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ON ART ATTACKS: AT THE CONFLUENCE OF SHOCK, APPROPRIATION, AND THE LAW

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ABSTRACT

Does the law adequately recognize the expansive nature of art, especially in scenarios involving controversial acts of appropriation art?

Of particular curiosity is just how the law should treat acts of artistic appropriation involving the creation of artwork on top of other original works of art, or art attacks. This is an issue that has been largely unaddressed by the courts outside the realm of criminal proceedings. However, the legal implications of such acts reach far beyond crimes and property torts, involving copyright, moral rights, freedom of expression, and the preservation of cultural heritage. Indeed, the issues are not just far reaching, but complex as well. Art attacks yield double-hinged questions as to intellectual property rights and moral rights. Whether art attacks are protected by the First Amendment largely splits along the lines of property ownership, while international treaties concerning the preservation of cultural heritage weigh heavily and numerously against the lawfulness, or acceptability, of any art attacks. In 1903 the Supreme Court admonished that those trained only in the law should not "constitute themselves final judges" of the worth of artistic creations—with this in mind, it is crucial to consider all the legal dimensions presented by these challenging acts of appropriation art.

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I. INTRODUCTION

On October 7, 2012, a twenty-six year old artist walked into the Tate Modern in London, approached a 1958 painting by Mark Rothko called *Black on Maroon*, and penned, "Vladimir Umanets '12 a potential piece of Yellowism."[1] The artist was sentenced to two years in prison, and although the painting was ultimately restored, the act detracted millions from the value of the painting.[2] The artist is, or was, part of a highly criticized art movement called Yellowism.[3] He stated that he did not believe that he had defaced the painting.[4] As the artist told the BBC, "Art allows us to take what someone's done and put a new message on it."[5]

Certainly this Yellowist is far from the first artist to commit an act of appropriation, recasting preexisting artwork or objects in a new light. With the advent of appropriation art in the twentieth century, the question "What is art?" continues to be answered on ever-broader terms. Swept into art's reach are acts of appropriation committed by artists and thus deemed art, whether by that artist in particular or by society at large. Indeed, in 1917 Marcel Duchamp turned a urinal on its side, signed it "R. Mutt" and called it art.[6] This piece, entitled *Fountain*, is one of the most famous examples of Duchamp's *Readymades*, a series of artworks that consisted of ordinary manufactured objects that the artist selected and minimally modified.[7] Although Duchamp's *Fountain* was to be featured in a democratic, non-curated art show by the Society of Independent Artists, the piece was so shocking it caused infighting and was ultimately not exhibited.[8] "Before *Fountain* people had rarely been made to think what art actually was, or how it could be manifested; they had just assumed that art would

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[1] Ewan Palmer, *Vandal Vladimir Umanets Jailed for Two Years for Defacing Mark Rothko Painting*, INTERNATIONAL BUSINESS TIMES, (Dec. 13, 2012, 2:23 PM), http://www.ibtimes.co.uk/vladimir-umanets-jailed-mark-rothko-painting-yellowism-414769.

[2] Mark Brown, *Tate Modern Unveils Painstakingly Restored Rothko*, THE GUARDIAN, (May 13, 2014, 10:19 AM), http://www.theguardian.com/artanddesign/2014/may/13/tate-modern-unveils-restored-mark-rothko-black-on-maroon.

[3] *See* THIS IS YELLOWISM, http://www.thisisyellowism.com (last visited Feb. 21, 2015) containing the website for the artists involved with the yellowism movement.

[4] *Mark Rothko Painting Defacement: Man Arrested*, BBC, (Oct. 9, 2012, 5:36 AM) http://www.bbc.com/news/uk-england-london-19879650.

[5] *Id.*

[6] TONY GODFREY, CONCEPTUAL ART 6 (1998).

[7] *Id.* at 7, 27-28.

[8] *Id.* at 28-29.

be either painting or sculpture. But very few could see *Fountain* as a sculpture."[9] After *Fountain*, the question thus became "What if this is art?"

In the intervening years appropriation art took on many forms.[10] Artists like Andy Warhol and Jasper Johns created iconic works that incorporated pop images, trademarks, and everyday objects, such as Warhol's 1962 *Big Campbell's Soup Can (19¢)*, or Johns's 1964 *Painted Bronze II: Ale Cans*.[11] Contemporary visual artists, such as Richard Prince, continue the practice of appropriation art, and though not without its legal perils, appropriation art remains a vital facet of contemporary art.

However, at some point around the 1970's art began appropriating itself when artists started making art on top of original art and even perpetrating physical attacks on other original works of art, considering the attack or its result a "new" work of art.[12] For purposes of this article, such instances constitute "art attacks." Art attacks not only challenge the viewer, they present some very thorny legal issues as well. In certain contexts, such as when the artist commits an attack on a work of art that he or she does not own, the criminal and civil tort implications of these acts are fairly obvious. But, what of the many other legal issues? When an artist writes on Mark Rothko's painting, dumps a bottle of ink in Damien Hirst's sheep preserved in a glass tank, or draws clown faces on Francisco Goya's prints, do these acts of destruction create new works of art and thus new legal rights in another author? Or, do such acts merely infringe copyrights and offend the moral rights of the original artists? Is the destruction of original works of art ever justified by an artist's free speech rights? And what of the ethical, if not legal, obligations to preserve works of art for future generations?

