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## **“Temporary” Conceptual Art: Property and Copyright, Hopes and Prayers**

Richard H. Chused

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# "TEMPORARY" CONCEPTUAL ART: PROPERTY AND COPYRIGHT, HOPES AND PRAYERS

Richard Chused\*

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\*Professor of Law, New York Law School. My artist wife, Elizabeth Langer, contributed a number of thoughts to me as I worked on this project. As with my other art-oriented essays, she was my constant muse as well as companion. My colleagues Jacob Sherkow and Ari Waldman read and commented upon earlier drafts of this essay. They have my deep gratitude. Their collegiality and generous expenditures of time reading the work of their colleagues is worth a kudo. A thank you also is due to New York Law School for providing summer writing grants in support of my labors. I also am thoroughly delighted that this article is being published by a Rutgers-Newark Law School journal. Rutgers-Newark was generous enough to offer me a teaching job when I first began my career immediately after completing law school in 1968. Closing the circle is a symbol of my deep gratitude for the opportunity the school provided me over half a century ago.

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## I. INTRODUCTION

This meditation on transitory art begins with Sol LeWitt. His conceptual art is representative of a large strain of creative endeavors that emerged after 1950. To this day it engages artists, galleries, collectors, and museum curators worldwide. “Ownership” of his art was not always evidenced by possession of a physical object like a painting or a sculpture, but by possession of documents—a certificate of authenticity and a diagram in the case of LeWitt. Together these documents contained (typically partial) instructions on how to fabricate or install his work. Possession of a certificate and diagram gave their owner a guarantee of provenance and the authority to arrange for installation of the work with the artist or the artist’s successors in interest—nothing more.<sup>1</sup> In addition, the actual installations of such works typically were not accomplished by the artists who made the certificates and diagrams; these installations were usually completed by others. Whether the installed work was a wall drawing by LeWitt, a construction by Donald Judd,<sup>2</sup> or a lighting work by Dan Flavin,<sup>3</sup> the pieces were often described by

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<sup>1</sup> See Donald Judd, GUGGENHEIM,

<https://www.guggenheim.org/conservation/the-panza-collection-initiative/donald-judd> (last visited Apr. 13, 2019). Loss of the certificate and diagram, and therefore of the ability to arrange for installation, can destroy the value of the work. Short descriptions of problems faced by those who lose certificates are available for many artists, including Donald Judd and Daniel Flavin. See also Charles & Thomas Danziger, *When Conceptual Art Certificates of Authenticity Go Up in Smoke*, THE BROTHERS IN LAW (Nov. 20, 2015), <https://www.blouinartinfo.com/news/story/1282175/brothers-in-law-when-conceptual-art-certificates-of>

<sup>2</sup> See Judd, JUDDFOUNDATION, <https://juddfoundation.org/artist/art/> (last visited Apr. 13, 2019). Some of his conceptual work is described on the website of the Judd Foundation.

<sup>3</sup> See Dan Flavin, *Long-term view, Dia:Beacon*, DIA ART FOUNDATION, <https://www.diaart.org/program/exhibitions-projects/dan-flavin-collection-display> (last visited Apr. 13, 2019). Some of his more permanent, but easily movable, work is available at the Dia:Beacon Museum.

the artists as temporary, movable, or destructible after their installation. Such projects were distinctly different from routine art sales by galleries or auction houses. Rather than obtaining a painting or sculpture, a buyer obtained only the right to seek its creation and installation. It was the creative plan that was the artistic product, not an extant creative work.

The unusual structure of conceptual art endeavors raises a set of conundrums governing a great deal of contemporary artistic work. First, what are the property and copyright ownership structures of a work of conceptual art? Those structures are controlled in various ways by pulling apart ownership of the certificate and diagram on the one hand and control over installation of a work on the other. Second, given the divided ownership patterns of much conceptual art, who might be designated as author of a copyrighted work? That issue also is complicated by the splitting apart of control over the certificate and diagram from installation of a work. Additional problems are raised by the fact that such works typically were and still are installed by persons other than the artist who devised the creation. Does that mean authorship of a copyrighted work might be split between well-known personages like Sol LeWitt and those who actually fabricated their creations? Third, who controls the actual installation of a work—the owner of the certificate and diagram, the artist or the successors of the artist who created the certificate and diagram, the craftspeople who actually do the work, or some combination of people or institutions? This first family of three problems is discussed in Part II of this essay. Fourth, who controls maintenance of a work of conceptual art if it remains in place for a significant period of time, of a work's demise, or, as in the case of LeWitt's *Wall Drawing #679* used in this essay as a template, a plan to restore a work that was covered over? Are such decisions in the hands of the owners of the physical attributes of an installed work, the owners of the copyright interests in the work, the craftspeople who originally installed it, or some combination? This topic is covered in the first section of Part III. Fifth, given the complex ownership structure and power relationships surrounding a work of conceptual art, what sorts of moral right issues may surface over the attribution, destruction, or mutilation of a work if some or all of the relevant actors desire to alter, remove, transfer, or restore a work? The second segment of Part III takes this up. Finally, if all of those holding an interest of one kind

or another in an installed work endeavor to destroy it, are there any non-legal, ethical considerations that should be applied in deciding how to handle such decisions? The conclusion tackles this question. All of these issues are implicated by the story of LeWitt's Wall Drawing #679—the template for this essay.

## II. THE STORY OF WALL DRAWING #679

A peculiar and fascinating example of the property and copyright problems embodied in conceptual art works became an object of widespread discourse in the artistic and museum worlds last year. A controversy arose over Sol LeWitt's Wall Drawing #679 originally installed during 1991 in the home of William Stern—a well-known and widely respected Houston architect. The tale, filled with intriguing questions about the ownership, copyright status, ethics, and control over the installation, removal, and restoration of impermanent conceptual art, began in the early 1990s. Stern designed the home pictured below for himself in Houston's Museum District at 1202 Milford Street—about a twenty-minute walk from the campus of the city's distinguished Menil Collection.<sup>4</sup>

While the house was under construction he arranged with Sol LeWitt to formulate a work, also pictured below, for installation on a large living room wall thirty feet high and fourteen feet wide.<sup>5</sup> The certificate and diagram for the work, denominated as Wall Drawing #679, were created in 1991 and installation on a wall in the living room of the new house occurred the same year.<sup>6</sup> There

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<sup>4</sup> See *The Menil Collection*, <https://www.menil.org/campus> (last visited Apr. 13, 2019). The campus includes the main museum building, the famous Rothko Chapel, buildings devoted to Cy Twombly and Daniel Flavin, a drawing institute, café, a park, and other structures covering a thirty-acre area.

<sup>5</sup> See Telephone Interview with Jonna & Georgia Hitchcock (Aug. 1, 2018) [hereinafter *Hitchcock Conversation*].

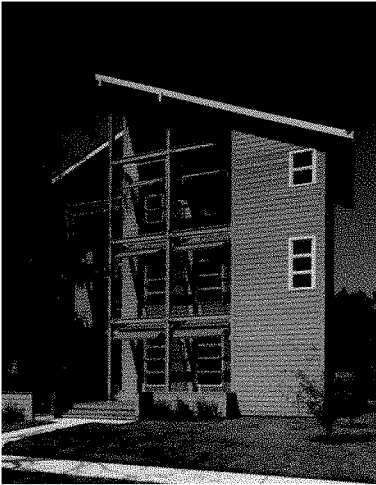
<sup>6</sup> See *The Menil Collection*, ISSUU (Dec. 21, 2015), <https://issuu.com/themenilcollection/docs/2014-menil-annual-report> (The house is dated on the architectural firm's website as being built in 1992. The wall drawing is dated a year earlier. Such date differences can be typical for LeWitt's work. The creation date is when the instruction set was written, not when the work was installed. In this case the drawing apparently was installed before the house was fully complete.); see ANNIE BYERLY (ED.), 2014 ANNUAL REPORT: THE MENIL COLLECTION 35 (2014). Wall Drawing #679 is listed among the recent acquisitions of the Menil Collection as created in 1991.

also were two working drawings of the piece made before its installation to assist the artists who installed the work—Patricia Phillips and Rebecca Schwab.<sup>7</sup> Stern was a major patron and a trustee of the Menil Collection. When he died in 2013 he left his large art collection,<sup>8</sup> as well as his house, to the museum. And that was when events took a turn to the viral.

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<sup>7</sup> See Hitchcock Conversation, *supra* note 5 (Jonna Hitchcock called them maquettes in the Hitchcock Conversation); E-mail from David Aylsworth to Richard Chused (Aug. 24, 2018) (“[W]hile I’m not sure I would really call the studies that we have here ‘maquettes,’ there are two diagrams here that were apparently created by Mr. LeWitt’s studio for Mr. Stern to decide which colors he preferred when he first acquired the work. My understanding is that this type of thing is still produced today by the studio in order to guide new iterations or acceptable variations to make the work adjust to a different location. These works are probably not done by Mr. LeWitt himself, are unsigned, and are not considered by Menil to be separate works of art in our accessioned permanent collection. Rather, they are documentation about how the Wall Drawing is to be made.”) (on file with author); E-mail from David Aylsworth to Richard Chused (Aug. 28, 2018) (After he inspected the actual certificate and diagram for Wall Drawing #679, he provided the names of the artisans who are listed as first installing the work in Stern’s home.) (on file with author); Telephone Interview with Aaron Parazette (Oct. 22, 2018) (That differs some from another report published in 2012 indicating that two Texas artists—Jeff Elrod and Aaron Parazette—were “on the work crew” that did the work. It is possible, of course, that LeWitt named Phillips and Schwab because they were the primary artisans. Parazette indicated to me that he only helped prepare the wall for the installation by plastering and painting multiple rolled on layers. He did not do the actual placement of colors on the wall. Parazette now is a member of the School of Art faculty at the University of Houston and is represented by the McClain Gallery in the city.); see *Faculty*, UNIVERSITY OF HOUSTON, <https://ssl.uh.edu/class/art/undergraduate-programs/Painting/Faculty/> (last visited Apr. 13, 2019); see *Aaron Parazette*, MCCLAIN GALLERY, <http://www.mcclaingallery.com/artists/aaron-parazette> (last visited Apr. 13, 2019).

<sup>8</sup> BYERLY, *supra* note 6, at 32-41. Dozens of works are listed as newly acquired from the estate by the museum in its 2014 Annual Report.



William Stern House (1992)<sup>9</sup>



Wall Drawing #679 in Stern House<sup>10</sup>

Rather than convert the Stern house and its large art collection into an adjunct space of the Menil Collection, the museum elected to move all of the portable art into its primary facility a short distance away and sell the dwelling. At that point, the museum had to determine what, if anything, to do with the wall drawing in place in the living room. The museum elected to cover it up and end the visible life of Wall Drawing #679.

The home was purchased by Dr. Georgia Hitchcock in 2014. She and her daughter Jonna knew about the existence of the wall drawing for quite some time after the purchase but made no efforts to learn about its condition for several years. A friend of the Hitchcocks then suggested that they dampen some of the wall and see if they could remove the material hiding the drawing. They discovered that the covering was composed only of a thin water-soluble skim-coat of sheetrock-mud or plaster. When damp it was easy to

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<sup>9</sup> *William Stern House*, STERN AND BUCEK ARCHITECTS, <http://sternbucek.com/residential/william-stern-house> (last visited Apr. 13, 2019). The image can be located on the architecture firm website.

