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Owning Nothingness: Between the Legal and the Social Norms of the Art World

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Owning Nothingness: Between the Legal and the Social Norms of the Art World

Guy A. Rub*

Almost \$8 million – that is what the Crystal Bridges Museum paid for one work of contemporary art in November 2015. What did that museum get for that hefty sum? From a legal perspective, absolutely nothing. The work it purchased was just an idea, and ideas of this kind escape legal protection.

Despite this lack of legal protection, the social norms of the art world lead large, sophisticated, experienced, and legally represented institutes to pay millions of dollars for this type of work. This Article is one of the first in legal scholarship to examine at depth those norms in this multibillion-dollar industry. It does so by, inter alia, reporting on interviews the author conducted with industry insiders concerning their practices. This Article suggests that those norms create property-like rights in all artworks, whether or not they are legally protected, as well as an ongoing right of artists to partly control the use of their works. Those social norms fill a gap between the ways in which the contemporary art world understands creativity and the ways in which our legal system actually incentivizes creative endeavors.

This Article analyzes the normative implications of these social norms and the gap they fill. First, it explains how those norms incentivize certain forms of creativity in a way that is more effective and efficient than

* Professor of Law, The Ohio State University Moritz College of Law. I would like to thank the curators, museum administrators, and other industry insiders who agreed to discuss their work with me, as well as Brian Frye, Laura Heymann, Amalyah Keshet, Efthimi Parasidis, the participants of the Intellectual Property Scholars Conference (IPSC) at Cardozo Law, Penn State Faculty Workshop, The Ohio State University Moritz College of Law Faculty Workshop, the Junior IP Scholars Association (JIPSA) workshop at Northwestern School of Law, the Law & Technology Workshop at Tel-Aviv University Faculty of Law, and the Advance Topics in IP Workshop at the Hebrew University in Jerusalem for their valuable comments; Matthew Krsacok and Jordan Powers for outstanding and indispensable research assistance; and The Center for Interdisciplinary Law and Policy Studies at The Ohio State University for financially supporting this study. The study reported in this Article was approved by The Ohio State University's Office of Responsible Research Practices. The remaining errors are, of course, my own.

property rights. Second, going beyond the art world, the Article shows how the social norms expose certain hidden assumptions in copyright authorship and their shortcomings. It suggests how the law can be improved to account for the richer description of creativity this Article provides. Third, the Article contributes to the ongoing debate concerning private property ownership. The art world provides sellers with significant post-sale control over their works in a way that the law commonly finds undesirable. That tension might justify rethinking the current legal rules that disincentivize post-sale control.

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INTRODUCTION

Almost \$8 million—that is what the Crystal Bridges Museum paid for one work of contemporary art in November 2015.¹ What did that museum get for that hefty sum? From a legal perspective, absolutely nothing.

In its official announcement of the acquisition, the museum described the work, by the renowned conceptual artist Felix Gonzalez-Torres, as “small, green candies wrapped in cellophane [that] are spread across the gallery floor, so that viewers may touch, take, and consume the work, which can be endlessly replenished.”² But what does that mean from a legal perspective?

The museum did not purchase any chattel because there is none. As the announcement of the acquisition makes clear, every time the work is installed, candies are placed on the gallery floor only to be taken by viewers and be replenished by the museum. The original candies that the artist used are long gone. The museum also did not purchase any intangible legal rights. The only such right that comes to mind is copyright.³ However, nobody can seriously claim that copyright law protects the notion of placing green candies on a gallery floor for viewers to take. That is nothing more than an idea, and ideas are not protected by copyright.⁴

The Crystal Bridges Museum is not the only museum that paid a small fortune for buying “rights” in artwork that the law does not recognize.⁵ Considering that conceptual art is one of the most

1. Kelly Crow, *Christie's Sells \$331.8 Million of Art*, WALL STREET J. (Nov. 10, 2015, 10:26 PM), <https://www.wsj.com/articles/christies-sells-331-8-million-worth-of-art-1447212399>.

2. *Crystal Bridges Museum of American Art Acquires Artwork by Felix Gonzalez-Torres*, CRYSTAL BRIDGES MUSEUM AM. ART (Nov. 16, 2015), <https://crystalbridges.org/blog/crystal-bridges-museum-of-american-art-acquires-artwork-by-felix-gonzalez-torres>.

3. See *infra* notes 131–34 and accompanying text.

4. 17 U.S.C. § 102(b) (2018) (“In no case does copyright protection . . . extend to any idea . . .”); see also *infra* Section II.D (explaining why this and similar works are unprotected and in the public domain).

5. See, e.g., *infra* note 72; see also Colin Gleadell, *Tino Sehgal: Invisible Art Worth £100k*, TELEGRAPH (May 7, 2013, 12:27 PM), <https://www.telegraph.co.uk/culture/art/art-news/10041272/Tino-Sehgal-Invisible-art-worth-100k.html> (describing the purchase of a Tino Sehgal work by The Museum of Modern Art in New York); Zoë Lescaze, *How Does a Museum Buy an Artwork That Doesn't Physically Exist?*, N.Y. TIMES STYLE MAG. (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/t-magazine/tino-sehgal-hirshhorn-museum-art.html> (exploring the ways in which the Hirshhorn Museum and other institutes purchase and handle works that have no tangible existence, focusing on the works of Tino Sehgal, which

influential art movements in the last fifty years,⁶ it is hard to find a respectable museum with a decent contemporary art collection that does not claim to “own,” or at least “borrow” such nothingness.⁷

This conundrum—the willingness of large, sophisticated, experienced, and legally represented institutes to pay millions of dollars and to engage in transactions over legal nothingness—is the driving force of this work. The solution to that puzzle and the answer to the question about what the Crystal Bridges Museum and similar institutions purchase for millions of dollars is not found in any statute, legal rule, or caselaw. It is rooted in the social norms of the art world. To explore those norms, and the gap between them and our legal framework, I conducted interviews with industry insiders and studied multiple industry-related publications and reports.⁸ The result is an account of the norms of this multibillion-dollar industry.

While our legal system incentivizes multiple forms of creativity, this Article explains that there is a gap in that legal framework which is especially pertinent to the art world. Indeed, some forms of creativity, specifically concerning ideas, are left unprotected and seemingly under-incentivized.⁹ However, the legal norms of the art world—including those that require museums to pay for legal nothingness—effectively provide those incentives. Therefore, extending copyright law protection is unnecessary.¹⁰

The impacts of the social norms this Article explores go beyond the art world. Those norms expose and question our legal framework for protecting creativity and its hidden underlying assumptions, as well as broader and controversial notions regarding authorship and even ownership. The Article shows how

consist of actors interacting with museum visitors); Elise Taylor, *The \$120,000 Art Basel Banana, Explained*, VOGUE (Dec. 10, 2019), <https://www.vogue.com/article/the-120000-art-basel-banana-explained-maurizio-cattelan> (discussing a work of the conceptual artist Maurizio Cattelan, titled *Comedian*, that consists of a banana taped to a wall, and was sold to three buyers, each paying \$120,000 or more for it; on December 7, 2019, an installation of the work at Art Basel Miami was famously eaten, without authorization, by the performing artist David Datuna).

6. See, e.g., Lisa S. Wainwright, *Conceptual Art*, BRITANNICA, <https://www.britannica.com/art/conceptual-art> (last visited Feb. 19, 2020); see also Justin Wolf, *Conceptual Art*, ART STORY (OCT 1, 2012), <https://www.theartstory.org/movement/conceptual-art/>.

7. See, e.g., *infra* text accompanying notes 157–59.

8. See *infra* note 138 and accompanying text.

9. See *infra* notes 221–30 and accompanying text.

10. See *infra* notes 232–40 and accompanying text.

existing copyright law rules, especially those concerning authorship, might be too narrowly focused. It therefore suggests how those rules can be modified to take into account the richer description of creativity that this Article provides.¹¹ The Article concludes by providing a new angle to an ongoing and heated debate concerning the nature of private property ownership itself.¹² It suggests that the legal perception of ownership is likely too narrowly construed and that a more holistic approach—one that takes into account developments outside of the legal system—might improve the law.

This Article proceeds in four parts. The first two parts introduce the gap between the contemporary art world and the legal system that purports to support and incentivize creativity. They explain how contemporary artists push the boundaries of creativity in an attempt to challenge the art world, but in doing so, they also undermine core principles in our legal system.

Part I briefly introduces certain developments in the art world during the last century and focuses on the emergence of conceptual art, one of the most consequential developments in that period.¹³ Conceptual art is an art form that questions the nature of art itself. As such it constantly pushes the boundaries of the definition of art.¹⁴ As the name suggests, conceptual art focuses on the concept, or idea, behind an artwork, and not on the execution of that idea. This led to the so-called dematerialization of artworks.¹⁵ Many conceptual artists take the centrality of ideas to the next logical step: If only ideas matter, those artists ask, why should they bother to create tangible artwork at all? They, therefore, create artwork that is nothing more than pure ideas. Felix Gonzalez-Torres's work, with which this Article opens,¹⁶ is an example of an artwork whose entire value is in its idea (placing candies on the museum's floor)

11. *See infra* Section IV.C.

12. *See infra* Section IV.C.

13. *See* Wainwright, *supra* note 6.

14. *See infra* note 62 and accompanying text.

15. The phrase was first coined in Lucy R. Lippard & John Chandler, *The Dematerialization of Art*, ART INT'L, Feb. 1968, reprinted in CHANGING: ESSAYS IN ART CRITICISM 255 (1971).

16. *See supra* text accompanying notes 1-2.

and not its execution (actually placing them). Part I examines some of those works and explains how conceptual artists, like Gonzalez-Torres, are able to powerfully comment on important developments in our society—the AIDS epidemic in the case of Gonzalez-Torres—by creating works that are, in essence, just pure ideas.¹⁷

Part II examines the other side of the law-art gap by focusing on the legal system. Specifically, it introduces the ways in which the law protects and incentivizes creativity and why conceptual artworks commonly escape such protection, becoming legal nothingness. The two main ways by which the law protects and incentivizes creativity are personal property law and copyright law. Those regimes work in tandem to provide different forms of protection for different works.¹⁸ Some creators, including most fine artists, at least before the twentieth century,¹⁹ produce unique authentic goods, which are protected by private property rights. Those creators earn a living primarily by selling their ownership interest in those goods.²⁰ Other creators, such as book authors and recording musicians, produce goods, such as manuscripts and master recordings, that are not considered to be authentic or hold special intrinsic value.²¹ Those creators generate income by selling copies of their creations. Copyright law is designed to address the economic reality that those creators face and the relevant market failures. In other words, the law allows them to generate income by exclusively controlling the creation of new copies.²²

This framework applies to tangible objects, like books, paintings, and sculptures, but not to ideas. The standard account of intellectual property law theory is that ideas, at least if they are

17. See *infra* Section I.C.

18. I briefly explored the different modes of creativity commercialization and legal protection in my previous work, especially in Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 *YALE L.J. F.* 1, 4–5 (2014).

19. This Article uses the terms “fine art” and “visual art” interchangeably to refer to the type of art that is typically presented in a single copy in museums. This is a rather narrow definition but, for the most part, it follows the legal definition of the term “work of visual art,” as used within the Copyright Act, 17 U.S.C. § 101 (2018). See also *infra* notes 120–23 and accompanying text.

20. See *infra* notes 85–86 and accompanying text.

21. See *infra* text accompanying notes 96–97.

22. See *infra* text accompanying note 99.

public, can only be protected by patents.²³ Ideas that do not meet the high threshold of patentability are therefore unprotected and free for the taking.²⁴

Part II concludes by analyzing the ways in which conceptual art challenges core notions and hidden assumptions in the law.²⁵ It shows that the very same choices that conceptual artists make in an intentional attempt to expose and undermine the art world's preconceptions also challenge existing legal norms. While conceptual artists focus on generating creative ideas and consider the execution of those ideas trivial and uninteresting, copyright law makes the exact opposite assumption concerning creativity: it expects the heart of a work and its main source of value to be in its expression and not ideas.²⁶ This mismatch makes copyright law an inadequate tool for incentivizing and protecting conceptual art. Similarly, while the notion of pure-idea artworks might free artists from the shackles of tangible expression and allow them to focus their creative energy on developing ideas, it turns their work into legal nothingness.

Indeed, pure-idea works fall between the cracks of our legal framework for protecting creativity. They are unprotected by copyright and are not subject to personal property rights. As a legal matter, they simply cannot be owned. If they cannot be owned, they cannot be sold. If they cannot be sold, how are conceptual artists expected to make a living?

The answer to that question, as Part III explains, is that the social norms of the art world provide all artists, including conceptual artists, with powerful rights with respect to their creations. Those norms allow artists to get paid for their works and to partly control their future use, whether those works are legally protected or not. To better understand those norms, I studied industry publications and interviews with artists, curators, and

23. Non-public ideas can be protected by other legal norms, such as trade secrets. See Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 HARV. L. REV. 703 (2006) (exploring the legal doctrines that protect confidential ideas); *infra* text accompanying notes 224–29.

24. See, e.g., Clark D. Asay, *Intellectual Property Law Hybridization*, 87 U. COLO. L. REV. 65, 65, 75–76 (2016) (“[P]atent law aims to incentivize the production of inventive ideas, while copyright focuses on protecting the original expression of ideas, but not the underlying ideas themselves.”).

25. See *infra* Section II.D.

26. See *infra* text accompanying note 127.

other industry insiders. In addition, I conducted my own interviews with industry insiders and reviewed agreements entered into by their institutes.²⁷

Part III separates the rights that the social norms provide to artists into two main (related) categories. First, according to those norms, artists initially own every work they come up with, whether or not a tangible object was created. The artists are therefore granted what this Article calls *pseudo personal property rights* (or *pseudo-ownership*) even in pure ideas.²⁸ Section III.A analyzes the nature of those socially created property-like rights. Those rights initially vest with the artists, but they can be transferred, including by sales and loans, to others. At the heart of this regime is the social norm, shared by *all* industry insiders I spoke with, that no museum or gallery will ever present a work unless it is the work's (pseudo) owner, or the work is on loan from the (pseudo) owner. Otherwise, such a work is considered fake.

Because museums and galleries will not present any dematerialized artwork unless they pseudo-own it (or it is on loan from the pseudo-owner), there is only one copy of the work presented at any given time.²⁹ The result is that the idea that forms a work, which is, by its nature, non-rivalrous (i.e., can be enjoyed by many simultaneously) becomes rivalrous: only one entity may "possess" it at any given time. While the work is presented at Alice's gallery, Bruce's gallery will not present it. This important norm thus creates artificial scarcity which allows artists to earn income by selling their works – their pseudo-ownership rights.³⁰

Second, a separate but related set of social norms allows artists to exercise a certain level of control over the use of their works, even after they are sold.³¹ Indeed, the art world recognizes an ongoing connection between artists and their works. Specifically, the art world gives artists a right to be consulted concerning the ways their works are presented and a right to affect the authentication of what

27. See *infra* note 138 and accompanying text.

28. See *infra* Section III.A.

29. See *infra* text accompanying note 153.

30. See *infra* text accompanying note 153.

31. See *infra* Section III.B.

is perceived to be their works.³² The law too arms artists with a certain post-sale control, both through copyright law and the Visual Artists Rights Act of 1990 (VARA).³³ This Article compares and contrasts the nature of the social norms to the legal norms, and finds the first to be more flexible and context sensitive.³⁴ Interestingly, the art world often uses legal terminology to describe its social norms.³⁵ This inaccurate use of legal terms – sometimes to describe legal nothingness – might be a way for the industry to give even greater legitimacy to its norms.³⁶

Part IV examines the normative implications of these social norms and how they should inform the development of the law on three fronts. First, this Article suggests that the social norms of the art world fill a gap in our legal framework, which does not incentivize the creation of certain public ideas.³⁷ Indeed, the social norms regime operates mostly in a negative space where creativity exists without IP protection.³⁸ They incentivize creativity in a way that is effective, flexible, and likely superior to any property

32. Authenticity means more than just determining whether works were actually created by a certain artist, but it takes into account additional factors such as whether the artist feels that the works still represent her artistic vision. Artistic authenticity, which plays a significant role throughout this Article, has received limited attention in legal scholarship, although that attention has been growing in recent years. *See, e.g.,* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 342–51 (2018); Derek Fincham, *Authenticating Art by Valuing Art Experts*, 86 MISS. L.J. 567 (2017); Laura A. Heymann, *Dialogues of Authenticity*, 67 STUD. L. POL. & SOC'Y 25 (2015); Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111 (2017). In other fields, and especially in art history research and in philosophy, authenticity is a major topic of study. *See also infra* note 88 and accompanying text.

33. Codified in 17 U.S.C. § 106A (2018).

34. *See infra* Section III.C.

35. *See infra* text accompanying note 162.

36. *See infra* text accompanying note 162.

37. *See infra* Section IV.A.

38. The term “negative space” was famously coined in Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006). In recent years, creative social norms in various industries were explored in the copyright literature. *See, e.g.,* CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (Kate Darling & Aaron Perzanowski eds., 2017) (exploring several case studies in which creativity exists in industries that either do not offer copyright protection, or offer it in limited scope); Stephanie Plamondon Bair & Laura G. Pedraza-Fariña, *Anti-Innovation Norms*, 112 NW. U. L. REV. 1069, 1136 (2018) (exploring the recent social norms scholarship in all areas of IP law); Robert Spoo, *Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America*, 69 STAN. L. REV. 637 (2017) (examining how social norms of the publishing industry protected foreign literary works); *infra* note 231 and accompanying text.

norms.³⁹ In other words, this gap in our legal framework should not be addressed by the legal system, but by the pertinent industry itself.

Second, the social norms shed light on the nature of copyright authorship, its underlying assumptions and their shortcomings, and the ways to improve it. When a work is created by a group of individuals, which is common, identifying the one who is initially entitled to copyright protection—that is, the author—is one of the main challenges of copyright law.⁴⁰ Courts have developed tests that typically grant authorship to those who control the fixation—that is, the execution—of a work.⁴¹ Those tests have become highly controversial in recent years both domestically and internationally, as they arguably unfairly reward some, like producers, while excluding others, like actors or vocalists.⁴²

This Article contributes to this heated debate. In the context of conceptual art, the one who controls the execution of the work might not be the artist who came up with an idea, but a curator who executed it.⁴³ Elevating curators to be authors is, of course, absurd. Indeed, the analysis shows that copyright law's notion of authorship might be too narrow. This Article, therefore, provides support to those who call for a more holistic approach to authorship.⁴⁴ It explains how the law may be modified to account for this possible shortcoming.⁴⁵

39. See *infra* text accompanying notes 232–40.

40. See *infra* text accompanying notes 241–43.

41. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) (holding that the movie producer and director is the sole author and not an actor); *16 Casa Duse, L.L.C. v. Merkin*, 791 F.3d 247 (2d Cir. 2015) (holding that a producer and not a director is the author); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (holding that a director and not an advisor on set is the author).

42. See, e.g., Beijing Treaty on Audiovisual Performances, World Intellectual Property Organization, June 24, 2012, https://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf; *infra* text accompanying notes 249–51. The topic of authorship also attracted much attention from legal scholars in recent years. See, e.g., Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 CORNELL L. REV. 1015, 1035–37 (2015); Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1234–35 (2016); Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1550 (2013); Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1124–27 (2017).