Undeniably, these are difficult questions, and they are questions that the courts may not be particularly well suited to address. In 1903 the Supreme Court of the United States contemplated the outer limits of copyright in visual art stating:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[13]

While legal cases related to defaced, or more aptly, attacked, works of art are not particularly uncommon, such cases tend to be criminal in nature. It does not appear that any court has truly reached the issue of whether an art attack may constitute a new work of art, nor balanced the legal rights of one artist against another in such a context. This note posits that legal evaluation of art attacks must extend beyond the criminal aspects related to the attack, thus reaching a deeper evaluation of the legal rights of all parties involved. Indeed, not all art attacks have a criminal dimension. A court's initial repugnance at the attack must necessarily yield to deeper questions

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[9] *Id.* at 6.

[10] MARILYN STOKSTAD, ART HISTORY: VOLUME TWO 1155 (1995).

[11] JAMIE JAMES, POP ART 9, 72-73 (1996).

[12] Chris Wright, *How to Shock an Unshockable Crowd*, THE BOSTON GLOBE, (Oct. 28, 2012), http://www.bostonglobe.com/ideas/2012/10/27/how-shock-unshockable-crowd/lnegNqkYdwf0fXU1AguluK/story.html?s_campaign=sm_tw.

[13] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

regarding the ever-broadening landscape of art itself. Should the criminal issues associated with art-making ultimately eclipse deeper inquiries about the nature of art? And is an outright rejection of the art attack as art a failure to uphold *Bleistein's* reasoning that the law not be the judge of artistic merit?

II. ART ATTACKS

Art attacks are not all that uncommon. Certainly the internet allows these incidents, or perhaps, works of art, to be documented more readily. Where art attacks may have previously been viewed and treated as criminal matters without any additional dialogue, they may now be widely disseminated and discussed. There is no simple way to classify all attacks. While some of these acts may be rooted in iconoclasm, or art criticism, still many others appear to be strictly intended as a form of appropriation art. By way of example the following incidents were reviewed for purposes of preparing this note: A young artist sprayed "Kill Lies All" on Picasso's *Guernica* as an "art action" in 1974;[14] an Italian painter took a hammer to the toe of Michelangelo's *David* in 1991;[15] in 1994 an artist dumped a bottle of ink into Damian Hirst's piece, *Away From the Flock*, a sculptural work consisting of a sheep preserved in a glass tank;[16] an art student purposefully vomited on a Mondrian painting as a piece of performance art in 1996;[17] in 2001 brothers Jake and Dinos Chapman procured a rare set of Franciso Goya prints and drew clown faces on them;[18] in 2012 an artist wrote on Rothko's *Black on Maroon* at the Tate Modern in London;[19] in 2014 a performance artist threw what was (allegedly) his own blood on the walls of the Jeff Koons retrospective at the Whitney Museum of American Art;[20] also in 2014, an artist painted over Banksy murals, placing videos of the performances on YouTube, and he was criminally prosecuted;[21] and finally in 2014, an artist "protested" at an Ai Weiwei exhibition in Miami by smashing a Han Dynasty vase that Ai Weiwei had appropriated

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[14] Owen Wilson, *Tony Shafrazi*, INTERVIEW, http://www.interviewmagazine.com/art/tony-shafrazi/#_ (Feb. 14, 2015, 7:51PM); *See also* Wright, *supra* note 12.

[15] *See* Wright, *supra* note 12.

[16] *Id.; See also* Maeve Walsh, *It was 5 Years Ago Today: When Damien Hirst Put a Sheep in His Tank*, THE INDEPENDENT, (Apr. 25, 1999), http://www.independent.co.uk/arts-entertainment/it-was-5-years-ago-today-when-damien-hirst-put-a-sheep-in-his--tank-1089375.html.

[17] *See* Wright, *supra* note 12.

[18] Jonathan Jones, *Look What We Did*, THE GUARDIAN, (Mar. 31, 2003, 9:48 AM), http://www.theguardian.com/culture/2003/mar/31/artsfeatures.turnerprize2003.

[19] Nick Clark, *"Yellowist" Rothko Vandal Jailed for Two Years*, THE INDEPENDENT, (Dec. 13, 2012), http://www.independent.co.uk/arts-entertainment/art/news/yellowist-rothko-vandal-jailed-for-two-years-8412813.html; *See also* Julia Halperin, *WTF is Yellowism? A Guide to the Obscure Movement Behind the Tate Rothko Attack*, BLOUINARTINFO, (Oct. 9, 2012), http://www.blouinartinfo.com/news/story/831942/wtf-is-yellowism-a-guide-to-the-obscure-movement-behind-the.

[20] Inae Oh, *Man Vandalizes Jeff Koons Retrospective With Own Blood, Because He's An Artist Too*, THE HUFFINGTON POST, (Aug. 21, 2014, 3:59 PM), http://www.huffingtonpost.com/2014/08/21/jeff-koons-istvan-kantor_n_5697784.html.

[21] Sheila Kumar, *Man Accused of Vandalizing Banksy Images*, THE WALL STREET JOURNAL, (Aug. 19, 2014, 2:41 PM), http://www.wsj.com/articles/man-charged-with-criminal-mischief-for-allegedly-vandalizing-banksy-images-1408473714.

by painting it bright colors. The exhibition also featured large photographs of Mr. Ai smashing vases.[22]

As these incidents demonstrate, art attacks are widely variable and happen across different mediums and national borders. Their most loathsome and most brilliant qualities bear equally upon the shocking attack of an original artwork. While the contemporary art scene may observe and debate such incidents, the law must often play a role in such incidents as well. But the law of art attacks is far richer than it initially appears, yielding questions as to intellectual property, moral rights, freedom of expression, and cultural heritage law.

III. COPYRIGHT & FAIR USE

A. Copyright

Moving beyond the issues of criminal and civil tort liability for physically harming the property of another, the primary questions implicated by art attacks revolve around intellectual property. The copyright issues presented may be double-hinged, in that a single, original work may have two authors at one time. But are art attacks merely copyright infringement? Is it possible that any attacks may be viewed as so transformative in nature as to constitute fair use?