<sup>10</sup> See Julia Halperin, *One Texas Woman's Paradoxical and Controversial Quest to Prove She Rediscovered a Major Work of Conceptual Art*, ARTNET NEWS (Jan. 18, 2018), <https://news.artnet.com/art-world/sol-lewitt-drawing-menil-texas-1201514> (depicting Paul Hester of Hester + Harway's picture of Wall Drawing #679 in Stern House).

scrape away. As seen below, a scraggly line of it was removed. To their surprise the work was quite visible underneath; the drawing had not been painted over before the skim-coat was applied. The Hitchcock family then decided to arrange for the work to be restored and to create a documentary about the effort.<sup>11</sup> Word got out and controversy ensued.<sup>12</sup> Some contended that the Hitchcocks had every right to do as they pleased; others opined that the life of the LeWitt work was over and they should let it rest in peace.

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<sup>11</sup> *Un-Erasing Sol LeWitt*, <http://unerasingsolewitt.com/> (last visited Feb. 17, 2019). A trailer for the documentary of this project is also available on this website.

<sup>12</sup> See, e.g., HALPERIN, *supra* note 10 (Roy Nolen, executor of Bill Stern's estate, says he was "quite certain that he would feel that his legacy and reputation were being exploited for personal gain by the so-called 'unerasing' documentary proposed by representatives of the current owner of the house he built and loved."); see also *How the 30-Ft.-Tall Ghost of a Sol LeWitt Drawing Is Slowly Reappearing in Houston's Museum District*, SWAMPLLOT (Jan. 5, 2018), <http://swamplot.com/how-the-30-ft-tall-ghost-of-a-sol-lewitt-drawing-is-slowly-reappearing-in-houstons-museum-district/2018-01-05/> (referring to the piece as a "zombie LeWitt drawing."); Lynn Steen, Comment to *Disappeared Sol LeWitt Painting Slowly Reappears in Houston Home*, GLASSTIRE (Jan. 9, 2018), <http://glasstire.com/2018/01/09/disappeared-sol-lewitt-painting-slowly-reappears-in-houston-home/#comment-1375678> ("Whatever you choose to call that which remains under the sheetrock mud and paint, is what the homeowner will have when they are finished. A 'not-LeWitt' or an 'un-LeWitt' or an 'Unerased Sol LeWitt' (with a nod and wink to Rauschenberg)."); Paula Newton, *Why "Unerasing" a Sol LeWitt is Impossible*, GLASSTIRE (Jan. 11, 2018), <http://glasstire.com/2018/01/11/update-why-unerasing-a-sol-lewitt-is-impossible/> (The Menil Collection says "the artistic creation is in the design . . . [and] [t]he work is ephemeral . . . despite the homeowners' many chronicles of the 'unerasing' on a variety of social media platforms, they are really just messing up a perfectly good wall."); but see Isaac Kaplan, *A Houston Homeowner Is Uncovering A Painted-Over Sol Lewitt On Her Wall – But She Doesn't Own It*, ARTSY (Jan. 16, 2018), <https://www.artsy.net/article/artsy-editorial-houston-homeowner-uncovering-painted-over-sol-lewitt-wall> ("[T]he Menil said it does not take issue with the homeowner doing whatever projects they wish to undertake in their home.").





Credited to Jonna Hitchcock

The scraggly, scraped off segment of sheetrock is visible in this image inside the red rectangle.<sup>13</sup>

While the family was considering how to proceed they contacted the Menil Collection to learn what the museum's position was about ownership and recovery of the hidden wall drawing. Jonna Hitchcock, daughter of the homeowner, received an email from David Aylsworth, the Menil Collection's Registrar.<sup>14</sup> He wrote:

As I am sure you are aware, LeWitt's wall drawings are designed to be temporary, challenging the idea of permanence that so much of the art world is based on. The owner of one of his wall drawings does not own anything tangible. Rather, when he acquired the drawing, William Stern purchased the use of an idea. The idea was then executed by craftspeople overseen by the artist's studio and entrusted to carry out the idea satisfactorily.

The drawing lives on only as a certificate of authenticity and diagram that transferred to the Menil as part of his bequest. LeWitt likened his wall drawing to a musical score. The artistic creation was in the design. The execution depended on talented craftspeople

<sup>13</sup> *Un-Erasing Sol LeWitt*, *supra* note 11.

<sup>14</sup> The job of a "registrar" varies some from museum to museum. But in the general the position tasks may include control over movement of the collection, records for the various works in the museum, preservation and maintenance of the works, provenance, and other data about the collection.

who take the design and adapt it to specific structural circumstances, under the supervision of the artist's studio (and now his estate). By design, they were intended to be on view for an undefined and temporary period of time, painted over, re-created and re-configured by the owner of the diagram and certificate (in conjunction with the artist's estate) in different locations and at different times. When ownership of *Wall Drawing #679* transferred to the Menil Collection, we became its caretaker. When we ceased to own the wall and the house it previously existed in, and could no longer be in control of its environment, it was painted over and its physical life came to an end. This was always the intent of the artist, and is the standard procedure when these works change ownership. While we have not had the opportunity to re-configure or re-construct the piece, it still exists as a concept and idea. On the attached report it is represented as a tangible object and wall in Mr. Stern's house. But the artwork itself is the intangible idea represented by the directives that passed to the Menil with the bequest of his collection.<sup>15</sup>

His representations that the work was "painted over" and that "its physical life came to an end" were not entirely accurate. In addition, the opinions that the work was intended by all involved to be visible for "a temporary period of time" and that its demise upon sale of the house "was always the intent of the artist" were contested. The Hitchcocks questioned that line of argument, noting among other things that many chats they had with friends of William Stern, neighbors, and architects revealed a widespread sense that Stern would be surprised by both the sale of his house and the covering over of *Wall Drawing #679*; they also wondered why Stern and LeWitt bothered to retouch the piece after about ten years to make sure it was true to the initial conception. It is, of course, true that some of LeWitt's wall drawings have been visible in museums or other locations for many years without being disturbed.<sup>16</sup> But

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<sup>15</sup> Email from David Aylsworth to Jonna Hitchcock (Jan. 4, 2018), attached to an email from Tommy Napier, Assistant Director of Communications of the Menil Collection, to Michael Roffer, Associate Librarian and Professor of Legal Research, New York Law School (Apr. 9, 2018) (on file with author). The "attached report" mentioned in the email was the 2014 annual report for the museum. See BYERLY, *supra* note 6.

<sup>16</sup> See, e.g., *Sol LeWitt/A Wall Drawing Retrospective*, MASS MoCA, <https://MASS MoCA.org/event/sol-lewitt-a-wall-drawing-retrospective/> (last visit-

Aylsworth's other positions were based not on the physical status of the drawing or disputes about the background of the work, but on more theoretical ideas about conceptual art—that the certificate was evidence only of ownership of the certificate itself, together with the accompanying diagram, that a tangible wall drawing was a “LeWitt” only if it was drawn or maintained with permission of LeWitt or his estate, that Stern may have hoped the work would endure but he held no interest in the creation after his death, and that the Hitchcocks may have owned the markings on the wall under the skim-coat but they did not own a “LeWitt.” What is the best way to parse the varying opinions about the propriety of restoring Wall Drawing #679?

### III. COPYRIGHT (AND PROPERTY) OR IS IT PROPERTY (AND COPYRIGHT)?

#### A. OWNERSHIP PATTERNS

The journey begins with exposition of the property and copyright structure of works of conceptual art like those of Sol LeWitt. When he “sold” a work he, like other conceptual artists, did not always sell a physical copy of a two- or three-dimensional work. Ra-

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ed Feb. 17, 2019). The LeWitt installation at MASS MoCA originally installed in 2007 remains intact and is scheduled to continue until 2033. *See also* John Hogan & Carol Snow, *Sol LeWitt's Wall Drawings: Conservation of an Ephemeral Art Practice*, 22 OBJECTS SPECIALTY GROUP POSTPRINTS 37, 41 (2015), <http://resources.conservation-us.org/wp-content/uploads/sites/8/2015/05/osg022-04.pdf> (last visited Feb. 17, 2019). John Hogan is the Mary Jo and Ted Shen Installations Director and Archivist for Sol LeWitt Wall Drawings at the Yale University Art Gallery. He is a leading figure in the LeWitt world. Carol Snow is Deputy Chief Conservator and the Alan J. Dworsky Senior Conservator of Objects at the Yale University Art Gallery. MASS MoCA's LeWitt exhibition is quite extensive, occupying all 27,000 square feet of Building No. 7 on the large MASS MoCA campus in North Adams, Massachusetts. The museum worked directly with LeWitt shortly before he died to design the exhibition spaces and install the works. *See also* NYCSubway, <https://www.nycsubway.org/perl/artwork>, (last visited Feb. 17, 2019) (These works, like the wall covered with tile in the Columbus Circle station of the New York City subway system, are long lasting. The MTA maintains a list of art in the subway system.); NYCSubway, [https://www.nycsubway.org/wiki/Artwork:\\_Whirls\\_and\\_Twirls\\_\(Sol\\_Lewitt\)](https://www.nycsubway.org/wiki/Artwork:_Whirls_and_Twirls_(Sol_Lewitt)) (last visited Feb. 17, 2019) (to view the LeWitt piece *Whirls and Twirls*, which was installed in 2007.)

ther he transferred a certificate of authenticity and a diagram with basic instructions for how to make and install the work. It is not entirely clear when LeWitt began to formalize sales of his works in this way. In the 1980s he did replace some early documentation for the large conceptual art collection of Giuseppe Panza, a significant part of which is now held by the Guggenheim Foundation.<sup>17</sup> But he and other artists began to remove some of the ambiguity in the nature of their authentication and sale process beginning in the 1970s, though not without some notable conflicts with those who had previously purchased unfabricated works with ambiguous or nonexistent documentation.<sup>18</sup>

A typical certificate of authenticity and diagram for a LeWitt wall drawing—in this case one owned by the Tate Gallery in London—is pictured below.<sup>19</sup> As is evident from the certificate's 1970 date LeWitt was an early, archetypical formulator of certificates and diagrams for the transfer and authentication of conceptual two-dimensional art.<sup>20</sup> The primary certificate clause for The Tate's Wall Drawing #49 reads, "This certificate is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred."<sup>21</sup> It appears to say, "Congratulations, this

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<sup>17</sup>See *The Panza Collection*, GUGGENHEIM MUSEUM, [https://www.guggenheim.org/artwork/special\\_collection/the-panza-collection](https://www.guggenheim.org/artwork/special_collection/the-panza-collection) (last visited Feb. 17, 2019); see also *Giuseppe Panza Papers, 1956-1990*, GETTY MUSEUM, <http://archives2.getty.edu:8082/xtf/view?docId=ead/940004/940004.xml;query=:;brand=default> (last visited Feb. 17, 2019). Panza's papers are held at the Getty Museum in Los Angeles; see also Eileen Kinsella, *The Guggenheim Gets \$750,000 To Help Answer Knotty, Existential Questions About The Nature Of Conceptual Art*, ARTNET (Aug. 29, 2018), <https://news.artnet.com/art-world/guggenheim-museum-gets-750k-mellon-grant-1339031>. Noting the Guggenheim is undertaking a massive effort to authenticate and document a large portion of the 350 item Panza Collection it now owns.