43. See *infra* text accompanying notes 259–61.

44. See *infra* note 249.

45. See *infra* text accompanying notes 262–63.

Third, this Article offers a new angle to an old problem: Can sellers of chattel restrict their buyers' use thereof? This question goes to the heart of our understanding of personal property ownership. While it has intrigued legal scholars for centuries,⁴⁶ the issue has attracted a growing attention in recent years.⁴⁷ The reasons for that renewed interest have to do with developments in the law—especially as a result of recent Supreme Court decisions which broadly interpret rights in chattel (at the expense of intellectual property rights)⁴⁸—and the emergence of new models of ownership in the marketplace, empowered by modern technologies, such as those offered by the sharing economy.⁴⁹

What is often missing from this debate is the impact of social norms on the perception of private property ownership.⁵⁰ This Article starts to fill this gap by noting that the art world demonstrates how an industry can create flexible property-like rights over sold goods.⁵¹ Those rights provide the artists-sellers with broad post-sale control over the use of their works, in a way that is in tension with the legal norms, which often disfavor such control. This Article, therefore, suggests that it might be prudent to

46. See *infra* note 264.

47. See *infra* text accompanying note 265.

48. *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1527 (2017) (holding that a purchaser can resell patented items “because those are the rights that come along with ownership”); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530, 551 (2013) (holding that personal property rights allow importation and resale of copyrighted works purchased abroad because “full ownership of a lawfully-made copy authorizes its owner to dispose of it freely” (quoting H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION pt. 5, at 66 (Comm. Print 1965))); see also Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual Property and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1211–12 (2015) (discussing the tension between “ownership of the copyright” and “ownership of the copy”); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 760–62 (2015) (discussing how the common law notion of chattel should affect modern copyright law).

49. See, e.g., Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944, 65953–55 (Oct. 28, 2015) (codified, as amended, at 37 C.F.R. § 201.40(b)(9) (2019)) (considering whether car ownership entails a right to circumvent the software installed in the vehicle); Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, and Subjective Well-Being*, 103 IOWA L. REV. 1361, 1380–94 (2018) (examining how the sharing economy, among others, challenges the notions of exclusion and possession of chattel); *infra* text accompanying notes 278–80.

50. See LAWRENCE LESSIG, CODE: VERSION 2.0 121–25 (2d ed. 2006) (explaining that human behavior is typically shaped by four forces: the law, the market, the architecture (i.e., technical and physical constraints), and social norms).

51. *Infra* Section IV.C.

rethink the inflexibility of the legal norms concerning private property ownership.⁵²

I. THE SUBJECT OF LEGAL NOTHINGNESS:
CONCEPTUAL DEMATERIALIZED ART

This Article focuses on the gap between the legal norms that encourage creativity and the current social norms of the art world. This Part provides the readers with a brief introduction to one side of this gap: the contemporary art world. It focuses on the conceptual art movement and especially the notion of dematerialized artworks – works that are nothing more than pure ideas. Scholars of contemporary art have published hundreds of books and articles about this movement, and this Part cannot explore that vast literature. Instead, it provides the necessary background to understand the discussion and the legal analysis that follows.

Defining conceptual art might be more than nontrivial or difficult. It might be impossible. I could not find a truly satisfactory definition.⁵³ That failure might not be a failure at all. Conceptual art rose as an anti-formalistic movement that opposes boxing art in a formalistic, scientific, or empirical way.⁵⁴ Avoiding an exact definition is, therefore, more of a feature of conceptual art than a bug. Nevertheless, the next few pages introduce conceptual art and its contribution to the art world. Section A discusses the readymade movement, which, in many respects, is the predecessor that led to the emergence of conceptual art. Section B examines some of the

52. *Infra* Section IV.C.

53. See also TONY GODFREY, CONCEPTUAL ART 12 (1998) (“[T]here has never been a generally accepted definition of Conceptual art, though many have been proposed.”).

54. See, e.g., Joseph Kosuth, *Art After Philosophy*, 178 STUDIO INT’L 134 (1969), as reprinted in CONCEPTUAL ART: A CRITICAL ANTHOLOGY 158, 165 (Alexander Alberro & Blake Stimson eds., 1999) (explaining that conceptual art rejects attempts to define art through formulas, or by using aesthetic considerations).

It is worth noting that copyright law perceives art in a formalistic way that is antithetic to the notions of contemporary art. For example, the extrinsic test, as used by many courts to consider if a work is infringing on another, “compares the objective similarities of specific expressive elements in the two works.” *Skidmore v. Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). The test “depends . . . on specific criteria which can be listed and analyzed.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). In other words, the fact finder is expected to analytically dissect the work to its elements and to analyze them in an objective or scientific way. As explained above, conceptual artists do not perceive art as something that can be analyzed in this way.

main features of conceptual art. Section C uses the work of Felix Gonzalez-Torres to demonstrate how conceptual artists can create works that are powerful and moving and yet consist of ideas.

A. *The Historic Predecessor of Conceptual Art: Readymade*

While the term “Conceptual Art” originated in a 1961 essay by the philosopher Henry Flynt,⁵⁵ and even though the movement gained momentum and a central place starting in the late 1960s, its origins are earlier than that. As this section explains, it can be traced to cubism and more importantly to the readymade school of the 1910s.

Those movements, much like conceptual art, focused on exploring “what is art.” This exploration included, among other things, using objects or industrial products that were not normally considered artistic. In 1912, Pablo Picasso may have been the first renowned artist to do this when he pasted a printed image of a chair and an industrial rope to a canvas as part of his cubist work *Still Life with Chair Caning*.⁵⁶ The readymade movement is, however, commonly identified with the artist that many consider to be the founding father and the main inspiration for conceptual art: Marcel Duchamp. As the famous conceptual artist Joseph Kosuth noted, “All art (after Duchamp) is conceptual”⁵⁷

One narrative that runs through much of Duchamp’s work is questioning and pushing the boundaries of the art world.⁵⁸ In 1917, for example, he purchased a urinal, turned it on its back, placed it on a pedestal, signed it as “R.Mutt 1917,” and named it *Fountain*.⁵⁹ He then submitted it to the first annual exhibition of the Society of Independent Artists.⁶⁰ The society originally



55. Henry Flynt, *Concept Art*, in AN ANTHOLOGY OF CHANCE OPERATIONS (La Monte Young ed., 1963) (defining conceptual art, in an essay that gave the movement its name, as the antithesis to “structure art”).

56. See RICHARD LEWIS & SUSAN I. LEWIS, *THE POWER OF ART* 401 (2nd ed. 2008).

57. Kosuth, *supra* note 54, at 164.

58. THOMAS MCEVILLEY, *THE TRIUMPH OF ANTI-ART* 16–29 (2005).

59. GODFREY, *supra* note 53, at 28. *But see* ZING TSJENG, *FORGOTTEN WOMEN: THE ARTISTS* 114 (2018) (suggesting that *Fountain* was actually created by Elsa von Freytag-Loringhoven and not Duchamp).

60. GODFREY, *supra* note 53, at 28.

promised to accept every work of art, but, once it received *Fountain*, it questioned whether this was art at all. The work—later considered one of the most important and influential works of the twentieth century—was not shown in the exhibition.⁶¹

B. From Readymade to Conceptual Art

Like readymade, conceptual art is an art form about art and artistic meaning.⁶² It builds on earlier inquiries about the nature of art, such as those of Duchamp's readymade movement, but, as further explained below, it pushes them, and the boundaries of the art world, even further.

The conceptual art movement stresses certain notions that will be important for the discussion in later parts of this Article. Like the readymade movement (and other early twentieth century movements in modern art), conceptual art devalues artistic craftsmanship.⁶³ Pre-twentieth-century art centered on artistic skills. Indeed, it is hard to look at a Rembrandt or a Van Gogh painting and not appreciate the masterful way in which those artists used oil paint. As the twentieth century progressed, the focus of artistry shifted.⁶⁴ Picasso was a gifted and skillful painter, but when he created *Still Life with Chair Caning*, he chose to paste a printed image of a chair, instead of drawing one, which did not require any special skills. Duchamp took the notion further. Many of his works, including *Fountain*, do not require any special skills, at least not the type of artistic skills that is being taught in a drawing or a sculpturing class. Conceptual art similarly typically does not require special skills. In fact, conceptual artists often stress that their works are intentionally simple to execute.⁶⁵

61. *Id.* at 28–29.

62. See, e.g., Arthur R. Rose, *Four Interviews*, ARTS MAG., Feb. 1969, at 22, 23 (quoting Joseph Kosuth) (“Being an artist now means to question the nature of art. If one is questioning the nature of painting, one cannot be questioning the nature of art; if an artist accepts painting (or sculpture) he is accepting the tradition that goes with it. . . . If you make paintings you are already accepting (not questioning) the nature of art.”).

63. JOHN A. PARKS, UNIVERSAL PRINCIPLES OF ART 50 (2015) (“With the advent of modernism, craft has become increasingly divorced from the fine arts. . . . With Conceptual Art . . . the importance of craftsmanship disappears altogether.”).

64. *Id.*

65. See, e.g., Lippard & Chandler, *supra* note 15, at 257 (describing “highly conceptual art” as including “monotonal or extremely simple-looking painting and totally ‘dumb’ objects” because they “demand more participation by the viewer”).

As the value of artistic craftsmanship was significantly declining, the importance of the work became attributable to another component—the ideas it embodies. As the important conceptual artist Sol LeWitt explained, “[i]n conceptual art the idea or concept is the most important aspect of the work.”⁶⁶

Many conceptual artists took this notion to its logical conclusion. If the value of the work lies in its idea, then artists should devote their artistic energy to creating ideas, and, possibly, nothing more. This led to a phenomenon that Lucy Lippard and John Chandler famously called “The Dematerialization of Art” in which “the object[] becom[es] wholly obsolete.”⁶⁷ Therefore, in creating dematerialized artworks, artists do not produce any tangible object. Instead, they come up with a set of simple instructions. Those who present the work, mostly museums and galleries, follow those instructions and create what is commonly known as “an installation” of the work.⁶⁸

C. *The Work of Felix Gonzalez-Torres*

To demonstrate how art can be both meaningful and dematerialized, this section explores the work of Felix Gonzalez-Torres, including his candy-based works, like the one with which this Article opens.

Felix Gonzalez-Torres was born in Cuba in 1957. In 1979, he moved to New York City, where he lived and worked until his death from complications related to AIDS in 1996.⁶⁹ The Guggenheim museum described Gonzalez-Torres’s work as “[e]mploying simple, everyday materials . . . and a reduced aesthetic vocabulary . . . to address themes such as love and loss,

66. Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, June 1967, at 80 (explaining that “[i]n conceptual art the idea or concept is the most important aspect of the work” and that “the execution is a perfunctory affair”); see also GODFREY, *supra* note 53, at 4 (“Conceptual art is not about forms or materials, but about ideas and meanings.”); *infra* Section II.D (returning to LeWitt’s explanations and analyzing the significant legal implications thereof).

67. Lippard & Chandler, *supra* note 15, at 255.

68. Some even classify this type of work, which is installed and not just presented like a painting or a statue, *installation art*. See CLAIRE BISHOP, *INSTALLATION ART* 6–8 (2005).

69. NANCY SPECTOR, *FELIX GONZALEZ-TORRES: AMERICA* 62–63 (2007).

sickness and rejuvenation, gender and sexuality.”⁷⁰ Gonzalez-Torres was not only one of the most critically acclaimed and heavily researched and discussed conceptual artists, but he was also one of the most popular and commercially successful visual artists, both in his lifetime and thereafter.⁷¹ Nowadays, Gonzalez-Torres’s works are sold for millions of dollars⁷² and they continue to intrigue commentators from multiple disciplines.⁷³

Some of Gonzalez-Torres’s most famous works, including his most commercially successful pieces, consist of installations of candies. In exploring these works and the legal questions they raise, this Article focuses on one such work: “*Untitled*” (*Portrait of Ross in L.A.*).

“*Untitled*” (*Portrait of Ross in L.A.*) consists of 175 pounds of candies. The work, as created by Gonzalez-Torres in 1991, is nothing more than a set of general instructions on how to exhibit those candies. According to those instructions, the candies are to be individually wrapped in multicolor cellophane.⁷⁴ Visitors to the exhibit, the instructions continue, are invited to take candies

70. Felix Gonzalez-Torres, GUGGENHEIM, <https://www.guggenheim.org/artwork/artist/felix-gonzalez-torres> (last visited Feb. 19, 2020); see also Randy Kennedy, *Tough Art with a Candy Center*, N.Y. TIMES (June 7, 2007), <http://www.nytimes.com/2007/06/07/arts/design/07bien.html>.

71. Felix Gonzalez-Torres, *supra* note 70 (listing several fellowships that Gonzalez-Torres won and many of his shows exhibited before and after his death).

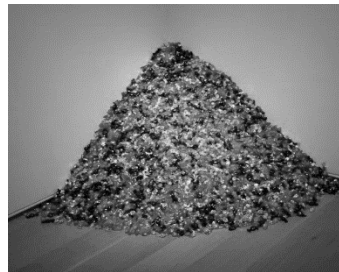
72. Kyle Chayka, *Candy Sells for \$4.5 Million at Philips de Pury Auction*, HYPERALLERGIC (Nov. 9, 2010), <https://hyperallergic.com/12202/candy-sells-philips-de-pury> (reporting on a sale of a Gonzalez-Torres work for \$4.5 million); Leslie Newell Peacock, *High-priced Candy: “Untitled” (L.A.) Acquired by Crystal Bridges*, ARK. TIMES (Nov. 16, 2015, 5:44 PM), <https://www.arktimes.com/RockCandy/archives/2015/11/16/high-priced-candy-untitled-la-acquired-by-crystal-bridges> (reporting on a sale of another Gonzalez-Torres work for \$7.67 million); *Revolt of the Rich?*, ARTNET (May 11, 2011), <http://www.artnet.com/magazineus/news/artmarketwatch/sothebys-2001-spring-contemporary-sale-5-11-11.asp> (reporting on a sale of Gonzalez-Torres prints for \$1.65 million).

73. There are quite a few examples from recent years that demonstrate the tremendous interest in Gonzalez-Torres and his work, including multiple new books, articles, and exhibitions. See, e.g., ELENA FILIPOVIC ET AL., *FELIX GONZALEZ-TORRES: SPECIFIC OBJECTS WITHOUT SPECIFIC FORM* (2016); ROBERT STORR ET AL., *FELIX GONZALEZ-TORRES* (Julie Ault ed., 2d ed. 2016); Eduardo M. Peñalver & Sergio Muñoz Sarmiento, *Law in the Work of Félix González-Torres*, 26 CORNELL J.L. & PUB. POL’Y 449 (2017) (introducing a small symposium on Gonzales-Torres); M.H. Miller, *A Colossal New Show Revisits a Conceptual Art Icon*, N.Y. TIMES STYLE MAG. (May 11, 2017), <https://www.nytimes.com/2017/05/11/t-magazine/art/felix-gonzalez-torres-zwirner-new-york-show.html> (covering a large-scale new exhibition of Felix Gonzalez-Torres work at David Zwirner Gallery).

74. JONATHAN D. KATZ & DAVID C. WARD, *HIDE/SEEK: DIFFERENCE AND DESIRE IN AMERICAN PORTRAITURE* 224 (2010).

with them. The owner of the space—typically a museum—is allowed to replenish the candies every day if it chooses to do so, or it can let them disappear.⁷⁵ The instructions do not dictate the shape or arrangement of the candies.

Gonzalez-Torres named all his works “Untitled,” but, in parentheses, he included more telling titles. In this case, “Ross” refers to Gonzalez-Torres’s longtime life partner, Ross Laycock, who died of complications related to AIDS in 1991.⁷⁶ The candies might therefore represent the sweetness of their relationship.⁷⁷ The weight, 175 pounds, was Ross’s weight when he was healthy, and the taking of the candies by the exhibit’s visitors represents the dwindling of his body as he was fighting AIDS.⁷⁸ One can suggest that the taking of the candies by the public points to the shared responsibility of the American public at large in allowing the AIDS epidemic to take such a high toll on the gay community at the time.⁷⁹ Finally, the replenishment of the candies, if the exhibit owner chooses to do so, might represent the circle of life and death.⁸⁰



Indeed, “Untitled” (*Portrait of Ross in L.A.*) is an example of a powerful and socially meaningful work that consists of nothing but ideas that can be simply executed. With simple instructions on how to use candies, Gonzalez-Torres was able to comment on both his private relationship with his life partner and on society’s treatment of the gay community during the AIDS epidemic crisis.

75. *Id.*

76. RENATE LORENZ, *QUEER ART: A FREAK THEORY* 136–37 (2012).

77. KATZ & WARD, *supra* note 74, at 224; Stephanie Eckardt, *The New Met Breuer Wants You to Take Candies, Not Photos*, *W MAGAZINE* (Mar. 13, 2016, 11:00 AM), <https://www.wmagazine.com/story/felix-gonzalez-torres-candy-the-met-breuer>.

78. Eckardt, *supra* note 77.

79. KATZ & WARD, *supra* note 74, at 224.

80. *Id.* While this is the common explanation of the work, Gonzalez-Torres, like most conceptual artists, rarely provided detailed explanations of his works. *See, e.g.*, NANCY SPECTOR, *FELIX GONZALEZ-TORRES* 11 (1995) (explaining that conceptual artists believe that “meaning does not fully reside in authorial intentions”); LeWitt, *supra* note 66, at 79 (criticizing “the notion that the artist is a kind of ape that has to be explained by the civilized critic”).

II. THE LEGAL NOTHINGNESS: RIGHTS IN CONCEPTUAL ARTWORKS

In this Part, this Article moves from the powerful, inspiring, and thought-provoking art to the corresponding legal norms. Specifically, this Part explores the legal framework in which fine artists operate, and how it fits, or does not fit, conceptual art. This Part claims that just as contemporary artists question long-held notions of the art world, they similarly challenge existing legal norms, and by doing so they shed light on certain hidden assumptions in our legal system and their possible shortcomings.

Creativity, in general, is supported by two property regimes: private property law and intellectual property law, and in particular copyright law. Section A examines the role of private property rights in incentivizing creativity. Section B explains why some forms of creativity cannot effectively use private property rights and instead rely on intellectual property protection. Section C explains that while copyright is typically used to prevent free and unrestricted reproduction, it can at times also be used just to control certain post-sale use of works, which is common for visual artists.

After this Article explores both conceptual art (in Part I) and the legal framework for incentivizing creativity (in sections A through C of this Part), section D analyzes the gap between the two, which is one of the driving forces of this Article. It explains why the legal framework does not work for conceptual artists, and how their choices challenge our legal system.

A. The Role of Personal Property Rights in Protecting Fine Art

Personal property law recognizes rights in chattels.⁸¹ As personal property rights are typically transferable, the law fosters trade and forms the basis for significant parts of our economy.⁸² This rather trivial notion allows many industries—some more creative than others—to operate effectively. Carpenters, for example, buy wood and nails and use their talent and time to create

81. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 796 (2nd ed. 2005).

82. Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 954 (2005) (“[Property rights] force the parties to the bargaining table, where the Coase Theorem takes over and assets are deployed to their highest and best uses. . . . Property rights plus free contracting make this possible.”).

furniture. The law, of course, recognizes their property rights in the furniture, which means that others are excluded from taking or using them without the carpenter's permission.⁸³ Carpenters can sell those rights and use the proceeds to cover the costs associated with the creation of the furniture. If the proceeds do not cover the carpenter's costs, the standard economic theory suggests that some changes will need to be made: the carpenter will need to reduce the costs, raise the prices, or look for another line of employment.

The same reasoning that applies to carpenters applies to many other manufacturers and industries. Importantly, it also applies to fine artists. Pablo Picasso, for example, purchased a large canvas and oil paints, and used his talents, skills, and time—twenty-four days to be exact—to create *Guernica*, which, in 1938, he sold to the Spanish government for 200,000 francs.⁸⁴ That source of income should have allowed Picasso to cover his costs, or else, like any other producer, he should have either reduced his costs, increased his prices, or changed profession. This is the heart of the economic model that fine artists work under—one that I elsewhere called a “single copy business model”⁸⁵: they create unique physical goods and earn a living by selling them.

