian.com/artanddesign/2020/oct/04/ai-weiwei-on-china-free-speech-and-a-message-for-london>.

1. Andy Warhol

Warhol toyed with U.S. copyright law throughout his fine art practice. He almost always avoided infringing copyright law by securing prior permission for his use of other people's photographs from their copyright owner, but not always.¹⁷⁷ In 2023, a landmark court decision addressed the lawfulness of artists appropriating into their works other artists' pre-existing images. The U.S. Supreme Court decided the case brought by the Andy Warhol Foundation for The Visual Arts (AWF). It concerned one of a series of silkscreen prints, *Orange Prince*, 1984, made by Warhol using a photograph of the musician Prince taken in 1981, by Lynn Goldsmith. Key facts were not disputed.¹⁷⁸

In 1981, Goldsmith was commissioned by *Newsweek* magazine to photograph the then-emerging musician Prince Rogers Nelson to accompany its article, "The Naughty Prince of Rock." Goldsmith's photograph of Prince, in which Goldsmith owns the copyright for, was the subject of the case. In 1984, Goldsmith licensed that photograph to *Vanity Fair* to serve as an "artist reference for an illustration ... to be published in *Vanity Fair*, November 1984 issue. It can appear one-time full page and one-time under one quarter page. No other usage right granted."¹⁷⁹ Goldsmith was paid \$400. *Vanity Fair* commissioned and paid Warhol to execute the illustration. Using Goldsmith's photograph, Warhol created a purple silkscreen portrait of Prince's head. The image accompanied an article entitled "Purple Fame," crediting Goldsmith as the "source" photographer.

Beyond executing the single illustration authorised by Goldsmith's copyright licence to *Vanity Fair*, Warhol created further works based on Goldsmith's photograph: 13 silkscreen prints and two pencil drawings, known collectively as the *Prince Series*, 1984. After Warhol's death in 1987, AWF inherited most of Warhol's unsold works and their copyrights including the Prince Series. When Prince died in 2016, Condé Nast obtained a copyright licence from AWF to reproduce *Orange Prince* in its tribute publication entitled *The Genius of Prince, 1958–2016*. Condé Nast paid AWF \$10,000 for the licence. Goldsmith received no fee or photographic source credit. Goldsmith did not know about the 1984 Prince Series until 2016, when she first saw *Orange Prince* reproduced on the cover of the Condé Nast tribute. Goldsmith immediately recognised her image and notified AWF of her belief that it had infringed her copyright. In response, AWF sued Goldsmith for a declaratory court judgment of non-infringement of copyright or, in the alternative, a fair use

¹⁷⁷ Barabara Hoffman "Claims for unauthorized use and copyright infringement were made by photographers Henri Dauman, Charles Moore, and Patricia Caulfield against Andy Warhol for appropriating their photographs without paying to license the images in 1963, and 1968 respectively. Fair use existed as judge-made law before fair use was codified, and before *Campbell v. Acuff-Rose Music, Inc.* Thus, Warhol's settlement of these claims of copyright infringement occurred before the standard of transformative use and during a time when there was a presumption that any commercial use was unfair. However, given the collage nature and subject matter, it's hard to say that it might not be considered fair use, even at that time." See The Hoffman Law Firm, *The Art Lawyer's Diary June 2023*, THE HOFFMAN LAW FIRM (June 12, 2023), <https://www.hoffmanlawfirm.org/the-art-lawyers-diary>.

¹⁷⁸ Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (U.S. May 18, 2023).

¹⁷⁹ *Id.* at 3.

copyright defense. Goldsmith counterclaimed for copyright infringement.

In 2019, those lawsuits decided in AWF's favor were reversed on appeal in 2021 by Goldsmith, after which result AWF appealed to the U.S. Supreme Court, hence the final appeal.¹⁸⁰ The U.S. Supreme Court comprised of nine Justices heard the case. Written analyses and reasons were given by two Justices, with whom the other seven variously agreed. Justice Elena Kagan's opinion was delivered using examples and analogies evidently aimed at engaging non-legal readers – visual artists were probably in mind. Kagan dwelled more on art and the creative act, rather than on the U.S. Copyright Act. Kagan viewed *Orange Prince* as an example of Warhol's art of reframing and reformulating iconic images of popular culture first created by others, connecting the traditions of fine art with mass culture, which “earned his conspicuous place in every college's Art History.”¹⁸¹ Copyright law's core purpose was to foster creativity, which is why it permitted fair use of copyrighted material to allow artists to build creatively on the work of other artists: “let's be honest, artists don't create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others.”¹⁸²

Fair use required four factors to be considered, the first of which lay at the heart of AWF's case. Kagan opined fair use to be “the purpose and character of the use,” made of a pre-existing copyright work, including whether such use is of a commercial nature.¹⁸³ A user's purpose required a court to look at whether the original image was used as raw material that was “transformed in the creation of new information, new aesthetics, new insights – a judicial enquiry that matters profoundly.”¹⁸⁴ In concluding her extensive discourse, Kagan asked, “[i]f Warhol does not get credit for transformative copying, who will?”¹⁸⁵ Chief Justice John G. Roberts Jr. was the only other member of the Court to concur with Kagan.

The other six Court members concurred with Justice Sonia Sotomayor, who delivered the Court's majority judgment. Sotomayor's opinion focused more on the U.S. Copyright Act than on the creative act, more on law than on art. Sotomayor stressed that AWF did not challenge whether Goldsmith's photograph and the Prince Series works were substantially similar. The only question was whether the “purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes” weighed in Goldsmith's favor.¹⁸⁶ AWF contended that the purpose and character of its use of Goldsmith's photograph weighed in favor of fair use because Warhol's silkscreen image of the photograph had a new meaning or message that made the use transformative in the fair use sense. However, in Sotomayor's opinion, whether a work was transformative did not turn merely on the stated or perceived intent of the artist, nor on the meaning or

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 559 (Kagan, J. dissenting).

¹⁸² *Id.* at 560 (Kagan, J. dissenting).

¹⁸³ *Id.* at 558 (Kagan, J. dissenting).

¹⁸⁴ *Id.* at 570 (Kagan, J. dissenting).

¹⁸⁵ *Id.* at 593 (Kagan, J. dissenting).

¹⁸⁶ *Id.* at 550.

impression that a critic or a judge drew from the work. Otherwise, copyright law might recognise any alteration as transformative.