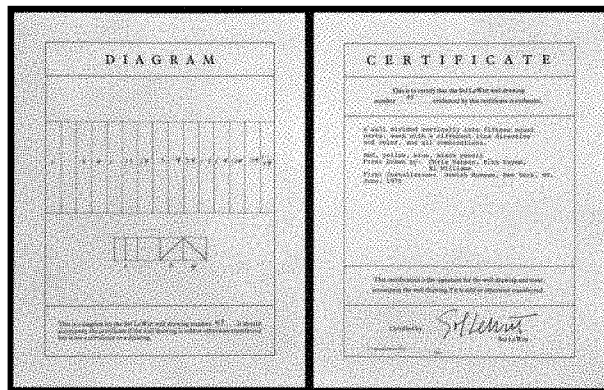
<sup>18</sup> See Martha Buskirk, *Public Experience/Private Authority*, 26 CORNELL J. L. & PUB. POL'Y 469, 473 (2017); MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 35-43 (2003).

<sup>19</sup>*A Wall Divided Vertically into Fifteen Equal Parts, Each with a Different Line Direction and Colour, and All Combinations*, TATE, <http://www.tate.org.uk/art/artworks/lewitt-a-wall-divided-vertically-into-fifteen-equal-parts-each-with-a-different-line-t01766> (last visited Feb. 17, 2019).

<sup>20</sup> See HOGAN & SNOW, *supra* note 16, at 39.

<sup>21</sup> *Wall Drawing #1136*, TATE (Aug. 2004), <https://www.tate.org.uk/art/artworks/lewitt-wall-drawing-1136-ar00165>.

document suffices as a signature for a non-existent work of art that will be based on this certificate that I will claim copyright in upon installation. Enjoy it.” And things get even stranger in another standard clause contained in the diagram stating: “This is a diagram for the Sol LeWitt wall drawing number 49. It should accompany the certificate if the wall drawing is sold or otherwise transferred but is not a certificate or a drawing.”<sup>22</sup> While the certificate and diagram do contain instructions of a sort<sup>23</sup> for installation of the work, they also make quite clear that they are not the actual work.<sup>24</sup> In essence, it says, “Congratulations again. Here are some instructions for installing a not yet extant work. Since I hold the copyright in the certificate and instructions, contact me if you’d like to actually implement them. Maybe we can work something out. Have a nice day.”<sup>25</sup>



<sup>22</sup> *Id.*

<sup>23</sup> I equivocate because LeWitt and other conceptual artists sometimes made or had made working drawings for use by the artisans actually installing a work before they began the project. These drawings might contain more precise indications about how to proceed or reflect the actual dimensions of the wall where the drawing was going to be installed.

<sup>24</sup> A picture of the actual work during a period when it was visible at the Tate Gallery during 2000 may be found in Anna Lovatt, *Ideas in Transmission: LeWitt's Wall Drawings and the Question of Medium*, *TATE PAPERS* (2010), <https://www.tate.org.uk/research/publications/tate-papers/14/ideas-in-transmission-lewitt-wall-drawings-and-the-question-of-medium>.

<sup>25</sup> This is me chatting. I certainly am not suggesting that this sort of language was used by LeWitt. From the many people I have talked to in the course of writing this project, it appears he was known as a nice person who routinely helped other artists.

It is obvious that the meanings of these clauses are puzzling at best and totally obscure at worst, at least for most people. Why should anyone want to buy such a non-existent thing? While the certificate guarantees the authenticity of the work, that authenticity seems to refer directly only to the certificate and its accompanying diagram. There certainly is no guarantee that Wall Drawing #49 actually existed when the certificate was drafted; quite the contrary. All that appeared to be required was that the certificate and diagram switched hands when they were transferred. Neither sentence clearly says anything about the authenticity or ownership of an installed version of the wall drawing or about the process required for arranging installation.<sup>26</sup> It is clear from the standardized nature of the documents, however, that Sol LeWitt (and later his estate after his death in 2007) held the copyright in the certificate and diagram for Wall Drawing #49, as well as for Wall Drawing #679 at the Stern manse. There is no doubt that LeWitt gave approval to install the latter drawing in Houston in 1991.<sup>27</sup>

And the narrative becomes even more perplexing. It should be clear by now that this sort of artistic genre is not easily encompassed within traditional concepts of property or copyright law. Though contemporary property theorists typically think of real or personal property law as a set of relational rules about things or intangible products based on personal preferences, organizational intentions, exercise of political or social power, or societal needs,<sup>28</sup>

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<sup>26</sup> A similar method of transferring conceptual art was used by Felix Gonzalez-Torres, well known for placing stacks of various items on the floor of a museum or gallery and inviting viewers to take them. The objects included sheets of paper with sometimes cryptic phrases on them or wrapped candies intended to be opened and eaten. The stacks were supplemented as they were reduced in size. See Joan Kee, *Felix Gonzalez-Torres on Contracts*, 26 CORNELL J.L. & PUB. POL'Y 517, 418 (2017); see also Gregory S. Alexander, *Objects of Art: Objects of Property*, 26 CORNELL J.L. & PUB. POL'Y 461, 461 (2017) (discussing ways in which such transactions conflict with traditional notions of contract and property law).

<sup>27</sup> See Tyler Rudick, *Houston Architect's Towering Sol Lewitt Installation is a Piece of American Art History*, CULTURE MAP (Nov. 11, 2012, 4:16 PM), <http://houston.culturemap.com/news/home-design/11-09-12-20-57-houston-architect-opens-his-home-to-share-a-piece-of-american-art-history/> (discussing much of the story of the work's installation).

<sup>28</sup> See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 325 (1980) (discussing the idea of property as relational); see also Morris R. Cohen,

LeWitt described his work as simply ideational and totally non-physical.<sup>29</sup> The “work,” if you will, was the concept embedded in the instruction set used later to make it sensate. Copyright law is certainly thought of as “intellectual” property, but it is not solely ideational. Indeed, ideas are not copyrightable at all.<sup>30</sup> Only original creations fixed in a “tangible medium of expression” are protected.<sup>31</sup> If LeWitt just crafted *ideas* to be executed by others, he could claim nothing under copyright law. But it is likely that LeWitt’s formulation of “idea” was quite distinct from its use in copyright law. LeWitt thought of his creations as more like a blueprint—a plan of action—rather than a completed project. And blueprints in the world of architecture are copyrightable as graphic works if original.<sup>32</sup> Copyright law uses “idea” to connote something so basic to human communication, discourse, and thoughtfulness that it should not be surrounded with property like protections. To allow anyone to own an idea, the thinking goes, would undermine social and political discourse in destructive ways. That is why copyright is said to cover expression of ideas rather than ideas themselves. The expression, if original, may be subject to protection; the underlying idea will not.<sup>33</sup>

But even if one of LeWitt’s diagrams, together with its certificate, is expressive—and original—enough in copyright terms to justify the award of legal protection, that prize extends to LeWitt or

*Property and Sovereignty*, 13 CORNELL L. REV. 8, 8 (1927) (discussing and confirming the declaration that property is about power).

<sup>29</sup> See Sol LeWitt, *Paragraphs on Conceptual Art*, 5 ARTFORUM No. 10 (June 1967), [https://www.corner-college.com/udb/cproVozeFxParagraphs\\_on\\_Conceptual\\_Art\\_Sol\\_leWitt.pdf](https://www.corner-college.com/udb/cproVozeFxParagraphs_on_Conceptual_Art_Sol_leWitt.pdf).

<sup>30</sup> See 17 U.S.C. § 102(b) (2018).

<sup>31</sup> 17 U.S.C. § 102(a) (2018); *Baker v. Selden*, 101 U.S. 99, 99 (1897). The idea/expression dichotomy is one of the most ineffable in copyright law. Problem examples are legion. What, for example, is John Cage’s 4’33”—a “musical” composition consisting of silence “emanating” from one or more musicians for four minutes and thirty-three seconds? Is it ideational or expressive? Or is there a difference between a blank canvas purchased by an artist at an art supply store and that same object hung on the wall of a museum and entitled “Blank Canvas #1 in Ecrú?”.

<sup>32</sup> See 17 U.S.C. § 101 (2018) (defining “pictorial, graphic, sculptural work” to include “architectural plans”).

<sup>33</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 239 (1903); see also *Baker v. Selden*, 101 U.S. 99, 99 (1879); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 119 (2d Cir. 1930).

his successor in interest for a wall drawing or three-dimensional structure executed by others only if the visible version is deemed a “copy” or a “derivative work” of the instruction set.<sup>34</sup> Not surprisingly, copyright holders have the right to control the making of copies of their works or the derivative reuse of significant portions of their work.<sup>35</sup> Since installed drawings typically are not duplicates of a certificate and a diagram, they are not copies but derivative works—expressive items that, in the language of the statute, are based on the original but have “recast, transformed, or adapted” it.<sup>36</sup> Copyright owners—such as LeWitt as the holder of the intellectual property interests in certificates and diagrams—retained the exclusive right to license the making of such derivative works. But those crafting the derived creation of an installed drawing with permission hold another copyright in the new material they added to the original.

This division of authority between the “owner” of a certificate and diagram, the “owner” of the copyright in the certificate and diagram, and the “owner” of the new material in the installed diagram can create some deceptively strange results. On its face, the copyright statute makes a firm distinction between ownership of a physical copy of a work and ownership of the copyright in the work. The former involves control over a physical copy of a work; the latter speaks to control over the non-physical, intellectual property rights in a work. 17 U.S.C. § 202 provides:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is

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<sup>34</sup> See 17 U.S.C. § 101 (2018) (“Copies are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed . . . . A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”).

<sup>35</sup> See 17 U.S.C. § 106 (2018).

<sup>36</sup> 17 U.S.C. § 101 (2018).



embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.<sup>37</sup>

Accordingly, when an artist creates a *traditional* two-dimensional work on canvas and sells it, ownership of the “material object”—the painting in this traditional setting—passes to the buyer. The artist loses her right to control sale or other disposition of the object.<sup>38</sup> Ownership of the copyright in the painting, however, is retained by the artist in the absence of a second contract transferring some or all of the intellectual property rights to the purchaser.<sup>39</sup> The physical and intellectual interests in the work are split in two. In addition, the owner of the copyright in a pictorial, graphic, or sculptural work has the exclusive right “to display the work publicly.”<sup>40</sup> That right, however, is subject to an important exception allowing “the owner of a particular copy lawfully made under this title . . . to display that copy publicly . . . to viewers present at the place where the copy is located.”<sup>41</sup> This works as expected with a standard, traditionally made, two or three-dimensional work of art. The owner of the physical copy may display it where it is kept or on loan but may not make copies of it and sell them.

Do these rules work as many art lovers expect in the case of a conceptual art work by LeWitt, Flavin, Judd or any other similarly creative soul? What were the consequences of Sol LeWitt transferring to William Stern the tactile certificate and diagram associated with Wall Drawing #679 in the early 1990s? Under Section 202,

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<sup>37</sup> 17 U.S.C. § 202 (2018).

<sup>38</sup> See 17 U.S.C. § 109 (2018) (“[T]he owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy[.]” This is commonly known as the “first sale” rule).

<sup>39</sup> Transfers of exclusive rights in a copyright require a writing. See 17 U.S.C. § 204 (2018).

<sup>40</sup> 17 U.S.C. § 106(5) (2018).

<sup>41</sup> 17 U.S.C. § 109(c) (2018).