Copyright protection is, therefore, not needed under this single-copy business model. While, as further discussed in section C, Picasso's works are protected by copyright, this is not the main source of income for him and most visual artists.⁸⁶ Indeed, from this perspective, there is little difference between Pablo Picasso and a carpenter. They both produce goods and sell them. They do not work in a lawless environment. Both primarily rely on personal property law (as well as other legal norms such as those rooted in contract law) to support their activities.

83. SINGER, *supra* note 81, at 796–97.

84. *A Journey Through the Exhibition: Guernica*, NAT'L GALLERY OF VICT., https://www.ngv.vic.gov.au/picasso/education/ed_JTE_ITG.html (last visited Feb. 19, 2020). Other sources, however, note that the work was not sold to the Spanish government, but commissioned by it. *Guernica, 1937 by Pablo Picasso*, PABLO PICASSO, <https://www.pablocassio.org/guernica.jsp> (last visited Feb. 19, 2020).

85. Rub, *supra* note 18, at 4.

86. See Adler, *supra* note 32, at 335–37 (suggesting that the income of artists from selling reproductions and derivative works is insignificant). *But see* Brian L. Frye, *Art Law & the Law of the Horse* 6 (Dec. 10, 2017) (unpublished manuscript) (available at ssrn.com/abstract_id=3085632) (noting that copyright allows some artists to sell reproductions of their works).

*B. From Private Property to Intellectual Property:
Authenticity as a Substitute for Copyright*

Considering that visual artists do not need copyright law, why does the law provide such a protection to creators? To better understand how different types of creators use different legal mechanisms, and why some of them rely primarily on private property law while others depend mostly on copyright law protection, this section introduces the notion of authenticity. This concept, which will play an important role throughout this Article, significantly impacts both the economics of creativity and the legal framework that supports it.

If visual artists can make a living without relying on copyright, can the same be said about other creators? Can J. K. Rowling follow in Picasso's footsteps? Can she buy materials—a notepad and ink or a laptop—invest her talent and time in creating an artistic artifact—a manuscript—in which she will certainly have personal property rights, and sell that artifact to cover her costs? The answer is, unfortunately, no. In a non-IP world, most book authors would likely not be able to cover their fixed costs,⁸⁷ even when the social value of their work outweighs those costs.

There is a fundamental difference between a Pablo Picasso painting and a J. K. Rowling manuscript. Consumers get to enjoy Rowling's work by reading *copies* of it while they get to enjoy Picasso's work by examining the *original* artifact that was created by Picasso. A copy of Picasso's work that was created by others, even if visually identical, is considered a poor substitute for Picasso's work, as it lacks authenticity—a concept that plays a significant role in the art world and in this Article.⁸⁸

87. Rub, *supra* note 18, at 5.

88. For a discussion on authenticity in legal scholarship, see sources cited *supra* note 32. While the discussion of authenticity in legal scholarship is limited, the topic receives significant attention outside of legal scholarship. See, e.g., MEGAN ALDRICH ET AL., ART AND AUTHENTICITY (Megan Aldrich & Jos Hackforth-Jones eds., 2012); DAVID A. SCOTT, ART: AUTHENTICITY, RESTORATION, FORGERY (2016); RICHARD TODD, THE THING ITSELF: ON THE SEARCH FOR AUTHENTICITY (2008); WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION (1935), reprinted in ILLUMINATIONS 217 (Hannah Arendt ed., Harry Zohn trans., 1968) (1955).

Consider, for example, the alleged actions of Tatiana Khan. Khan, a gallery owner in Los Angeles, paid \$1,000 to commission from an unknown local artist a copy of a famous Picasso drawing.⁸⁹ Khan then presented this copy as an authentic Picasso, which allowed her to claim it was worth \$4–5 million. She sold it for a “bargain” price of \$2 million. Neither the buyer nor his experts noticed it was not an authentic Picasso. The forgery was discovered years later.⁹⁰

The story demonstrates how economically valuable authenticity is.⁹¹ The market for fine work can contain both a \$4,000,000 authentic Picasso drawing and a \$1000 visually identical copy because there is little substitution between the two. Buyers in this market perceive those two works as completely different. As the notorious forger Han van Meegeren noted after being caught, “Yesterday this picture was worth millions of guilders, and experts and art lovers would come from all over the world and pay to see it. Today it is worth nothing, and nobody would cross the street to see it for free.”⁹² The famous art critic Martin Gayford noted that “Discovering a work is a fake is like discovering a friend has been lying to you for years.”⁹³

89. The details about the story are taken from the federal criminal complaint that was filed against Khan. Complaint, United States v. Khan., No. 10-0030M, 2010 WL 326207 (C.D. Cal. Jan. 7, 2010).

90. *Id.*

91. This Article takes consumers’ preferences as a given. Therefore, it does not focus on *why* we consume visual art by observing original artifacts in museums while we are satisfied with consuming non-original copies of books (as well as music, movies, and more). This question is left to future work. Moreover, the Article focuses on the current reality. The significance of “copying” and “authenticity” can and does change over time. The music industry, for example, saw a gradual decrease in income from selling copies – albums and tracks – while it experienced a significant increase in income from live performances. GLYNN LUNNEY, COPYRIGHT’S EXCESS 173 (2018). Live performances, much like a Picasso painting, are authentic and cannot be replicated by third parties, which makes them mostly immune to piracy. Technology also plays a crucial role. Indeed, it is possible that buyers would be indifferent between original authentic work and a good-quality copy, but creating those copies is not technically feasible. That was, for example, the state of the book industry before the invention of the printing press. Therefore, it is not surprising that copyright law was not needed and did not exist at the time. Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1. It is possible, therefore, that preferences, including preferences concerning visual art consumption, will change over time.

92. MAGNUS MAGNUSSON, FAKERS, FORGERS AND PHONEYS 93–94 (2006).

93. Martin Gayford, *Art Forgeries: Does It Matter if You Can’t Spot an Original?*, TELEGRAPH (June 17, 2010, 1:59 PM), <http://www.telegraph.co.uk/culture/art/art-features>

This “aura of authenticity,” as Walter Benjamin famously called it,⁹⁴ is why Picasso does not need copyright. If the relevant market attributes the value of an artifact to the identity of the person who created it, then all a creator needs are personal property rights in that artifact, together with legal protection against forgeries (i.e., a prohibition on fraud). Because Pablo Picasso was the only one who could have created authentic Picassos and because only authentic Picassos can be sold for millions of dollars, the mere ownership interest in the tangible creation allowed Picasso to extract much of the value of his work from his buyers.⁹⁵

Books, as well as many other forms of creativity, operate under a different economic reality and employ a different business model. I elsewhere called it a “multi-copies business model.”⁹⁶ The concept of authenticity, for the most part,⁹⁷ does not exist when it comes to books. Consumers of books – readers – are typically quite satisfied with copies. The fact that J.K. Rowling did not personally create a certain copy of *Harry Potter* does not significantly detract from the value the reader places on it.

The fact that copies of the manuscript of *Harry Potter* are close to perfect substitutes for the manuscript itself has an enormous

/7824999/Art-forgeries-does-it-matter-if-you-cant-spot-an-original.html (discussing an exhibition about famous art forgeries at the National Gallery in London). Stories of art forgery are not rare. The history of fine art includes multiple examples of works that were purchased for a small fortune and later turned out to be forged or fake, which caused them to lose practically all their value. The stories of art forgers incite the imagination of authors and have been the subject of multiple movies, books, and articles, from Orson Welles’s last movie *F for Fake* to the successful TV series *White Collar*. See also Leila A. Amineddoleh, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L.J. 59, 92–97 (2016) (exploring famous art forgeries in recent decades).

94. BENJAMIN, *supra* note 88, at 220; see also Adler, *supra* note 32, at 344.

95. Authenticity, however, is a vague notion that can be subject to multiple meanings. As Laura Heymann points out, we use the word in various contexts – from “authentic Italian sauce,” to “authentic Napa Valley wine,” to an authentic folk singer, to “an authentic Rembrandt.” Heymann, *supra* note 32, at 29–32. In each of those contexts, the meaning of the word *authentic* is different. At best, we can hope that the term has a stable meaning within a certain context, but even that is not always the case. An authentic Van Gogh painting is understood to mean a painting that was physically painted, from scratch to finish, by Van Gogh. But an “authentic Warhol” might have been painted by someone working at Andy Warhol’s studio, maybe under Warhol’s supervision. For the purpose of this Article, it is enough to note that while this uncertainty exists at the margin, nobody will perceive the work of a forger that has nothing to do with the artist as an authentic work of the artist.

96. Rub, *supra* note 18, at 4.

97. Authentic items in this model might have value as collectors’ items. However, that value, even if it exists, pales in comparison to that of the copies of the work. Rub, *supra* note 18, at 4.

impact on the market in which authors operate. On the one hand, it allows many more readers to access the work. Thus, this feature, which economists call non-rivalry in consumption,⁹⁸ has the potential to be a great source of social good. On the other hand, the fact that it is possible to create almost perfect substitutes through copying means that the social value of an author's creativity is detached from the value of the manuscript. In other words, the social value of the work is misaligned with personal property law. Even in a world with well-developed and well-enforced personal property rights, practically all book authors will not be able to generate significant income from their rights in tangible artifacts: that is, the manuscripts they create. Those authors—unlike carpenters and painters—should not decide whether to stay or leave the market based on the value of those physical goods.

This is a market failure—one that economists call a public goods failure⁹⁹—that copyright law mitigates.¹⁰⁰ If authors' rights were limited to personal property rights—that is, if they had rights over their manuscripts, but not over the creation of copies thereof—they could have recovered only a tiny fraction of the social value of their creation. The market will, therefore, under-incentivize their creation, and too many potential authors will either leave the market or not enter it in the first place. Copyright law addresses this failure by creating a legal exclusivity over the creation of copies.¹⁰¹ This exclusivity allows authors to earn income under the multiple-copies business model.

98. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NAT'L BUREAU OF ECON. RESEARCH, *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 614–17 (1962).

99. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610–11 (1982).

100. *Id.* The fact that visual artists do not need copyright led some to argue that copyright law discriminates against them. See, e.g., Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395, 403 (1992). Shockingly, a few years ago, the U.S. Copyright Office joined that faulty logic. U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 1, 31 (2013), <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>. As I discussed elsewhere, Rub, *supra* note 18, at 3–7, and as further clarified in this section, this argument misstates the role of copyright in mitigating market failures concerning some types of creativity. Naturally, copyright does not need to fix what is not broken. Fine artists do not need copyright, because they do not suffer from the market failures that harm other creators.

101. 17 U.S.C. § 106(1) (2018) (“[T]he owner of copyright . . . has the exclusive rights . . . to reproduce the copyrighted work in copies . . .”).

C. Using Intellectual Property Law to Exercise Post-Sale Control

The previous section suggests that visual artists who create authentic tangible work rely primarily on their personal property ownership interest in the tangible items they create. Their main source of income is the sale of those tangible items, such as paintings and sculptures—not copyright. Nevertheless, copyright subsists in their works.¹⁰² What role does it play?

For relatively few artists, copyright is used to earn income by controlling massive commercialization of their works: from merchandise that incorporates Andy Warhol's or Keith Haring's work to posters presenting those of Pablo Picasso or Salvador Dali. Such commercialization requires a license to reproduce the work from the artists (or their heirs), and it thus generates income. Nevertheless, very few artists generate significant revenue from mass commercialization, and for most of them this is a relatively minor source of income compared to the proceeds from the sale of their works.¹⁰³

Copyright, however, is sometimes used as a tool of post-sale control over the use of artworks. When an artist creates a tangible artifact—that is, when the work is fixed—it is typically protected by copyright.¹⁰⁴ However, when the object is first sold, much of the copyright in the work is extinguished. Specifically, the copyright owner's rights to control the distribution of the artifact and its public display are exhausted and cannot be exercised.¹⁰⁵ In other words, once a painting or a sculpture is sold, the owner of the artifact is free to transfer it to others and to display it publicly without the authorization of the artist.¹⁰⁶

Nevertheless, the exclusive right to reproduce the work is not exhausted by the sale of an artifact.¹⁰⁷ Presenting the work of art that was purchased does not require reproduction, but presenting

102. *Id.* § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”).

103. *See supra* note 86.

104. *See* 17 U.S.C. § 102(a).

105. *Id.* § 109(a), (c); *see also infra* Section IV.C (discussing how contemporary art challenges the principles of copyright exhaustion and how that affects our notion of ownership).

106. Rub, *supra* note 48, at 749–50.

107. *See* Capitol Records, L.L.C. v. ReDigi, Inc., 910 F.3d 649, 657 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2760 (2019).

the work in another medium—such as in a catalog or on a museum’s website—involves reproduction and therefore might require a license.¹⁰⁸

In addition to the artists’ economic rights under the Copyright Act, they are entitled to certain moral rights under the Visual Artists Rights Act of 1990 (VARA).¹⁰⁹ Those nontransferable rights of attribution and integrity are designed to protect the artist’s personal noneconomic interests.¹¹⁰ They thus create an ongoing connection between artists and their works.

The attribution right gives artists a cause of action when their names are used in connection with works that either they did not create¹¹¹ or were distorted or mutilated in a way that would harm the artists’ honor or reputation.¹¹² The integrity right creates a cause of action under certain circumstances when the work is being distorted or destroyed.¹¹³ Together, those rights raise the possibility

108. It is not obvious that a license is indeed needed. The purchaser of an artwork and any subsequent purchaser can rely on two main theories in arguing that a license is not needed. First, the sale of the artifact might be considered to include an implied nonexclusive license from the artist to the buyer to reproduce the work in a way that is incidental to the ownership of the artifact. *See* I.A.E., Inc. v. Shaver, 74 F.3d 768, 775–76 (7th Cir. 1996) (explaining how a copyright owner might be considered to grant an implied license in similar circumstances). This argument is not without doubts, partly because of a circular rejoinder: the fact that many museums believe that they need a license, and that they spend significant resources entering explicit contracts with artists regarding the reproduction of their works, might suggest that a license should not be typically implied.

Second, a museum might claim that creating a copy for a catalog or a website is fair use. Determining if a use is fair hinges on a four-factor test, as codified in 17 U.S.C. § 107. The first factor, the purpose and character of the use, can cut both ways. On the one hand, the use is, at best, only borderline transformative. On the other hand, museums are typically nonprofit institutes. The second factor, the nature of the work, and the third, the amount used, will probably support the finding of infringement because the works are protected by copyright and, in many cases, being copied in their entirety. Finally, the fourth factor, the market harm to the copyright holder—which is likely “the single most important” one, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)—will likely strongly support fair use. The presentation of works on websites or catalogues is no substitute for the work and does not harm the artist’s income stream. This is, of course, a simplified analysis of the complex question of fair use, but it indicates that museums’ fair use claims are strong although not guaranteed to prevail.

To the best of my knowledge, those issues were never fully litigated. *But see* Teter v. Glass Onion, Inc., 723 F. Supp. 2d 1138 (W.D. Mo. 2010) (considering a gallery’s possible implied license to present an image of the artist’s works on its website; in that case, however, the artist and the gallery had a long-term relationship, including several explicit agreements).

109. The Visual Artists Rights Act of 1990 was codified in 17 U.S.C. § 106A.

110. *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003).

111. 17 U.S.C. § 106A(a)(1)(B).

112. *Id.* § 106A(a)(2).

113. *Id.* § 106A(a)(3).

that handling works without the artists' consent might violate their moral rights.

While these cases are not common, artists do, from time to time, sue museums, galleries, and collectors to enforce their post-sale moral rights when their works are allegedly harmed. For example, in 2011, Sotheby's planned to auction a 1990 print on aluminum by Cady Noland, titled *Cowboys Milking*. Noland was at the time (and until recently) the most commercially successful living female artist in the world.¹¹⁴ Unfortunately, at some point before the work came into Sotheby's possession, its four corners were slightly bent. Upon discovering this, Noland, through her lawyer, contacted Sotheby's and claimed that the work had been distorted in a way that would be prejudicial to her honor and reputation.¹¹⁵ Sotheby's then withdrew the work.¹¹⁶ Similarly, in 2007, the Swiss contemporary artist Christoph Büchel and the Massachusetts Museum of Contemporary Art (MASS MoCA) sued each other. The dispute revolved around a massive installment of Büchel's work, titled *Training Ground for Democracy*. According to the museum, Büchel's requirements concerning the installation were unreasonable, but when the museum decided to present parts of the work without the artist's approval, the parties ended up in court.¹¹⁷ Even less well-known artists sometimes file VARA lawsuits. In 2014, for example, Jomar Statkun successfully sued a gallery for cropping one of his paintings at the request of a buyer.¹¹⁸

Those isolated cases might create the wrong impression. This type of VARA litigation is relatively rare, and winning is difficult.

114. Jason Daley, *Jenny Saville Takes Title of Most Expensive Living Female Artist*, SMITHSONIAN MAG.: SMARTNEWS (Oct. 9, 2018), <https://www.smithsonianmag.com/smart-news/jenny-saville-becomes-most-expensive-living-female-artist-180970497>.

115. *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, No. 650316/2012, 2012 WL 7964120 (N.Y. Sup. Ct. Nov. 13, 2012).

116. The owner of the work later sued Sotheby's for breach of contract and Noland for tortious interference in a contractual relationship. The court dismissed the claim because the contract with Sotheby's allowed it to withdraw the work if "there is doubt as to its authenticity" and because of "Noland's assertion of her right under VARA . . . there was more than 'doubt' as to attribution." *Id.*

117. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 42–46 (1st Cir. 2010). The parties settled after the First Circuit allowed part of Büchel's suit to proceed to trial. See *Training Ground for Democracy*, MASS MOCA (Dec. 7, 2010), <https://massmoca.org/event/training-ground-democracy>.

118. *Statkun v. Klemens Gasser & Tanja Grunert, Inc.*, No. 13 Civ. 5570(LAK), 2014 WL 1383849 (S.D.N.Y. Mar. 31, 2014).

VARA is narrow in scope. It only applies to living artists¹¹⁹ and only if their work is protected by copyright.¹²⁰ Works that are not protected by copyright, such as the conceptual artworks that this Article focuses on, are therefore automatically excluded from VARA protection. Moreover, VARA is designed to protect only fine art, and therefore it excludes many works that are protected by copyright.¹²¹ In addition, the rights it provides are narrow and subject to multiple defenses. For example, modifications that are the result of “the passage of time” or the result of conservation are immune from liability under VARA unless, in the case of conservation, it is done in gross negligence.¹²² On top of the legal limitations, the rarity of those formal legal proceedings makes them salient, and therefore they can entail significant reputational harm for the parties involved.¹²³

Overall, the combination of the right of reproduction under copyright law and the moral rights under VARA allows artists to control some limited aspects concerning the post-sale use of their works. As further discussed below in section III.B, the social norms of the art world grant artists different and mostly broader post-sale rights.

D. Legal (Non)Protection of Conceptual Art

Part I of this Article explores one of the main innovative features of the conceptual art movement: emphasizing ideas that

119. 17 U.S.C. § 106A(d)(1) (2018).

120. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 302 (7th Cir. 2011).

121. VARA protection is limited to only artists who created a “work of visual art.” VARA defines that term narrowly in an attempt to cover only fine art. 17 U.S.C. § 101. That narrow definition excludes many copyrighted works from VARA protection. This limitation, while significant to some creators, such as photographers, is less relevant to the visual artists whose interests are at the heart of this Article. For them, as fine artists, if their work is protected by copyright (and in many cases it is not), it is likely protected by VARA as well.

122. *Id.* § 106A(c)(1)–(2).