Sotomayor concluded that the purpose and character of AWF's use of Goldsmith's photograph, in commercially licensing *Orange Prince* to Condé Nast's special edition magazine devoted to Prince, did not favor AWF's fair use defense to copyright infringement. AWF's use was not transformative, being for substantially the same purpose as Goldsmith's original photo. Goldsmith's original works, like those of other photographers, were entitled to copyright protection even against famous artists. Accordingly, the Court denied AWF's appeal. The Court's comprehensive reasoning, together with Kagan's extensive dissenting opinion, will doubtless be considered by—perhaps even influence—not only jurists worldwide, but also appropriation art practitioners such as Jeff Koons,¹⁸⁷ Sherrie Levine,¹⁸⁸ Richard Prince,¹⁸⁹ and perhaps even in civil law jurisdictions.

The doctrine of fair use is rooted in the Anglo-American common law tradition of judge-made rulings creating legal precedents, where many are codified into legislation. In civil law jurisdictions, judicial precedents are traditionally much less possible and prevalent, and fair use has been an alien doctrine.¹⁹⁰ However, some civil law courts have begun to consider, and in some cases apply, what amounts to a fair use copyright defense. A revolutionary ruling by the Supreme Court in France—traditionally the exemplar of civil law reasoning in copyright cases—could signal a change of judicial approach that other civil law jurisdictions may follow in *Klasen v Malka*.¹⁹¹ A Paris-based artist, Peter Klasen, included in his paintings photographic images of a model appropriated from a fashion magazine, which he painted blue. Aix Malka, a France-born photographer, sued for violation of his photographic copyright by Klasen. The lawsuit processed through lower courts and appeals in France, ending at the supreme court. Eventually ruling in Klasen's favor and to override claims of copyright infringement, the supreme court applied Article 10 of the 1953 European Convention on Human Rights—the fundamental right to artistic freedom of expression.¹⁹²

¹⁸⁷ Jeff Koons (b.1955) is an American artist recognized for his work dealing with popular culture, and his sculptures depicting everyday objects. His works have sold for substantial sums, including at least two record auction prices for a work by a living artist: \$58.4 million for *Balloon Dog (Orange)* in 2013 and \$91.1 million for *Rabbit* in 2019. Koons has been sued several times for copyright infringement over his use of pre-existing images, the original works of others, in his work. See Andrew Anthony, *The Jeff Koons Show*, THE GUARDIAN (Oct. 15, 2011), <https://www.theguardian.com/artanddesign/2011/oct/16/jeff-koons-art-custody-son>.

¹⁸⁸ Sherrie Levine (b.1947) is an American photographer, painter, and conceptual artist. Some of her work consists of exact photographic reproductions of the work of other photographers such as Walker Evans, Eliot Porter and Edward Weston. See Kristine McKenna, *Sherrie Levine and the Art of the Remake*, L.A. TIMES (Nov. 17, 1996), <https://www.latimes.com/archives/la-xpm-1996-11-17-ca-65436-story.html>.

¹⁸⁹ Richard Prince (b. 1949) is an American painter, photographer and re-photographer. His image, *Untitled (Cowboy)*, a rephotographing of a photograph by Sam Abell and appropriated from a Marlboro cigarette advertisement, was the first rephotograph to be sold for more than \$1 million at auction at Christie's New York in 2005. See GLENN O'BRIEN & JACK BANKOWSKY, RICHARD PRINCE (2007).

¹⁹⁰ See Paul Geller, ed., *International Copyright Law and Practice* (2009).

¹⁹¹ Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., May 15, 2015, Bull. Civ. 1, No. 13/27391 (Fr.).

¹⁹² EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 135.

2. Sol LeWitt

Sol LeWitt (1928-2007) was a U.S.-based artist linked to various movements, including conceptual art, and became prominent in the late 1960s for his wall drawings.¹⁹³ A lawsuit filed in 2012 at New York County Supreme Court concerned LeWitt's *Wall Drawing #448*, 1985, for a private residence in Massachusetts.¹⁹⁴ The document signed by LeWitt had written instructions for drawing the mural and attested that the resulting work would be LeWitt's original: his authenticity certificate. A typical LeWitt certificate is headed, "This is to certify that the Sol LeWitt wall drawing number ... evidenced by this certificate is authentic."¹⁹⁵ It then specifies any lines, shapes, forms, configurations, colours, and the place and date of first "installation." After which it states, "[t]his certification is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred."¹⁹⁶ Finally, it is signed and dated.¹⁹⁷

The lawsuit claimant was Roderic Steinkamp, a contemporary art collector and dealer.¹⁹⁸ The respondent was the Chicago-based Rhona Hoffman Gallery, which specialised in "international contemporary art in all media," and art that is conceptually, formally, or socio-politically based.¹⁹⁹ Steinkamp owned LeWitt's *Wall Drawing #448* and authenticity certificate, which he consigned to the gallery for resale in 2008 via a signed contract in which the gallery agreed to be liable for "all loss, damage or deterioration."²⁰⁰ In 2011, the gallery notified Steinkamp that the certificate had become "lost and irretrievable."²⁰¹ The gallery claimed for the loss on its insurance policy, but the insurers declined to pay and so did the gallery, hence the lawsuit.²⁰²

Steinkamp claimed:

The original certificate, issued and signed by the artist who is now deceased, is a unique and irreplaceable document that cannot be generated anew or replaced. There is no substitute for the original certificate entrusted to the care, custody, and control of the defendants ... Since the wall drawings do not constitute freestanding, portable works of art like a framed canvas or a sculpture on a podium, documentation of the work is key to

¹⁹³ LeWitt's wall drawings are usually executed by people other than the artist himself, and used teams of assistants to create such works. Writing about making wall drawings, LeWitt himself observed in 1971 that "each person draws a line differently and each person understands words differently". The wall drawings, executed on-site, generally exist for the duration of an exhibition; they are then destroyed, giving the work in its physical form an ephemeral quality. They can be installed, removed, and then reinstalled in another location, as many times as required for exhibition purposes. See Holland Cotter, *Now in Residence: Walls of Luscious Austerity*, N.Y. TIMES (Dec. 4, 2008), <https://www.nytimes.com/2008/12/05/arts/design/05lewi.html>.