Stern owned the physical pieces of paper—the certificate and diagram—but not the copyright in either of them.<sup>42</sup> If a copyright existed it was retained by LeWitt. As with the documentation for The Tate Modern’s Wall Drawing #49 displayed earlier,<sup>43</sup> there surely is a copyright notice in LeWitt’s name on the certificates he commonly used. And the diagram noted that it must accompany the certificate; the two documents were tightly linked together. Neither the certificate nor the diagram, according to the express provisions they contained, was a “wall drawing.” That item may not have actually existed at the time the certificate and diagram were transferred to Stern.<sup>44</sup> There could not be a copyright in such a drawing until it was placed on a wall; perhaps it was only a hope and a prayer at the point of transfer. Since copyright subsists only in “original works of authorship fixed in any tangible medium of expression,”<sup>45</sup> no intellectual property rights could exist in a wall drawing when only the certificate and diagram were conveyed. And a copyright may exist in the certificate and diagram only if together they constitute “original expression.”<sup>46</sup>

“Ownership” of a LeWitt work purchased from the artist, therefore, did not mean that a wall drawing could be displayed solely at the behest of the owner of the certificate and diagram at the place where the certificate and diagram were located. The certificate and diagram could be displayed by the owner of the pieces of paper at the place they were located, but permission of the artist or the artist’s successor copyright owner was required before a wall drawing could be installed in accordance with the instructions in and copy-

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<sup>42</sup> The presence of a copyright notice on the certificate does not alter this conclusion; it only confirms it. And if the certificate and diagram are considered part of the same copyrightable entity the single notice suffices for both. Notice is no longer required to create a copyright in the United States. It may change certain remedies if present.

<sup>43</sup> See *supra* p. 5 (the certificate).

<sup>44</sup> See *supra* note 7. Since those installing the drawing in Stern’s home—Patricia Phillips and Rebecca Schwab—are listed on the certificate it is possible that the documentation and drawing were crafted in the same time frame.

<sup>45</sup> 17 U.S.C. § 102 (2018).

<sup>46</sup> Since the originality hurdle is quite low, this usually is not a problem with conceptual art works like those of LeWitt. See 17 U.S.C. § 102 (2018); see generally *Burow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

right ownership of a certificate and diagram. This may strike many as out of sync with the expectations of those drafting the copyright code. But in the LeWitt setting the “owner” of the “wall drawing” evidenced only by possession of the certificate and diagram did not obtain an automatic right to display an actual wall drawing. It was not “located” anywhere at any particular moment; it didn’t exist until it was installed. It also would be perfectly legitimate that versions of a wall drawing could be installed in various places over time, provided that permissions were obtained. While we might expect that the owner of a certificate and diagram had the right to install and display the wall drawing at the place where the certificate and diagram were kept, that right was only a hope and a prayer that arrangements could successfully be made with LeWitt (or now LeWitt’s estate) to have it installed. If a wall drawing is installed today without permission of the estate, it is not a “LeWitt;” it is just some random marks on a wall, or an infringement of a copyright held by LeWitt or the LeWitt Estate in the certificate and diagram!

Indeed, the possibility that those random marks on a wall made without permission of LeWitt or of the LeWitt Estate may be an infringement should be taken seriously. The certificate and diagram for Wall Drawing #49 printed above,<sup>47</sup> for example, are owned by their possessor, The Tate Modern in London, and they may be displayed there. But if The Tate hired an artisan on its own this year to install the drawing on a wall without the permission of the LeWitt Estate, the museum would most likely be authorizing the making of a derivative work of the certificate and diagram for that work and displaying it publicly without permission of the copyright owner.<sup>48</sup> Today the installation of a wall drawing typically is done not only with the permission of the LeWitt Estate, but also with artisans authorized by the estate to do the work.<sup>49</sup> While LeWitt was alive he

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<sup>47</sup> See *supra* p. 5.

<sup>48</sup> An installation is almost surely a “derivative work.” See 17 U.S.C. § 101 and accompanying text. It typically does not look at all like an enlarged version of the diagram, but surely is derived from it.

<sup>49</sup> See E-mail from Steven Henry, Paula Cooper Gallery, to Richard Chused (July 9, 2018) (on file with author). In some cases volunteers help out. The most recent example I know of was at the Yale Art Museum’s installation of Wall Drawing #1180. See a brief video and explanation at Yale (@Yale), INSTAGRAM, <https://www.instagram.com/p/Bc8AgT8lGaF/?hl=en> (last visited Feb. 17, 2019). But note that it was overseen by John Hogan, Installation Director and Archivist,

apparently sought out those who originally installed a drawing to rejuvenate it every ten to twenty years if it was on display for a long time.<sup>50</sup> As a practical matter, therefore, the right to make a copy or derivative work by installation resides not only with the owner of the physical pieces of paper labeled as a certificate and a diagram but also with the holder of the copyright in those items—now the LeWitt Estate. Since the possessor of the documents has monopoly-like control over access to them, the wall drawing may not be installed without cooperation of the owner of the papers. That possessory interest in the certificate and diagram is therefore valuable—quite valuable in the case of someone as well known as LeWitt. Without it the work may become virtually worthless—unauthentic as a practical matter.<sup>51</sup> But the owner of the certificate and diagram has a property like “future interest” only in the potentiality of the actual wall drawing. The owner of the certificate and diagram needs permission of the copyright owner in the certificate and diagram to actually execute a wall drawing.<sup>52</sup> While the Tate, as possessor of the certificate and diagram for #49, may prohibit a party desiring to do an installation simply because it controls access to the documents, the museum itself may not claim to have created a LeWitt wall drawing if they install it on their own. Instead they would be violating the rights of the very person (or successor) whose work they own. We have come full circle. “Owning” a LeWitt means only that you have the unique “right” to seek per-

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Sol LeWitt Archive, Yale University Art Gallery. *See id.* The huge MASS MoCA exhibition of LeWitt wall drawings was installed over a six-month period by a team of twenty-two people—some long-time installers and others from local art schools. *See also* SOL LEWITT, *supra* note 16.

<sup>50</sup> *See From Fruit to Frozen Blood—7 Issues in the Conservation of Contemporary Art*, CHRISTIE'S (May 25, 2015), <https://www.christies.com/features/From-fruit-to-frozen-blood-7-tricky-issues-in-the-conservation-of-Contemporary-Art-6123-1.aspx>.

<sup>51</sup> *See* Steinkamp v. Hoffman, No. 0651770, 2012 WL 1941149 (N.Y. Sup. Ct. May 22, 2012). Allegations that a gallery lost a LeWitt certificate and diagram for Wall Drawing #448 led to a lawsuit in 2012. The case never went to trial; it apparently was settled. *See* Dr. Derek Fincham, *How Law Defines Art*, 14 J. MARSHALL REV. INTELL. PROP. L. 314, 322 (2015). It is apparently common for those purchasing a LeWitt to leave the papers in the custody of a gallery for safekeeping. That process apparently went awry here.

<sup>52</sup> As far as I know neither LeWitt nor his estate has simply refused to allow the holder of a certificate and diagram to undertake an installation under any circumstance. That would create intriguing litigation prospects.

mission from the LeWitt Estate to install it. The “deal,” as it were, requires a three-party arrangement between the owner of the certificate and diagram, the LeWitt Estate, and the individual or individuals actually crafting its installation. And, nothing will happen without the expenditure of funds by the owner of the certificate and diagram to arrange and pay for a space to install the work and to pay the fees of the artisans doing the work.

That is born out in reality at some museum websites. The Dia Foundation that runs the renowned Dia:Beacon Museum of contemporary art north of New York City owns several LeWitt certificates and diagrams. The web pages displaying images of the pieces as drawn on walls at the museum are always accompanied by a copyright notice in the name of “The LeWitt Estate, Artists Rights Society, New York,” along with statements that the works (that is, the certificates and diagrams) were obtained as gifts from the artist. The Museum of Modern Art site is similar. Comparable practices have been described to me by various museum and gallery officials.<sup>53</sup> The web site of MASS MoCA (Massachusetts Museum of Contemporary Art), an equally renowned museum of contemporary art, is strangely silent about the copyright status of works now on display in a huge exhibition of LeWitt wall drawings installed over a decade ago.<sup>54</sup>

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<sup>53</sup> Telephone Conversation with Steven Henry, Senior Director at the Paula Cooper Gallery in New York City, an agent for Sol LeWitt’s estate (July 2, 2018).

<sup>54</sup> See, e.g., *Wall Drawing #411B*, DIA, <https://www.diaart.org/collection/collection/lewitt-sol-wall-drawing-411b-isometric-figure-with-progressively-darker-gradations-of-gray-ink-wash-on-each-plane-1984-2003-169/keyword/lewitt#> (last visited Feb. 17, 2019); see also *Wall Drawing #1085*, DIA <https://www.diaart.org/collection/collection/lewitt-sol-wall-drawing-1085-drawing-seriescomposite-part-iiiv-124-ab-1968-1968-2003-168/keyword/lewitt> (last visited Feb. 17, 2019); see also *Wall Drawing #411D*, DIA <https://www.diaart.org/collection/collection/lewitt-sol-wall-drawing-411d-isometric-figure-with-progressively-darker-gradations-of-gray-ink-wash-on-each-plane-1984-2003-170/keyword/lewitt> (last visited Feb. 17, 2019); *Wall Drawing 411E*, DIA, <https://www.diaart.org/collection/collection/lewitt-sol-wall-drawing-411e-isometric-figure-with-progressively-darker-gradations-of-gray-ink-wash-on-each-plane-2003-2003-171/keyword/lewitt>, (last visited Feb. 17, 2019); see, e.g. *Wall Drawing #260*, MOMA <https://www.moma.org/calendar/exhibitions/305>, (last visited Feb. 17, 2019). The status of the wall drawings on display at MASS MoCA is left open. The owners of the works are provided, but there are no copyright notices. See *Sol Lewitt: A Wall Drawing Retrospective*, MOCa <https://MASSMoCA.org/sol-lewitt/> (last visited Feb. 17, 2019).

Needless to say, the division of legal authority between owners of certificates and diagrams on the one hand and owners of copyrights in them on the other has led to some major controversies. Lack of documentation or confusing phraseology in their terms, especially early in the history of this genre of work, has led to problems. A number of them involving works by Carl Andre, Donald Judd, and Dan Flavin, among others, are well documented in Martha Buskirk's important volume on the history and culture of such artists—*THE CONTINGENT OBJECT OF CONTEMPORARY ART*<sup>55</sup>—published in 2003. Many involved pieces in the large conceptual art collection of Giuseppe Panza. His efforts to control installation of works or fabricate them on his own initiative, sometimes in cases lacking any documentation, led to conflicts with living artists. It is not surprising, therefore, that documents such as those used by LeWitt emerged in this artistic arena.<sup>56</sup>

## B. REFINING AUTHORSHIP OF CONCEPTUAL ART

Exposition of the property and copyright conundrums is not yet complete. The legal structure has additional complexities! As previously noted, LeWitt and other conceptual artists did not typically intend to install their own creations. Rather, the instructions in the certificate and diagram were to be used by those bringing the conceptual art work to fruition. LeWitt's initial forays into this realm involved three-dimensional "structures." He first exhibited them at the Daniels Gallery in New York in 1965.<sup>57</sup> Three years later he began to exhibit two-dimensional "wall drawings." While LeWitt

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<sup>55</sup> See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 21-56 (2003).

<sup>56</sup> See Zoë Lescaze, *How Does a Museum Buy an Artwork That Doesn't Physically Exist?*, *THE NEW YORK TIMES* (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/t-magazine/tino-sehgal-hirshhorn-museum-art.html> (some still do not seem to grasp, or perhaps to care about, the complexities of the copyright issues at stake in this sort of genre. The Hirshhorn Museum and Sculpture Garden recently purchased a Tono Sehgal performance art work lacking any documentation at all. Ah, what will the future hold?).