123. For example, Cady Noland’s reputation as an artist who aggressively enforces her alleged post-sale rights affects the market for her work. When Scott Mueller, a businessman and an art collector affiliated with the Cleveland Museum of Art, purchased her work, titled *Log Cabin*, in 2014, he insisted on including a provision in the purchase agreement that would allow him to return the work for a full refund of the purchase price (\$1.4 million) if Noland ever disowns the work. The details of this arrangement became public when Noland did just that: disowned the work. *See Mueller v. Michael Janssen Gallery Pte. Ltd.*, 225 F. Supp. 3d 201, 203 (S.D.N.Y. 2016). Similarly, the clash between Christoph Büchel and MASS MoCA is well known in the art world, and some industry insiders I interviewed commented negatively on both parties to this dispute.

can be simply executed instead of technical artistic craftsmanship, and even dematerialization, where artists do not create tangible objects at all. Sections A through C of this Part detail how private property law and copyright law work in tandem to protect and incentivize creativity. This section analyzes the tension between the two. It suggests that dematerialized conceptual artworks do not fit the legal framework and, as such, they evade legal protection. They are, this section maintains, a legal nothingness.

First, consider the importance that conceptual art attributes to ideas and concepts at the expense of their technical expressions. Such a shift, which can be traced to the readymade movement,¹²⁴ challenges the hidden assumptions upon which our legal framework for protecting and incentivizing creativity rely. Take, for example, the following description by Sol LeWitt, one of the most important conceptual artists of the twentieth century:

In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art. . . . It is usually free from the dependence on the skill of the artist as a craftsman.¹²⁵

This statement undermines an important hidden assumption in copyright law. Like many other artists, including Duchamp and Gonzalez-Torres, LeWitt places the entire value of the work in its “idea or concept.” But both ideas and concepts are mentioned *explicitly* in the Copyright Act as outside the subject matter of protection.¹²⁶

Copyright, instead, protects the *execution* of the ideas and concepts. The law’s hidden assumption is that the value of the work is found primarily in its execution. But conceptual artists keep the execution intentionally simple—“a perfunctory affair” as LeWitt put it. However, those who are engaged in this “perfunctory affair”—expressing the idea—are those who copyright law

124. See *supra* text accompanying notes 59–65.

125. LeWitt, *supra* note 66, at 80 (footnote omitted); see also GODFREY, *supra* note 53, at 4 (“Conceptual art is not about forms or materials, but about ideas and meanings.”).

126. 17 U.S.C. § 102(b) (“In no case does copyright protection . . . extend to any *idea*, procedure, process, system, method of operation, *concept*, principle, or discovery . . .” (emphasis added)).

considers authors.¹²⁷ Authors are the ones who are granted copyright protection, whether or not they used ideas that were created and developed by others.¹²⁸ Moreover, if an artist's work lacks copyright protection, it is also not subject to moral rights,¹²⁹ and thus the artist cannot exercise any legal post-sale control over the use of her work.

Nevertheless, as long as the artist produces a tangible object, her private property rights in that object and the "aura of authenticity" it possesses will compensate the artist for her creative labor. Indeed, even if the tangible objects are too simple to be protected by copyright, the value of the work can be extracted from the unique authentic object created by the artist.¹³⁰

127. See *infra* Section IV.C.

128. 17 U.S.C. § 201(a) ("Copyright in a work . . . vests initially in the author . . ."). The distinction between unprotected ideas and protected expressions is one of the most complex notions in copyright law, and a full analysis thereof is beyond the scope of this work. It is, however, important to note that although "expression" and "execution" are closely related, they are not synonymous. There could be cases in which an artist will come up with an idea – as the term is commonly used – but the idea will be detailed enough to be considered an expression, as the term is understood in copyright law. In fact, some of Sol LeWitt's works might fit that mold, as they include very detailed instructions regarding the execution. If those instructions include the artistic choices that copyright considers expressions, which they arguably do, see Peter J. Karol, *The Threat of Termination in a Dematerialized Art Market*, 64 J. COPYRIGHT SOC'Y U.S.A. 187, 188–90 (2017), then LeWitt's instructions are a copyright-protected expression.

On the other hand, copyright law does not protect a work if it expresses an idea that can only be expressed in a few ways. In that case, the idea and the expression are considered merged, which makes the work unprotected. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1359 (Fed. Cir. 2014). That rule likely applies to many readymade and conceptual artworks. Because of their simple execution, there are likely limited ways to express the idea behind such works. For example, the execution of a work such as *Fountain* is so trivial that it might not be protected by copyright, and thus free for others to copy.

129. See *supra* note 120 and accompanying text.

130. This was true with respect to the "authentic" readymade works, which were sold for hefty sums a century ago, and it is still true nowadays when it comes to conceptual artists who produce tangible objects. Damien Hirst, for example, one of the richest living artists in the world, produces such work. His *The Physical Impossibility of Death in the Mind of Someone Living* – showing a shark in a tank of steel and glass – was sold for about \$12 million in 2004. Carol Vogel, *Swimming with Famous Dead Sharks*, N.Y. TIMES (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/arts/design/01voge.html>. Another one of his works – *Lullaby Spring* – featuring a ten-foot steel cabinet with more than 6,000 pills, was sold for \$19.2 million in 2007. Pernilla Holmes, *The Branding of Damien Hirst*, ARTNEWS (Oct. 1, 2007), <http://www.artnews.com/2007/10/01/the-branding-of-damien-hirst/>. Indeed, whether or not Hirst's works are protected by copyright, his ownership rights over the objects he creates allow him to make a fortune from his creativity. Carol Vogel, *Art Sales Put London in Catbird Seat (and New York on Notice)*, N.Y. TIMES (June 25, 2007), <http://www.nytimes.com/2007/06/25/arts/design/25auct.html>.

But dematerialized artworks cannot even enjoy that source of income. Those artists who create dematerialized art, that is, pure ideas, do not produce any tangible item, and so there is no authentic object that they own once the work is completed. Without a tangible object, there are obviously no private property rights in the work.

Consider, for example, Felix Gonzales-Torres's "*Untitled*" (*Portrait of Ross in L.A.*), discussed above. It seems to escape all forms of legal protection.¹³¹ The work is not protected by copyright, because the idea of having 175 pounds of colorful candies on the floor is exactly that—an idea—and ideas are not protected by copyright. The elements that can, maybe, be protected by copyright—the creative choices concerning the expression of the idea—are not only trivial but were not made by Gonzalez-Torres. The exact choice of colors, the shape of the arrangement, and its size are not dictated by Gonzalez-Torres's instructions and are left to the individual, typically a curator, who is setting up the exhibit. For example, below are several installations of the same work—"Untitled" (*Portrait of Ross in L.A.*).¹³²

131. This Article focuses on the two main legal rights that artists have: personal property rights in the artifacts they create and copyright. It explains that conceptual artists that create dematerialized works cannot rely on any of those rights. One can consider other legal claims that conceptual artists might assert if a museum presents the artists' works, such as those that are based on trademark, unfair competition, fraud, right of publicity, unjust enrichment, and more. It is doubtful that any of those theories can prevent a museum from presenting an unauthorized dematerialized art, such as "*Untitled*" (*Portrait of Ross in L.A.*). For example, suing a museum for such use under the Lanham Act would be quite challenging. Conceptual art does not fit well within the definition of a mark under the Act, as this is not how we typically think of trademarks (which identify goods), service marks (which identify services), collective marks (which certify a certain origin or quality), or collective marks (which indicate membership in an organization). 15 U.S.C. § 1127 (2018). Moreover, the Supreme Court read the relevant provisions of the Lanham Act, 15 U.S.C. § 1125(a), narrowly, and explicitly rejected the argument that when it comes to a communicative product, such as a book or novel, trademark law protects the origin of the work itself and not just the origin of the physical object in which the work is fixed. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003). The Court stressed that such a protection can be achieved only through the Copyright Act and "once the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution[.]" *id.* at 33–34, and that Congress chose to regulate the right of attribution with the enactment of VARA and not by the Lanham Act, *id.* at 34–35. A full analysis of artists' rights under the Lanham Act and other causes of action is beyond the scope of this Article.

132. As a practical matter, whether or not the curators' contribution meets the legal requirement for copyrightability, curators and museums do not seek protection for the arrangement of conceptual artworks. Those who I spoke with found this notion strange and even offensive. *See also infra* Section IV.B.



Copyright law focuses on the expression of ideas and on the elements that together constitute that expression—such as shapes, colors, and arrangements.¹³³ Infringement analysis of three-dimensional works, for example, considers whether the works are substantially similar—that is, whether their protected elements look alike. Specifically, the judge or jury examines the expressive elements of the works in question and not the ideas behind them.¹³⁴ Therefore, the copyright-protected elements in this work, if there are any, do not belong to Gonzalez-Torres, but to the individual, the curator, who made those artistic choices. Moreover, as the pictures above demonstrate, various installations of “*Untitled*” (*Portrait of Ross in L.A.*) may look different. Therefore, and although the art world treats them as the same work, they are, as far as copyright law is concerned, different works: a rectangle of candies, a pyramid of candies, and a circle of candies.

Indeed, by defining the work by its ideas, and by treating the expressive elements as nothing more than “a perfunctory affair”

133. See *supra* note 54 and accompanying text.

134. Kaminski & Rub, *supra* note 42, at 1119–20 (exploring how copyright law applies the various substantial similarity tests).

that is left for the curator to execute, Gonzalez-Torres's creativity is made unsuitable for copyright protection.¹³⁵

Gonzalez-Torres also cannot rely on personal property law, because he did not create the tangible objects that are being presented. While Duchamp purchased the urinal and the pedestal and physically created *Fountain*, Gonzalez-Torres did not do anything similar. He did not create any object. Even if he created the first installment of the work, that installment—those 175 pounds of candies—is long gone. It was eradicated the first time the work was presented and visitors took those candies from it. If no tangible object that was created by the artist survived the first installation of the work, then no object can be subject to personal property rights.

This is the legal nothingness. Putting aside patent law, which is irrelevant in this case,¹³⁶ public ideas simply cannot be subject to legal protection. The law does not recognize any property right with respect to those ideas.¹³⁷ As such, from a legal perspective, they cannot be owned, sold, or bought.

If no form of legal mechanism protects Gonzalez-Torres's work, then how can society incentivize the creation of those pure ideas that form dematerialized art? More specifically, how can Gonzalez-

135. There are other legal obstacles to copyright protection for some works by conceptual artists. For example, the tendency of conceptual artists to use unorthodox materials might challenge copyright law's notion of fixation. If, for example, the artist uses materials that change over time, such as flowers, one might argue that this ever-changing work is not fixed, and therefore it is not subject to copyright protection. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011) (holding that the "Wildflower Works" by the famous artist Chapman Kelley is not protected by copyright because a living garden does not meet the fixation requirement); cf. Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335 (2016) (arguing that conceptual artworks, including Kelley's work, satisfy the fixation requirement). For the arguments set forth by Professor Said, I find the *Kelley* court's reasoning unconvincing. However, the issue discussed in this section in connection to Gonzalez-Torres's works has nothing to do with the fixation requirement. See Said, *supra*, at 354 ("There may be many sound reasons to exclude conceptual art from copyright protection, perhaps chief among them that, often, conceptual art is driven by a concept, or idea, which copyright law remains committed to excluding.").

136. While patent law can protect more abstract ideas, those are protected only if they meet the requirement of patentability, and in particular if they are useful, novel, and nonobvious. 35 U.S.C. §§ 101–103 (2018). This is part of the law's overall balance that reserves the strongest form of protection—which extends to ideas—to the newest and most path-breaking works. In this case, it is quite obvious that Gonzalez-Torres's works cannot be protected by patents, as they are not useful and probably cannot meet any of the other requirements for patentability.

137. See also *infra* Section IV.A.

Torres, and artists like him, earn a living? The answer lies primarily in the social norms of the art world. Those norms and their effects are the subject matter of the next Part of this Article.

III. FROM NOTHING TO SOMETHING: THE SOCIAL NORMS OF THE ART WORLD

The previous Part explained how conceptual art challenges the legal framework for protecting and incentivizing creativity. Conceptual artists create powerful works that consist of pure ideas. Those works are not protected by either personal property rights or copyright. Therefore, as far as the law is concerned, those works cannot be subject to any type of property rights: they are nothing. Moreover, many of those works are intentionally simple, and therefore copying them would be very quick and easy. Indeed, no legal norm prevents a museum from buying 175 pounds of individually wrapped candies in multicolor cellophane and presenting them as a work of art. Considering that such a work will be visually identical to any other Felix Gonzalez-Torres installations, why should museums not do so? In other words, what rights do creators of dematerialized artworks have?

While the law does not arm conceptual artists with legal rights, the social norms in the art industry step in and fill this gap.¹³⁸

138. To explore those social norms and the rights they create, I reviewed dozens of published interviews with industry insiders and studied industry publications and websites. In addition, I conducted my own interviews. I interviewed thirteen industry insiders, including curators, museums' and galleries' senior administrators, and collection managers. When allowed, I also reviewed legal documents, such as contracts their institutions entered into. My interviewees were affiliated with ten different institutes, including private collections; large public galleries; and small, medium, and large museums, including one of the twenty largest museums in the world (measured, as is the industry practice, by the size of the gallery space). Four of the institutes are located in New York, three in Ohio, and three in Israel. The relevant Israeli law is substantially similar to American law. Specifically, they both do not protect public ideas. I used my personal connections to secure some of those interviews. In addition, I asked each of my interviewees to recommend and connect me with others I should speak to, which proved to be the most fruitful way to secure interviews. Many of my interviewees also recommended other written materials that would assist me in this study. Three of the interviews were held over the phone and the rest in person. All the in-person interviews were held, at my interviewees' request, at the art institute with which they were affiliated. To encourage open and informal conversation, I did not record any of my interviews but took detailed notes during the conversations and immediately thereafter. The shortest interview lasted twenty-five minutes and the longest more than two and a half hours. On average, each interview lasted about an hour and a half. To encourage my

In fact, a close examination of those social norms, which this Part provides, shows that the social norms create a scheme that, in many respects, resembles the core framework of the legal protection of creativity. Indeed, while the legal system grants Picasso both private property rights and copyright in his paintings, the social norms of the art world arm him with somewhat parallel rights.

The social norms of the art world grant an ownership interest to artists in their creations, whether or not that ownership interest is legally recognized. The social norms bestow ownership-like interest over legal nothingness. This Article calls that interest *pseudo personal property rights*. Like legally recognized private property rights, pseudo rights can be bought and sold. Selling their pseudo ownership interest provides artists with a valuable source of income. Section A discusses those norms.

On top of pseudo personal property rights, artists also enjoy broadly recognized and partly nontransferable rights to control certain aspects regarding the work after it is sold. Those rights include a right to be consulted and affect the use of their work, as well as a related right to determine the authenticity of work that is allegedly theirs. Indeed, the art world recognizes an ongoing connection between the work and the artist who created it. That connection is sometimes parallel to copyright law, but, as this Part explains, the contours of the social norms are different and typically broader than the legal norms. Those social norms, which apply even when the law does not provide the artists any post-sale rights, are explored in section B below.

Section C discusses other aspects of the social norms of the art world. It focuses on the degree of flexibility that those norms entail, as well as their varying impacts in different contexts.

A. Pseudo Property Rights over Legal Nothingness

Paintings, like any other tangible artifacts, typically have owners. They can be bought, sold, gifted, or loaned. Intangible rights in paintings—that is, copyright—can also be owned and subject to their own set of standard transactions: buying, selling,

interviewees to be candid, I promised them (as well as The Ohio State University's Office of Responsible Research Practices, which approved this study) to not identify any of them by their name or by the name of their affiliated institute.

gifting, licensing, and more. As a legal matter, public ideas¹³⁹—for example, dematerialized artworks—are not subject to property rights, and therefore transactions in those ideas are meaningless. The art world, however, considers the artists of all works of art, including works that consist of pure ideas, to initially have property-like rights in their works.

Take, for example, Felix Gonzalez-Torres's work, discussed in section I.C., "*Untitled*" (*Portrait of Ross in L.A.*). Multiple leading fine art websites and publications state that the work is *located* at the Art Institute of Chicago.¹⁴⁰ The website of the Art Institute of Chicago states that the work is a "[p]romised *gift* of Donna and Howard Stone."¹⁴¹ The Smithsonian's website suggests that the work is "on extended *loan* from Donna and Howard Stone."¹⁴² The *Chicago Tribune's* art section similarly suggested that the work "has been on *loan* to the Art Institute for the last few years."¹⁴³ In November 2015, *ArtNews* reported that another candy-based work of Felix Gonzalez-Torres, titled "*Untitled*" (*L.A.*), was "*sold* last week at Christie's postwar and contemporary evening sale for \$7,669,000."¹⁴⁴

Those descriptions raise multiple questions: What does it mean that this type of work—in essence, an idea—is located somewhere? What exactly is located there? What does it mean to gift or to loan it? A loan typically includes a temporary transfer of possession,

139. Private ideas can likely be subject to property rights under the law of ideas. See *infra* notes 224–29 and accompanying text. However, the law of ideas is inapplicable to public ideas, such as those whose implementations are presented at the MoMA. See *infra* notes 229–30 and accompanying text.

140. See, e.g., *Hide/Seek: "Untitled" (Portrait of Ross in L.A.) by Felix Gonzalez-Torres*, NAT'L PORTRAIT GALLERY, https://www.si.edu/es/object/yt_37bSb-aQ4BM?width=85%25&height=85%25&iframe=true&destination=spotlight/frederick-johnson-photographs (last visited Feb. 19, 2020); "*Untitled*" (*Portrait of Ross in L.A.*), WIKIART (Oct. 9, 2012), <https://www.wikiart.org/en/felix-gonzalez-torres/untitled-portrait-of-ross-in-l-a-1991>.

141. Description of "*Untitled*" (*Portrait of Ross in L.A.*), ART INST. CHI. (emphasis added), <http://www.artic.edu/aic/collections/artwork/152961> (last visited Feb. 19, 2020).

142. *Hide/Seek: Portraits by Felix Gonzalez-Torres and David Wojnarowicz*, NAT'L PORTRAIT GALLERY (emphasis added), https://www.si.edu/es/object/yt_4iiLMJru7SY (last visited Feb. 19, 2020).

143. Lisa Stein, *What a Concept*, CHI. TRIB. (Oct. 22, 2000) (emphasis added), http://articles.chicagotribune.com/2000-10-22/news/0010220318_1_art-institute-conceptual-art-new-museum.

144. Hannah Ghorashi, *Crystal Bridges Museum Acquires Record-Setting Work by Felix Gonzalez-Torres*, ARTNEWS (Nov. 16, 2015, 5:01 PM) (emphasis added), <https://www.artnews.com/art-news/market/crystal-bridges-museum-acquires-record-setting-work-by-felix-gonzalez-torres-5359/>.

but here there is none. So what is being loaned? And what did the buyer of the work get in return for almost \$8 million? As far as the law is concerned, the answer to all those questions is nothing. Those descriptions are meaningless. Indeed, only by treating the pure idea as the equivalent of an object could those statements start to make sense.

This materialization of pure ideas does not stop here. Museums commonly enter loan agreements concerning those works. One such agreement that I was allowed to review during my study, concerning a dematerialized Felix Gonzalez-Torres work, is titled "Borrower's Agreement." In it, the "owner" of the work states that it "will be pleased to lend" the work to a museum for a specific period of time. The same document, nevertheless, mentions that "there is no object to lend in this case."

The social norms of the art world go well beyond the mere symbolism of property rights.¹⁴⁵ The art world actually treats those intangible dematerialized works as physical artifacts. Most notably, the art world treats them as rivalrous goods, and it thus creates artificial scarcity, uniqueness, and value. The next paragraphs explain those impacts in greater detail.