¹⁹⁴ Complaint, at 1, *Steinkamp v. Hoffman*, No. 0651770 (N.Y. Sup. Ct. filed May 22, 2012) 2012 WL 1941149.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ See Sol LeWitt, *Certificate for Wall Drawing #128 (Ten Thousand Random Not Straight Lines)*, HARVARD ART MUSEUMS (1972), <https://harvardartmuseums.org/collections/object/171166>.

¹⁹⁸ Complaint, *supra* note 194, at 1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.*

²⁰² *Id.* at 3-4.

transmitting it or selling it to a collector or institution ... The original certificate is required for the sale of the wall drawing.²⁰³

He sought judgment for damages of at least \$350,000 for each of four alleged breaches of contract, bailment, negligence, and conversion.²⁰⁴ These claims raised challenging art and law issues. All are interrelated and based on the same set of circumstances: the existence of the certificate and its physical consignment to, and unexplained disappearance from, the gallery. Should any of these claims have succeeded, the claimant would then have been required to prove to the court that he had suffered quantifiable financial loss—and that is where market and cultural values would have become key issues.

The key criterion for establishing market value is not the estimated or asking price, but what has already been paid. LeWitt originated 1,259 wall drawings between 1968 and his death in 2007.²⁰⁵ Independent evidence existed about LeWitt's works in the market, showing that auction prices ranged from \$35,250 for *Wall Drawing #767*, 1994, sold at Christie's New York in 2001, to \$254,500 for *Wall Drawing #41*, 1970, sold at Phillips de Pury New York in 2009.²⁰⁶ Such sales were of physical works with their authenticity certificates. There appeared to be no evidence of sales without such certificates, nor of sales of certificates alone. Therein was the greatest challenge: whether Steinkamp's art lawyers could prove to the court that a LeWitt certificate was an intrinsic element of the market value of the wall drawing it authenticated. In this respect, it was self-evident that the LeWitt-signed lost certificate was unique and could not be replaced. Moreover, the gallery was a specialist in conceptual artwork, in which case, the gallery should ideally have tried to overturn the rejection of its insurance claim. The rejection most likely occurred because the insurer had less understanding of the conceptual and legal significance of LeWitt's certificates. In the event, this was perhaps what transpired because the lawsuit was eventually settled out of court on an undisclosed confidential basis.²⁰⁷

3. Christo & Jeanne-Claude

During October 2021, a live stream from Paris, France, showed the Arc de Triomphe entirely wrapped in fabric: a project conceived by artists Christo and Jeanne-Claude over 60 years ago, which they developed and financed, but were unable to execute before their deaths in 2020 and 2010 respectively.²⁰⁸ This is a fitting fulfilment of a remarkable practice, demonstrating special knowledge and skills

²⁰³ See *id.* at 2-4.

²⁰⁴ *Id.* at 5-8.

²⁰⁵ See *Now in Residence: Walls of Luscious Austerity*, *N.Y. Times* (December 4, 2008).

²⁰⁶ *Sol LeWitt: Auction Results*, MUTUALART, <https://www.mutualart.com/Artist/Sol-LeWitt/5D1F862F0381BF32/AuctionResults> (last visited Feb. 5, 2024).

²⁰⁷ Dr. Derek Fincham, *How Law Defines Art*, 14 *J. MARSHALL REV. INTELL. PROP. L.* 314, 322 (2015).

²⁰⁸ Christo Vladimirov Javacheff died on 31 May 2020 in New York City, a decade after his spouse Jeanne-Claude Denat de Guillebon also died there: they were astrological twins (both born June 13, 1935). For obituary, see Charles Darwent, *Christo obituary*, *THE GUARDIAN* (June 1, 2020), <https://www.theguardian.com/artanddesign/2020/jun/01/christo-obituary>.

needed to achieve their conceptual environmental installations. Realisation of their projects was effectively a legal and business obstacle course: to execute artwork that intentionally embraced the law as a tool for its creation, especially navigation of intellectual property laws operating both within the U.S., their adopted home, and countries beyond. From the outset of their practice in the 1960s, Christo and Jeanne-Claude developed the art of self-financing their projects through creative use of copyright.

They understood that there is no copyright ownership of ideas. This meant copyright law could not protect their ideas to, for example, erect a fabric fence across 24 miles of California ranch land, *Running Fence*, 1972–76; wrap the Reichstag at Berlin, Germany, in polypropylene fabric covered with silvery aluminium, *Wrapped Reichstag*, 1971–95; wrap the Pont-Neuf in Paris, France, with sand-coloured polyamide fabric, *The Pont Neuf, Wrapped*, 1975–85; install 7,503 sixteen feet-high gates of saffron-coloured fabric on paths in Central Park, New York City, *The Gates, Central Park, New York*, 1979–2005; or indeed to wrap the Arc de Triomphe in 25,000 square metres of recyclable polypropylene fabric in silvery blue, anchored with 3,000 metres of red rope, *L'Arc de Triomphe, Wrapped, Project for Paris since 1961*, 2021.²⁰⁹ Anyone is legally free to copy such ideas and do likewise, but this evidently did not concern Christo and Jeanne-Claude because the world soon acknowledged them as progenitors of their unique public environment wrapping concept.

However, there can be copyright law protection for expressions of ideas in fixed media/forms that can be seen, heard, and/or read. This idea-expression dichotomy, or distinction, was evidently well-understood by the artists who shaped their practice accordingly.²¹⁰

“Do you know that I don’t have any artworks that exist?” Christo said, “[t]hey all go away when they’re finished. Only the preparatory drawings and collages are left, giving my works an almost legendary character. I think it takes much greater courage to create things to be gone than to create things that will remain.”²¹¹

More pragmatically, Jeanne-Claude said:

The only way to work in total freedom is to pay for it. When you accept outside money, someone wants to tell you what to do. So, we fund each of our projects with our own money – through sales of Christo’s preparatory drawings, collages, and early works. But we never know if they will sell fast enough to meet the expenses.²¹²

Accordingly, over six decades they created and owned copyright in volumes of preparatory project artwork. Such creations and ownerships included two-dimensional plans, technical drawings, watercolours, paintings, prints and related three-dimensional artefacts. Some of these works they sold as unique or limited-edition objects, others they reproduced and merchandised themselves, or licensed others to do so. Such monetisation of their creative artwork was only one way to finance realisation of their projects. They also understood that films and photographs of their public art projects, used for commercial purposes without their consent, were not

²⁰⁹ *Realized Projects*, CHRISTO AND JEANNE-CLAUDE, <https://christojeanneclaude.net/artworks/realized-projects/> (last visited Feb. 5, 2024).