On its most basic terms, copyright is comprised of a bundle of rights awarded to the author of an "original work of authorship" that is "fixed in any tangible medium of expression."[23] This bundle of rights includes the exclusive right to reproduce, the right to distribute copies, the right to publicly perform, the right to publicly display, and, the right to create derivative works for a limited time.[24] As art attacks all involve acts upon the original work of art, the primary inquiries here are whether such an act violates an author's right to display or creates an unauthorized derivative from the original artwork.

1. The Right to Display

Unsurprisingly, case law on these issues is highly limited, but a small number of cases guide our inquiry here. *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* is one of very few copyright disputes related to original works of art instead of some form of reproduction.[25] In this case, Swiss artist, Christoph Büchel, entered into an agreement with the Massachusetts Museum of Contemporary Art ("Mass MoCa") to create an art installation for a massive exhibition

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[22] Jonathan Jones, *Who's the Vandal: Ai Weiwei or the Man who Smashed his Han Urn?*, THE GUARDIAN, (Feb. 18, 2014, 9:30 AM), http://www.theguardian.com/artanddesign/jonathanjonesblog/2014/feb/18/ai-weiwei-han-urn-smash-miami-art.

[23] 17 U.S.C. § 102 (2012).

[24] 17 U.S.C. § 106 (2012); 17 U.S.C. §§ 302-305.

[25] Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d 38 (1st Cir. 2010).

space at the museum.[26] The exhibition was to be comprised of a village, containing significant architectural and structural elements.[27] Major components proposed by the artist included a movie theater, a mobile home, sea containers, and an aircraft fuselage, amongst others.[28] During the fall of 2006 the artist remotely provided instructions to the museum for construction with the artist later arriving on site.[29] Eventually, the relationship between the parties deteriorated, due in large part to the lack of a contract between the parties and miscommunications as to the roles and responsibilities associated with constructing the project.[30] Ultimately, the show was cancelled.[31] The artist explicitly prohibited Mass MoCa from showing the unfinished work in his name, leaving the museum with what amounted to a hangar full of Büchel's unfinished works.[32] In May of 2007, Mass MoCa announced that a new show called "Made at MASS MoCa," a "documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions."[33] The show was comprised of Büchel's works displayed under burlap and yellow tarpaulins.[34]

Upon opening the show, Mass MoCa filed a declaratory judgment action seeking a ruling that it was entitled to show Büchel's work in this manner.[35] Büchel made five counterclaims, largely centering on the artist's moral rights under the Visual Artists Rights Act;[36] however Büchel also sought an injunction and damages for violations of his copyrights.[37] Specifically, Büchel claimed that his right to publicly display and create derivatives from his works was violated by Mass MoCa's new show.[38] While the district court granted summary judgment in favor of the museum on all of Büchel's claims, the First Circuit reversed several of those holdings on appeal.[39] The First Circuit determined that Büchel raised genuine issues of material fact as to whether Mass MoCa violated his exclusive right to publicly display his work under § 106(5) of the Copyright Act.[40] In its defense, Mass MoCa attempted to rely on 17 U.S.C. § 109(c), which allows the public display of a lawfully made copy without the consent of a copyright holder.[41] However, the museum was unsuccessful in demonstrating that it actually owned the physical works—thus falling through a trap door in its "lawfully made copy" argument under § 109(c). Büchel introduced evidence that the museum understood that the physical pieces of the installation belonged to him.[42] Accordingly,

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[26] *Id.* at 42-44.
[27] *Id.* at 43.
[28] *Id.* at 44.
[29] *Id.* at 44-45.
[30] Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d. 38, 44-45 (1st Cir. 2010).
[31] *Id.* at 45.
[32] *Id.* at 44-46.
[33] *Id.* at 45.
[34] *Id.* at 46.
[35] *Id.*
[36] *See infra* Part IV addressing Moral rights and the Visual Artists Rights Act.
[37] Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d. 38, 46 (1st Cir. 2010).
[38] *Id.* at 46.
[39] *Id.* at 65.
[40] *Id.*
[41] *Id.* at 63-64; 17 U.S.C. § 109(c) (2012).
[42] *Mass. MoCa.*, 593 F.3d at 64.

the First Circuit allowed Büchel to maintain his claim that the exhibition violated his exclusive right to display the works.

Büchel was less successful on his claim that the artworks displayed under tarpaulins and burlap were sufficiently original enough to constitute an unauthorized derivative of his work.[43] The First Circuit disposed of this claim without reaching the merits, finding that Büchel had failed to develop the claim in his briefing.[44] The case settled after it was remanded to the district court, thus leaving this question unanswered.[45]

When considered in the context of art attacks, *Mass MoCa v. Büchel* provides at least some insight on the copyright implications of displaying original works that have been appropriated or repurposed in some way, and it largely weighs in favor of the rights of the original artist if the display does not involve a lawfully made copy.[46] If we thus consider an example such as the Yellowist attack on Rothko's *Black on Maroon*, the painting as written on still remains Rothko's original painting and thus attached to it Rothko's right of display. As is demonstrated by the *Mass MoCa v. Büchel*, Büchel as the original artist may have been able to use his exclusive right of display to prevent the exhibition of his original work in a modified format that he found objectionable on the basis that it violated his copyright in the work. Assuming *Black on Maroon* was protected by copyright in 2012, perhaps the right of display could have been used to prevent the painting being shown as a "potential piece of Yellowism."

