Art in the Shadow of the Law

Brian L. Frye
University of Kentucky College of Law, brianlfrye@uky.edu

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Art
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BY: BRIAN L. FRYE
While precious little law is specific to art, a rich and complex body of social norms and customs effectively governs artworld transactions and informs the resolution of artworld disputes. In any case, a smattering of scholars study art law and a similar number of lawyers practice it. In this essay, I will provide a brief overview of art law from three different perspectives: the artist, the art market, and the art museum.

THE LAW OF THE ARTIST

Art is as art does. Artists make art, and the public determines whether it matters and what it means. But the law shapes what artists can do, how they can do it, and what they can do with it. And in turn, art challenges the law to explain and justify its assumptions about meaning and aesthetic value.  

A. COPYRIGHT

Copyright is indifferent to art. For better or worse, it automatically protects every “original work of authorship” as soon as it is “fixed in a tangible medium of expression.” Original just means “not copied” and “minimally creative,” resulting in a comically low standard for copyright protection. When an artist creates a painting, every brushstroke is protected by copyright the moment brush touches canvas. But likewise, when a teenager composes a tweet, each word is protected by copyright as soon as it is written. Nevertheless, some things are categorically unprotected by copyright, such as white-page telephone directories and shovels.

Moreover, copyright explicitly ignores the aesthetic value of the works it protects. This “aesthetic nondiscrimination” principle was intended to ensure that courts don’t discriminate against either avant-garde or commercial works. But it also requires courts to treat all works identically, even though the scope of copyright protection has gradually become immeasurably broader, granting ever more protection to an ever increasing range of works, and even as technology has transformed the ways in which we use those works.

The purpose of copyright is to encourage authors to create new works by giving them an economic incentive. Without copyright, authors couldn’t recover the costs associated with creating and marketing their works. Copyright is supposed to solve this market failure by giving them the exclusive right to make and distribute copies. Writers get the exclusive right to sell copies of their books, and musicians get the exclusive right to sell copies of their songs.

In theory, copyright should be largely irrelevant to artists. Copyright protects intangible “works,” not the tangible “copies” in which a work is reproduced. According to copyright, a painting is just a unique “copy” of the intangible work it embodies. But artists typically sell unique objects, not copies. The art market relies on scarcity, not volume. Leonardo Da Vinci’s Salvator Mundi is worth $450 million, but a reproduction is worth essentially nothing.

But in practice, many artists sell both unique objects and reproductions, and copyright enables them to do so. When artists sell paintings, they keep the copyright, and can sell as many reproductions as they like. For many commercial artists, their reproduction rights can be far more valuable than their actual paintings. And the same is true for some popular fine artists, like Andy Warhol.

In other words, copyright seemingly gives artists the best of both worlds. It’s either irrelevant or beneficial. But in some circumstances, it can actually work to their disadvantage. For example, many countries have created “resale royalty rights” that give artists the right to claim a percentage of the resale price of art they created. And in 1976, California tried to create a similar right. But courts have held that the California law is preempted by the “first sale” doctrine, which provides that transferring a copy of a work terminates the distribution right in that copy. As a consequence, when an artist sells a painting, the artist cannot control its resale or demand a cut of the profits.

B. MORAL RIGHTS

In theory, copyright does give artists some special protections. The Berne Convention provides that member states must give authors certain moral rights, including rights to attribution and integrity. Soon after the United States joined the Berne Convention in 1989, Congress passed the Visual Artists Rights Act (“VARA”), which gives the “author” of a “work of visual art” certain rights of attribution and integrity.

The right of attribution gives artists the right to claim authorship of their works, and disclaim authorship of works they didn’t create. The right of integrity gives artists the right to prevent the “intentional distortion, mutilation, or other modification” of their work, if it would be “prejudicial” to their “honor or reputation,” and the right “to prevent any destruction of a work of recognized stature.” VARA rights cannot be transferred, but can be waived in writing, and terminate at death.