Most tangible goods, from cars and chairs to paintings and manuscripts, are rivalrous, in the sense that their consumption by one prevents or limits the consumption by another.¹⁴⁶ Intangible goods, like ideas, are an example of non-rivalrous goods, where the consumption by one person does not limit consumption by another.¹⁴⁷ Without the art world's social norms, "Untitled" (*Portrait of Ross in L.A.*) would have been non-rivalrous. Everyone, including every museum, could have presented and enjoyed the work simultaneously: buy 175 pounds of colorful candy and present it according to the well-known simple directions that were originally set forth by Felix Gonzalez-Torres.

But doing so would be inconsistent with the social norms of this industry. According to those norms, there is only one "Untitled"

145. See also *infra* text accompanying note 162.

146. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 945-46 (2005).

147. *Id.*

(*Portrait of Ross in L.A.*).¹⁴⁸ The work is “owned” by Donna and Howard Stone and “kept,” on a long-term “loan,” by the Art Institute of Chicago.¹⁴⁹ That work was “purchased” from Felix Gonzalez-Torres and was “transferred” from one owner to another until it was “purchased” by the current owners in 1997.¹⁵⁰ Those owners, like the owners of tangible items, can “loan” the work to others. In the case of “*Untitled*” (*Portrait of Ross in L.A.*), the “owners” did just that.¹⁵¹ The truly crucial aspect of this norm is

148. Not every dematerialized work exists in just one copy. When the artist creates a work, she can decide how many copies of it may exist at any given time. Thus, an artist may decide that at any given time there will be five copies of the work, which, as far as the art world is concerned, means that the artist created and can sell five works. See, e.g., Taylor, *supra* note 5 (explaining how a conceptual work titled *Comedian* was sold to three separate buyers). Purchasers are, of course, informed before buying whether the work is unique and, if not, how many copies of it will exist at any given time. Some of them require the artist to contractually promise not to sell more instances of the work. Unique works, however, are typically significantly more expensive. This practice does not undermine the core observation and argument made in this section: every authorized copy of a work, even a pure idea, must originally be purchased from the artist who came up with that idea.

149. Description of “*Untitled*” (*Portrait of Ross in L.A.*), *supra* note 141.

150. *Id.*

151. *Id.* It should be noted that there is one tangible item that the purchasers of a dematerialized work sometimes get: a certificate of authorship. That document is sometimes signed by the artist and includes the instructions for installing the work. Some artists even require the purchasers of their works (i.e., the purchasers of the pseudo personal property rights) to sign the certificate, allegedly creating a contract. Joan Kee, *Félix González-Torres on Contracts*, 26 CORNELL J.L. & PUB. POL’Y 517, 519 (2017).

However, the importance of the physical certificate itself should not be overstated. Suggesting that the certificate is the work that museums are paying millions for seems unreasonable. Cf. Martha Buskirk, *Public Experience/Private Authority*, 26 CORNELL J.L. & PUB. POL’Y 469, 475 (2017) (discussing a lawsuit, which quickly settled, by a collector against a gallery that lost a certificate of authenticity). First, from a legal perspective, those certificates have limited value. Their main source of power is rooted in the social norms of the industry and not with legal limitations on the use of the work. Even if some of those certificates are contracts, which is not without doubts, they are obviously not easements and they do not create property rights that legally bind downstream buyers and third parties (e.g., other museums). In other words, as a purely legal matter, no certificate can prevent a museum, or anyone else who did not sign the certificate, from presenting a candy-based work of Felix González-Torres. Cf. Peter J. Karol, *Permissive Certificates: Collectors of Art as Collectors of Permissions*, 94 WASH. L. REV. 1175 (2019) (considering the legal impact of certain certificates of authenticity).

Second, my impression from discussing the matter with industry insiders is that the certificates themselves have limited power even as far as the social norms are concerned. Dematerialized works are being “loaned” routinely without any change in the possession of their certificates. Borrowing agreements that I reviewed included the instructions for the installation but not the certificates. Most of my interviewees, including those who routinely engaged in loaning and borrowing conceptual art, never saw a certificate. Some told me that even when they buy art it is mostly unaccompanied by a certificate. Others told me that their

that my interviewees stressed time and again that a museum would *never* present an installation of the work without receiving permission from the pseudo-owner. That permission is typically in the form of a “borrowing” agreement. Because this right of the artists and their purchasers is respected by the entire art world, it is *de facto* a right against the world—a pseudo property right.

This last point is worth stressing because it is the heart of this entire ecosystem. In my conversations with industry insiders, some of whom work for large museums and some for smaller institutes, I repeatedly asked if they would ever consider presenting one of Felix Gonzalez-Torres’s dematerialized works “on their own” without contacting the “owner.” Most of my interviewees could barely understand the question. I explained that they could easily purchase 175 pounds of candies and present it in exactly the way that Gonzalez-Torres intended. With no exception, all my interviewees told me, in one way or another, that what I was asking them to consider was “to create and present a forgery, which we would never do.” Some interviewees called such actions “piracy.”¹⁵² Most of them could not imagine that any museum or gallery would ever deviate from this norm. Some of them said that if any institute presents “unauthorized” work, the reputational harm will be immense, and nobody will take that institute seriously or want to transact with it.

Because museums and galleries refuse to present “*Untitled*” (*Portrait of Ross in L.A.*) unless it is “on loan” from the work’s

certificate certifies that their installation of a work is consistent with the artist’s vision, which means that the certificate is not transferable.

I asked my interviewees what would happen if an original certificate were lost. They noted that if that happens, which is unlikely, it would not hurt the “authenticity” of the work. In other words, if the Crystal Bridges Museum loses the certificate of authenticity concerning “*Untitled*” (*L.A.*), a work that cost it almost \$8 million, the art world would still perceive the museum as the owner of the work.

It should be noted, however, that most of my interviewees work in museums, and museums, with minor and rare exceptions, do not sell their art. Therefore, one cannot rule out that a different population, one that engaged more routinely in selling and buying artworks (as opposed to loaning and presenting them) would place greater weight on certificates of authenticity.

152. One of my interviewees, however, stated that he does not consider it piracy or morally problematic. But when I asked him if his institute would ever consider presenting such a work without a borrowing agreement, he noted they would not because the reputational backlash would be severe, especially from the institute who “owns” the work. He explained that “that institute, and others, will not work with us in the future if we do that.”

pseudo-owner, there is at most only one copy of the work presented at any given time. Artificial scarcity is thus the natural result of this social norm.

That artificial scarcity gives the artist a powerful and valuable property-like right. Because the artist is the initial pseudo-owner of the work, she can sell that right (i.e., the work). As the buyer knows that after the sale she will be the only one who is considered authorized to present the work, she is willing to pay for her exclusive rights.¹⁵³ This reality puts all visual artists, whether they create tangible artifacts or pure ideas, on equal footing.

B. Post-Sale Artistic Control

Part II explains that our legal system protects creativity through both private property law and copyright law. But visual artists who create unique, authentic, tangible works typically do not rely on copyright licensing as their main source of income. Instead, those artists primarily use copyright's right of reproduction together with VARA's moral rights as a way to control the post-sale use of their works.¹⁵⁴ That control is, however, quite narrow in scope, as it is subject to multiple defenses and limiting principles.¹⁵⁵ Artists who create pure ideas (i.e., dematerialized works) do not get copyright or moral rights in their creations—which are legal nothingness—and therefore cannot exercise *any* legal post-sale control.

The social norms of the art world, however, designate a central place for artists when it comes to decisions concerning the post-sale use of their works. This section explores those social norms.

153. Sonia Katyal recently compared Gonzalez-Torres works to public goods. Because of their "endless nature" and because viewers are invited to take pieces of the works, they resemble non-rivalrous goods. Sonia K. Katyal, *The Public Good in Poetic Justice*, 26 CORNELL J.L. & PUB. POL'Y 497, 500-01 (2017). This is an interesting observation, although it does not consider the social norms of the art world. Those norms transform the works into rivalrous private goods. Gonzalez-Torres and his Foundation were well aware, *see, e.g., infra* text accompanying note 156, of those norms and enjoyed the financial benefits that are the result of the artificially created scarcity.

154. *See supra* Section II.C.

155. *See supra* text accompanying notes 108, 119-22.

1. *The legal post-sale control rhetoric*

While the law does not allow artists who create dematerialized art to control the art's post-sale use, the art world uses legal terminology, often inaccurately, to signal the artists' ongoing rights over certain aspects of their work.

Consider, for example, Felix Gonzalez-Torres's candy-based works. The Felix Gonzalez-Torres Foundation's website, which until recently included references to dozens of dematerialized works, stated that it "holds the copyright in and to all works by Gonzalez-Torres."¹⁵⁶ Although many of those works are actually not protected by copyright, the art world accepts the Foundation's copyright-like interest in those works.

Industry websites routinely include a form of copyright notice when referring to or presenting Gonzalez-Torres's candy works. On its webpage dedicated to "*Untitled*" (*Portrait of Ross in L.A.*), the Art Institute of Chicago states "© The Felix Gonzalez-Torres Foundation."¹⁵⁷ The Guggenheim Museum has an identical copyright notice on its webpage dedicated to another candy-based work of Gonzalez-Torres, which the museum recently had on display.¹⁵⁸ The Museum of Modern Art (MoMA) in New York includes a similar notice on its webpage dedicated to another Gonzalez-Torres candy-based work: "© 2020 The Felix Gonzalez-Torres Foundation."¹⁵⁹

From a legal perspective, those copyright notices are quite preposterous. First and foremost, as discussed above, the "work" in all those instances is an idea that is not protected by copyright.¹⁶⁰ Second, the notice itself only looks like a copyright notice, but it does not meet the legal requirement of such notices. A copyright notice must include, alongside the symbol ©, the "year of first publication" and the name of the copyright owner.¹⁶¹ The notices

156. *Copyright*, FELIX GONZALEZ-TORRES FOUND., http://felixgonzalez-torresfoundation.org/?page_id=56 (last visited Oct. 24, 2018) (at the time of editing of this Article, the foundation's website is under construction and unavailable).

157. Description of "*Untitled*" (*Portrait of Ross in L.A.*), *supra* note 141.

158. Description of "*Untitled*" (*Public Opinion*), GUGGENHEIM, <https://www.guggenheim.org/artwork/1512> (last visited Apr. 28, 2020).

159. Description of "*Untitled*" (*USA Today*), MOMA, <https://www.moma.org/collection/works/81073> (last visited Apr. 28, 2020).

160. *See supra* text accompanying notes 131-34.

161. 17 U.S.C. § 401(b) (2018).

on the websites of the Art Institute of Chicago and the Guggenheim Museum do not include a year of publication, while the one on MoMA's website lists the year 2020, which is obviously not the year of first publication. It is surprisingly easy to find similar mistakes in other museum websites and printed publications. Luckily, even if those works were protected by copyright—and they are not—since 1988, a copyright notice is no longer a requirement for copyright protection.¹⁶²

The repeated use of legal terminology is peculiar, and it is unclear whether this is just an error, an assumption—unverified and mistaken—that the law must follow the industry practice, or an attempt to inject legal symbolism into a non-legal system of norms. In my interviews with industry insiders, I tried to explore whether they know that there is a gap between copyright law and their use of copyright terminology and copyright notices. The answers were often unsatisfactory and vague. Some of my interviewees clearly did not know about the gap and for them it was a mistake, others (including some with significant experience in copyright law) said that they “didn’t think about it before,” and others noted that for them the exact nature of copyright legal norms is not crucial or that using the copyright terminology “is something that the [artist] wanted us to do.”

The common thread in the answers I received is that my interviewees did not question the copyright-like terminology that they were used to applying. As such, it seems that for the art world as a whole, the legal cover might help strengthen and support the social norms. With those terms, the art world signals that it acknowledges a long-lasting link between visual artists, and even their estates and foundations, and the works they created. The remainder of this section explores the nature of that link and the rights that artists—conceptual and non-conceptual—have over their sold works.

2. *The norm of consultation*

It is a common practice for museums and galleries to contact artists or their estates and foundations to get their views and

162. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857 (codified as amended at 17 U.S.C. § 401(a) (2018)).

eventually their permission for an exhibition. That permission process typically includes conversations about the nature and format of the exhibit, how the artists and their work are going to be presented, and the supporting materials that are going to be produced in connection therewith, such as the exhibit's catalog and webpage.

The main motivation for this practice, besides the (relatively small) litigation risk,¹⁶³ is artistic. The industry insiders I interviewed expressed a desire to "do the best by the artist and the work" by preserving the intentions of the artist. Many museums have established clear policies to foster a form of dialogue between their curators and other administrators and artists. The Museum of Contemporary Art in Chicago, for example, sends all artists whose work it considers exhibiting a questionnaire that documents their desires regarding the way to present their works.¹⁶⁴ Other museums collect that information when they purchase a work, and sometimes they also request that the artist consent in advance to future use that is consistent with such information.

Museums and galleries are especially interested in having the artists' views when they need to exercise greater discretion. Curators I spoke with were willing to openly discuss their discretion as to what exhibits to have and what works to include therein, but they often minimized their role in choosing *how* a specific work is presented. To them, their role in executing the work was insignificant and likely meaningless.

Exhibiting installations of dematerialized art requires greater discretion, and it is therefore not surprising that curators are typically interested in the artists' views when it comes to those works. Stephanie Skestos, a curator at the Art Institute of Chicago, noted that "[w]henever the Art Institute installs any kind of art, we want it to be installed the way the artist intended With conceptual pieces sometimes it's hard to nail that down."¹⁶⁵

Felix Gonzalez-Torres's works are especially challenging for curators. The instructions for many of his works are intentionally

163. See *supra* Section II.C.

164. Stein, *supra* note 143.

165. *Id.* Interestingly, there is clear tension between the curators' fascination with artistic intent and conceptual artists' desire not to explain their works and let others, including curators and viewers, interpret it. See *supra* note 80.

vague.¹⁶⁶ Gonzalez-Torres thus invites the curators of his exhibits to exercise discretion when installing them. But curators, for the most part, would rather not make those judgment calls. Elena Filipovic, who curated several exhibitions of Gonzalez-Torres's works, described the need to make those decisions as no less than "devastating."¹⁶⁷ Andrea Rosen, Felix Gonzalez-Torres's former gallerist, the executor of his will, and the president of his Foundation, commented on that phenomenon from the other perspective: that of the artist or, in this case, his Foundation. She noted that while the Foundation records how Felix Gonzalez-Torres's works are presented by museums and galleries, it does not maintain a "record[] of what the rules are, even though institutions would like us to do this."¹⁶⁸

In some cases, the artist or his estate requires the presenting museum to take actions that are more than mere consultation. For example, some of Sol LeWitt's works include instructions as to how to execute a drawing. But my interviewees explained that, unlike Felix Gonzalez-Torres, LeWitt in his lifetime and, after his death, his estate, require that those instructions be executed by someone from a narrow list of "qualified" painters – most of whom worked with LeWitt in his lifetime. This requirement is backed up by all the social norms this Article discusses: The pseudo-owner of the work will refuse to loan it to a museum unless it follows those instructions. Not following them might make the installment considered inauthentic or "forged" by the art world.

Another common situation in which industry insiders feel that it is important to consult the artist is when the work needs to be conserved.¹⁶⁹ Conservation and restoration typically entail discretion, and the art world perceives it as vital that the artist's intent is not replaced or even undermined by those who restore the work. As Samantha Sheesley explained: "A work of art is fully realized and completed when encountered by and interpreted by a

166. See FILIPOVIC ET AL., *supra* note 73, at 12.

167. See *id.* at 19.

168. Interview: Andrea Rosen & Tino Sehgal, in FILIPOVIC ET AL., *supra* note 73, at 395; see also Kee, *supra* note 151, at 518 (commenting on the desire of institutions to receive significant guidelines when installing Felix Gonzalez-Torres works); Katyal, *supra* note 153, at 505 (describing how Gonzalez-Torres insisted on not providing detailed installation instructions even when museums asked him to do so).

169. See *supra* Section II.C.

viewer. . . . When the interpreter of an artwork is a conservator, false impressions can lead to misguided practice.”¹⁷⁰ Museums, therefore, spend significant resources trying to guarantee that the artist’s intent is preserved, which, in the case of a living or recently deceased artist, includes consulting with the artist or their foundation or estate. One museum insider told me that her institute would not conserve any work of a living artist without the artist’s explicit consent. In one case, after a work was mutilated by a visitor, the museum contacted the artist, who stated that he would rather the work be left mutilated—a request that the museum honored.¹⁷¹

Museums and galleries nowadays take the consultation norm a step further, in that they carefully document the artist’s intent regardless of their current use of the work. They conduct detailed interviews with the artist, sometimes as early as they purchase the work, and inquire how exactly the work is to be preserved and presented in the future. Those interviews are typically recorded to make sure that the artists’ accounts are as accurate as possible.¹⁷²

The art world values consulting with artists because it is broadly believed that artists are in the best position to present and maintain the intent behind a work, and that this intent is what the exhibit-goers should be exposed to. Museums and galleries are happy to spend the resources involved in this process partly because they know that others in the art world are spending those resources as well. In that way, this norm preserves the quality of artistic works for generations to come. Artists and their foundations are regarded as the stewards of authenticity. Indeed, the norm of consultation and the norm of authentication, discussed immediately below, are tightly connected. In some respects, they are two sides of the same coin.

170. Samantha Sheesley, *Artist Interviews as Tools for Diligent Conservation Practice*, 17 *TEXTILE SPECIALTY GROUP POSTPRINTS* 107, 107 (2007).

171. *Cf.* 17 U.S.C. § 106A(c)(2) (2018) (“[M]odification of a work of visual art which is the result of conservation . . . is not [actionable] unless the modification is caused by gross negligence.”); *see also infra* text accompanying note 181.

172. Glenn Wharton, *INCCA: A Model for Conserving Contemporary Art*, GETTY CONSERVATION INST., http://www.getty.edu/conservation/publications_resources/newsletters/24_2/incca.html (last visited Apr. 28, 2020).

3. *The norm of authentication*

The second post-sale right that the social norms in the art world give visual artists is the right to significantly affect which works are considered authentic and which are not.¹⁷³ As discussed in section I.B, authenticity is a central concept in the art world. There is a broad consensus that collectors, museums, and galleries should refrain from purchasing or presenting any work that is not authentic. The artist's position has a tremendous effect on the perception of a work as authentic or not and, therefore, on its value.

Artists can obviously declare that a work is simply a forgery: a work—a tangible artifact—that seems to be theirs but was actually created by someone else. Experienced industry insiders often contact artists, or their foundations and estates, requesting that the authenticity of a work be confirmed or refuted. Many foundations form “authentication boards” to conduct this very task.¹⁷⁴ In 2012, for example, Leslie Hindman Auctioneers, a leading auction house based in Chicago, contacted the famous contemporary painter Peter Doig to verify that a work it was about to auction was indeed his. Doig, through his attorney, denied that it was his painting, and the auction house refused to auction it.¹⁷⁵ The painting immediately lost practically all of its value—\$7 million by one estimate.¹⁷⁶

The ability of artists to disown their works is broader than either the right to announce that a work is forged or the legal right of attribution under VARA. Artists, for example, sometimes disown their works because they were allegedly distorted or modified to their dissatisfaction. Those modifications are typically the result of a failure to maintain the condition of the work or a failed attempt—at least failed from the artist's perspective—to conserve the work.

173. This right can also be called a right of attribution, as artists get the power to decide which works can be attributed to them and which cannot. I chose to call it a right of authentication to not confuse it with the right of attribution under VARA. *Supra* text accompanying note 111. As further explained below, those two rights are related but not identical.

174. Fincham, *supra* note 32, at 594. The role of those boards is complex and, in some extreme cases, they can even create a liability risk for the foundation. *Id.* at 604–08. A full analysis of the work of those boards is beyond the scope of this work.