2. The Right to Create Derivative Works

Although the *Mass MoCa v. Büchel* case left the matter of derivative works comprised of original art largely unexamined, a series of cases related to the question of derivative works and the activities of the Albuquerque A.R.T. Company provides limited guidance on this issue. These cases involve the lawful purchase of printed images, such as in books or notecards that Albuquerque A.R.T. Company then mounted on tiles and offered for sale.[47] As such, the Albuquerque A.R.T. cases implicate the intersection of derivative works and the first sale doctrine and thus do not wholly address the issue of art attacks. However, the diverging approaches as to the meaning of "derivative work" in those cases by the Seventh Circuit and Ninth Circuit are worthy of review.

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[43] Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d. 38, 65 (1st Cir. 2010). As the court noted, citing 17 U.S.C. § 101, "A derivative work includes any work 'consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.'"

[44] *Id.*

[45] *See* MASSACHUSETTS MUSEUM OF CONTEMPORARY ART, http://www.massmoca.org/event_details.php?id=144 (last visited Feb. 28, 2015).

[46] This assumes the fair use defense does not apply. *See infra* Part III.B discussing fair use.

[47] Lee v. Albuquerque A.R.T. Co., 125 F.3d 580 (7th Cir. 1997); Munoz v. Albuquerque A.R.T. Co., 38 F.3d 1218 (9th Cir. 1994), *aff'd,*, 829 F.Supp. 309 (D. Alaska 1993); Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988).

In 1988, the Ninth Circuit held that Albuquerque A.R.T. Company's technique of mounting artwork on tiles amounted to the creation of unauthorized derivatives.[48] However, in 1997 the Seventh Circuit held that Albuquerque A.R.T. Company's technique did not result in unauthorized derivative works.[49] Both courts began with the statutory definition of "derivative work:"

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".[50]

The Ninth Circuit hinged its decision upon the language "or any other form in which a work may be recast, transformed, or adapted" to find that the lawfully purchased copy of an artwork, mounted on tile and offered for sale constituted an unauthorized derivative.[51] That decision had many critics, including the Seventh Circuit. When confronting a highly similar fact pattern, and affirming the lower court, the Seventh Circuit likened the process used by Albuquerque A.R.T. Company to other forms of art mounting, such as framing. Based on this interpretation of Albuquerque A.R.T.'s process, the Seventh Circuit found that no derivative had been created because, in its opinion, the definition of "derivative work" also requires originality, and gluing the artwork to a tile did not meet this requisite level of originality to support a copyright.[52] The Seventh Circuit thus held that the tiles with artwork mounted on them did not infringe upon the author's exclusive right to create derivative works under copyright law.[53] The fact that the copies were lawfully bought before placing them on tiles also meant that the Seventh Circuit's decision necessarily relied, in part, on the first sale doctrine—a concept that is inapplicable to art attacks.

Most importantly, it does not appear that there has been any reconciliation between the circuits on this issue. In assessing the question of whether an art attack, say for example writing on Rothko's *Black on Maroon*, or dumping black ink into Damien Hirst's *Away from the Flock*, creates an unauthorized derivative are we to rely upon the limiting interpretation of derivative work set forth by the Seventh Circuit? Or, on the more expansive view asserted by the Ninth Circuit?

In declining to address the derivative work issue the *Mass MoCa* court cited the Seventh Circuit's opinion in *Lee v. Albuquerque A.R.T. Co.*, noting the matter of derivative works was extremely complex.[54] Ultimately, scant case law and an apparent circuit split on this issue provide us little direction. Another troubling aspect of these inquiries is that the courts here seem to rely upon the judges' own opinions as

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[48] Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988).

[49] Lee v. Albuquerque A.R.T. Co., 125 F.3d 580, 581 (7th Cir. 1997).

[50] 17 U.S.C. § 101 (2012).

[51] *Mirage Editions,* 856 F.2d at 1343.

[52] Lee v. Albuquerque A.R.T. Co., 125 F.3d 580, 581–82 (7th Cir. 1997).

[53] Id. at 582–83.

[54] Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d. 38, 65 (1st Cir. 2010).

to what is "recast," "transformed," or "sufficiently original," which would tend to lead to highly unpredictable results that do not account for the artists' own views or broader art history and theory. Under the circumstances, the question of whether an art attack results in a sufficiently "original" or "transformative" derivative work would certainly require case-by-case analysis. It does not seem outside the realm of possibility that a white sheep displayed in a glass tank is "recast, transformed, or adapted" when it is turned to black by a bottle of ink, but is such a change sufficiently original under the Seventh Circuit's interpretation? With both interpretations equally rooted in the statutory language, which level of inquiry should prevail?

B. Fair Use

Given the complex, uncertain nature of copyright as it relates to art attacks, the applicability of fair use in this context necessarily requires the assumption that any art attack may constitute infringement of an author's exclusive rights under 17 U.S.C. § 106.[55] If so, the next question is whether an art attack may ever constitute fair use, thus allowing use of that work without permission. Again, while it appears that no court has reached this question regarding an original work of art, certain holdings provide insight. Before we examine the case law, however, the statutory language must be examined. 17 U.S.C. § 107 provides, in relevant part, that fair use is to be evaluated using four factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[56]

Facially, it would seem that the third and fourth factors are implicitly violated when the art attack involves a copyright-protected original artwork. Evaluation of the third factor is flexible, but "copying" an entire work generally militates against a finding of fair use.[57] In the context of art attacks, the amount used constitutes in most cases, the entire original. With respect to the fourth factor, a physical act upon the original work has a massive and potentially permanent impact on the value of the original as well as its potential market. For example, although Rothko's *Black on Maroon* was fully restored, the cost of the restoration was exorbitant, and the painting, once valued at 50 million GBP, is estimated to have lost 5 million GBP in value due to

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[55] 17 U.S.C. § 106 (2012).
[56] 17 U.S.C. § 107 (2012).
[57] Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 62 (1st Cir. 2012).

the attack.[58] Indeed, despite a full restoration, the work inevitably bears a scar upon its value and reputation.