²¹⁰ See SHIVNATH TRIPATHI, IDEA EXPRESSION DICHOTOMY UNDER COPYRIGHT LAW (2018).

²¹¹ MARK GETLEIN, LIVING WITH ART 264 (11th ed. 2015).

²¹² *Id.*

permitted by laws in many jurisdictions worldwide. This was made clear in the 1980s, following realisation of *The Pont Neuf, Wrapped* in Paris in 1985, when the artists successfully sued two companies in France for violating their copyright via commercial use of films and photographs of their installation without their permission.²¹³

4. Alan Smith

Alan Smith (1941-2019) was a Scottish artist, who originated an artwork of significance in the development of Scotland's contemporary art in the last quarter of the twentieth century: *£1512*, 1977.²¹⁴ The work is manifest as a locked briefcase, containing investment certificates to the value of the remaining assets of a then recently liquidated artists' workshop entity. *£1512* is an ongoing and open-ended conceptual artwork. Its sardonicism is founded on toying with the usually restricting laws at the time, although occasionally permitting for exceptional purposes, perpetuities, and accumulations of capital assets.

In 1974, Smith was a trustee of the non-profit Ceramic Workshop Edinburgh, which he and fellow artists founded in 1969 to provide artists with ceramic, screen-printing, darkroom, and exhibition facilities. Despite their success, the workshop was forced to close in 1974 due to lack of external funding. After ceasing activities and paying its debts, the trustees agreed to a proposal Smith made to convert remaining funds into an artwork. There was an "uncomfortable" provision in the trust's constitution saying in terms that if it ceased operating, it must donate any remaining assets to another organisation with similar aims. Smith suggested not surrendering such funds but changing the trust's constitution to allow it to invest them, so that the investment would be an artwork and the workshop would continue to exist as that artwork.

Accordingly, in 1977, the trust was converted into an investment artwork with the title *£1512*. The money was entombed in perpetuity, and tax-free interest from the investment would feed back to rejoin the original capital sum at a rate that doubled its value every five years. Smith estimated that by the end of its first century of investment/entombment, the original *£1512* would have a value of £410.7 million. Further, by the nature of its expansion, *£1512* would become a work of art that "in concept at least" had the potential through its absorption of capital to "own the world."

The material manifestation of the conceptual artwork was first exhibited in 1977 at the Roxburgh Hotel in Edinburgh, Scotland. In 1978, it was shown at the Städtisches Kunsthalle in Dusseldorf, Germany, and in 1979, at the Centre Pompidou in Paris, France. Critical reviews of *£1512* at that time, and since then, have included discussions about the social exchange of money, the economic base of art and of time. Scottish contemporary art expert and scholar Professor Craig Richardson regards *£1512* as "a metaphor for the

²¹³ CA Paris, 13 mars 1986, Gaz. Pal. JP 239; Véronique Laroche-Signorile, *Christo Emballe le Pont-Neuf*, Le Figaro, Sep. 22, 1985.

²¹⁴ Henry Lydiate was consulted by Alan Smith and his fellow workshop trustees for the realisation of *£1512*, and the text is based on recollections and contemporaneous notes of conversations between Henry Lydiate and Alan Smith from 1976 to 2019.

Scottish visual arts in the 1970's," and cites Duchamp's immense influence on Smith's creative activities.²¹⁵

5. JSG Boggs

JSG Boggs (1955-2017)²¹⁶ was in a Chicago diner in 1984, "having a doughnut and coffee and doodling on this napkin ... sketching a numeral 1, and gradually began embellishing it. The waitress kept refilling [his] cup and [he] kept right on drawing, and the thing grew into a very abstracted one-dollar bill."²¹⁷ The waitress offered to buy the napkin work, but Boggs refused. He then asked for his bill—90 cents—and suggested "I'll pay you for my doughnut and coffee with this drawing." The deal was done and as he was leaving, the waitress called out, "[w]ait a minute. You're forgetting your change," and gave him a dime. For Boggs this was a "lightbulb" moment, which inspired him to pursue his artistic practice in this art-bartering manner for the foreseeable future. Boggs practised many such exchanges over the next two years as payment for his basic expenses including his rent, and determined that drawings of currency alone were not his artwork, rather that the whole bartering transaction, including the receipt of legal currency as change, was the complete artwork.

In 1986, Boggs was living in London and successfully pursuing his art-bartering practice, when he was arrested and indicted for reproducing Bank of England currency notes without authorisation.²¹⁸ At his jury trial, Boggs pleaded not guilty to four counts, alleging reproduction of £10, £5, and two £1 notes, each being a hand-drawn image of one side of a Bank of England currency.²¹⁹ If the jury determined that Boggs had indeed reproduced the notes, he would be found guilty. These were absolute offences not requiring the prosecution to prove any *mens rea*. The prosecution stressed the fact that the accused was an artist whose only intention was to create art, which was not relevant and was in anticipation of the defense.

The nature and flavor of Boggs's defense were captured in his counsel's opening address stating,

The Mona Lisa is not a reproduction of an Italian woman, and Van Gogh did not reproduce sunflowers ... Boggs is not an artist of that calibre—and being an artist would in any case be no [defense] in itself—but if you just look at his drawings you will see that they are not reproductions . . . but an artist's impression, objects of contemplation . . . they had never been passed off as

²¹⁵ CRAIG RICHARDSON, SCOTTISH ART SINCE 1960: HISTORICAL REFLECTIONS AND CONTEMPORARY OVERVIEWS 94 (2011).

²¹⁶ James Stephen George Boggs was born in New Jersey, U.S., in 1955. He dropped out of an accountancy course to attend art schools in Florida and New York. See Brian O'Neill, *Obituary: J.S.G. Boggs / Artist who drew money and government attention*, Pittsburgh Post-Gazette (Jan. 27, 2017), <https://www.post-gazette.com/news/obituaries/2017/01/28/Obituary-J-S-G-Boggs-Artist-who-drew-money-and-government-attention/stories/201701270049>.

²¹⁷ This and all subsequent quotations from Boggs are taken from direct conversations in 1986 and 1987 with Henry Lydiate, who was a member of Boggs' defense team. Interview with JSG Boggs, in London, Eng. (1986-1987).