<sup>57</sup> See NICHOLAS BAUME, *RELATED TO STRUCTURES 15* (Nicholas Baume ed., 2011). This book contains essays and images related to the Public Art Fund's large retrospective installation of a number of structures in City Hall Park in New York in 2008.

personally rendered his first wall drawing, shown at the Paula Cooper Gallery, in 1968,<sup>58</sup> he relegated that task to others in subsequent exhibitions.<sup>59</sup> He did not use traditional labels such as “sculpture” or “painting” to describe his works; they, like the works of other conceptual artists, often were in a separate class not intended to be permanent or immutable compositions. Some were made on multiple occasions; others were never installed before his death in 2007; some in collections were installed many years ago and are still extant; and still others were installed on multiple occasions in different locations on different sized walls and therefore with varying proportions. Something quite different from traditional notions of fine art is undoubtedly on the table here. LeWitt<sup>60</sup> made that clear in a famous essay, *Paragraphs on Conceptual Art*:

In conceptual art the idea of 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. This kind of art is not theoretical or illustrative of theories; it is intuitive, it is involved with all types of mental process and it is purposeless. It is usually free from the dependence on the skill of the artist as a craftsman. It is the objective of the artist who is concerned with conceptual art to make his work mentally interesting to the spectator, and therefore usually he would want

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<sup>58</sup> See *Hypnotic Nature Of Sol LeWitt Wall Drawings*, IDEELART BLOG (May 24, 2016), <https://www.ideelart.com/magazine/sol-lewitt-wall-drawings>. When asked by Paula Cooper, owner of the fledgling gallery where the first wall drawing was installed in 1968, what to do with the installation when the exhibition was over, LeWitt reportedly told her, “Just paint it out.”

<sup>59</sup> See HOGAN & SNOW *supra* note 16, at 39. This process began with Wall Drawing #3 in 1969.

<sup>60</sup> *Sol LeWitt Wall Drawings*, ARTIFEX PRESS, <https://artifexpress.com/catalogues/sol-lewitt-wall-drawings/description> (last visited Feb. 17, 2019). The most important catalog of LeWitt drawings. Images from that catalog are available at Barbara Krakow Gallery. See also *Sol LeWitt Prints Catalogue Raisonné 1947–2006*, SOL LEWITT PRINTS, <https://www.sollewisprints.org/introduction> (last visited Feb. 17, 2019).

it to become emotionally dry. There is no reason to suppose, however, that the conceptual artist is out to bore the viewer. It is only the expectation of an emotional kick, to which one conditioned to expressionist art is accustomed, that would deter the viewer from perceiving this art.<sup>61</sup>

Each artisan struggling to execute one of his works was, in LeWitt's words, a "machine that makes the art."<sup>62</sup> Since the execution of a project was "a perfunctory affair" in the language of LeWitt, there was no particular reason why he should personally bring it to life. As noted, he rarely did. But despite the "machine" and "perfunctory affair" language in his essay, it was and is often difficult to implement LeWitt's instructions. While some of his diagrams are quite precise,<sup>63</sup> others leave an enormous amount of discretion in the hands of the "installers" who draw or construct the works.<sup>64</sup> And even the most precise creations require the artisans installing them to make an array of aesthetic and technical judgments as they work. One of the largest installations of his wall drawings now on display is at MASS MoCA in North Adams Massachusetts. The museum has posted online images of the works, along with descriptions of the instructions, though neither the actual certificates and diagrams, nor any working drawings made to aid in the installations are online.<sup>65</sup> For example, installing the diagram

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<sup>61</sup> SOL LEWITT, PARAGRAPHS ON CONCEPTUAL ART 166 (Alicia Legg ed., 1978).

<sup>62</sup> LE CORBUSIER, TOWARDS A NEW ARCHITECTURE 107 (1986). This notion mirrors a similar aesthetic statement made by Le Corbusier: "The house is a machine for living in." The notion has often been applied to his famous house, Villa Savoye, completed in 1929.

<sup>63</sup> See, e.g., *Wall Drawing #337 and Wall Drawing #338 1977*, THE ART GALLERY NSW <https://www.artgallery.nsw.gov.au/resources/exhibition-kits/sol-lewitt/focus-works/> (last visited Feb. 17, 2019); see also *Wall Drawing #564*, ART OBSERVED <http://artobserved.com/2013/09/new-york-sol-lewitt-at-the-paula-cooper-gallery-through-october-12-2013/> (last visited Feb 17, 2019); *Wall Drawing #366*, COMPUTATION FOR CREATIVE PRACTICES <http://cmuems.com/2015b/drawing-machines/> (last visited Feb. 17, 2019).

<sup>64</sup> See, e.g., *Wall Drawing #70*, THE PRINTED MATTER, <https://www.printedmatter.org/catalog/tables/623/37864> (last visited Feb 17, 2019); see also *Wall Drawing #91*, YALE UNIVERSITY ART GALLERY <https://artgallery.yale.edu/collections/objects/179947> (last visited Feb 17, 2019).

<sup>65</sup> See *Wall Drawing 1180*, MASS MOCA, <https://massmoca.org/event/wall->



for Wall Drawing #1180 is described as requiring a person using a marker, “within a four-meter (160”) circle, [to] draw 10,000 black straight lines and 10,000 black not straight lines. All lines are randomly spaced and equally distributed.”<sup>66</sup> Those executing the drawing had to make “mundane” decisions about which markers to use, where to place each of the 20,000 lines, and how hard to press on the marker, as well as ineffable judgments about the meaning of “randomly spaced” and “equally distributed.” The best any conceptual artist like LeWitt could hope for was that those bringing the work to life did do so “correctly,” that the process was capable of execution by human persistence and patience, and that the end result was of interest to viewers. Indeed, we learn from the MASS MoCA posting that Wall Drawing #1180 was executed incorrectly in its first incarnation in Beirut.<sup>67</sup> In short, creating a LeWitt work is based on a hope that it is possible and a prayer that the artisans are capable of bringing the underlying concept to fruition.<sup>68</sup>

The notion that LeWitt’s instructions were always so precise that his ingenuity was the only creative element at work is therefore false. Indeed, LeWitt himself said as much in a 1971 essay entitled *Doing Wall Drawings* that he penned three years after writing *Paragraphs on Conceptual Art*. In this essay he was candid about the potentially extensive roles the artisans installing his works may play. Among other things he said:

There are decisions which the draftsman makes,  
within the plan, as part of the plan. Each individu-

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drawing-1180/ (last visited Feb. 4, 2019). Though not referenced to a LeWitt certificate, the website quotation reads very much like the language of a number of other certificates I have read.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* The certificate and diagram for Wall Drawing #1180 was most recently installed at the gallery Yale University Art Gallery. *See also LeWitt Wall Drawings: Expanding a Legacy*, THE YALE UNIVERSITY ART GALLERY, <https://artgallery.yale.edu/exhibitions/exhibition/sol-lewitt-wall-drawings-expanding-legacy>; *see also* Yale Art Gallery (@yaleartgallery), INSTAGRAM, <https://www.instagram.com/p/Bcw6h0aHTH1/>. It is fascinating that the page with the video invites guests to come to the museum to participate in the process.

<sup>68</sup> *See* Hogan & Snow, *supra* note 61, at 72-73, 94, 126-129. Instructions for other LeWitt wall drawings are available in Legg.

Diagrams for many of the works also are available online simply by performing an image search for “LeWitt diagram.”

al being unique, given the same instructions would carry them out differently. He would understand them differently. The artist must allow various interpretations of his plan. The draftsman perceives the artist's plan, then reorders it to his own experience and understanding. The draftsman's contributions are unforeseen by the artist, even if he, the artist, is the draftsman. Even if the same draftsman followed the same plan twice, there would be two different works of art. No one can do the same thing twice. The artist and the draftsman become collaborators in making the art.<sup>69</sup>

Flesh was put on *Doing Wall Drawings* in an interview of John Vogt and Loren Smith by Julie Caniglia at the Walker Art Gallery in Minneapolis.<sup>70</sup> Vogt and Smith worked on LeWitt projects at the Walker with Sachi Cho and Chip Allen, two frequent LeWitt artisans. They commented on the care, time, intense concentration, discretion, and complexity involved in completing an installation. At one point, Smith comments about her role in doing the work:

So much of what LeWitt was after was not the finished piece, but the concept of the piece. So looking at these pictures of us working, seeing his concept for a wall drawing being carried out, is in some ways closer to his intention. Chip has worked on hundreds of these pieces, and he said that the instructions are really the art—and the act of carrying them out. Apparently LeWitt never actually saw all results of all of his instructions carried out. And he knew people could do them in their own homes, or on a wall anywhere – they just wouldn't have the original instructions.

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In his earlier work, LeWitt was more into man-on-

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<sup>69</sup> Sol LeWitt, *Doing Wall Drawings*, 3 (ARTNOW:NEW YORK 1971).

<sup>70</sup> See Julie Caniglia, "Peace or Misery": *The Making of a Sol LeWitt Wall Drawing*, WALKER ART CENTER (Mar. 15, 2011), <https://walkerart.org/magazine/peace-or-misery>.

the-street instructions—things anybody could do—but over time, the nature of work changed. He began to make pieces that on some level would be affected by the personality of the person making them, so he wanted those people to have training in how to carry out the instructions. The kind of patience and dedication required to make this work isn't something that everyone has. So in some sense it's how he's made personality a factor in his later work.

If the process of installing a LeWitt wall drawing is often laden with significant discretion in the hands and minds of the artisans executing a work, who then is the author of the completed work for copyright purposes? Was it LeWitt in the past? Is it the LeWitt Estate now? And what of the artisans? Could a combination of actors hold these rights? Unraveling this is critically important. The term of copyright protection, the ability to assign rights in a work, the right to terminate assignments of copyright interests, and the right to claim moral rights in a work,<sup>71</sup> as well as other major features of copyright law, all are related to the concept of “author” or an author's successors. Further discussion of these issues follows.

### C. DECIDING AUTHORSHIP

Resolving authorship in a setting like a wall drawing depends on two critically important aspects of copyright law—the nature of a derivative work and the ways in which authorship of a work may be divided among various actors. First, recall the statutory directive that the creator of a derivative work obtains a copyright only in the new material added to the preexisting, original creation upon which the derivative work is based.<sup>72</sup> When, for example, a playwright authors a script based on a novel the scope of legal protection provided the play is limited to the new material added by the writer. Protection of the novel remains in the hands of the original author in the absence of a transfer of the copyright. As a result, creation of a derivative work is dependent on obtaining permission from the par-

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<sup>71</sup> See 17 U.S.C. § 106A, 113(d) (1990).

<sup>72</sup> See 17 U.S.C. § 103(b) (1976).

ty holding copyright in the original work. Dramatization of a novel requires use of the novel; permission to do that must be obtained before writing the play. And similarly, making a copy of a work, rather than doing something derivative, also requires permission. In the case of a LeWitt, the present installation of a wall drawing—likely a derivative work—requires the permission of his estate.