If a work of art is permanently damaged as a result of an art attack the original author may be deprived of many future opportunities to commercially exploit the work in terms of reproductions, derivatives, public display, and licensing opportunities, which could otherwise have flowed therefrom. As the Supreme Court provided, "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."[59] Similarly, in evaluating the purpose and character of use under the first factor, courts have indicated that the analysis is not limited to profits but rather "encompasses other non-monetary calculable benefits or advantages."[60] While art attacks do not necessarily seem to be undertaken for direct monetary gain, the notoriety that accompanies such a shocking attack may vault an attacker into the limelight and further his or her artistic career. Such monetary considerations would certainly seem to cut against a finding of fair use.

Then, of course, there is the difficult question of transformativeness with respect to a fair use analysis, a factor that is generally evaluated as part of a court's inquiry into the purpose and character of use.[61] The case of *Cariou v. Prince* provides a somewhat analogous starting point with respect to fair use and appropriation art.[62] In that case an appropriation artist Richard Prince used copies from a photography series called *Yes Rasta* by photographer Patrick Cariou, adding different elements and features to the images, but in large part, using a significant portion of Cariou's works for Prince's 2008 series, *Canal Zone*.[63] While the district court held that the majority of the works were infringing, and Prince's work was not justified under fair use, the Second Circuit in large part reversed the case.[64] The Second Circuit rejected the district court's reasoning that appropriation art must comment on the original, and instead, it held that the work must be transformative to the "reasonable observer."[65] The inquiry of transformativeness was thus refocused upon the court's perceived qualities of the piece, and it found the majority of Prince's works "transformative as a matter of law."[66] The Second Circuit held that Prince fundamentally changed the "character" of Cariou's works, thus giving them "new expression" with "communicative results" distinct from Cariou's photographs.[67]

The *Cariou* opinion has left us with very little in the way of true guidance as to the "reasonable observer's" impressions of the "character" and "new expression" embodied in a work of appropriation art. Importantly for our purposes, however, it does not seem that the Second Circuit's holding would foreclose the possibility that an art attack could be perceived as transformative. Indeed, as this opinion highlights, the

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[58] *Restoring Rothko's Black on Maroon*, PHAIDON (May 13, 2014) http://www.phaidon.com/agenda/art/articles/2014/may/13/restoring-rothkos-black-on-maroon.

[59] Harper & Row Publishers, Inc., v. Nation Enters., 471 U.S. 539, 566-67 (1985) citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[D] at 1-87, (internal quotations omitted).

[60] *Soc'y of Holy Transfiguration,* 689 F.3d at 61.

[61] *Id.* at 59-60; *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–579 (1994).

[62] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

[63] *Id.* at 698-99.

[64] *Id.* at 704, 712.

[65] *Id.* at 707.

[66] *Id.* at 707.

[67] *Id.* at 707-708.

shocking nature of a work of appropriation art has profound power to transform a viewer's experience of the original work.

But how should fair use law apply to the appropriation of physical objects, more specifically pre-existing works of art? Indeed, some commentators have opined, "As an *intellectual property* institution, fair use simply does not permit the 'entry or physical interference' with *tangible* property."[68] All things considered, fair use and broader copyright law are in many ways a poor fit for art attacks. The whole of copyright law yields a potentially double-hinged result of two original works existing in one physical manifestation. Further, copyright's economic reward model does not necessarily comport with the spirit or physical realities of art attacks. Indeed, copyright law is not particularly concerned with the physical integrity of original works of art, but rather with downstream economic opportunity.

IV. MORAL RIGHTS

Moral rights, though related, are separate and distinct from copyrights. Where copyrights protect an author's economic interest, moral rights are "rights of a spiritual, non-economic and personal nature" that exist "independently of an artist's copyright in his or her work" and "spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as integrity of the work, should therefore be protected and preserved."[69] While art attacks may very likely implicate the moral rights of the artist whose work has been appropriated or otherwise attacked, one ought to question whether the moral rights of an artist whose work is being "undone" in restoration also has moral rights in his or her creation. Many art attacks also involve international dimensions, further clouding the issue as moral rights regimes vary intensely between jurisdictions.

A. Moral Rights in the United States

In the U.S. moral rights were codified under U.S. law 17 U.S.C. § 106A in 1990 in order for the U.S. to comply with its obligations under the Berne Convention.[70] This legislation is known as the Visual Artists Rights Act ("VARA"). Section 106A endows creators of qualifying works with limited moral rights, specifically the rights of authorship and integrity for the duration of the creator's life.[71] VARA contains many limitations; works of "visual art" that fall within in its protection may only constitute a "painting, drawing, print, or sculpture," and prints and cast sculptures must exist in numbers less than two hundred.[72] Further, while the right of integrity allows the

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[68] Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 57 (1997) (citing Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1367–68 (1989))(emphasis in original).

[69] Carter v. Helmsley-Spear, 71 F.3d 77, 81 (2d Cir. 1995).

[70] 17 U.S.C. § 106A (2012); *see also,* Robert Platt, *A Comparative Survey of Moral Rights*, 57 J. COPYRIGHT SOC'Y 951, 968-69 (2010).

[71] 17 U.S.C. § 106A (2012).

[72] 17 U.S.C. § 101 (2012).

creator of a qualifying work of visual art to prevent the intentional distortion, mutilation, or modification of work that would be prejudicial to the artist's honor, VARA only allows artists to prevent the destruction of a work if that work is of a "recognized stature."[73] When viewed in the context of art attacks, it is difficult to determine whether an art attack would be viewed as intentional distortion or mutilation prejudicial to an artist's honor or whether such an act would constitute outright destruction—surely this would require case-by-case analysis and the two claims are not necessarily mutually exclusive. In either event, the besmirched artist is left with the burdens of showing harm to his or her honor,[74] or that the work destroyed was of "recognized stature."