In practice, VARA is largely irrelevant, because the interests of artists and owners are usually aligned. After all, art is valuable only if it is attributed to the artist and kept in good condition. But sometimes, the interests of artists and owners diverge. Occasionally, artists have asserted the VARA right of attribution to disavow a work, typically claiming that the owner misrepresented or failed to maintain it. For example, Cady Noland has asserted the VARA attribution right to disavow restorations of her works Log Cabin (1990) and Cowboys Milking (1990). But more commonly, artists have asserted the VARA right of integrity to prevent the alteration or destruction of their work.

Cady Noland, Log Cabin (1990)
The Achilles heel of VARA is waiver. While most countries make moral rights non-waivable, VARA permits waiver. Sophisticated arts organizations typically require a VARA waiver whenever relevant. But many smaller arts organizations are unaware of VARA or their potential liability for infringement of VARA rights. Organizations commissioning site-specific works should consider potential VARA liability and request a VARA waiver. And artists creating site-specific works should know about their VARA rights and at least negotiate any VARA waiver.

VARA issues usually arise when the owner of a site-specific work wants to move, alter, or destroy it. If the artist's VARA rights are intact, it can be possible to prevent – or at least limit – the changes. For example, in 2005, the Massachusetts Museum of Contemporary Art ("Mass MoCA") commissioned Christoph Büchel to create Training Ground for Democracy, a large interactive art installation.16 The relationship soon soured, and Büchel disavowed the unfinished work. In 2007, Mass MoCA filed a declaratory judgment action, seeking to exhibit the work. Büchel counterclaimed, alleging infringement of his VARA rights of attribution and integrity. Ultimately, Büchel won a partial victory, in large part because he never waived his VARA rights.

But more commonly, courts conclude that artists have waived their VARA rights or that VARA simply doesn't apply. For example, in 1984, Chapman Kelley received permission from the Chicago Park District to install Wildflower Works, a site-specific work consisting of two elliptical flowerbeds planted with an assortment of wildflowers, each about the size of a football field. In 2004, the Park District changed the flowerbeds into smaller rectangles planted with different flowers. Kelley sued the Park District for infringement of his VARA integrity right, but the court held copyright could not protect Wildflower Works, because a garden is not a "work of authorship ... fixed in a tangible medium."17

While artists occasionally try to assert their VARA rights, they are rarely successful, in large part because courts are sensitive to the circumstances. VARA rights typically become an issue when the owner of a site-specific work wants to use the site for a different purpose. Understandably, courts are reluctant to hold that site-specific art is forever, regardless of the wishes of future owners. Extension of the VARA integrity right to site-specificity would be a powerful disincentive to commissioning public art, not to mention a hardship to property owners unaware of the risks associated with VARA.

C. FAIR USE

The "fair use" doctrine is the most important exception to copyright, intended to protect free speech and increase the economic efficiency of copyright.18 Essentially, it provides that certain uses of a copyrighted work are non-infringing. The key questions are whether the use is "transformative" in some way and whether it competes with the original use. At least in theory, the first question is subjective and the second is objective: is the use justified and is it efficient?19

Artists have always borrowed ideas and images from the world around them, including from each other. Until relatively recently, they rarely worried about fair use, for the same reason they rarely worried about copyright. Artists typically made unique objects, so copyright and copying just didn't matter. But with the proliferation of technologies that enabled artists to reproduce both their own works and works made by others in a congeries of different ways, copyright and fair use suddenly became relevant. And no one knew how to answer the questions they presented.

While artists had always assumed they could use anything they liked, pop art took that assumption to new extremes. Andy Warhol notoriously used images from any source imaginable in order to create his enigmatic commentaries on contemporary life and culture.

Ironically, when he used commercial marks and works, the owners usually turned the other cheek or simply asked him to stop.20 When Warhol created his iconic series of paintings Campbell's Soup Cans (1962), the Campbell's Soup Company initially considered suing for trademark infringement, but desisted, and was ultimately thrilled by the free publicity.