175. Fletcher v. Doig, 125 F. Supp. 3d 697, 704–05 (N.D. Ill. 2014).

176. Andrea Rush, Fletcher v. Doig: A Case of Refuted Authorship and a Role for Alternative Dispute Resolution, WIPO MAG. (Feb. 2017), http://www.wipo.int/wipo_magazine/en/2017/01/article_0007.html.

In recent years, the renowned conceptual artist Cady Noland disowned two of her works because of their conditions. As mentioned above, in 2011 she disowned her print on aluminum titled *Cowboys Milking*, because its corners were slightly bent.¹⁷⁷ In 2014, she disowned her work *Log Cabin*, because the gallery that owned the work replaced some of the wooden logs that formed the piece with identical logs once the old logs started to rot.¹⁷⁸ In both cases, while Noland took legal actions, she did not need to sue to disown the work and materially affect its value. Disowning *Cowboys Milking* only required her to notify Sotheby's, and the latter refused to auction it.¹⁷⁹ Disowning *Log Cabin* required only a public announcement, which caused the buyer of the work to cancel the transaction and return the item to the seller.

It is quite doubtful that Noland had legal recourse in any of those cases. VARA exempts damage "which is a result of the passage of time or the inherent nature of the materials."¹⁸⁰ It is quite likely that the damage to *Cowboys Milking* was caused by "the passage of time" as well as the nature of the aluminum, a soft metal, that Noland used to create it, which means that there would not be any liability for this damage. VARA also exempts damage that is the result of conservation, unless it was caused by gross negligence.¹⁸¹ This likely means that the owner of *Log Cabin* did not infringe on Noland's moral rights.¹⁸²

Indeed, VARA plays a limited role in this ecosystem.¹⁸³ Regardless of her legal rights, the mere fact that Noland does not perceive those works as hers anymore is enough for much of the art

177. See *supra* text accompanying note 115.

178. See *supra* note 123.

179. Noland contacted Sotheby's through her lawyer, see *supra* text accompanying note 116. However, as discussed below, *infra* text accompanying notes 180-82, Sotheby's acceptance of Noland's demands was likely not rooted only in her legal rights.

180. 17 U.S.C. § 106A(c)(1) (2018).

181. *Id.* § 106A(c)(2).

182. This question might be litigated as part of the complaint that Noland filed against the gallery that restored her work. However, on June 1, 2020, the District Court dismissed Noland's complaint on different grounds. *Noland v. Janssen*, No. 17-CV-5452 (JPO), 2020 WL 2836464 (S.D.N.Y. June 1, 2020). At the time of writing, it is unclear whether Noland will appeal this decision.

183. Daniel Grant, *Artistic Paternity: When and How Artists Can Disavow Their Work*, OBSERVER (July 28, 2016, 10:17 AM), <https://observer.com/2016/07/artistic-paternity-when-and-how-artists-can-disavow-their-work/> (comparing the limitation on liability under VARA to the artists' ability to disown their work by noting that "[t]he right to disclaim authorship, however, has fewer impediments").

world to consider them inauthentic, which drastically diminishes their value.¹⁸⁴

Artists can disown their works for an even simpler reason: they just do not like them anymore or believe that they no longer represent their artistic vision. Consider, for example, the case of Richard Prince, who is considered by some to be the most important artist since Andy Warhol.¹⁸⁵ In 1988, Prince disowned all his work created before the late 1970s. He noted that he had destroyed all works from that period that were in his possession and stated that he does not regard works from that period as representing his vision, stating that “I didn’t like the work I did 10 or so years ago.”¹⁸⁶ Prince’s website, as well as the website of his leading dealer, Barbara Gladstone, do not list a single work or exhibit before 1979, when he was thirty years old.¹⁸⁷

Many in the art world – although, as further discussed below, not everyone – respect Prince’s wishes. The Guggenheim Museum’s website, for example, dates Prince’s career from 1980 on and does not list any work or style of his before the late 1970s.¹⁸⁸ The Whitney Museum of American Art, which staged the last retrospective of Prince in 1992, did not include in it a single early work by the artist.¹⁸⁹ Nancy Spector, a current curator at the Guggenheim who put together the Prince retrospective, stated that the museum “tend[s] to respect the artist’s wishes” when selecting works for an exhibition.¹⁹⁰ The Walker Art Center in Minneapolis, Minnesota, which owns several of Prince’s works from that early era, agreed to lend them to others, but it will not present those

184. See *id.* (“The audience for disclaiming authorship of an artwork is not just its current owner but future buyers who may be dissuaded from purchasing something that the artist claims has been distorted or mutilated.”).

185. See, e.g., Carol Vogel, *For Those Who Can Afford It, Christie’s Is Selling Anxiety*, N.Y. TIMES (Mar. 26 2014), <https://www.nytimes.com/2014/03/27/arts/design/a-christies-contemporary-art-auction-with-an-edge.html>.

186. Daniel Grant, *Can Artists Really Disown Their Early Work?*, HUFFPOST (Aug. 11, 2010, 7:49 AM), https://www.huffingtonpost.com/daniel-grant/can-artists-really-disown_b_678184.html.

187. RICHARD PRINCE, <http://www.richardprince.com> (last visited Apr. 28, 2020); *Biography of Richard Prince*, GLADSTONE GALLERY, <https://gladstonegallery.com/artist/richard-prince/biography> (last visited Apr. 28, 2020).

188. *Richard Prince*, GUGGENHEIM, <https://www.guggenheim.org/artwork/artist/richard-prince> (last visited Apr. 28, 2020).

189. Grant, *supra* note 186.

190. *Id.*

works at the museum. Siri Engberg, its curator, explained that “[i]t’s important to maintain a close relationship with the artist.”¹⁹¹ She noted that “[t]he gesture of disavowal may be a way [for the artist] to regain . . . control [of their work]” and to signal that some of the artist’s works are “not part of an artist’s conceptual plan.”¹⁹²

In 2017 Richard Prince did it again, although for a slightly different reason. In January, just days before the inauguration of then President-elect Donald Trump, he disowned a work he created for Ivanka Trump. Prince disowned the work by calling it “fake” and returning the payment, \$36,000, he received for it.¹⁹³ Prince stated that disowning the work was an act of protest against the Trump family.¹⁹⁴

Richard Prince is, of course, not the only prominent artist to disown his prior works that were no longer to his liking. Additional examples include Pablo Picasso, who disowned a painting he allegedly drew as a “joke”;¹⁹⁵ Gerhard Richter, the abstract artist, who—much like Prince—disowned his early and more realistic works;¹⁹⁶ and even Felix Gonzalez-Torres, who disowned several works he created, calling them “additional material” and “non-works.”¹⁹⁷

C. *The Flexibility of Social Norms*

Social norms are typically characterized by their potential for flexibility, if the industry participants choose to make them so.¹⁹⁸

191. *Id.*

192. *Id.*

193. Randy Kennedy, *Richard Prince, Protesting Trump, Returns Art Payment*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/arts/design/richard-prince-protesting-trump-returns-art-payment.html>.

194. *Id.*

195. Grant, *supra* note 183.

196. Fincham, *supra* note 32, at 594.

197. Grant, *supra* note 186.

198. Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 21 (2000) (“Social norms have the advantages of flexibility . . .”). Legal norms can offer some flexibility too—for example, by using more standard-based norms and fewer rule-based norms. *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (explaining that flexibility is a virtue of legal standards). In the context of copyright law, for example, the law achieves flexibility primarily through the fair use defense. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007) (“We must be flexible in applying a fair use analysis.”); Gordon, *supra* note 99, at 1637 (“[T]he case-by-case flexibility of fair use allows the courts to weigh the value criterion in defendant’s favor only when they do feel equipped to make such judgments.”).

When it comes to its social norms, the art world shows flexibility regarding flexibility. Some norms, in particular those that resemble private property rights, show little flexibility. As noted above, I was unable to find an instance where a museum or a gallery exhibited a work, including a work that is a pure idea, without “owning” or “borrowing” it.¹⁹⁹ Nor did any of my interviewees know of such an example. Those norms do not seem to have any exception.

The norms regarding the artists’ post-sale control, on the other hand, are flexible, which makes the industry significantly more adaptable and susceptible to nuances than copyright law. Indeed, the norms of consultation and authentication are not always accepted and followed. While the art world rarely wholly ignores the artists’ desires, some are willing to take actions that are inconsistent with those wishes, especially when they are difficult to assess accurately or when they seem unreasonable.

One important aspect of this flexibility has to do with works by deceased artists. When individuals die, most of their legal rights pass to their heirs. Their heirs can, and sometimes do, exercise those rights in a way that is inconsistent with the desire of the deceased.²⁰⁰ Copyright is an example of a legal right that heirs can fully exercise as they desire, regardless of the deceased’s wishes.²⁰¹ The heirs’ power does not diminish or disappear as long as copyright lasts, which is currently seventy years after the death of the author.²⁰² This means that in many cases the rights will be transferred several times, including to those who probably never met the author.

The social norms of the art world work differently. Museums try to preserve the artist’s intent, but when it comes to deceased

199. See *supra* text accompanying note 151.

200. Property law includes legal mechanisms that are designed to curtail what is commonly referred to as “dead-hand control.” See, e.g., *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988) (“Property law disfavors restraints on alienation and dead-hand control by prior owners.”). The most famous of those mechanisms is probably the rule against perpetuities. See, e.g., Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 718–20 (1990).

201. See, e.g., *Ray Charles Found. v. Robinson*, 795 F.3d 1109 (9th Cir. 2015) (allowing the heirs of Ray Charles to use their rights under the Copyright Act although that use circumvented the artist’s clear and expressed intent); cf. Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639 (2017) (exploring various interests that the estate of deceased artists might promote).

202. 17 U.S.C. § 302(a) (2012); see also Ariel Katz, *Substitution and Schumpeterian Effects over the Life Cycle of Copyrighted Works*, 49 JURIMETRICS 113 (2009) (suggesting that copyright protection should be stronger shortly after the work is created and weaker later on).

artists, assessing that intent becomes more complex. The identity of the legal heir of the artist plays relatively little role in this process. Instead, museums seek input from individuals who should be most familiar with the artist. Ideally, artists leave behind foundations that are managed by those who knew them and their work during their lifetime. The artist's former gallerists, dealers, and others who worked in the artist's studios are valuable sources whose advice might be sought by presenting museums. But, in sharp contrast with copyright law, the social norms that require consultation with the artist's foundation and former colleagues weaken over time and, in some circumstances, might eventually disappear. Industry insiders explain that they consult with an artist's foundation or former colleagues because they are best positioned to know the artist's intent. However, they also note that as those individuals retire or die, museums take a greater role in deciding for themselves how to express the artist's intent.²⁰³ Similarly, over time, the role of the artist's circle of acquaintances in authenticating a work is diminished as museums take a more significant role in this process, by, *inter alia*, maintaining documentation regarding the provenance of their works.²⁰⁴ In other words, unlike copyright law, the artistic post-sale control does not have a preset fixed term.

This flexibility is not limited to deceased artists. Many industry insiders I spoke with are familiar with examples of museums that did not receive permission from an artist to exhibit a work, and even cases in which an exhibition presented a work against the

203. When it comes to conceptual art, the discussion regarding the diminished role of the artists' foundations and heirs is looming, but still mostly theoretical. Conceptual art started to gain momentum in the late 1960s, which means that many leading conceptual artists are still alive or recently deceased. Therefore, their foundations and estates are still managed by those who knew them. This reality, however, will unavoidably change in the years to come.

204. See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 360 (1982) ("Museums have a mission to help the search for truth about the art they possess. That mission entails searching for and acquiring as much information about provenance as possible . . ."); Ronald D. Spencer & Judith Wallace, *Museums and Museum Curators: Caught in the Cross-Hairs of Authenticity Disputes*, in THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS 27, 32 (Julia Courtney ed., 2015) (explaining how foundations gradually stop dealing with authentication requests, partly because of liability risk, and how "[t]his leaves a void that museum curators may be asked to fill").

artist's desire.²⁰⁵ In some of those cases, the lack of permission required the museum to refrain from using an image of the artist's work in its supporting materials, such as its website. Many industry insiders are familiar with examples, which are apparently rare but somewhat salient, of permissions that were denied, which led to the cancellation of an entire exhibition at great harm, both financially and to the reputation of the parties involved.

Somewhat similarly, while some prominent museums refrain from presenting works that artists disowned because of their dislike of their old works, other museums are willing to exhibit them. In 2007, for example, the Neuberger Museum of Art at Purchase, New York, arranged an exhibit titled "Fugitive Artist: The Early Work of Richard Prince, 1974-77."²⁰⁶ As the name suggests, that exhibit presented Richard Prince's disowned works from the mid-1970s. Prince, of course, refused to cooperate in this exhibit, which limited the museum's ability to use images of the work in its catalogs.²⁰⁷ The exhibition, nevertheless, was well received by the art world.²⁰⁸ Other museums, such as the Walker Art Center, which refrains from presenting Prince's disowned works, were willing to loan them to be exhibited elsewhere.²⁰⁹ The industry insiders I spoke with found this issue difficult. Some of them noted that they think it is "in poor taste" to present a disowned work, although others said that "you can only disown a work you did not sell by destroying it." Some stated that if their museum owned a disowned work it would just store it, while others suggested that lending it to third parties would be

205. See, e.g., Kate Taylor, *National Portrait Gallery Rejects Artist's Request to Remove His Work*, N.Y. TIMES: ARTSBEAT (Dec. 20, 2010, 2:20 PM), <https://artsbeat.blogs.nytimes.com/2010/12/20/national-portrait-gallery-rejects-artists-request-to-remove-his-work/> (reporting on how the National Portrait Gallery in Washington refused to remove a work by AA Bronson from an existing exhibition). Bronson asked for his work to be removed after the museum's highly criticized decision to censor a work by another artist, David Wojnarowicz. *Id.* The lender of Bronson's work, the National Gallery of Canada, publicly supported the artist's request and urged the Washington museum to respect it, but the National Portrait Gallery refused. *Id.*

206. The exhibit was covered by leading publications such as the *New York Times* Art and Design section. Roberta Smith, *Tracing a Radical's Progress, Without Any Help from Him*, N.Y. TIMES (Feb. 9, 2007), <https://www.nytimes.com/2007/02/09/arts/design/09prin.html>.

207. *Id.*

208. *Id.*

209. Grant, *supra* note 186.

acceptable, and yet others noted that they would be willing to present it with a clear indication that the artist disowned the work.

The market for disowned artworks similarly shows the complexity of the issue. The market treatment of disowned works varies and depends on the circumstances that led to the artist's decision. If there is any doubt as to whether an artist created a work, the large auction houses will refuse to sell it.²¹⁰ Several large auction houses refused to sell works that were disowned because the artists were displeased by their state, such as Cady Noland's work *Cowboys Milking*.²¹¹

On the other hand, the resistance to selling disowned art is much weaker when it is the result of the artist's changed taste. Sotheby's and Christie's, for example, agreed to sell Richard Prince's early works, even though they were disowned.²¹² The effect of the act of disowning on the market price of the work is similarly ambiguous. It is likely that, in most cases, disowning a work reduces its value.²¹³ On the other hand, the act of disowning art may, under some circumstances, arm the work with additional meaning, which might even raise its price. For example, Joshua Holdeman, the former vice chairman of Sotheby's, noted that Richard Prince's disowned print of Ivanka Trump "will probably

210. See, e.g., *supra* text accompanying note 175 (explaining that as soon as Peter Doig denied that a work was created by him, the auction houses refused to sell it). In some cases, probably not common, there could be doubts whether the artist is considered the one who created the work. For example, Andy Warhol routinely supervised works that were created by others in his studio and later signed them. The Andy Warhol Foundation typically considers those to be Warhol's and they are sold as such. However, the Andy Warhol Authentication Board, appointed by the Andy Warhol Foundation, refused to authenticate several such works that were later, nevertheless, included in his official catalogue raisonné, which is typically also controlled by the Foundation. The auction houses consider those to be Warhol works and sold them as such. See Heymann, *supra* note 32, at 38-39. Those actions and the authentication policies of the Andy Warhol Foundation were subject to a bitter lawsuit. See Fincham, *supra* note 32, at 605-06.

211. See *supra* text accompanying note 115.

212. Grant, *supra* note 186.

213. For example, Andrea Rosen, the president of the Felix Gonzalez-Torres Foundation, referred to Gonzales-Torres's disowned works by acknowledging that they are being sold occasionally at auctions, but she also noted that "[t]hey sell for less' than the pieces the artist did view as constituting art." *Id.* This phenomenon makes sense. As many museums and industry insiders refuse to present disowned works, and as it is more difficult to authenticate or exhibit them, the demand for them is lower.

end up being a more culturally rich object than if this whole episode [hadn't] happened" and that it might increase in value.²¹⁴

Finally, but importantly, in some respects, the scope of the artists' rights under the social norms is quite narrow, as they apply to the artists' work but not to closely similar works. My interviewees mentioned that while they will never ignore pseudo personal property rights (i.e., present a work they did not buy or borrow), and while they typically consult with artists before presenting their works, these norms only apply to the work itself. If Bob creates a work that is inspired by and is very similar to Alice's work, then—as far as the social norms are concerned—Bob's work can be purchased or presented without consulting with Alice.²¹⁵

Limiting the scope of an artist's rights to her work alone and excluding any rights over substantially similar works puts the social norms of the art world in an interesting tension with the corresponding legal norms. Legal rights over intangible property—including copyright—are not limited to literal copying. Judge Learned Hand famously observed that copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."²¹⁶ Under copyright law, if the defendant copies protected elements of the plaintiff's work, and if the defendant's work is substantially similar to the plaintiff's work, copyright is *prima facie* infringed.²¹⁷

The social norms of the art world are different, as they perceive two works by two artists, even if visually identical, to be different from one another. One is an authentic work by one artist, and the other an authentic work by another. Therefore, the permission of one artist is not needed to use the work of another. The fine artists also typically respect those norms and rarely sue other fine

214. Kennedy, *supra* note 193; see also August Brown, *Banksy Pranks Auction by Shredding Million-Dollar Painting. Now It May Be Worth Even More*, L.A. TIMES (Oct. 6, 2018), <https://www.latimes.com/entertainment/la-et-cm-banksy-shreds-painting-20181006-story.html> (explaining that when Banksy, the famous street artist, publicly partly destroyed one of his paintings he likely significantly increased its value by giving it a special meaning in the history of fine art).

215. One curator cynically asked me when I inquired about this practice: "You know that we have works by appropriation artists in this museum, right?" The curator was, of course, referring to the tendency of appropriation artists to present works that are nearly identical to the originals on which they are based.

216. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

217. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018).

artists for creating works that are substantially similar to theirs, even if those actions constitute copyright infringement.²¹⁸ It is thus not surprising that most of the litigated disputes surrounding visual art in recent years concerned conflicts between appropriation artists and individuals from outside the fine art world, primarily photographers.²¹⁹

218. Picasso and his estate, for example, do not engage in legal actions against dozens of artists who create and present, in many cases without authorization, derivative works of Picasso paintings. For example, the author recently attended an exhibit at Musée Picasso in Paris that was dedicated to perhaps Picasso's most famous work—*Guernica*. The original work was on exhibit at Museo Reina Sofia in Madrid, but the museum in Paris presented pictures of the work and a full-size engraving titled *Garage Day Revisited* by Damien Deroubaix that was almost identical to the original work by Picasso. There is no doubt that under copyright law Deroubaix's work infringes the copyright in *Guernica*. But the art world, including Musée Picasso, considers it an authentic, unproblematic work by Deroubaix.