²¹⁸ Regina v. Boggs, Unreported (Cent. Crim. Ct. London 1987).

²¹⁹ "It is an offence for any person, unless the relevant authority has previously consented in writing, to reproduce on any substance whatsoever, and whether or not on the correct scale, any British currency note or any part of a British currency note." Forgery and Counterfeiting Act, (1981) § 18(1), 1981 C. 45, (U.K.).

real currency . . . and not even a moron in a hurry would mistake these drawings for the real thing, they are obviously drawings . . . Boggs is no mere reproducer, he's an artist. You may or may not like what he does. You may find what he does of value. You may feel that a Boggs isn't worth the paper it's drawn on . . . but that's not the point. The point is that these are original works of art and not reproductions at all.²²⁰

The trial judge directed the jury to ignore defense submissions and convict. English juries fiercely resent being told by trial judges what to decide. They returned a unanimous verdict of not guilty on all counts, within fifteen minutes. In the street outside the courthouse, members of the jury came out to shake Boggs' hand and said, "It was the correct verdict. We loved your work." The case earned Boggs a worldwide reputation as the artist who created his own currency, which pre-dated by three decades the advent of Bitcoin around 2008. Boggs is revered by many today as the "Patron Saint of Cryptocurrency."²²¹

6. Carey Young

Carey Young (b.1970) is a London-based artist. Young's "Law Works" use the law as an artistic medium, inviting the spectator to experience "both the performative and the conceptual dimension of the law to explore its limits and to destabilise its language."²²² An early work, for example, is *Disclaimer Series*, 2005, a suite of three text-based panels presenting "playful but legally-credible terms to renounce their ontological status as artworks and their relationship to the viewer, artist, and any gallery or sales context."²²³ Young explains her creative intentions for such artworks was "to throw the viewer off balance by completely undermining the validity of the content of the show."²²⁴

Mutual Release, 2008, poses the question "an the legal contract be a form of art?" through a series of six artworks "which invite the viewer to enter into, or be privy to contractual relationships based on viewing, owning and collecting art."²²⁵ The law is treated as an artistic medium, allowing the viewer to experience the otherwise abstract space of the contract. When first exhibited at a London gallery, visitors were offered a free work, which acquired the status

²²⁰ See GEOFFREY ROBERTSON, *THE JUSTICE GAME* (1999); LAWRENCE WESCHLER, *BOGGS, A COMEDY OF VALUES* (1999); Henry Lydiate, *The Courtroom as Gallery: The Jury as Spectators*, in *THE TRIALS OF ART* (2007).

²²¹ Richard Whiddington, *J.S.G. Boggs's Estate Has Minted the Late Artist's Drawings of Banknotes, Which Questioned the Value of Money, as NFTs*, ARTNET (Oct. 25, 2022), <https://news.artnet.com/market/jsg-boggs-money-talks-nft-lacollection-2198530#:~:text=In%20death%2C%20his%20estate%20is,dip%20a%20toe%20in%20Web3>.

²²² Henry Lydiate, *Being an Artist's Lawyer*, 434 ART MONTHLY 44, 45 (Mar. 2020). See also Carey Young, *Law Works* (series of artworks), CAREY YOUNG, <https://www.careyyoung.com/law-works> (last visited May. 5, 2024).

²²³ Carey Young, Letter the Editor, 286 ART MONTHLY 18, (May. 2005). See also Henry Lydiate, *Being an Artist's Lawyer*, 285 ART MONTHLY 40 (Apr. 2005); Carey Young, *Disclaimer Series* (series of photographs), CAREY YOUNG, <https://www.careyyoung.com/works#/disclaimer-reality> (last visited May. 5, 2024).

²²⁴ Lydiate, *supra* note 223, at 40.

²²⁵ Carey Young, *Mutual Release* (series of artworks), in solo show at Thomas Dane Project Space, London (Nov. 20 2008–Dec. 15, 2008), CAREY YOUNG, <https://www.careyyoung.com/mutual-release-thomas-dane-project-space> (last visited May. 5, 2024).

of an artwork only when it had been signed by them. From then on, the owners and artist entered a contract that ended only with the death of the artist and/or the owner. In a text work, the artist and the gallery also entered a contract that offered each “complete mutual release.” In a video work, an actor interpreted legal terms from a commercial contract as a form of acting exercise. Through Mutual Release, the artist further developed her interest in both the performative and the conceptual dimension of the law to explore its limits and to destabilise its language. Over the past 20 years or so, Young has constantly developed her “Law Works” with titles that intrigue jurists, such as: *Terms and Conditions*, 2004; *Consideration*, 2004-5; *Artistic License*, 2005; *Declared Void*, 2005; *Counter Offer*, 2008; and *Before the Law Series*, 2017.²²⁶

The video work *Appearance*, 2023, is a silent film portrait of fifteen serving U.K. female judges in their judicial robes looking straight at the camera.²²⁷ Young describes how “almost forensic” close-ups of hair, shoes, jewellery and regalia, the camera plays off the judges’ roles as powerful, self-possessed public intellectuals against their varied physical presence and the quirks of individual personalities. Poised between painting and photography, the piece takes inspiration from Andy Warhol’s Screen Tests, which were themselves inspired by “most wanted” ads of the New York Police Department. Whilst countering the familiar patriarchal culture of law, *Appearance* places the viewer in the dock, and centres on ideas of judgement between viewer and judge, on judging as performance, and on the power relations between judge and camera.²²⁸

Critical reviews of *Appearance* have been positive, including “[Young’s] enduring fascination with justice and the law has yielded an outstanding new film in a riveting retrospective.”²²⁹ Another states:

The effect is uncanny. These women are accustomed to embodying legal authority and to listening and deliberating with a certain gravitas. Seeing them express their own forms distinct of composure—and concomitant hints of humor, playfulness, inscrutability, or imperturbability—while gazing into the camera and then gradually moving in to study the pulse behind their ears gives new dimensions to the old maxim, justice must be seen to be done, and to our understanding of female power.²³⁰

7. Alison Jackson

Alison Jackson (b.1960) is a London-based artist. She gained public attention in 1999, when she published her lookalike photographs of celebrities in compromising positions. She developed these into BBC television’s broadcast series, *Double Take*, for which she won a British Academy of Film and Television Arts Award for

²²⁶ Young, *supra* note 222.