Second, who is the author when execution of a work is divided among various actors? The word “author” is not defined in the copyright statute. The courts have attempted to place some rules around the word, but exactitude is not always in the offing. The party creating a wall drawing certificate and diagram—LeWitt in our setting—was the author and owner of the copyright in those documents when they were produced, assuming that the expression they contained was original. Permission of that soul was a prerequisite for an installation project to go forward. What about the status of the artisans? Were they the creators of any new original expression in the derivative contents of a wall drawing? Did they hold an interest in the new material they added to the original underlying work? In general, if a person exercises significant direction and control over an installation, that individual would be treated as the author of the new material added during the installation.<sup>73</sup>

It is unlikely, however, that LeWitt or his estate fulfilled that direction and control requirement in many of the settings in which his works have been installed. The installers usually controlled the way they carried out their work. As noted, LeWitt only installed his first wall drawing.<sup>74</sup> While LeWitt was alive, he would be consulted about the installation of one of his creations. He was, after all, the copyright owner; his permission was required. His role may sometimes have gone beyond consultation. Before a work was installed in a particular location, working drawings that contained measurements of the space to be occupied by the drawing, color indications, or other basic features of the work that installers would need to do a competent job, often were made. That was the case with respect to Wall Drawing #679 installed in Stern’s home,

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<sup>73</sup> See *Erikson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7<sup>th</sup> Cir. 1994); *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9<sup>th</sup> Cir. 1999).

<sup>74</sup> See *HYPNOTIC NATURE OF SOL LEWITT WALL DRAWINGS*, *supra* note 58.

though it is not clear who made the drawings.<sup>75</sup> Two working drawings were made before the installation, apparently with different color arrangements.<sup>76</sup> They are now held by the Menil Collection as successors to the estate of William Stern. The more precisely defined the project, the more likely it was that the finished project would approximate the diagram and working drawings in appearance. The size of the actual wall drawing would be significantly larger than any of the previously created documents. Some other details also might change. If the enlargement simply required a rote use of measuring devices on a wall, the artisans may not have created enough new material worthy of separate copyright protection as original content of a derivative product.<sup>77</sup> LeWitt would be deemed the primary controlling actor in the drama and therefore the sole author. But this conclusion is hardly preordained and is usually inaccurate. Originality is a vague concept in copyright law. And creative talent can be an integral part of the calculus. If the enlargement involved not just rote use of measuring devices, but also a special degree of care in their use and the ability to carefully implement and attractively fabricate the work, then a derivative work and its new copyright likely resulted.<sup>78</sup> For works that were not precise, such as Wall Drawing #1180 described above,<sup>79</sup> it was impossible for LeWitt to tell those installing the actual wall drawing how to proceed, except in the most general terms. In that case, it would be virtually certain that the artisans held an interest in the new material added when they created the derivative work—the installed version of Wall Drawing #1180.

After LeWitt's death in 2007, can his estate ever claim to be

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<sup>75</sup> See Telephone Interview with Aaron Parazette, Associate Professor, University of Houston (Oct. 22, 2018) (indicating that they were made by persons unknown at his studio).

<sup>76</sup> See *id.*

<sup>77</sup> See, e.g., *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1267 (10th Cir. 2008) (explaining that the produced work must sufficiently deviate from the original in order to qualify for copyright protection).

<sup>78</sup> See *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959). *Alva v. Winninger* is regarded as one of the most famous cases on this point. It involved the hand crafting of a copy of Rodin's famous *Hand of God* sculpture. The court concluded that the creative energy underlying the careful the making of the copy justified awarding it protection, even though the goal was to make it look as much like the original as possible.

<sup>79</sup> See *infra* p. 19.

the sole author of an installation? The installation must be done with the estate's permission, but LeWitt is no longer around to create or give instructions for making working drawings for installation at a particular site. The best that can be done is to seek out previously executed working drawings in those cases where the works were installed at earlier times. Those drawings typically survived their use in assisting an installation. Many are held by the LeWitt Estate; others are housed in institutions all over the world where drawings were installed.<sup>80</sup> It is possible that installers executing a LeWitt project today are merely rote copiers of extant certificates, diagrams, and working drawings, but that is even less likely now than before LeWitt's death in 2007 when he was available to oversee the crafting of new working drawings for each site. Once artisans and installers become involved in making new working drawings for a new site, the ownership outcome may change as well.

The only other way in which installers or project supervisors might be thought of as extensions of LeWitt or his estate was if the artisans were employees.<sup>81</sup> While "a work prepared by an employee within the scope of his or her employment" is deemed to be authored by the employer,<sup>82</sup> those installing LeWitt's works during his life were not his employees, but independent contractors paid for each project.<sup>83</sup> That still is the case. They may be well trained

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<sup>80</sup> See Telephone Interview with John Lavertu, LeWitt Collection Assistant Registrar, (Sep. 4, 2018).

<sup>81</sup> See 17 U.S.C. § 101 (2018). The second part of the definition of a work made for hire dealing with commissioned works doesn't apply here; its coverage is limited to distinct classes of works. It is also theoretically possible that LeWitt and the artisans each held ownership as a joint author. The statute allows such joint ownership when two or more people prepare a work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." See *id.* Only if LeWitt himself worked closely with the artisans, either in preparing them for the work or onsite, would this apply. But if it did, then *all* the participants would have authorial rights. It is more likely in this artistic setting that LeWitt directed that certain steps be taken during the installation and the artisans carried them out. In that case, LeWitt *might* have been the only author.

<sup>82</sup> 17 U.S.C. § 101 (2018). (Statute includes definition of work for hire); see generally *Community for Creative Non-Violence v. Reed*, 490 U.S. 730 (1989).

<sup>83</sup> Email from Steven Henry, Agent for the Paul Cooper Gallery, to Richard Chused (Aug. 31, 2018) (on file with author). There are Estate trained drafters who are responsible for executing the work; they are typically assisted by locally sourced artists or art students. None of the drafters are employees of the Estate; they are independent contractors who are paid by the day. All the costs of installa-

by people associated in some way with the estate, but that does not automatically change the ownership situation. And once on site they use their own judgment and intuition when installing a drawing. It is, therefore, quite possible that artisans, perhaps as joint authors among themselves,<sup>84</sup> hold a copyright interest in wall drawings installed before and after LeWitt's death. Unless they acted in a rote "copy-cat" role, the material they added to LeWitt's extant directions was created with permission of the copyright owner and was original in ways not completely anticipated by the original concept. That is, they owned rights in a derivative work.

#### D. OWNERSHIP PATTERNS IN WALL DRAWING #679 AFTER THE DEATH OF STERN

After riding this copyright merry-go-round, the status of the wall drawing in the Stern house when it was sold to Georgia Hitchcock may best be described as ambiguous. When it was first installed, all required permissions were in place. The copyrights in the certificate and diagram were held by LeWitt. Stern owned the physically tangible certificate and diagram, as well as the physical location of the drawing—his house—and the physical aspect of the marks on the wall of the house after they were in place. Once the wall drawing was installed, its copyright was held by LeWitt, or at least that is what those involved in the kerfuffle over the drawing have assumed.<sup>85</sup> But as noted, the installed composition may be a derivative work of the diagram, certificate, and working drawings, and the copyright in the new material in the drawing might have been held by the installers—Patricia Phillips and Rebecca Schwab. In many cases, those making the first installation are listed on the certificate. That was true for Wall Drawing #679, but not for Wall Drawing #49.<sup>86</sup> While it is clear that that a working drawing used to

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tion—labor, materials, any equipment like scaffolding or ladders—are the responsibility of the purchaser or owner of the wall drawing.

<sup>84</sup> See *supra* note 81 and accompanying text.

<sup>85</sup> Wall Drawing 274, <https://massmoca.org/event/walldrawing274/>, (last visited Feb. 17, 2019).

<sup>86</sup> See E-mail from David Aylsworth to Richard Chused (Aug. 28, 2018) (on file with author) (The installers' names for #679 from David Aylsworth at The Menil Collection. The certificate for #49, displayed above at p. 8, only lists the place of the first installation—the Jewish Museum in New York.).

craft the installation was in the house while the work progressed and that it was a much smaller version of the work with the same color scheme used in the final version, the scope of differences between that document and the completed work is unclear.<sup>87</sup> Nonetheless, it is reasonably clear that substantial amounts of creativity were required of the artisans who did the work—so much that it almost surely was a derivative work. The installed work certainly was a much-enlarged version of the working drawing. And in a telling interview of William Stern in 2012, Tyler Rudick described in some detail the architect's recollections about the scope of creativity required of the artisans who did the work:

From a distance, the wall drawing is a simple arrangement of colored lines and rectangles. Up close, however, one can see additional thick layers of washes and the sharp edges where one hue meets another.

When the artists painted the piece, they only used four colors of ink — blue, yellow, red, black — and diluted each in buckets of water," the architect remembered, adding that noted Texas artists Jeff Elrod and Aaron Parazette were both on the work crew employed by LeWitt, who never physically touched his final pieces.

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<sup>87</sup> Telephone Interview with David Aylsworth, Collections Registrar, The Menil Collection (Aug. 1, 2018). Not sure about exact differences between the certificate and diagram, the working drawings, and the installed work since the Menil Collection has not given me permission to see the documents for Wall Drawing #679. I have requested access more than once, suggesting that all I wanted was to see the documents online not to take pictures or preserve images of them. The first inquiry about viewing the documents was in a conversation with the Menil Collection Registrar. Our conversation on this and other issues was quite pleasant. I asked Mr. Aylsworth if I could see the documents. Request was declined. *See also* Email from David Aylsworth (Sep. 14, 2018) (on file with author). The most recent communication was by email when I reemphasized that I had no desire to retain any images of any items. I was told politely but firmly that the documents were deemed "highly confidential" and were not available for my perusal. *See also* Telephone Interview with Aaron Parazette (Oct. 22, 2018). LeWitt was not present during the time the wall drawing was made.



These rich tones are made by layering on the ink with cotton cloth. The bluish color, for example, is 21 layers of the blue and black inks. The process almost gives the look of a fresco, but it's not. It's painted right onto the surface of the wall.<sup>88</sup>

After LeWitt's death, his copyright interests in the certificate, diagram, and wall marks became the property of his estate. But the installers' interests, if any, were independent of the estate and continued to exist after LeWitt's death. After Stern died, the property interests in his art collection, as well as in his house, were bequeathed to the Menil Collection. The museum, therefore, held the traditional property interests in the certificate and diagram and the marks on the house's living room wall. As noted, those who installed the wall drawing in 1991, however, may still have owned an interest in the derivative aspects of the installed piece.

The drawing was covered over with a skim-coat shortly before the house was sold to Dr. Georgia Hitchcock. There is nothing in American copyright law that prevents artists or their successors from destroying or agreeing to destroy their own work if the owner of the physical copy of the work is amenable.<sup>89</sup> Nor is there any constraint on making a work designed to last for a limited period of time.<sup>90</sup> The Menil Collection insists that destruction of the work

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<sup>88</sup> See RUDICK, *supra* note 27; Telephone Interview with Tyler Rudick (Oct. 22, 2018). Parazette confirmed that the ink surface was installed in multiple layers with pads after the wall was carefully taped in various segments.

<sup>89</sup> See Gregory Alexander, *Of Buildings, Statutes, Art, and Sperm: The Right to Destroy and the Duty to Preserve*, 27 CORNELL J. L. & PUB. POL'Y 619, 620, 636-647 (2018). The idea of destroying a work is not much written about. There are however, significant constraints on the right of those other than the artist to destroy a work installed in or on a building during the life of the artist, as the recent controversy over the demolition of the 5Pointz aerosol art complex demonstrated. See generally Richard Chused, *Moral Right: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J. L. & ARTS 583 (2018). I suspect the dearth of commentary on the subject will quickly change now that Banksy pulled off one of the greatest pranks in the history of art in October 2018—the partial shredding of *Girl With Balloon* immediately after it was gaveled sold by Sotheby's in London for over one million pounds. See Scott Reyburn, *Banksy Painting Self-Destructs After Fetching \$1.4 Million at Sotheby's*, THE NEW YORK TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/arts/design/uk-banksy-painting-sothebys.html>.