Picasso's estate, however, uses a different standard for those outside of the fine art world. For example, it famously threatened to sue James Cameron, the producer of *Titanic*, and was eventually paid licensing fees for including an image of Picasso's *Les Femmes d'Alger (O. J. R. M.)* in the movie. Patricia Cohen, *Art Is Long: Copyrights Can Even Be Longer*, N.Y. TIMES (Apr. 24, 2012), <http://www.nytimes.com/2012/04/25/arts/design/artists-rights-society-vaga-and-intellectual-property.html>. The motivation for the lawsuit was not purely financial, as the Picasso estate wanted to punish the movie creators for falsely implying that the work, which has been part of the permanent collection of the Museum of Modern Art in New York for decades, was on board the Titanic and thus lost. Milton Esterow, *The Battle for Picasso's Multi-Billion-Dollar Empire*, VANITY FAIR (Mar. 7, 2016), <https://www.vanityfair.com/culture/2016/03/picasso-multi-billion-dollar-empire-battle>.

219. Richard Prince was famously sued by the photographer Patrick Cariou for using his photographs in an exhibition at the Gagosian Gallery in New York. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013). Shortly after the Second Circuit's decision, which held that most of Prince's works were fair use, Prince got himself in legal troubles again when, in 2014, he exhibited copies of Instagram posts without permission. Four lawsuits—three from photographers and one from a make-up artist—soon followed. Beatrice Kelly, *The (Social) Media is the Message: Theories of Liability for New Media Artists*, 40 COLUM. J.L. & ARTS 503, 505 (2017). Two of the complaints were settled. Kelly, *supra*. At the time of writing, the proceedings in the two other cases are continuing.

Prince is not the only prominent contemporary artist who has been sued for using copyrighted materials that were created by those who are not part of the fine art world. For example, Jeff Koons, the most commercially successful living visual artist in the world, has been sued multiple times for copyright infringement. See, e.g., *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (holding that Koons's use of a fashion photograph was fair use); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding that Koons infringed the copyright in a photograph); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (holding that Koons infringed the copyright of a graphic designer); see also Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016) (exploring the application of the fair use defense in copyright lawsuits against contemporary artists); Adler, *supra* note 32, at 361 (suggesting, after exploring the recent legal battles over fine art, that they are not needed for the progress of art).

To summarize: The social norms of the art world fill a gap that the legal system creates. They attribute property-like rights to every artwork, whether or not the law recognizes such rights, including when the work is nothing more than an idea. In addition, they allow all artists to exercise a certain level of post-sale control over the use of their works. These norms create something – rights for the artists – in legal nothingness.

IV. THE NORMATIVE IMPLICATIONS OF RIGHTS OVER LEGAL NOTHINGNESS

The previous Part explores, in depth, the social norms of the art world that allow artists to be compensated for and be involved in the use of their works. Those norms apply whether or not copyright, or any other legal norm, incentivizes or otherwise protects those works. As such, the art world provides artists with rights in legal nothingness. This Part discusses some of the normative implications of those social norms.

Section A analyzes the impact of recognizing pseudo property rights in all artworks, including pure ideas. The section compares the social norms to the legal norms and argues that the social norms incentivize idea creation in a relatively efficient way. Sections B and C zoom out and suggest that the social norms of the art world shed light on and put into question more general legal concepts. Section B explains that the norms of the art world expose some of the shortcomings of the legal notion of authorship, a cornerstone concept in copyright law. Indeed, authorship, as currently applied by courts, is built on a perception of creativity which is suitable to some creative industries but not to others. The section suggests how authorship can be revised by taking into account the richer account of creativity that this Article explores.

Section C suggests that the art world perceives private property ownership in a flexible way that is partly inconsistent with certain legal notions and rules. Developments in the market and in existing technology, like the emergence of the sharing economy, similarly question existing property law norms. Therefore, the section explains that it might be appropriate to reconsider certain aspects in our legal norms concerning private property ownership.

A. Incentivizing Ideas' Creation Efficiently

The social norms of the art world recognize property-like ownership in legal nothingness: that is, works consisting of pure ideas. The immediate effect of those norms is to provide an answer to the question this Article posed at the end of Part II: How do Felix Gonzalez-Torres and artists like him earn a living from their acclaimed dematerialized works? If artists are considered the “owners” of the works they create, and if no art institute will present that work without purchasing or borrowing it, then the artists must be paid for their works. Indeed, this is the main source of income of visual artists, including Gonzalez-Torres and other artists who create pure-idea works.

This regime is especially effective because of the strongly shared norms among industry insiders—collectors, museum administrators, gallery owners, curators, and so on. Fine art is mostly consumed through museums and galleries, which places their curators and administrators in a strong gatekeeping position. In other words, there is no *de facto* free entry into this market by outsiders who disrespect the industry norms. It is mostly impossible to bypass that ecosystem and the close-knit society of individuals who foster and promote those social norms.

As a result, those social norms and the pseudo property rights they create close a certain gap in the way that our legal system incentivizes creativity. Creativity comes in many forms. For our purposes, it is enough to note that individuals can come up with creative ideas, execute ideas in creative ways, or do both. Copyright protection, however, attaches only to creative execution.²²⁰ In other words, if Alice comes up with a creative idea and Bob executes it in a creative way, Bob’s creative contribution is protected by copyright, but Alice’s is not.

Developing ideas, however, takes time and involves resources. If ideas escape legal protection, how are ideas’ creators incentivized to develop them? Often, the legal system indirectly incentivizes this activity. First and foremost, in many cases, protecting the execution also provides adequate incentive for ideas’ development. This is especially true in the rather common case in which the same individual comes up with both the idea and its execution, and when

220. *See also supra* note 128.

the main value of the work is in that execution, while the idea embodied therein is trivial.²²¹ For example, the idea of painting the sky over a village at night is not very creative or unique, but Van Gogh's execution of *The Starry Night* is considered one of the greatest artworks in history. The idea of a battle between a young hero who is learning the ways of the trade and an older, more experienced villain is not particularly interesting or new, nor is the idea about a group of youngsters learning to use their magic powers.²²² But J.K. Rowling's expression of those ideas when she wrote the *Harry Potter* books made her the most famous and the richest author of our time.²²³ In those cases, leaving the ideas that are expressed in *The Starry Night* or *Harry Potter* in the public domain and making them free for others to take causes no real harm to the creators' income.

In other cases, if the idea is developed by one individual and executed by another, the law can still incentivize ideas' creation. A host of legal doctrines, collectively called "the law of ideas," protect idea developers against the misappropriation of their creativity.²²⁴ Most cases concerning the law of ideas revolve around "idea submission" disputes. The defendant in those cases created a

221. The line between ideas and expression is of course blurry. See *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008) ("[T]here is no bright line separating the ideas conveyed by a work from the specific expression of those ideas."); see also *supra* note 128. This known difficult problem, however, does not affect the analysis in this section and is beyond the scope of this work.

222. There are multiple examples of those ideas in popular works that predate *Harry Potter*. The idea of fights between pure good and pure evil is at least as old as the Bible and Greek mythology. In modern popular culture, that idea plays a major role in most comic books. The idea of a group of youngsters who are learning to use their special powers is also old and in modern times is expressed in such works as the *X-Men* series, Terry Pratchett's *Discworld Series*, and Jane Yolen's *Wizard's Hall*. The idea of combining the two is of course not new either. The similarity in ideas between *Star Wars* and *Harry Potter* is well-known. The important observation is, however, that copying ideas is not only a common practice, but it typically does not significantly harm the market for the earlier work.

223. Karissa Giuliano & Sarah Whitten, *The World's First Billionaire Author Is Cashing In*, CNBC (July 31, 2015), <https://www.cnbc.com/2015/07/31/the-worlds-first-billionaire-author-is-cashing-in.html>.

224. The term "law of ideas" was coined in Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119 (1954). See also Robert C. Denicola, *The New Law of Ideas*, 28 HARV. J.L. & TECH. 195, 205 (2014) ("Idea creators have invoked a dazzling array of legal theories in their attempts to stop unauthorized use, with varying degrees of success."); Miller, *supra* note 23.

final product—for example, a children’s toy,²²⁵ a movie,²²⁶ a TV series,²²⁷ or a commercial campaign.²²⁸ However, the idea for those endeavors allegedly originated from the plaintiff who did not directly benefit from its commercialization. The law of ideas allows the idea developers to recover the value of their contribution to the final product. As a practical matter, the law of ideas, nevertheless, protects only non-public ideas.²²⁹

This indirect incentivization scheme leaves out works whose value primarily lies in the idea and not in its expression, such as dematerialized conceptual artworks. Protecting their execution, which is typically trivial,²³⁰ and leaving the most creative part thereof—the idea—in the public domain for others to freely copy, can significantly undermine the incentives to create those ideas.

This is where the social norms of the art world step in by providing pseudo-ownership over public ideas. Indeed, this regime seems to provide a sophisticated, effective, and, as we shall

225. See, e.g., *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714 (7th Cir. 2003); *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000).

226. See, e.g., *Smith v. Weinstein*, 578 F. Supp. 1297, 1307–08 (S.D.N.Y. 1984), *aff’d*, 738 F.2d 419 (2d Cir. 1984); *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956).

227. See, e.g., *Forest Park Pictures v. Universal Television Network*, 683 F.3d 424, 436 (2d Cir. 2012); *Montz v. Pilgrim Films & Television*, 649 F.3d 975, 981 (9th Cir. 2011) (en banc).

228. See, e.g., *Wrench, L.L.C. v. Taco Bell Corp.*, 256 F.3d 446, 459 (6th Cir. 2001); *Garrido v. Burger King Corp.*, 558 So. 2d 79, 83 (Fla. Dist. Ct. App. 1990).

229. Some of the limitations on the protection of public ideas are doctrinal. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (“Information that is public knowledge or that is generally known in an industry cannot be a trade secret.”); *Nadel*, 208 F.3d at 373, 378, 380 (Sotomayor, J.) (noting that “property-based” causes of action for protection ideas, such as misappropriation of quasi-property rights or conversion, require that the idea will be “novel in absolute terms” because the law “does not protect against the use of that which is free and available to all”). Moreover, if the law of ideas would have provided property-like protection for public ideas, it might have been preempted by the Copyright Act. See, e.g., *SCO Grp., Inc. v. Int’l Bus. Machs. Corp.*, 879 F.3d 1062, 1080 (10th Cir. 2018); *GlobeRanger Corp. v. Software AG United States of Am., Inc.*, 836 F.3d 477, 488 (5th Cir. 2016).

Contracts, in theory, can regulate non-public ideas. But, in practice, relying on contracts to protect public ideas entails a host of issues. It is possible that a contract over public ideas might not be supported by consideration, especially if the idea is known to both parties. *Nadel*, 208 F.3d at 380. In addition, a contracts plaintiff needs to prove privity, tackle contractual defenses, such as unconscionability and public policy, and handle the reputational harm involved in enforcing such an oppressive contract. See Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141, 1209–18 (2017) (exploring those limitations on contracts over information goods). Indeed, I am not familiar with any proceedings in which a plaintiff tried, successfully or not, to use a contract to prevent the use of publicly available and known ideas.

230. See *supra* Section I.B.

see, an efficient way to fill this gap in our legal system. To use the terminology set forth by Kal Raustiala and Chris Sprigman, the law leaves a negative space in which it does not provide incentives for creativity,²³¹ and that space is then filled by the social norms' pseudo personal property regime.

It is probably more efficient to have the gap in our current legal framework filled by social norms rather than by any form of creativity-protection property rights, especially copyright-like rights over ideas.²³² Indeed, as far as copyright law is concerned, ideas *need* to stay free in the public domain.

231. Raustiala & Sprigman, *supra* note 38, at 1764 (explaining that the negative space is “a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited propertization”). Raustiala and Sprigman studied the social norms of the world of fashion. In recent years, other scholars examined the negative space in other industries. *See, e.g.*, David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019) (exploring the social norms that support the decoration of egg clowns); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (analyzing the social norms advancing the creation of jokes); Zahr K. Said, *Craft Beer and The Rising Tide Effect: An Empirical Study of Sharing and Collaboration Among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355 (2019) (studying the norms among Seattle's craft breweries).

The focus in this section, and the main focus of this Article, is on the operation of the social norms of the art world in that negative space. However, this Article also clarifies that the social norms of the art world are not limited to that negative space, and that they operate even with respect to those parts of the art world that, unlike conceptual art, are subject to legal norms, including intellectual property law. *See, e.g.*, *supra* notes 216–19 and accompanying text.

232. While the claims made in this section are important, one should not lose sight of their limitations. The question that the rest of this section asks is whether property law, especially copyright, can incentivize idea creation better than the industry currently does. In other words, is a legal reform needed? It explains that the answer to both questions is no. This, by itself, does not mean that the system of social norms, and in particular the pseudo personal property regime, is perfect or costless. *Cf.* Bair & Pedraza-Fariña, *supra* note 38 (claiming that many scholars of social norms in creative industries compare them only to fictional IP regimes, although they might raise other issues, including some that go beyond IP law).

One can raise multiple questions regarding the overall desirability of the social norms scheme that this Article describes. For example, is it possible that it provides too strong of incentives? Such a phenomenon was studied in some industries. *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 419–24 (1997). Discovering the efficient level of incentives is not a simple question to answer. In tackling such a question, it is important to keep in mind that the art world (like many other industries in the 21st century) is not purely driven by market powers. The government intervenes in the market in multiple ways, including, for example, direct financial support to many museums and significant tax benefits to non-profit institutes, including practically all museums.

The relative efficiency of the social norms comes from the low social costs that this form of protection entails. To appreciate the likely superiority of the pseudo personal property regime, one must understand why copyright law leaves this negative space and why it would be difficult to come up with a *legal* rule that would fill that gap. Extending copyright protection to ideas would be exceptionally socially costly. Protecting ideas would give existing authors much stronger monopoly power, which would dramatically shrink the public domain—the library of preexisting information goods that can be used in future creations.²³³ Once ideas are protected, it would become significantly more difficult for new creators to “create around” existing works and enrich our world with new works.²³⁴ Moreover, as the Supreme Court explained, if copyright law were to protect ideas, it might conflict with the right of free speech as guaranteed by the First Amendment.²³⁵

Devising a narrower *sui generis* property regime over some public ideas, such as ideas that are used in conceptual art installations, would be extremely challenging. First, the constitutionality of such an act is questionable. It is not clear that Congress is authorized by Article I to extend copyright beyond

Moreover, as section III.A explains, the social norms create artificial scarcity. So do property rights. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 275 (1977). And while this section suggests that society should prefer the first over the latter, one cannot rule out that a solution that does not entail scarcity at all might be preferable. For example, the government can pay conceptual artists for their creativity and allow anyone to use their works in a non-rivalrous way. In that way, instead of having one copy of a Felix Gonzalez-Torres work, located in a specific museum, every museum interested in conceptual art would present it. Wouldn't that be better for consumers of fine art? Such an approach, of course, entails a host of other difficulties. For example, is it justified to spend taxpayers' money on conceptual art? And how does such a scheme affect free artistic expression in a free society? In the context of fine art, patronage has significant social costs, mainly because it is, and always has been, linked to censorship. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 353 (1996).

As I hope this note makes clear, assessing the overall desirability of the social norms of the art world goes well beyond the scope of this Article. In fact, it is doubtful that such an inquiry can be completed without assessing the overall operation of the art world itself and the government's effects on it and related markets.

233. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990) (explaining the importance of a robust public domain to future creators).

234. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1337 (2015) (explaining how copyright law channels future creativity).

235. *Golan v. Holder*, 565 U.S. 302, 328 (2012).

expressions,²³⁶ and it is similarly doubtful that such an act would survive First Amendment scrutiny.²³⁷ Second, even if Congress is allowed to pass such legislation, it would be exceptionally difficult, probably impossible, to accurately define the scope of such a right.

Indeed, the drafting of such a bill would be problematic. VARA provides an analogy to this challenge. VARA bestowed moral rights only to fine artworks, but its attempt to do so resulted in repeated litigation at the margins. Time and again courts are asked to decide if certain works—such as photographs or alleged applied art—fall under the scope of VARA or not.²³⁸

The challenge here is significantly more complex than the one that the VARA drafters faced. First, *sui generis* legislation would need to identify the works whose ideas it protects. As explained throughout this Article, there are many forms of fine art that do not need idea protection—from a Van Gogh painting to Duchamp's *Fountain*. Second, the drafters would need to identify which ideas within any work should be protected and to what extent. Obviously, the law does not need to limit an individual's ability to buy 175 pounds of candies for a party, but creating a legislative scheme that would separate such a case from now-unauthorized copying of "*Untitled*" (*Portrait of Ross in L.A.*), which consists of

236. The Supreme Court typically read Congress's authority under the IP Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 8, quite broadly. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 208–10 (2003) (holding that Congress's authority to enact copyright protected for "limited Times" does not preclude extending the protection period from time to time); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56–58 (1884) (holding that Congress's authority to grant exclusive rights over "writings" extends to photographs). However, the Court has never considered an attempt to protect ideas, and it is therefore unclear whether it would agree that Congress's authority to protect "writings," as the term is used in the IP Clause, extends that far. It is similarly unclear whether Congress can bypass such limitations on its power under the IP Clause, if they exist, and pass copyright-like laws using its commerce power. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004) ("The overwhelming view among commentators is that the Intellectual Property Clause's limits apply to all of Congress's powers . . .").

237. *See supra* note 235 and accompanying text.

238. *See, e.g.*, *Cheffins v. Stewart*, 825 F.3d 588, 591 (9th Cir. 2016) (considering whether a mobile replica of a 16th-century Spanish galleon, built from a used school bus, is protected under VARA); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 291–92 (7th Cir. 2011) (considering whether a wildflower garden is protected under VARA); *Kleinman v. City of San Marcos*, 597 F.3d 323, 324 (5th Cir. 2010) (considering whether a wrecked car that has been painted and put to use as a cactus planter is protected under VARA); *Lilley v. Stout*, 384 F. Supp. 2d 83, 85–89 (D.D.C. 2005) (considering whether an artistic photograph is protected under VARA).

175 pounds of candies, would be challenging. The risk of overbroad legislation, which would unnecessarily shrink the public domain and might harm free speech, would make the legislative endeavor grueling.

Lastly, there is no need for a legislative reform that will provide property-like protection to ideas, because the current system seems to operate adequately.²³⁹ The pseudo personal property regime carefully addresses the challenges that might be unresolvable in a legislative reform. Because the social norms are shared by the fine art world, but not beyond it, the rights themselves are applicable only to the type of fine artists whose works are exhibited in museums and galleries. It, therefore, does not present the same overbreadth problem associated with federal laws. Moreover, the scheme is limited to the type of copying that harms artists while allowing others to create around it.²⁴⁰ The social norms thus offer a level of flexibility that a legislative scheme typically lacks.

B. Recalibrating Copyright Authorship

The art world's perception of authorship is rich and complex, and it challenges the ways in which the term is understood under copyright law. Comparing the social norms of this industry and copyright law's account of authorship sheds light on certain underlying assumptions in our legal system and might require recalibration of existing legal tests. Indeed, while the previous section of this Article suggests that the law should not protect public ideas, this section notes that the law concerning the protection of *expressed* ideas might need slight recalibration.

Authorship is an important and complex concept in copyright law. Therefore, it is not surprising that it attracts much attention from courts and scholars.²⁴¹ Authors are the stars of our copyright system. The IP Clause of the Constitution authorized Congress to "[S]ecur[e] . . . to authors . . . the exclusive Right to their respective Writings,"²⁴² and the Supreme Court has repeatedly stated that one

239. Of course, the superiority of the current system does not mean it cannot be improved, as suggested in the rest of this Part.