²²⁷ See Carey Young, *Appearance* (silent film), in solo exhibition at Modern Art Oxford (Mar. 25 -July 2, 2023), CAREY YOUNG, <https://www.careyyoung.com/works#/appearance> (last visited May. 5, 2024).

²²⁸ *Id.*

²²⁹ Laura Cumming, *Carey Young: Appearance review – the faces of female justice*, THE GUARDIAN (Mar. 26, 2023), <https://www.theguardian.com/artanddesign/2023/mar/26/carey-young-appearance-review-the-faces-of-female-justice>.

²³⁰ Toby Kamps, *Carey Young: Appearance*, THE BROOKLYN RAIL (June, 2023), <https://brooklynrail.org/2023/06/artseen/Carey-Young-Appearance>.

Best Innovation in 2002.²³¹ Jackson uses conventional mainstream broadcast media and publishing as both her art form and dissemination medium (as well as exhibiting in art galleries). She works not as a conventional television director, but as an artist with exclusively artistic parameters. Jackson uses media to subvert and question notions of celebrity, and toys with the “it’s on television/in print, so it must be true” response by viewers. Jackson says, “[m]y aim is to explore the blurred boundaries between reality and the imaginary—the gap and confusion between the two. I recreate scenes of our greatest fears which we think are documentary but are fiction.”²³² Jackson employs skill and judgement in intentionally sailing close to—and to date successfully circumventing—hazardous boundaries of laws relating to confidentiality, defamation, and related celebrity rights.²³³

Laws of confidentiality or privacy exist in most jurisdictions worldwide, aimed at deterring or preventing confidential information (including what a person looks like in private), being acquired (via a still photograph or moving picture image) in confidential circumstances, and being exposed to the public. In Jackson's artworks, there are no actual invasions of privacy, rather the portrayal of imagined invasions. Therefore, there are no breaches of confidentiality. As she says, “I'm depicting what exists in the public imagination, with one foot in fantasy and one foot in reality.”²³⁴ Defamation generically describes publication of something that damages a person's reputation by causing reasonable people to think less of them. In Jackson's artworks, her targeted celebrities are sometimes objects of satire, possibly ridicule, certainly fun. However, given the nature and range of Jackson's artistic credentials and professional standing, and the relatively low risk of the general public, or audiences/fans of celebrity subjects, thinking less of them, it is difficult to envisage defamation actions being taken.

Many jurisdictions worldwide have enacted so-called personality, publicity, or celebrity rights to protect a celebrity's commercial “attributes” that may be a potential trading asset, such as name, signature, or image. Such rights often overlap with trademark legislation.²³⁵ In Jackson's artworks, if violation of such rights were alleged, courts are likely to consider and recognise the artistic nature and intent of her past and current work, her well-established reputation as an artist/director, and the non-commercial nature of many of her projects. Moreover, Jackson's extensive website contextualises her work:

We live our lives through screens now, whether they are televisions or our computers or our phones, and screens are hugely addictive. There is a gap between the facts, and how the

²³¹ See Megan Lane, *That's Blair and Becks! No wait...*, BBC NEWS ONLINE MAGAZINE (Dec. 18, 2003), http://news.bbc.co.uk/2/hi/uk_news/magazine/3309591.stm.

²³² See generally Alison Jackson, *Photography*, ALISON JACKSON, <https://www.alisonjackson.com/photo-gallery> (last visited Feb. 5, 2024).

²³³ *Id.*

²³⁴ Henry Lydiate, *Alison Jackson's Sven*, ART MONTHLY (2006), <https://artquest.org.uk/artlaw-article/alison-jacksons-sven/>. See also Alison Jackson, *Press*, ALISON JACKSON (citing *Fame and Fortune: Alison Jackson*, THE SUNDAY TIMES, (Oct. 17, 2021)), <https://www.alisonjackson.com/press> (last visited Feb. 5, 2024).

²³⁵ See Abbas Mirshekari, *Foundations of Legal Protection of Reputation*, 11 U. TEHRAN COMPAR. L. REV. 339 (2020).

media portrays stuff, and that's what these images fill. I'm especially interested in how we think we know people through imagery – it goes straight from eye to psyche, which makes it very powerful, and very seductive. It also makes it very easy to lie.²³⁶

8. Banksy

Banksy is the pseudonym and tag of the London-based street artist, political activist, and film director. His birth-date, real name, and identity remain unconfirmed and the subject of worldwide speculation as he reportedly hails from, and attended art college in the west of England city of Bristol, until the late 1990s before moving to London.²³⁷ Initially operating from the early 1990s as a free-hand street graffiti artist, Banksy soon began using stencils to facilitate swifter execution of street work as well as assist him in avoidance of detection and arrest for criminal damage or trespass to other people's property. His career started as an urban guerrilla artist, using the built environment as both his canvas and gallery to convey messages to the general public against war, capitalism, and the establishment, via satirical images often with epigrammatic text. He had no artworks for sale.

Banksy responded to his increasing popularity (and requests from people wanting to somehow own one of his works) by using his stencils to make reproductions of his publicly-sited artworks. Some were printed on paper and offered for sale via eBay; others were printed on canvas and sold, more expensively, to selected collectors.²³⁸ In 2009, he established Pest Control as a separate online legal entity registered in the U.K. as a limited liability company, partly to protect his personal identity, partly to authenticate his site-specific artworks, but mostly to handle the growing commercial dimensions of his practice.²³⁹ In this way, Banksy extended his artistic brand by adopting and adapting mainstream art business practices, creating and selling authorised versions of his works, and occasionally accepting commissions in signed limited editions.

At a sale of several of his works in 2007, Sotheby achieved the following: £96,000 for *Ballerina with Action Man Parts*, 2005, a resin sculpture playfully parodying *The Little Dancer* by Edgar Degas (1834-1917); £72,000 for *Glory*, 2005, a unique print. Both works were sold on the first of two days of sales.²⁴⁰ By the start of Sotheby's

²³⁶ Andrew Mueller, *Putting the Boot in*, THE GUARDIAN, (June 3, 2006), <https://www.theguardian.com/media/2006/jun/03/tvandradio.theguide2>.

²³⁷ See STEVE WRIGHT, BANKSY'S BRISTOL: HOME SWEET HOME (2007).