By contrast, other artists were often less understanding. When Warhol used part of Patricia Caulfield's 1964 photograph of hibiscus flowers to create his Flowers (1965) series of painting, Caulfield threatened to sue him for copyright infringement and demanded a cash settlement.

The rise of appropriation art in the 1980s brought the tension between copyright and fair use in artistic practice into relief. Sherrie Levine was able to create her controversial appropriated photographs like After Walker Evans (1981) only because the photographs she copied were in the public domain. And many artists were infuriated by Elaine Sturtevant's brilliantly subversive imitations of their works, with the notable exception of Warhol. When asked about his own technique, he replied, "I don't know, ask Elaine."

Copyright infringement actions were inevitable, and have helped define scope and application of the fair use doctrine, for
better or worse. As is so often the case, artists often unwittingly push at the boundaries of the law, and expose the limitations of copyright doctrine, which otherwise might remain unnoticed.

Initially, courts were skeptical of the legitimacy of appropriation art, and dismissive of its fair use claims. And the scapegoat was Jeff Koons. In 1980, Art Rogers created the photograph Puppies. He sold copies and licensed it for use by third parties, including on postcards. In 1987, Koons purchased a postcard of Puppies, and hired Demetz Studio in Ortessi, Italy to create four painted wooden sculptures based on the postcard. Koons sold three of the sculptures at his exhibition “Banality Show” for a total of $367,000, and kept the fourth. Rogers sued Koons for copyright infringement, and Koons claimed fair use. The court rejected Koons’s defense, essentially because Koons’s work parodied the banality of society at large, rather than Rogers’s photograph in particular.  

Koons was undeterred, probably because his profits far exceeded his losses. But probably also because he was cussedly determined to make his art his way. So he kept on appropriating. Andrea Blanch created the photograph Silk Sandals by Gucci, which was published as a Gucci ad in the August 2000 issue of Allure. Soon afterward, Koons created the painting Niagara, a collage of images from many different sources, including Blanch’s photo. In 2003, Blanch sued Koons for copyright infringement. Blanch claimed fair use, and the court agreed, holding that his use of Blanch’s photograph was transformative, because he used it to comment on society. 

In 2015 another artist, Richard Prince, presented the show New Portraits at the Gagosian gallery. It consisted of 38 paintings, made by printing an Instagram post onto a large canvas. Essentially, Prince chose Instagram photos, made nonsensical comments on the posts, edited a screen cap of the post to eliminate unwanted comments, and had the edited screen cap printed onto a canvas. Some of the people whose posts he copied were flattered, but many were livid, and several have sued for copyright infringement. Prince claims fair use, but it is unclear how the court will decide.

Ultimately, courts struggle to apply copyright to art and reach coherent results, because copyright doctrine is not designed to accommodate art world norms. Copyright imagines works of authorship as expressive commodities, but contemporary art prizes inscrutable unique objects. The fair use doctrine asks judges to evaluate the justification for copying, but contemporary art disdains normativity. Some scholars argue that copyright should ignore art, because there is no market justification for copyright protection. Yet, artists are among the most litigious copyright owners, despite their own proclivity to copy others. “Fair use for me, but not for thee” is the byline.

THE LAW OF THE ART MARKET

The “art market” is a euphemism for the rarefied market in fine art. Modern technology enables the creation, reproduction, and distribution of art at a cost that asymptotically approaches zero. But the art market abjures reproductions, unless they declare themselves originals, and depends on scarcity, rather than abundance. In an age of reproduction, the art market insists on the aura of authenticity.

Essentially, the art market is an insider market for positional goods. Leading sources of art market information estimate total sales of $45 to $55 billion per year. But these estimates are tantamount to guesses, as reliable information about the art market is so scarce. Information about the “primary market” is almost nonexistent. And information about the “secondary market” is limited and unreliable.

A. THE PRIMARY MARKET

The primary art market comprises the market in which artworks are sold for the first time. While art transactions take many forms, the paradigmatic sale is from gallery to collector. But which gallery, which collector, and why? That is the money question.