There have been very few moral rights cases litigated in the United States, and the existing case law demonstrates that courts struggle deeply with determining a work of "recognized stature" for purposes of using rights under VARA to prevent destruction of an artwork.[75] This provision and its case law is particularly problematic when considered in the context of *Bleistein's* caution that the law not be the judge of artistic merit—the statutory language necessarily forces courts to evaluate works on this level.

Still more befuddling is that VARA specifically states that the rights set forth therein are subject to the fair use provisions of 17 U.S.C. § 107.[76] It is unclear just how fair use applies to moral rights, and it does not appear that any court has specifically addressed this issue.[77]

Based on these circumstances, the statutory protections afforded to artists under VARA are limited and problematic. Though, it remains likely that even under VARA's narrow moral rights regime, an art attack on the work of a living American artist may well be a violation of the artist's moral rights on some level. What is far less clear is whether those rights apply in the reverse, that is, whether the attacker may also assert moral rights in the "new" work of art. It would seem that even stronger moral rights regimes outside the U.S. may leave this particular question unanswered.

B. Moral Rights Abroad

Moral rights take on contrasting dimensions internationally, and these differing approaches are worthy of examination here. Although it would be impossible within the scope of this article to discuss in depth the varying nature of moral rights throughout the world, a brief exploration of the moral rights laws in the United Kingdom and France provide common law and civil law perspectives worthy of consideration. Examining these models allows us a window on how art attacks may be viewed in other jurisdictions.

Similar to the United States, in the United Kingdom authors have a right against derogatory treatment of their works, which includes rights against mutilation,

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[73] 17 U.S.C. § 106A(a)(3) (2012).

[74] *See* Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d. 38, 53-54 (1st Cir. 2010) (discussing the requirement that an artist show prejudice in instances of distortion, mutilation, or other modification, but noting highly limited case law on the topic).

[75] *See, e.g.*, Cohen v. G&M Realty L.P., 988 F.Supp.2d 212, 215-223 (E.D.N.Y. 2013).

[76] 17 U.S.C. § 107 (2012).

[77] *See generally*, Ciolino, *supra* note 68.

distortion, or action that is otherwise prejudicial to the author under the Copyright, Designs and Patents Act of 1988 ("CDPA").[78] Under the CDPA authors have the rights of attribution and integrity, as well as the right to privacy of certain photographs and film.[79] Considering the CDPA in the context of art attacks requires us to look more deeply at the right of integrity, which is expressed as "the right to object to derogatory treatment."[80] Section 80(2)(b) of the CDPA defines "derogatory" as "distortion or mutilation" which is "otherwise prejudicial to the honour or reputation of the author or director."[81] The CDPA generally defines "treatment" as "any addition to, deletion from, or alteration to or adaptation of the work."[82] Notably, British courts have somewhat narrowed this standard by requiring that the derogatory treatment be judged on an objective basis.[83] In the case of *Pasterfield v. Denham* the court held, "what the plaintiff must establish is that the treatment accorded to his work is either a distortion or mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author himself is aggrieved by what has occurred."[84]

Given the limited case law, it remains highly unclear as to how "honour" or "reputation" should be determined with respect to derogatory treatment of a work. Accordingly, although it is fairly evident that many art attacks may constitute "distortion" or "mutilation," it is far less evident whether and which art attacks would be found objectively prejudicial to the honor or reputation of the artist. Indeed, as one commentator has noted, "the *Pasterfield* court removes any role for the artist's subjective perceptions. A troubling inference from this conclusion is that the court, not the artist, knows better how to evaluate the aesthetics of the artist's creation."[85]

In sharp contrast, in France, where moral rights are "perpetual, inalienable, and imprescriptible," artists receive far richer protections.[86] Among other rights, French law provides for a strong right of integrity, which extends in perpetuity.[87] The right of integrity means that the author has a right to have his or her work kept in its original form without any alterations, and further, that an author may prevent his or her work from being presented in a manner and context inconsistent with the intent of the author.[88] By way of example, in 1991 the French Supreme Court held that colorizing the black and white John Huston film *The Asphalt Jungle* infringed on the

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[78] Copyright, Designs and Patents Act of (1988) §§ 77-89, 94-95 (hereinafter CDPA).

[79] CDPA §§ 77, 80, 84-85.

[80] CDPA § 80.

[81] CDPA §80(2)(b).

[82] CDPA §80(2)(a).

[83] *See* Iona Harding & Emily Sweetland, *Moral Rights in the Modern World: Is it Time for a Change?*, 7 J. INTELL. PROP. L. & PRAC., 565, 569 (2012); *See e.g.,* Pasterfield v. Denham and Another [1999] F.S.R. 168 (Plymouth County Ct.).

[84] Pasterfield v. Denham and Another [1999] F.S.R. 168 (Plymouth County Ct.); *See also* Iona Harding & Emily Sweetland, *Moral Rights in the Modern World: Is it Time for a Change?*, 7 J. INTELL. PROP. L. & PRAC., 565, 569 (2012).

[85] Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K's New Performances Regulations*, 24 B.U. INT'L L.J. 213, 245 (2006).

[86] Harding & Sweetland, *supra* note 83, at 566.

[87] Robert Platt, *A Comparative Survey of Moral Rights*, 57 J. COPYRIGHT SOC'Y, 951, 964 (2010) (citing ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL COMPARATIVE ANALYSIS 169 (2006)).