<sup>90</sup> See, e.g., Katie McGrath, *8 Works That Self-Destruct*, ARTSY (Jun. 14,

was always the intent of the parties when Stern agreed to give a bequest of his entire collection to the museum.<sup>91</sup> That is all fine and dandy if everyone with copyright and property interests in the wall drawing agreed, as the Menil contends. But what about those artisans who installed the drawing? If they held an interest in the piece when it was covered over in 2014 and did not consent, was a remedy available? And, in addition, who controls decisions about restoring the work—the LeWitt estate, The Menil Collection, Georgia Hitchcock, the installers, or some combination? Other difficult questions arise about the status of the wall drawing when and after it was covered over in 2014. Did anyone hold interests that were violated? Did the obliteration of the piece mean that its status as a “LeWitt” ended? Perhaps it did, at least if the Menil story that all relevant parties intended to end the visible life of Wall Drawing #679 when Stern died is accurate. The wall drawing’s continued physical existence was no longer with the permission of the owner of the certificate and diagram—by then the Menil Collection—or the copyright owner in both the certificate and diagram and the marks on the wall—by then the artist’s estate. But does that mean that the Hitchcocks may not uncover the marks if they wish? What about the artisans who worked on the drawing and, most notably, their moral right authority over mutilation or destruction of their work? This may get us thinking about how many angels dance on the head of a pin. But trying to do the choreography is worth the effort; much is to be learned. These various issues of control over the status of Wall Drawing #679 are taken up in the next section of the essay.

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2017), <https://www.artsy.net/article/artsy-editorial-8-artworks-self-destruct>. In addition to graffiti, there are many other conceptual and other art works which are designed to be temporary.

<sup>91</sup> See Email from Tommy Napier, Assistant Director of Communications of the Menil Collection, to Michael Roffer, Associate Librarian and Professor of Legal Research, New York Law School (April 9, 2018) (on file with author). In the attached email from David Aylsworth to Jonna Hitchcock (Apr. 9, 2018), Jonna Hitchcock wonders about whether the tale is totally accurate. See HALPERIN, *supra* note 10 (suggesting, for example, that the re-inking of the drawing after ten years implies it may have been intended to be permanent). But his wall drawings often were re-inked after they were up for a time. See also CHRISTIE’S, *supra* note 50.

#### IV. INTERESTS IN THE DESTRUCTION, MUTILATION, AND RESTORATION OF TEMPORARY WORK

A series of questions arises from statements by the copyright owners in the certificate and diagram claiming that the marks making up Wall Drawing #679 on the wall at the Stern/Hitchcock home no longer represent a “LeWitt” work. Does that mean that the marks no longer have a right to be visible to human eyes? Does that mean that any attempt to resurrect them is illegitimate? This is another way of probing the copyright law impact of an artist or copyright owner withdrawing or attempting to withdraw authentication of a work—to deny authorship. Is it even possible for artists to “deauthenticate” work previously recognized as theirs? Taking a slightly different tack, would restoring Wall Drawing #679—deemed by the Menil and the LeWitt Estate to be an unauthentic work—expose an unauthorized copy or derivative work of the original? Such a result would suggest the following: that the Menil Collection – together with the copyright holder – the LeWitt Estate, and perhaps the artisans, have the joint authority to control authentication and also the right to control making such marks visible on a wall.<sup>92</sup> At the other extreme, if recovering the marks left on the wall behind the skim-coat is not uncovering a “LeWitt” at all and perhaps therefore not revealing a copy or derivative work of the diagram but only some curious marks on a wall lacking authenticity, then the owners of the physical marks on the wall may do as they please with them as long as they don’t try to pass them off as a LeWitt. The Menil Collection has taken the interesting position that this option is fine with them.<sup>93</sup> Did they have to do that? And what if, in addition to uncovering the markings, presumably somewhat damaged by the Menil’s installation of the skim-coat and its later removal by the Hitchcocks, the Hitchcocks attempt as best they can to return the wall to its appearance when owned by Stern? Does it make any difference that the Hitchcocks would have to use artisans not approved by the LeWitt Estate? Would that be equivalent to the creation of an unlawful derivative work? Again, the Menil Collec-

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<sup>92</sup> See 17 U.S.C. § 106(5) (2018). Note that in this setting the copyright issue is about the right to make a copy or a derivative work, not the right to display. Only the right to control display a work *publicly* is held by the copyright owner.

<sup>93</sup> See KAPLAN, *supra* note 12.

tion seems not to care; the marks on the wall, to them, are not a "LeWitt" and therefore virtually worthless. Should they care?

#### A. CONCEPTUAL ART, OWNERSHIP INTERESTS, TEMPORALITY, AND RESTORATION

To add a layer of irony to the inquiry, Julia Halpern notes that Jonna Hitchcock views the effort to restore the markings in the house "as a kind of conceptual art project of her own."<sup>94</sup> The name of the website memorializing the restoration project—*Unerasing Sol LeWitt*—is a "nod" to Rauschenberg's famous work, *Erased De Kooning Drawing*.<sup>95</sup> That nod refers to a renowned event in the history of contemporary art involving William De Kooning and Robert Rauschenberg. In 1953 the young Robert Rauschenberg asked the well-known and successful artist William De Kooning if he could have one of De Kooning's drawings for the purpose of erasing as much of it as he could. After some discussion, De Kooning agreed to his request.<sup>96</sup> At one point, when asked about his erasure project, Rauschenberg said that some thought of his act as "vandalism." He preferred to see it as "poetry."<sup>97</sup> His evaluation is meritorious. De Kooning's decision to select an unsold work of value stored in his studio and allow Rauschenberg to obliterate it was itself a creative act. Perhaps their interaction expressed a mutual understanding that creativity comes from some deep, unfathomable place, that sometimes the allure of art lies in the inability to discern its origins or meanings, that destruction can be part of a process of

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<sup>94</sup> See HALPERIN, *supra* note 10.

<sup>95</sup> *Un-Erasing Sol LeWitt*, <http://unerasingsollewitt.com/contact-2.html> (last visited Feb. 2, 2019). This line appears on the site memorializing the LeWitt restoration project: "With a nod to Rauschenberg, we embark on this project which we have titled 'Un-Erasing Sol LeWitt.'"

<sup>96</sup> See San Francisco Museum of Modern Art, *Robert Rauschenberg on "Erased de Kooning,"* YOUTUBE (Apr. 27, 2010), <https://www.youtube.com/watch?v=nGRNQER16Do> (where one version of the story is told by Rauschenberg); see also Sarah Roberts, *Erased de Kooning Drawing*, SAN FRANCISCO MUSEUM OF MODERN ART (July, 2013), <https://www.sfmoma.org/artwork/98.298/essay/erased-de-kooning-drawing/>.

<sup>97</sup> *Robert Rauschenberg - Erased De Kooning*, YOUTUBE (May 15, 2007), <https://www.youtube.com/watch?v=tpCWh3IFtDQ>.

building or rebuilding, that art movements constantly reinvent themselves, and that art—like life—dies and is reborn cyclically.<sup>98</sup>

The “original” of Rauschenberg’s erased De Kooning is housed in the permanent collection of the San Francisco Museum of Modern Art.<sup>99</sup> An image of the work De Kooning handed over to Rauschenberg is not extant, though an infrared version of the erased work with some markings is available.<sup>100</sup> But suppose an image of the original is found and the San Francisco MoMA elects to restore the original De Kooning piece—an unthinkable step in light of the notoriety of the Rauschenberg/De Kooning interplay. But putting aside the hoopla that would cause, should or can it be done? The question actually is deeply complex. It involves not only the propriety of altering Rauschenberg’s erased work of De Kooning, but also of reconstructing the now almost completely obliterated original De Kooning composition. Since De Kooning and Rauschenberg created a “new” work by jointly agreeing to obliterate the original drawing, can it legitimately be “recreated” by third parties to their arrangement? Or, since De Kooning agreed to let Rauschenberg destroy the work, can others later restore it and claim it is a work by “De Kooning?” And that, of course, is also the Wall Drawing #679 dilemma.

The Menil Collection’s views about its right, or perhaps duty, to cover up Wall Drawing #679 when they sold the house reflect a set of attitudes much like those of Rauschenberg and De Kooning. LeWitt’s wall drawings, like graffiti, were not always intended by the artist to be permanent. Even now they often come and go as their wall display spaces are used for the works of other artists or reconfigured when museums alter their interiors. But it is one thing for graffiti artists or others to install temporary work or for creative souls to permit people to erase their creations; it is another for

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<sup>98</sup> For a quite similar description of the De Kooning/Rauschenberg events, see Richard Chused, *Moral Right: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J. L. & ARTS 583, 604-05 (2018).

<sup>99</sup> Robert Rauschenberg, *Erased de Kooning Drawing*, SAN FRANCISCO MUSEUM OF MODERN ART, <https://www.sfmoma.org/artwork/98.298> (last visited Feb. 2, 2019).

<sup>100</sup> See Ben Blackwell & Robin D. Myers, *Digitally Enhanced Infrared Scan of Robert Rauschenberg’s Erased de Kooning Drawing*, SAN FRANCISCO MUSEUM OF MODERN ART, [https://www.sfmoma.org/artwork/98.298/research-materials/document/EDeK\\_98.298\\_003/](https://www.sfmoma.org/artwork/98.298/research-materials/document/EDeK_98.298_003/) (last visited Feb. 2, 2019).

someone else to restore such art after its intentionally orchestrated “demise.” And when a creative work of art—any work, but especially a temporal one—is restored, what is its new “provenance?” This has recently become a much more prominent phenomenon. LeWitt’s Wall Drawing #679 controversy is only one example of the issue. A growing number of Banksy<sup>101</sup> works, for example, have been brought back to life, sometimes at great cost and rarely with the explicit blessings of the artist.<sup>102</sup> Large, extremely popular exhibitions of his work have drawn sell-out crowds.<sup>103</sup> Works in London,<sup>104</sup> New York,<sup>105</sup> Toronto,<sup>106</sup> and New Orleans,<sup>107</sup> and other places, have been restored, reworked, or moved to new locations. Should this be condemned or praised when done by someone out-

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<sup>101</sup> See WILL ELLSWORTH-JONES, *BANKSY: THE MAN BEHIND THE WALL* (2012). Banksy, who is compulsively reclusive, has made street art in often unlikely places all over the world. To see an online collection of his street art, see *80 Beautiful Street Crimes Done by Banksy*, BORED PANDA, <http://www.boredpanda.com/80-beautiful-street-crimes-done-by-banksy/> (last visited Feb. 2, 2019). Pest Control is primarily responsible for the authentication of Banksy’s work, see *The Practical Guide To Pest Control*, MY ART BROKER, <https://www.myartbroker.com/artist/banksy/the-practical-guide-to-pest-control/> (last visited Feb. 2, 2019).

<sup>102</sup> See Ailis Brennan, *Banksy Speaks Out Against Moscow Exhibition That He’s “Got Nothing to do With,”* GO LONDON (Aug. 16, 2018), <https://www.standard.co.uk/go/london/arts/banksy-speaks-out-against-moscow-exhibition-that-hes-got-nothing-to-do-with-a3912841.html>.

<sup>103</sup> See *There’s a Giant Banksy Show in Toronto, But How Good is it if Banksy Himself Isn’t in on the Joke*, CAN. BROAD. CORP. (June 15, 2018), [ca.news.yahoo.com/apos-giant-banksy-show-toronto-174546663.html](http://ca.news.yahoo.com/apos-giant-banksy-show-toronto-174546663.html); see generally *The Art of Banksy*, <https://www.banksyexhibit.com/> (last visited Feb. 17, 2018).