The primary art market is notoriously exclusive and opaque. Commercial businesses sell products to consumers at market prices. Art galleries do not. At least, the relevant ones do not. Commercial galleries sell works to all comers at more or less fixed prices, but galleries that constitute the primary art market do not. On the contrary, they put works on public display, with the implication those works are available for purchase. But they do not provide prices or offer to sell works to anyone but a select few. The hoi polloi get the brush off. They can look at the art, but they can’t actually buy it, at any price.

Only certain insiders can actually purchase works from the “market maker” galleries of the art market. And their degree of insider status determines their level of access and the price they must pay for any particular work. Often, galleries agree to sell especially desirable works subject to conditions. For example, a gallery may require a prospective buyer to purchase two works by the same artist and agree to donate one to a museum. Many of the sales on the primary art market occur at exclusive art fairs held in vacation destinations around the world. And many more are works never shown to the public at all.

The defining characteristic of the primary
The premise of an art fund is simple: buy low and sell high. The rationale is that the art market is uncorrelated with other markets, so investors can use art investments to hedge against risk. And the advantage is that investors can make a relatively small investment in a diversified portfolio of high-value works, and avoid the costs associated with actual ownership.

Unfortunately, it is not clear that the art market is actually uncorrelated with other markets to any significant degree. And a diversification strategy may be incapable of compensating for the disadvantages of art funds relative to private investors, primarily access and information. Art funds typically lack insider access to the primary market, where private investors make the largest profits. Art funds typically lack insider information about which works are available and attractive. In addition, private collectors can leverage tax advantages that art funds cannot. Financial technology may enable art funds to overcome these liabilities, but the jury is still out. 29

THE LAW OF THE ART MUSEUM

Despite vast quantities of money changing hands in these markets, the overwhelming majority of valuable works belong to art museums, which are almost uniformly charitable organizations dedicated to educating the public about art and culture. Among other things, museums remove works from the private art market into the public sector. In many respects, they are natural complements. Museums enable the art market to manage supply and maintain scarcity in the face of relatively inelastic demand, and the market subsidizes museums by providing them with both product and donors. Unsurprisingly, laws and norms governing art museums have developed in light of their symbiotic relationship with the art market.

A. CHARITABLE CONTRIBUTIONS

In the 19th and early 20th centuries art museums could acquire notable works on the primary and secondary markets. Today, it is beyond the means of most art museums to purchase anything but minor works, with the exception of museums funded and controlled by autocratic governments. As a consequence, art museums typically obtain the vast majority of works in their collection via donation, often as a bequest.

B. DEACCESSIONING

"Deaccessioning" is the polite term for an art museum selling works from its collection. Art museums typically show about five percent of the works in their collection. 30 The rest languishes in storage, imposing costs without generating revenue. Normally, charitable organizations sell non-performing assets. But art museums do not, at least in part because they fear the consequences.

Most art museums are members of the American Alliance of Museums ("AAM"), and most art museum directors are members of the Association of Art Museum Directors ("AAMD"). The AAM and the AAMD have both adopted deaccessioning rules holding that museums can sell art only in order to buy art, and that it is "unethical" for museums to sell art for any other reason. 31 But why?

The AAM and AAMD claim that museums cannot sell art because they hold it in the "public trust." That is both false and inconsistent with their own rules. The "public trust" doctrine provides that public entities cannot sell certain public assets to private parties. 32 But art museums are typically private charitable entities, so the art they own is not a public asset, even though museums are obligated to benefit the public, like any other charitable organization. Private parties buy and sell art all the time. So can museums.

Moreover, if museums hold art in the public trust, then they can't sell it for any reason. But the AAM and AAMD rules explicitly allow museums to sell art in order to buy art. Does this make sense? Either museums hold art in the public trust or they don't. How can their right to sell art depend on how they use the proceeds?