240. See *supra* text accompanying notes 216–18.

241. See, e.g., *supra* note 42.

242. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

of the primary goals of copyright law is to “protect the author’s incentive to create.”²⁴³

The Copyright Act provides that authors are the initial owners of the copyright in a work.²⁴⁴ Identifying the author, or authors, is therefore crucial when disputes arise among individuals who contributed to the creation of a final product. Those disputes require copyright law to figure out who among a group of creators should be considered the author—which turns out to be a difficult question. Those situations are not rare. A movie, for example, benefits from the creativity of the producer, director, screenwriters, actors, photographers, lighting director, costume designers, and many more.²⁴⁵ Authorship determines who within this large group is elevated and receives property rights in the final product and who is left out.²⁴⁶ Similar questions arise in many other forms of creativity, from music²⁴⁷ to software,²⁴⁸ and more.

Authorship has received growing attention in the 21st century. For example, copyright law’s tendency to deny most performing artists (e.g., vocalists and actors) authorship status has been harshly criticized in recent years, especially on equitable grounds.²⁴⁹ In 2012, partly in response to those claims, the World Intellectual

243. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U. S. 417, 450 (1984); *see also* *N.Y. Times Co. v. Tasini*, 533 U. S. 483, 524 (2001).

244. 17 U.S.C. § 201(a) (2012) (“Copyright . . . vests initially in the author . . . of the work.”).

245. *See Garcia v. Google, Inc.*, 786 F.3d 733, 742–43 (9th Cir. 2015) (en banc).

246. *See, e.g.*, *16 Casa Duse, L.L.C. v. Merkin*, 791 F.3d 247 (2d Cir. 2015) (holding that a producer and not a director is the author); *Garcia*, 786 F.3d at 742–43 (holding that the movie producer and director is the sole author and not an actor); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (holding that a director and not an advisor on set is the author).

247. *See, e.g.*, Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 116–17 (2013) (discussing how, under some circumstances, band members and even sound mixers can be considered joint authors).

248. *See, e.g.*, Clark D. Asay, *Software’s Copyright Anticommons*, 66 EMORY L.J. 265, 293 (2017).

249. *E.g.*, Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274 (2017); F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001). *But see* Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1 (2019) (suggesting that under existing copyright law, actors may be considered authors). *See generally* 17 U.S.C. § 114(g)(5)(A) (2018) (setting forth a voluntary mechanism to compensate “a producer, mixer, or sound engineer who was part of the creative process that created a sound recording,” a provision added to the Copyright Act in October 2018 as part of the Music Modernization Act, to better compensate all those who participate in the creative process).

Property Organization (WIPO) adopted the Beijing Treaty on Audiovisual Performances.²⁵⁰ In addition, modern technology, which fosters large-scale collaborative projects, such as Linux and Wikipedia, further challenges existing notions of authorship.²⁵¹

Copyright law has developed complex tests to tackle authorship.²⁵² The heart of those tests has to do with control during the creative process. The Ninth Circuit, for example, noted that “an author ‘superintends’ the work by exercising control[,]”²⁵³ and while authorship is a multi-factor inquiry, “[c]ontrol in many cases will be the most important factor.”²⁵⁴ But control over what? The Supreme Court answered that an author controls the fixation of the work: “[T]he author is the party who actually creates the work, that is, the person who *translates an idea into a fixed, tangible expression* entitled to copyright protection.”²⁵⁵ The result is that the individual who made the choices regarding the expressive elements in the work by fixing them, or by controlling their fixation, is the author.

In many contexts this rule makes sense. Copyright law elevates fixation of original expressive elements.²⁵⁶ It, therefore, follows that those who make such contributions will be granted legal rights. Moreover, this rule incentivizes those parts of the creative process that are exceptionally socially desirable and that are commonly resource-consuming: expressing ideas and fixing them.²⁵⁷

However, in some circumstances, placing the entire weight of our copyright law system on the fixation of expressive ideas is questionable. For example, as already noted, many have claimed

250. Beijing Treaty on Audiovisual Performances, *supra* note 42. The treaty entered into force on April 28, 2020, after it was approved by 30 countries. *Beijing Notification No. 31: Beijing Treaty on Audiovisual Performances*, WORLD INTELL. PROP. ORG. (Jan. 28, 2020), https://www.wipo.int/treaties/en/notifications/beijing/treaty_beijing_31.html.

251. Kaminski & Rub, *supra* note 42, at 1126–27.

252. *Id.*

253. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (footnotes omitted).

254. *Id.*

255. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (emphasis added); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015) (en banc).

256. 17 U.S.C. § 102(a) (2018) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”).

257. *See Douglas Lichtman, Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 723 (2003) (“One virtue of fixation is that it increases the likelihood that the relevant expression will be passed from place to place, person to person, and generation to generation.”); *supra* text accompanying notes 221–22 (explaining that in many cases the value of the work is mainly attributed to its expressions and not its ideas).

that this approach unfairly minimizes the contribution of performers and their creative choices.²⁵⁸

Conceptual art provides an even starker example for the shortcomings of the current approach to copyright authorship and its oversimplified underlying assumptions. As explained, under copyright law, the author is the one who “translates an idea into a fixed, tangible expression,” or in other words, controls the fixation of the expressive elements of the work.²⁵⁹ Applying this rule to conceptual artworks, however, leads to absurd results. For example, Felix Gonzalez-Torres came up with the idea to “Untitled” (*Portrait of Ross in L.A.*),²⁶⁰ but he did not exercise any control over the fixation of that idea. In fact, he did not even determine the attributions of that expression but left those simple choices to those who execute his works, typically museum curators. As curators make those choices (for example, whether to place the candies in a square or a circle), they control the fixation process, and, if the result is protected by copyright,²⁶¹ they – the curators – are the authors.

Any fan of the arts, and even more so any industry insider, including every curator I spoke with, would find this result absurd, if not offensive. The work, as perceived by the art world, is the idea, and all rights in it should be given to the person who came up with that idea and not the individuals who execute it. Typically, the curators’ names will not even be mentioned next to the work and will be known to only a few of the exhibit goers. The candy installations are, as far as the social norms of the art world are concerned, a work by Felix Gonzalez-Torres.

This gap between the industry perception and the law might require our legal system to come up with more sophisticated ways to determine authorship. Such a system could embrace a more holistic view of creativity, taking into account those cases in which

258. See *supra* note 249 and accompanying text.

259. *Supra* note 255 and accompanying text.

260. See *supra* text accompanying notes 74–80.

261. See *supra* text accompanying notes 131–34. It is unclear whether such an installation can be protected by copyright. It mostly depends on whether the aesthetic choices, made in this case by the curators, show a “creative spark[,]” thus meeting the required standard for originality. *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *supra* note 128.

a major artistic contribution might not express itself through control over the fixation process.

The authorship caselaw includes clues for such a holistic approach. For example, the Ninth Circuit mentioned that one of the factors in determining authorship is whether “the audience appeal of the work turns on both contributions.”²⁶² This factor opens the door for considering the views of third parties, for example, museum goers, and those they perceive to be the main contributors and the creators of the work. The Ninth Circuit, however, went on and explicitly held that this factor—the audience perspective—is not as important as the question of control,²⁶³ thus undermining the value of other factors.

This Article, however, and the norms of the art world it explores, might put into question that preference—meaning, the current focus on control over fixation—and instead advocates for a more balanced approach. That approach might need to place more weight than is currently placed on the ways in which the audience and the industry perceive creative contribution, at times even at the expense of those who control the fixation process. The social norms of the pertinent industry can be used to inform such a determination.

C. Challenging Private Property Ownership Standardization

The social norms of the art world, and especially their treatment of conceptual art, can contribute to a deeper understanding of the notion of private property ownership and help shape intellectual property law. One of the thorny questions concerning private property ownership is whether and to what extent sellers of chattel can transfer ownership to a buyer while restricting that buyer’s (and future owners’) rights to transfer and/or freely use their purchased good. In other words, does the private property ownership interest of the buyers entail freedom from such limitations, or can sellers encumber the chattel?

262. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

263. *Id.*

While this question has been debated in various contexts for centuries,²⁶⁴ it is taking a more central stage in legal discourse in recent years. One reason for this renewed interest has to do with changes in the law, especially in the context of items that are protected by intellectual property rights. Intellectual property law tries to preserve private property ownership, at least to a degree, through the doctrines of IP exhaustion. Those doctrines sever the link between the rights-owner/seller and the buyer by limiting the control that the rights-holder can exercise once an item is sold.²⁶⁵ In the context of copyright law, exhaustion allows buyers to transfer their purchased copies (e.g., books and CDs) to others and, in certain circumstances, to publicly display them,²⁶⁶ but not to make copies thereof.²⁶⁷ This is part of the balance that copyright law aims to preserve between conflicting interests: the need of authors to be paid, especially when new copies are created, and the need of the buyers of specific copies to be allowed to exercise ownership interest and use those copies.²⁶⁸

In recent years, in two important decisions, the Supreme Court broadened IP exhaustion, holding, *inter alia*, that neither a copyright holder nor a patentee can prevent unauthorized importation of IP protected chattel (e.g., books and medicines)

264. The most famous discussion of this issue was probably in Lord Coke's 17th century treatise. EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 360, at 223 (London, Adam Islip 1628) ("[I]f a man be possessed of . . . a horse, or of any other chattell . . . and give or sell his whole interest . . . therein upon condition that the [d]onee or [v]endee shall not alien[ate] the same, the [condition] is voide, because his whole interest . . . is out of him."); *see also* Rub, *supra* note 48, at 759–62 (discussing modern use of Lord Coke's statement, from the partial critique in JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* (1895) to the Supreme Court's favorable reliance in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538–39 (2013)). For modern in-depth discussion on the issue, *see, e.g.*, Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 906–24 (2008).

265. *See* Shubha Ghosh, *The Implementation of Exhaustion Policies: Lessons from National Experiences*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (Nov. 2013), <https://www.ictsd.org/sites/default/files/downloads/2014/01/the-implementation-of-exhaustion-policies.pdf> (exploring various IP exhaustion regimes).

266. 17 U.S.C. § 109 (2018).

267. *See* *Capitol Records, L.L.C. v. ReDigi Inc.*, 910 F.3d 649, 657 (2d Cir. 2018) ("[T]he creation of such new phonorecords involves unauthorized reproduction, which is not protected, or even addressed, by [17 U.S.C.] § 109(a)."); *see also* *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013) (holding a farmer liable for creating copies of patented grains).

268. *See* Rub, *supra* note 48, at 755.

purchased abroad.²⁶⁹ Those decisions disrupt well-established practices of many rights-holders, which are expected to try and find other ways to exercise legal post-sale control.²⁷⁰ This will likely generate additional litigation in the years to come.

The ongoing policy debate concerning post-sale restrictions, especially on chattel that is protected by intellectual property rights, is complex, and a full analysis thereof is beyond the scope of this Article.²⁷¹ One common argument in this debate, however, is that enforcing post-sale restraints is simply inconsistent with our notions of what private property ownership means and entails. The Supreme Court partly accepted this argument in its recent exhaustion caselaw when it relied on the common law aversion to restrictions on alienation²⁷²—an aversion that is rooted in those restrictions being “repugnant to the . . . fee.”²⁷³ Other commentators similarly claim that enforcing certain post-sale restrictions might mark “The End of Ownership,” and frustrate the reasonable expectation of buyers.²⁷⁴

The focus on the nature of private property ownership relates to well-established legal norms that require property rights to be standardized and limited to a fixed number of forms.²⁷⁵ The common explanation for this rule of standardization is that it helps minimize transaction costs. Because property rights are in rem (i.e., binding on the entire society), the argument goes, it is important to

269. *Impression Prod., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523 (2017); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

270. Courts already allow right-holders to partly circumvent exhaustion. *See, e.g., ReDigi*, 910 F.3d at 655 (holding that a license is needed for reselling digitally downloaded songs); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (holding that a software company can prevent a buyer from unbundling and separately reselling a package of its software products).

271. *See, e.g.,* Ariel Katz, Aaron Perzanowski & Guy A. Rub, *The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8, 24 (2016) (pointing to “various competing interests and considerations [that] should continue to inform the evolution of the law [of exhaustion]”).

272. *See, e.g., Impression Products*, 137 S. Ct. at 1532; *Kirtsaeng*, 568 U.S. at 538–39; *see also supra* note 264 and accompanying text.

273. Rub, *supra* note 48, at 759–62.

274. AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (2016).

275. This rule exists in most legal systems. In Civil Law countries it is known as the “Numerus Clausus principle.” *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000).

prevent unusual property forms. Otherwise, individuals will need to spend significant resources investigating the nature of the property rights by which they, like everyone else, are bound.²⁷⁶ Creating idiosyncratic post-sale limitations might, therefore, undermine that principle and raise information costs.

However, a broader view of private property ownership reveals a more complex reality. Lawrence Lessig's famous pathetic dot theory suggests that behavior is shaped by four forces: the law, the market, physical and technological constraints (Lessig called them collectively "the architecture"), and social norms.²⁷⁷ In our context, the law's attempt to simplify and limit the notion of private property ownership is undermined by the three other forces (the market, the technology, and the social norms). Together they present a richer and more flexible perception of ownership.

Recent developments in the marketplace and in its architecture (i.e., the available technology) draw attention and undermine certain common views of private property. First, the growth of the sharing economy causes more and more consumers to purchase temporary services (e.g., Uber rides) at the expense of permanent ownership (e.g., buying a car), and thus weakens the centrality of private property ownership in our society.²⁷⁸ As one commentator bluntly put it, "Millennials are losing interest in ownership. They prefer to access property as needed on a casual, short-term basis."²⁷⁹ Second, the Internet of Things, where purchasers buy items that permanently rely on the sellers' cloud services to operate properly, challenges the notion of private property ownership that is free of the seller's post-sale control.²⁸⁰ Third, digital reading devices, like Amazon's Kindle, similarly allow individuals to "buy" an e-book

276. *Id.* at 8.

277. LESSIG, *supra* note 50, at 121-25.

278. *See, e.g.,* Fagundes, *supra* note 49, at 1380-94 (examining how the sharing economy, among others, challenges the notions of exclusion and possession of chattel); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 510 (2016) (discussing how the sharing economy blurs distinctions between property law categories that were previously clearer).

279. Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL'Y REV. 155, 155 (2017).

280. *See, e.g.,* Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, 50 GA. L. REV. 1121 (2016) (discussing how the Internet of Things challenges the common law rules against servitudes on chattel).

when, in fact, they are getting nothing more than an ability to access their “purchased item” on the corporation’s servers.²⁸¹

This Article provides another example of the flexibility of private property ownership, but one that is not rooted in the market or the architecture. Instead, it stems from Lessig’s fourth force: social norms. Specifically, the social norms of the art world that this Article explores, especially those concerning conceptual art, give artists such a pivotal role in decisions concerning the use of their sold works that they undermine the perception of a sale as a transfer of ownership rights that severs the sellers’ interest.

Museums and collectors pay millions for works of art, but when they want to use their purchased goods, they – according to the well-established social norms of the industry – need to consult with the sellers-artists. This norm is especially strong for a sale of conceptual art, regardless of the price that the buyer paid, or was willing to pay, for the work.

Take, for example, a typical Sol LeWitt wall painting. The work itself – the one that buyers pay a small fortune for²⁸² – consists of a set of instructions on how to execute a simplistic wall drawing.²⁸³ However, my industry-insider interviewees explained that LeWitt and his estate do not just require that the painting be executed exactly according to those instructions, but that they be executed by what some of them referred to as “an authorized painter.” The list of authorized painters, who are paid generously for their services, is short. Those on that list were selected originally by LeWitt and now, after his passing, by his studio.

With that in mind, consider what a museum or a collector purchases when it successfully bids on a LeWitt wall drawing. It is something whose *standard* use (i.e., displaying it on a wall) requires

281. PERZANOWSKI & SCHULTZ, *supra* note 274, at 1–2 (recounting how Amazon removed all “purchased” copies of an e-book from all users’ Kindle devices and pointing out that this control cannot be exercised by sellers of physical books).

282. LeWitt’s wall drawings are often sold for more than \$100,000. *See, e.g.*, SOTHEBY’S (May 15, 2014, 9:30 AM) [hereinafter SOTHEBY’S 2014], <http://www.sothebys.com/en/auctions/ecatalogue/2014/contemporary-art-day-sale-n09142/lot.503.html> (wall drawing sold for \$437,000); SOTHEBY’S (Nov. 15, 2018, 10:00 AM), <http://www.sothebys.com/en/auctions/ecatalogue/2018/contemporary-art-day-sale-n09933/lot.109.html> (wall drawing sold for \$362,500).

283. Karol, *supra* note 128, at 187. Those instructions are commonly available online. *See, e.g.*, SOTHEBY’S 2014, *supra* note 282 (posting the full instructions, which were sold for \$437,000).

close supervision from the seller. It subjects the buyer to a host of post-sale restrictions on its core interest in the item purchased. The case of Sol LeWitt is not unique. As explored in section III.B, artists routinely exercise post-sale control over the use of their sold works.

Therefore, the notion that a sale of chattel terminates the link between the seller and the item sold—a view that the common law and the Supreme Court maintain²⁸⁴—is inconsistent with the social norms of the multibillion-dollar art industry. Participants in this industry perceive the buyer as the owner of the work and expect the buyer to be able to exercise many of the rights that are incidental to ownership, such as the right of alienation. Nevertheless, that does not mean that the ownership interest is not encumbered as a result of the social norms that grant artists-sellers certain post-sale rights.

As explained, idiosyncratic rights against the world, including post-sale restrictions, might increase the transaction costs in the marketplace.²⁸⁵ The art world industry insiders, as a relatively close-knit group, might be able to mitigate those costs, but not eliminate them. The norms of the industry, and the decision-making power they give to artists and their heirs, are likely well known to all industry participants. Therefore, those insiders do not expend resources in exploring *whether* the norms exist or not.²⁸⁶ However, the norms are flexible,²⁸⁷ which means, *inter alia*, that different works are subject to different limitations.²⁸⁸ Investigating those norms is apparently a cost that this industry is willing to bear in order to serve its other priorities, such as faithfully representing the creator's artistic intent.

Indeed, it seems there is a tension between the theory of private property ownership as a well-defined, static set of rights, which does not allow sellers to exercise post-sale control, and the reality

284. *Supra* note 264 and accompanying text.

285. *See supra* text accompanying note 276.

286. *Cf. Rub, supra* note 48, at 794–95 (suggesting how to calibrate the rules of copyright exhaustion to reduce transaction costs in transactions involving uninformed consumers, but allow greater personalization of rights where sophisticated parties are involved).

287. *See supra* Section III.C (discussing the flexible nature of the social norms concerning post-sale control).

288. *See supra* notes 168–69 and accompanying text (comparing Felix Gonzales-Torres's vague instructions, which provide curators with significant discretion when installing his work, with Sol LeWitt's detailed instructions, which restrict the curators' discretion and set forth multiple procedures concerning the installation of the work).

of the modern marketplace and its social norms. Going forward, the law might need to adopt a more flexible approach to ownership that better corresponds with the norms in multiple industries and contexts. Future research will be able to use social norms to further inform private property laws and to explore the best ways to duplicate their flexibility while maintaining enough standardization to keep transaction costs at bay.

CONCLUSIONS

Museums and similar institutions are willing to pay millions for a form of ownership-like interest that the law does not recognize because they are bound by the strong social norms of the art world. This web of norms, which this Article explores, provides artists with a set of powerful rights that only partly overlap with the existing legal framework for protecting and incentivizing creativity. Those norms guarantee the artists' central role in the art world and effectively and efficiently incentivize types of creativity that our legal system does not, such as the creation of certain public ideas.

This Article analyzes those social norms and shows how they shed light on broader concepts and their underlying assumptions, including our notion of copyright authorship and core principles within our perception of private property ownership. The Article suggests how the law might need to develop in order to account for these richer understandings.