[88] *Id.*

filmmaker's moral rights.[89] The court reasoned that because the film was made in the 1950s when colored film was available that shooting in black and white was an aesthetic choice of the author best suiting the character of the work—on this basis the court found colorization offensive to the filmmaker's moral rights.[90]

If we now examine the attack on British artist, Damien Hirst's *Away From the Flock*, where an individual dumped a bottle of ink into his sculpture, consisting of a sheep preserved in a glass tank, it is unclear whether such treatment would be considered derogatory treatment that "objectively" harms the artist's "honor" or "reputation" as British law may require. However, if viewed under French law, an artist's right of integrity runs far deeper, and thus dumping ink into the sculpture would be inconsistent with the artist's intent and would further constitute an alteration to the work. Accordingly, and in line with the French Supreme Court's ruling in *Turner Entm't Co. v. Huston*, colorizing *Away from the Flock* would most likely have been found to violate Hirst's moral rights. All things considered, these deeply varying legal regimes lead us to highly different outcomes on the same or similar sets of facts. By nature of acting upon a precious object, an art attack is at once shocking, but the degree to which it actually damages the artist is left entirely to the fortuity of the territories involved.

V. FREEDOM OF SPEECH AND PRESERVATION OF CULTURAL HERITAGE

A. Speech and Property Ownership

Moral rights present another quandary when considered in the context of private ownership of physical objects. The largely unquestioned private ownership of works of art and other cultural property is deeply entrenched in our society. However, when a work resides with a collector, that collector often has no obligation whatsoever to share that work with humanity, more or less take affirmative acts to preserve the work for the future.[91] Indeed, in many cases the owner is free to capriciously destroy the work of art, with the limited exception of the applicable artist's moral rights.[92] Assuming the moral rights of the artist are expired, waived, or otherwise nonexistent, the owner of an artwork is largely free to treat the work as seen fit, including damage or destruction by art attack.[93] This is true of the works by the Chapman Brothers and Ai

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[89] *See* Bird & Ponte, *supra* note 85, at 232-33.

[90] *Id.*

[91] *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 1–3 (1999).

[92] *See id.* at 4.

[93] We start with the widely accepted premise that ownership of property includes the right to destroy that property. This concept derives from Roman law, *jus abutendi*, which is reflected in U.S. law. *See, e.g.*, Cass v. Home Tobacco Warehouse Co., 223 S.W.2d 569, 571 (Ky. 1949); De Armas v. Mayor, 5 La. 132, 164 (La. 1833). Even with respect to chattel that may be subject to some form of state regulation, for example, U.S. flags, a private owner's First Amendment rights have been found to outweigh legitimate regulatory interest by the government. As the U.S. Supreme Court held, "[The flag owner's] message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression, and in light of the fact that no interest the State may have *in preserving the physical integrity of a privately owned flag* was significantly

Weiwei, for example, where the artists procured older (and presumably unprotected) works before acting upon them. These acts transformed valuable pieces of our common cultural heritage, and in turn they become new pieces of expressive speech by contemporary artists. Insofar as private ownership is concerned, the First Amendment would seem to approve of such art attacks.

In a relevant case, the Second Circuit held in favor of the U.S. General Services Administration's decision to remove a site-specific sculpture, *Tilted Arc*, created by Richard Serra despite the artist's objections.[94] The artist was of the position that removal of *Tilted Arc* was tantamount to its destruction.[95] Markedly, the court focused on the fact that the sculpture was wholly owned by the U.S. government, as the artist had voluntarily relinquished his rights in the work when he sold the work.[96] That being the case, the Second Circuit found the government, by removing the sculpture, was merely—and permissibly—regulating its own speech, not that of the artist.[97] Even if the court agreed with the artist's view that removal of site-specific work equated to destruction of the work, it found that the owner of such a work is within its rights to take an action that affects the work in a damaging manner.

The result is far different, however, when the attacking artist is not the owner of the work in question. While there are many other legitimate reasons to not damage a work of art, it is the affront to the physical property of another that seems to be most legally problematic. Even the rich protections for freedom of expression offered under the First Amendment will not serve as legal justification for an art attack. As the U.S. Supreme Court provided, "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[98] Accordingly, even protected speech is subject to reasonable time, place, and manner restrictions imposed by the government.[99]

For art attacks on the property of another to qualify for First Amendment protection, laws that prohibit destruction of property and similar acts would have to be found unconstitutional due to their impact on art attacks as protected speech or expression—an unlikely outcome. Notably, state and local governments have widely criminalized graffiti,[100] which certainly bears close relation to art attacks, despite arguments that graffiti could or even ought to be protected by artists' or property owners' First Amendment rights.[101] As the Supreme Court has provided:

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impaired on these facts, the conviction must be invalidated." Spence v. Washington*,* 418 U.S. 405, 415 (1974) (emphasis added).

[94] *See* Serra v. U.S. Gen. Servs Admin.*,* 847 F.2d 1045, 1048, 1052 (2d Cir. 1988). Notably, this case predates the VARA, thus the artist was unable to assert moral rights in the sculpture.

[95] *Id.* at 1047. "Site-specific sculpture is meaningful only when displayed in the particular location for which it is created; such works are not intended to be displayed in more than one place."

[96] *Id.* at 1048.

[97] *Id.* at 1048.

[98] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*,* 452 U.S. 640, 647 (1981).

[99] *Id.* at 646.

[100] *See, e.g.*, UTAH CODE ANN. § 76-6-107 (LexisNexis 2014); N.Y. ADC LAW § 10-117 (2014); N.Y. PENAL LAW § 145.60; (Consol. 2014); TEX. PENAL CODE Title 7 § 28.08 (2013), CAL. PENAL CODE 594-625c (Deering 2014), WIS. STAT. § 943.017 (2014) (state and local statutes criminalizing graffiti).