Deaccessioning opponents often argue that museums own art subject to charitable trusts that limit their ability to sell it. Sometimes, they are right, especially about particular works. But usually, they are wrong. Museums rarely form charitable trusts limiting their right to sell art, and rarely accept
They also argue that collectors won't donate art if museums can sell it. This is implausible, because collectors have many incentives to donate art, including income tax deduction, estate tax avoidance, and prestige. Most collectors donate works museums want, and collectors who donate undesirable works rarely care what happens to them. In any case, the rules allow museums to sell works anyway, so long as they buy more art.

Finally, they argue that deaccessioning rules discipline a museum's board of directors, by precluding it from relying on the museum's collection as a rainy day fund. But deaccessioning rules ultimately punish only the museum, not the board of directors. Deaccessioning rules do nothing to prevent mismanagement while it is happening. They only prevent museums from liquidating assets in order to remedy the consequences of mismanagement. Any other charitable organization would be expected to terminate ineffective directors and install a new board capable of preserving the institution. Only art museums are expected to just close up shop and parcel out their assets to other museums. Surely a museum's board of directors can and should authorize the sale of part of its collection in order to preserve the institution. "We had to destroy the museum in order to save it" cannot be the only answer.

In any case, the AAM and AAMD deaccessioning rules are legally toothless. They can complain about the kinds of deaccessioning they disapprove, but they can't actually stop it. At the end of the day, museums own their collections, and can dispose of them as they wish, so long as they do so in the best interests of the institution. Indeed, a museum board arguably has a legal duty to deaccession works if necessary to preserve the institution.

Unfortunately, all too often state Attorneys General are persuaded to intervene in deaccessioning disputes, despite the lack of legal justification. For example, when the City of Detroit filed for municipal bankruptcy, creditors asked it to sell the Detroit Institute of Arts ("DIA") collection, which was City property. The Michigan Attorney General chose to intervene with a brief making all of the conventional anti-deaccessioning arguments. The court essentially ignored the Attorney General's brief and allowed the City to sell the collection to the DIA, a compromise solution that both generated assets the City could use to satisfy its liabilities to its pensioners, and kept the collection in Detroit.33

C. OPEN ACCESS ART

Art museums collectively own the overwhelming majority of the most important works of art in existence. Many of those works are in the public domain, and reproductions should be made available to the public to use as it sees fit. Even works still protected by copyright should be made available to the public, to the extent possible. But historically, many museums have restricted access to their collections, and limited the right to reproduce works in their collections.

Courts have explicitly held that copyright cannot protect photographic reproductions of public domain works.34 Even so, many museums prohibit visitors from taking photographs of works in their collections, and impose contractual limitations on the right to use reproductions of those works. In some cases, artists and collectors have insisted on such restrictions as a gift condition. In other cases, museums have restricted access in the hope of creating a revenue stream through fees.

However, in recent years, some museums have begun to take the opposite approach, and focus on increasing digital access to their collections. For example, the Metropolitan Museum of Art recently committed to make reproductions of all of the public domain works in its collection freely available to the public with no restrictions on use.35 As charitable organizations, museums have a legal duty to benefit the public. While there are many ways to satisfy that duty, adopting an open access approach to collection management ensures both public benefit and public support.

D. CULTURAL PROPERTY

While the term "cultural property" has different meanings in different contexts, broadly speaking it refers to any form of property that has a special connection to a particular cultural group or country.36

Most countries claim ownership of some or all antiquities discovered at archaeological sites within their borders as cultural property. Countries of origin use cultural property laws to prevent both the theft of their cultural heritage and the destruction of archaeological data. And the Hague Convention invokes cultural property in an effort to prevent the intentional or negligent destruction of historic sites in wartime, albeit with limited success.37

But cultural property laws vary wildly among countries. Some countries only claim ownership of antiquities discovered on public land. Others claim ownership of all antiquities, no matter where they are discovered. And some extend the scope of their cultural property laws to include works owned by private individuals, including artworks created relatively recently. For example, many European countries restrict the sale or export of artworks located within their borders, irrespective of the provenance or age of the work. Some countries even claim ownership of intangible cultural practices as "cultural heritage."38

Museums typically run afloat of cultural property laws when they own or purchase antiquities with unclear or disputed provenance. The international market in antiquities consists substantially in looted works. While most countries have always prohibited the importation and sale of stolen property, historically many did not prohibit the importation of property in violation of another country's export restrictions, facilitating the black market in looted antiquities. The UNESCO Convention was intended to address this problem by encouraging countries to prohibit the importation of looted antiquities.