²³⁸ From Henry Lydiate's notes of conversations with Steve Lazarides in 2004, shortly after Lazarides opened his gallery in London's Soho, where he acted as Banksy's agent and dealer. Lazarides worked with Banksy for 11 years, initially documenting the artist at work in 1997, then becoming his agent, strategist and minder. Interview with Steve Lazarides, in London, Eng. (2004); See also Stuart Jeffries, *'We were lawless!' Banksy's photographer reveals their scams and scrapes*, THE GUARDIAN (Dec. 16, 2019), <https://www.theguardian.com/artanddesign/2019/dec/16/banksy-captured-steve-lazarides-photographer>.

²³⁹ *Pest Control: Parent/Legal guardian for the artist Banksy*, PEST CONTROL OFFICE, <https://pestcontroloffice.com/>.

²⁴⁰ *Ballerina with Action Man parts, 2005*, BANKSY EXPLAINED, <https://banksyexplained.com/ballerina-with-action-man-parts-2005/>; *Banksy Auction Results*, Sotheby's, <https://www.sothebys.com/en/search?query=banksy&timeframe=&tab=objects>.

second sale day, Banksy had updated his website with a new image of people bidding at auction with title, *I Can't Believe You Morons Actually Buy This Shit*.²⁴¹ Later that year London's Bonhams hammered for £288,000 his *Space Girl & Bird, 2003*, spray-paint on steel.²⁴²

Perhaps the most memorable and widely-known of all Banksy's legal and business creative art activities was his *Girl with Balloon, 2006*, shredding incident at Sotheby's London in 2018.²⁴³ Banksy's work has always been generative in the Duchampian sense, that its key concern has been for an image (alone or coupled with epigrammatic text) to stimulate intellectual engagement of the spectator—perhaps to think about their environment, and especially the location specifically chosen by the artist. In this case, the site-specific location for the key performative element of Banksy's auto-destructive conceptual work in 2018 was a live public auction room in a world-leading auction house, and in an art market capital city. The shredding occurred during a prestigious week in the contemporary art market's calendar and was timed to shred on the fall of the hammer confirming the highest bid of £1 million. An unidentified seller had consigned the work for sale to Sotheby's, whose sale catalogue entry stated:

Description

Banksy
 Girl with Balloon
 signed and dedicated on the reverse
 spray paint and acrylic on canvas, mounted on board, in
 artist's frame
 101 by 78 by 18 cm. 39 3/4 by 30 3/4 by 7 in.
 Executed in 2006, this work is unique.

Provenance

Acquired directly from the artist by the present owner in
 2006.²⁴⁴

The shredder hidden within the frame could have been installed by the artist when making the work in 2006 and was unknown to the owner who consigned it to auction. Alternatively, it could have been installed by Banksy with the owner's collaborative blessing in preparation for its consignment to Sotheby's. *Shred the Love | the Director's Cut* was a short video posted on Banksy's social media site twelve days after the shredding, including shots of the studio installation of a shredder within the frame of an artwork, and test rehearsal of shredding.²⁴⁵ In the end, things turned out well for all

²⁴¹ See *Morons, 2006-2007*, BANKSY EXPLAINED, <https://banksyexplained.com/morons-2006-2007/>.

²⁴² *5 Things to Know About Banksy*, BONHAMS, <https://www.bonhams.com/stories/32393/>.

²⁴³ Jason Daley, *Watch This \$1.4 Million Banksy Painting Shred Itself As Soon As It's Sold*, SMITHSONIAN MAGAZINE (Oct. 8, 2018), <https://www.smithsonianmag.com/smart-news/watch-14-million-banksy-painting-shred-itself-soon-it-sold-180970486/>.

²⁴⁴ See generally *Lot #67 Banksy Girl with Balloon*, SOTHEBY'S, <https://www.sothebys.com/en/auctions/ecatalogue/2018/contemporary-art-evening-auction-118024/lot.67.html>.

²⁴⁵ Daley, *supra* note 213.

parties including Banksy, because the highest bidder/buyer decided not to reject the shredded work, but to complete the auction transaction and pay to own it. Banksy promptly re-titled the piece, *Love Is in the Bin*, 2018, with a new authenticity certificate.²⁴⁶ Sotheby's was swift to capitalise on the incident, issuing a press statement saying, "Banksy didn't destroy an artwork in the auction, he created one ... the first artwork in history to have been created live during an auction."²⁴⁷ Only three years later, in October 2021, the shredded work was resold at Sotheby's London for £18.5 million.²⁴⁸ Did Banksy perhaps fail in the attempted subversion or disruption of the art and money nexus, and instead demonstrate how the status and value of an artwork can change? Or, did he succeed in metamorphosing from being a secretive street artist to becoming an international cultural icon?²⁴⁹

D. Life After Art School

Art college education throughout most of the world offers a wide variety of studio-based undergraduate and postgraduate degree courses focusing on visual arts practice. Authorities responsible for validating the delivery of such courses have necessarily developed criteria for assessing the performance of students. However, few such institutions have developed criteria for assessing students' performance in areas essential for establishing and maintaining a studio practice: appropriate legal and business knowledge and skills. In the U.K., for example, the 1997 report of the National Committee of Inquiry into Higher Education, commissioned by the U.K. Government, included a major review of art and design education and qualifications. One of its principal recommendations was for holistic embedding into creative arts degree courses as well as the delivery and formal assessment of professional practice, knowledge, and skills.²⁵⁰

Professional practice studies—of the commercial dimensions of a creative practice— should ideally include the following²⁵¹:

- The difficult transition from student life to that of a freelance practitioner, including registering for state welfare benefits, and as a sole trader for income tax and possible exemption purposes before moving towards the establishment of an economically sustainable practice;

²⁴⁶ See Julia Halperin, *Banksy's Famed Shredded Artwork, 'Love Is in the Bin,' Sells for a Record \$25.4 Million at Sotheby's—18 Times the Non-Shredded Price*, ARTNET NEWS (Oct. 14, 2021), <https://news.artnet.com/market/banksy-record-love-is-in-bin-2020706>.

²⁴⁷ Mattha Busby, *Woman who bought shredded Banksy artwork will go through with purchase*, THE GUARDIAN (Oct. 11, 2018), <https://www.theguardian.com/artanddesign/2018/oct/11/woman-who-bought-shredded-banksy-artwork-will-go-through-with-sale>.

²⁴⁸ Halperin, *supra* note 216.