[101] *See, e.g.*, Margaret L. Mettler, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned art on Private Property*, 111 MICH L. REV. 249 (2012); Kelly P. Welch, *Graffiti And The Constitution: A First Amendment Analysis Of The Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205 (2011).

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[102]

Accordingly, laws that protect private property and government property from destruction or graffiti are highly unlikely to be subject to a successful challenge based on the artist's First Amendment rights to commit art attacks.

That being the case, it seems that First Amendment rights with respect to art attacks run almost completely with property rights. The destruction of, or perhaps more aptly, repurposing, of property of cultural significance is unsettling, and the act itself becomes an impactful piece of speech. However, without meaningful government interest in regulating such speech, a legal theory that is largely untested and without basis in current law, private owners of cultural property are free to do as they will while those who lack the fortuity of owning cultural property have their speech censored by criminal and civil law.

B. Preservation of Cultural Heritage

Certainly academic arguments exist against the right to destroy property when that property bears particular cultural significance, as the original works of art involved in art attacks.[103] In 2003, British artists Jake and Dinos Chapman bought a rare series of prints by Francisco Goya entitled *Disasters of War*, created in the early 1800's.[104] Working on the originals, the Chapman Brothers reinvented the series as their own work, a series called *Insult to Injury*.[105] The Chapmans' works upon prints that were long-since out of copyright, with a deceased author and no other discernable criminal or civil legal implications, were well-received.[106] However, if there is an accepted right to ruin one's own property, does the expressive interest in destroying such property truly outweigh society's interest in preserving works of art for the future?

Indeed many international treaties express an outright commitment to the preservation of cultural heritage. By way of example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict states in its preamble, "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its

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[102] United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (footnotes and internal citations omitted).

[103] *See generally,* SAX, *supra* note 91.

[104] Jonathan Jones, *Look What We Did*, THE GUARDIAN, (Mar. 31, 2003, 9:48 AM), http://www.theguardian.com/culture/2003/mar/31/artsfeatures.turnerprize2003.

[105] *Id.*

[106] *Id.*

contribution to the culture of the world[.]"[107] Similarly, the Convention concerning Protection of World Cultural Heritage provides:

> Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,
>
> Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong,
>
> Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole….[108]

While the treaty obligations are imposed on member states directly, whether any such obligations filter down to the state's residents requires strict implementation and enforcement by the member states upon their citizens. In many cases, such as in the United States, this sort of implementation would run counter to widely accepted notions of private property ownership.

However, that is not to say that such treaties do not play a role in private lawsuits. Certainly courts may rely on the guiding principles of such treaties even when the treaty itself is inapplicable.[109] The Seventh Circuit Court did just this when it paid great deference to the Convention on the Means of Prohibiting and Preventing Illegal Import, Export and Transfer of Ownership of Cultural Property ("UNESCO 1970") in ordering the return of stolen artworks to their country of origin.[110] Despite the convention's legal inapplicability to the case, UNESCO 1970 was highly influential in the court's reasoning. While noting that the convention contemplates measures to be implemented by the executive branch of government, the Seventh Circuit found, "the judicial branch should certainly attempt to reflect in its decision making the spirit as well as the letter of an international agreement to which the United States is a party."[111] The court continued to acknowledge that, "callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court."[112] In addition, the court recognized that the need for respect of the history and culture of other nations is a matter of responsibility of the "world community." Inasmuch, the court seemed to view the treaty as a guide to overarching and systemic international public policy. It is thus not out of the realm of possibility that future courts, when considering art attacks, will similarly look to international treaties for

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[107] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

[108] Convention Concerning the Protection of the World Cultural and Natural Heritage, preamble, Nov. 16, 1972, 1037 U.N.T.S. 151.

[109] *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, 917 F.2d 278, 295 (1990) (Cudahy J., concurring).

[110] *Id.*

[111] *Id* at 296.

[112] *Id.*

guidance and will likely find no support for the attack or repurposing of art or other cultural heritage in any context. Perhaps these treaties demonstrate that art attacks in any form are not favored by the world at large.

VI. CONCLUSION

All things considered, the state of the law around art attacks is as divergent as it is unclear. Art attacks yield double-hinged questions as to intellectual property rights and moral rights. Whether art attacks are protected by the First Amendment largely splits along the lines of property ownership. Further complicating the legal view of art attacks, international treaties weigh heavily and numerously against the lawfulness, or acceptability, of any art attacks. And this brings me to a final question: Are art attacks simply *malum in se*? And if so, are they wrong for all artists, not just those who have the good fortune to procure valuable works of art as a chosen medium of expression?

Conversely, if art attacks are deemed merely criminal on the basis of property ownership, is the legal system failing on some level to recognize such art attacks as a meaningful facet of contemporary appropriation art? Keenly aware of the expansive nature of art, the *Bleistein* court warned that the law should not be the judge of artistic merit, yet the law passes value judgment upon works of art in ways that are not immediately perceptible. Even an art attack that may be viewed as a very straightforward act of vandalism presents a rich tapestry of deeper legal issues. Yet, this shocking act of expression can be so easily eclipsed by the criminal nature of the act itself, causing many to fail to see the result as art. Meanwhile an art attack that is not criminal may receive acceptance or even praise, simply by virtue of property ownership. Ultimately, the only clear conclusion regarding art attacks is that they mandate far deeper consideration by legal practitioners. We should strive to understand the broader cultural context and contemporary art theory that encompasses each work, not just some works. Acts of expression, however shocking, deserve sincere reflection for fear that we overlook a "work of genius for its own novelty."