Scholars and policymakers disagree about how to address the ongoing illicit trade in antiquities. While most argue for more rigorous enforcement of existing cultural property laws,39 some argue that existing laws are ineffective and should be revised in light of their underlying purposes.40 However, the illicit trade in looted antiquities continues, largely unabated.
E. HOLOCAUST ART RESTITUTION

Among its many other crimes, the Nazi regime stole massive quantities of cultural property from other countries and citizens, including hundreds of thousands of artworks. After WWII, the Allied forces began the effort returning the stolen artworks to their rightful owners. Given the quantity of works and difficulty of identifying and locating the rightful owners, they were not always successful. Many of these stolen works were eventually sold or given to museums, both in Europe and elsewhere.

Seventy years after the end of the Second World War, illegally acquired art continues to resurface, often through the efforts of organizations like the Commission for Art Recovery and others.\(^5\) Perhaps most notably, in 2012, German police discovered 1,406 works in the Munich home of Cornelius Gurlitt, many of which were stolen. The collection included Old Masters as well as works by Claude Monet, Pierre-Auguste Renoir, Henri Matisse, Franz Marc, Marc Chagall, Otto Dix, and Max Liebermann, and many others. Some of the works have already been returned, but the provenance of many others is still being investigated.\(^4\) Meanwhile, many important works are still missing, and many museums still resist legitimate claims.\(^4\)

CONCLUSION

Obviously, “art law” is not a unified body of legal doctrine, but a syncretic collection of legal rules and social practices governing a wide range of different scenarios. Yet, it derives some degree of cross-disciplinary commonality from the fact that it governs situations involving the same people, engaging with each other in familiar circumstances, through the lens of shared social expectations. Artists, galleries, collectors, and museums are all repeat players in the same game, and all know how the game is played, or at least is supposed to be played. Their expectations shape not only their transactions, but also how those transactions should be interpreted.

In other words, while studying “art law” may not improve our understanding of “the law” itself, it may improve our understanding of how people use the law, and what they expect it to accomplish: the “law in action.” This is hardly a new observation, or one unique to art law. After all, it is equally true of “the law of the horse.” But if we want to understand how the art world is both shaped by legal doctrine and shapes legal doctrines to fit its needs, we cannot simply observe particular trouble-cases and ask how they were decided.\(^6\) We must ask how they function within the broader ecology of the art world, and how they were accommodated.\(^9\)

ENDNOTES

9. Sam Francis Foundation, Inc. v. Christie’s, 769 F.3d 1195 (9th Cir. 2014).

ABOUT THE AUTHOR

BRIAN L. FRYE is Spears-Gilbert Associate Professor of Law at the University of Kentucky College of Law, where he teaches classes on intellectual property, copyright, nonprofit organizations, and professional responsibility. His scholarship focuses on legal issues affecting artists and arts organizations, among other things. He is also a motion picture artist, whose works are included in the collection of the Whitney Museum of American Art, and have been exhibited widely.
17. Kelley v. Chicago Park Dist., 635 F. 3d 290 (7th Cir. 2011).
22. Blanch v. Koons, 467 F. 3d 244 (2d. Cir. 2006).
30. See, e.g., Christopher Groskopf, Museums are keeping a ton of the world’s most famous art locked away in storage, Quarta, Jan. 20, 2016, at https://qz.com/583354/why-is-so-much-of-the-worlds-great-art-in-storage/