²⁴⁹ See *The Banksy Story*, BBC Radio 4 (July 10, 2023), <https://www.bbc.co.uk/sounds/brand/m001nw8s> (addressing the questions presented); *BANKSY OPENS "CUT & RUN" IN GLASGOW*, BROOKLYN STREET ART (June 15, 2023), <https://www.brooklynstreetart.com/2023/06/15/banksy-opens-cut-run-in-glasgow/>.

²⁵⁰ THE NATIONAL COMMITTEE OF INQUIRY INTO HIGHER EDUCATION, THE DEARING REPORT: HIGHER EDUCATION IN THE LEARNING SOCIETY 137 (1997).

²⁵¹ *Id.* at 130.

- Developing income generation skills for achieving grants, awards and prizes, bursaries, residences, sponsorships, and sales;
- Understanding and managing relationships in the global art world, such as how professionals and organisations operate in the commercial art market, and in the museums and galleries sector;
- Global marketing and promotion tactics like raising awareness and critical interest in the media and academic art worlds, and attracting potential collectors and commissioners;
- How to negotiate and secure successful contracts with collectors, commissioners, agents and dealers, museums and galleries—all in a potentially international context;
- A sound working knowledge of international and national laws that give artists intellectual property rights: especially ownership and management of copyright and statutory moral rights, their proactive entrepreneurial use for income generation and their use to resist or deal with infringements and abuses of artworks.

Such studies, although strongly recommended for the U.K. in the 1997 report, did not lead to the enactment of legislation or central government policies making it compulsory for such studies to be delivered and assessed by publicly funded art colleges. Instead, most colleges developed their own voluntary professional practice programmes, whereby external art business professionals visit to give occasional talks and conduct workshops and seminars to students. These workshops typically discuss subjects such as book-keeping and accounting, self-promotion and marketing, portfolio and curriculum vitae development, pricing of work, and art law. Students' attendance for such visits is normally voluntary, and therefore quite patchy. This is especially true when such sessions are arranged for the end of the academic year, often in the final course year, when students are understandably pre-occupied with completing creative works and projects for summative assessment. Therein lies a real problem: undertaking such professional practice study programmes may not earn students credit units towards their degree awards and may not therefore require students to submit assessed professional practice assignments in order to demonstrate their understanding and working knowledge of professional practice skills. The U.K. is not alone. Most other countries, where studio-based art college courses are delivered, do likewise.

Art colleges and their faculty staff could and ideally should derive substantial benefits from establishing such holistically embedded and assessed professional practice programmes. Colleges could rightly say to potential students, their supporting families, government and other funding bodies, that their studio-based visual arts courses aim, amongst other things, to equip students with the basic knowledge and skills necessary to establish and maintain a professional life after art school. Until this ideal is achieved, artists will continue from time to time to need the services of a lawyer.

CONCLUSION: BEING AN ARTIST'S LAWYER

An artist's lawyer is an attorney on whom visual artists can rely for experienced and knowledgeable advice and help. Lawyers have traditionally developed and offered many fields of specialist practice

including law relating to crime, children, finance, sports, music, film, entertainment, media, antiquities, and art. But the area of practice by living artists is perhaps more specialised and demanding than most. This is because of the unusual, challenging, changing and unique nature of contemporary fine art practices. Visual art, as a creative activity, mostly involves autonomous and self-funded generation of artwork, with dissemination following afterwards. The activity is almost entirely product-led rather than market-led - conventional business wisdom turned on its head.

A widely accepted principle of good legal practice is that lawyers should ideally stand inside the shoes of their clients, to try to see and understand from their perspective. This principle requires lawyers first to step out of their own shoes and their own legal comfort zone, which many find hard to do. If the client is an artist, it can be especially challenging to understand and empathise with the nature of their practice, processes, and intentions in order to assess whether (and, if so, what) legal advice and help is necessary or desirable. An artist's go-to lawyer should ideally be able to demonstrate a sound grasp not only of conventional art practices producing unique or limited-edition works for exhibition and sale, but also of unconventional art practices that sometimes create work only for exposition, with no material for sale. It is axiomatic that every artist's practice is unique, but there are dimensions of most visual artist's practices and processes and intentions with which an artist's lawyer should ideally be familiar. Let us consider examples.

Artists usually expect their go-to lawyer to demonstrate not only knowledge of art's developmental journey through the ages to date, but also understanding of any resonances with their client's particular contemporary art practices, processes, and intentions. Artists strive to create artwork to be self-evidently original, in the sense that it does not slavishly appropriate earlier work of other artists. It is therefore almost always the case that artists have a deep knowledge and understanding of visual art's history—from antiquity to date—not only to avoid conscious or unconscious plagiarism of specific images, compositions, shapes, forms, configurations, and so on, but also to be stimulated by the content of such past works as well as the lives and practices of past works' authors to originate something new and different. Possession of such knowledge of art history perhaps even allows artists to shock spectators with work they have never seen before, but which in time they may come to revisit and eventually value.²⁵²

Art and artist's history is full of artists' works that challenge conventional artistic norms, but which over time came to be viewed and widely accepted as being ground-breaking and influential on subsequent generations of artists and spectators. For example: Andrea Mantegna's (1431-1506) *Dead Christ*, c.1466; Michelangelo's (1475-1564) *The Last Judgement*, 1536-41; Caravaggio's (1571-1610) *St Matthew and the Angel*, 1602; Édouard Manet's (1832-1883) *Le Déjeuner sur l'herbe*, 1862-63; Gustave Courbet's (1819-1887) *The Origin of the World*, 1866; Marcel Duchamp's *Fountain*, 1917; Pablo Picasso's *Guernica*, 1937; Robert Rauschenberg's (1925-2008) *Erased De Kooning*, 1953; Andy Warhol's *Campbell's Soup Cans*, 1962; Yoko Ono's (b.1933) *Cut Piece*, 1964; Christo and

²⁵² Hughes, *supra* note 132.

Jeanne-Claude's *Running Fence*, 1976; Ai Weiwei's (b.1957) *Dropping a Han Dynasty Urn*, 1995; and Maurizio Cattelan's (b.1960) *Comedian*, 2019. Such examples effectively moved the goal posts and established new concepts, principles and propositions. Today's artist's lawyer should have an understanding that it was ever thus: to be ready, willing and able to understand and empathise with artists needing legal help and support for realisation and dissemination of artwork that is experimental, under-recognised, or challenging in nature.