<sup>104</sup> See Amie Tsang, *Hidden Banksy Art to Be Displayed by London Developer*, THE NEW YORK TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/business/banksy-art-london-lost.html>.

<sup>105</sup> See Jill Mahoney, *The Path to Banksy, The Globe and Mail* (Nov. 12, 2017), <https://www.theglobeandmail.com/news/toronto/toronto-developer-who-salvaged-banksy-graffiti-installs-it-in-pedestrian-pathway/article33989061/>.

<sup>106</sup> See Sara Lieberman, *A Newly Restored Banksy Has Been Unveiled in New Orleans*, CONDE NAST TRAVELER (Dec. 1, 2017), <http://www.cntraveler.com/story/a-newly-restored-banksy-has-been-unveiled-in-new-orleans>.

side the artist's ambit of authority or permission, including years after the work originally was made? Can these removed and "re-stored" works be passed as Banksy's work?

One of the Banksy "restoration" projects raised issues closely related to Wall Drawing #679. The Toronto restoration involved the removal of a badly damaged piece of wall art, *Muzzled Dog*, to a restoration studio. To make the move, the piece was sawed out of a cement wall in three pieces. It was then enclosed in a large stainless-steel frame and placed in a protective case. The assemblage was then placed in the PATH as part of a new large office building redevelopment project at One York Street in Toronto. The PATH is an extensive complex of underground and above ground passageways with shops and other establishments running for many kilometers between dozens of buildings in Toronto's center.<sup>108</sup> The re-installation of the Banksy was one of a series of public improvements made by the developers of One York Street to obtain substantial zoning bonuses.<sup>109</sup> Murray White, an author of a newspaper article, posed the right question about the project in his headline, which was, "What would Banksy think of Toronto's new Banksy?"<sup>110</sup> The word "new" was an apt description. The pictures below exhibit side-by-side views of the original and reinstalled Banksy wall images in Toronto, which went from trash cans to highly polished stone.<sup>111</sup>

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<sup>108</sup> See PATH Map, <http://torontopath.com/path-map/> (last visited Feb. 17, 2019); see also Paul Attfield, *A Look at One York Street Harbour Plaza Residences*, THE GLOBE AND MAIL (May 11, 2018), <https://www.theglobeandmail.com/report-on-business/industry-news/property-report/a-look-at-one-york-street-and-harbour-plaza-residences/article16205704/>.

<sup>109</sup> Murray Whyte, *What Would Banksy Think Of Toronto's 'New' Banksy?*, THE STAR (Feb. 21, 2017), <https://www.thestar.com/entertainment/visualarts/2017/02/21/what-would-banksy-think-of-torontos-new-banksy.html>.

<sup>110</sup> See *id.*

<sup>111</sup> See Richard Lautens, TORONTO STAR, <https://images.thestar.com/content/dam/thestar/entertainment/visualarts/2017/02/21/what-would-banksy-think-of-torontos-new-banksy/banksy-20103.jpg.size-custom-crop.0x650.jpg> (last visited Feb. 17, 2019); see also Paul Casselman, MENKES DEVELOPMENT (Mar. 7, 2017), <https://www.canadianinteriors.com/features/restoring-banksy/>.



Banksy in Original Location



"Banksy" encased along the PATH in downtown Toronto

Though Banksy and his authentication website Pest Control have been silent about the Toronto project, it would be interesting to know his views on the restoration and reconstruction of his original work. While his opinions about restoration projects are not well known, he has at times objected to unauthorized exhibitions and auction sales of his work unless the creation was originally expressly made for purposes of sale.<sup>112</sup> At times he has refused to authenticate or tried to withdraw authentication of drawings put up for sale

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<sup>112</sup> He does sell work; that work is now frequently resold at auctions or galleries. But there are a number of articles about Banksy's antipathy to using his wall art pieces for money making adventures. He views his outdoor creations as gifts to the public. See Henri Neuendorf, *Unsanctioned Banksy Show Will Anger Artist, His Former Dealer Says*, ARTNET NEWS (Sep. 13, 2016), <https://news.artnet.com/art-world/steve-lazarides-banksy-retrospective-646760>; *Banksy Calls the "Stealing Banksy?" Auction "Disgusting."* ARTNET NEWS (April 25, 2014), <https://news.artnet.com/art-world/banksy-calls-the-stealing-banksy-auction-disgusting-12092>; Henri Neuendorf, *Unauthorized Banksy Show Planned in Rome, The Artist Did Not Give Permission*, ARTNET NEWS (May 17, 2016), <https://news.artnet.com/market/banksy-unauthorized-exhibition-rome-498992>; Scott Reyburn, *Off the Street, Onto the Auction Block*, THE NEW YORK TIMES (May 2, 2014), <https://www.nytimes.com/2014/05/05/arts/international/taking-art-off-the-street-and-onto-the-auction-block.html>.



by private parties.<sup>113</sup> Presumably transformations of his work for non-cash incentives and monetary gain, as in Toronto's grant of zoning bonuses, might raise his hackles.

But like much about Banksy, his actual views are a mystery. The recent and now (in)famous half-shredding of a 2006 version of *Girl With Balloon* immediately after its auction at Sotheby's was gaveled down as sold certainly left many both amazed and befuddled.<sup>114</sup> Banksy had installed a shredder inside the ornate frame he used for the work that was apparently activated by a remote control in the auction room when the sale was complete.<sup>115</sup> Those in the room were initially stunned; then many broke into smiles. For my purposes, it created a mystery. On the one hand it can be read as another statement from Banksy that the commercial art world is scandalous; on the other hand, his prank created a truly unique work likely to be worth much more half-shredded in that scandalous world than the large sum it went for at the auction.

While much of Banksy's stated or pretended angst may be read as motivated by reactions outside the ambit of traditional intellectual property law or even artistic movements, it gives rise to fascinating questions about restoration similar to the LeWitt problem. Artist's works are often transferred or sold to new owners, re-framed, moved to dramatically different physical surroundings, carefully restored, or analyzed and imaged in untraditional ways by conservators, curators, and art historians. While the legal structure of gifts and trusts may be able to constrain such behavior, those limits are not embedded in widely applicable intellectual property norms. There is no precedent about whether the winner of the now partially shredded Banksy *Girl With Balloon* could legally restore the work to its previous form. Complicating that question are the facts that the successful bidder accepted the half-shredded work after rejecting an offer from Sotheby's to void the auction sale and that Banksy's authentication "agency"—Pest Control—recertified

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<sup>113</sup> See, e.g., Melena Ryzik, *Another Banksy Mural to Go From Wall to Auction*, THE NEW YORK TIMES (Aug. 13, 2013), <https://www.nytimes.com/2013/08/14/arts/design/another-banksy-mural-to-go-from-wall-to-auction.html>.

<sup>114</sup> See REYBURN, *supra* note 89 (reporting the full story).

<sup>115</sup> See *Shredding Banksy's the Girl and Balloon-The Director's half cut*, YOUTUBE (Oct. 17, 2018), <https://www.youtube.com/watch?v=vxkwRNIZgdY> (explaining Banksy's prank).

the piece as a “new” Banksy work and changed its name to *Love Is in the Bin*.<sup>116</sup> Does “new” mean the “old” one can’t be recovered? Oh, Banksy, you truly are a provocateur. So much for angst.

Significant recreations, alterations, mistaken attributions, mutilations, and other changes made by non-authors, however, may be limited by copyright or moral right law. And that is where Wall Drawing #679 reenters the scene. As noted, I have not seen any of the Wall Drawing #679 documents. But from information I do have, the actual installation of the wall drawing was a fairly complex undertaking; it was almost certainly a “derivative work” for copyright purposes.<sup>117</sup> In addition, the installation of even the most straight forward wall drawings involve both an increase in size (typically dramatic) and a significant amount of creativity and artistic talent in their actualization. When the work was covered with a skim-coat, did its status as a derivative work change? Perhaps. At a minimum, it is problematic to say that the marks were still fixed in a tangible medium of expression. While a machine or device able to “see” though the skim-coat might have been able to reveal some version of the marks, they certainly could not be mistaken for the original ones. Is that enough to label the work as one that remains “fixed”—that is a work that can be “perceived, reproduced, or otherwise communicated for more than a period of transitory duration.”<sup>118</sup> Does that part of the definition requiring that a work be perceivable with the aid of a “machine” or a “device” include the possibility of using a tool to strip away a skim-coat or an x-ray machine to find it? Isn’t it more likely that the work refers to technical or electronic devices that reproduce the actual work rather than hardware tools or devices that reveal only a distant relative of the original? And wasn’t the intention of the Menil Collection and the LeWitt Estate to end the life of the wall drawing upon the sale of the Stern house relevant to any decision about its continued existence? It is challenging to imagine a policy reason that justifies calling the covered-up wall drawing a “fixed” version of the original after it was placed under a skim-coat because of a desire by the ma-

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<sup>116</sup> See Scott Reyburn, *Winning Bidder for Shredded Banksy Painting Says She’ll Keep It*, THE NEW YORK TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/arts/design/winning-bidder-for-shredded-banksy-painting-says-shell-keep-it.html>.

<sup>117</sup> See *supra* p. 14.

<sup>118</sup> 17 U.S.C. § 101 (2018).

major players in the drama to obliterate it. But all that may be said with certainty is that the status of the buried marks is unclear. And if the marks of the original installation are uncovered, they likely will be marred by the installation and removal of the skim-coat. That makes their status even more difficult to define. Can a copy or derivative work be resurrected from oblivion? Or do the marks take on the status of a new work? If the marks are restored, has a new derivative work been created? Does any of this matter?

It might, especially if we credit the contention that the Menil Collection, the LeWitt Estate, and the Estate of William Stern, as owners of the copyright in the wall drawing, the copyright in the diagram, and of the physical marks on the wall, all agreed to destroy Wall Drawing #679 when the house was sold. They then used both their copyright and physical authority over the work to end its life as a derivative work fixed in a tangible medium of expression. And the Menil has made their view quite clear that any reappearance of the wall drawing would no longer be a work of LeWitt.<sup>119</sup> If the marks of the wall drawing are ever revealed they would not be “authentic” in the eyes of the museum; their reappearance presumably would not be an image made with the permission of the copyright holder or the owner of the certificate and diagram. Arguably, therefore, if the skim-coat is removed the newly visible marks would either be an infringing copy or, if different in some noticeable way from the original marks, an infringing derivative work of the original installed wall drawing. That would be especially true if a restoration was done by persons not approved by the LeWitt Estate. Perhaps, therefore, the Menil Collection should care about what the Hitchcock’s are doing rather than sluff it off.

Certainty, however, is hardly a thoughtful way to envision angels dancing on the head of a pin. Does the failure of the Menil to completely obliterate the marks, rather than merely cover them with an easily removable skim-coat or to get the permission of the artisans who installed it, mean that the wall drawing was actually not ended, that its life is ongoing?<sup>120</sup> In that case, uncovering the wall drawing would not be the creation of a new copy or derivative work but the revelation of a “living LeWitt.” Or might it mean that

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<sup>119</sup> See AYLSWORTH, *supra* note 15.

<sup>120</sup> That is a position Jonna Hitchcock has articulated. See HALPERIN, *supra* note 10.

its burial without the permission of the installers was inappropriate and therefore that its revelation is a merely a proper restoration of the work? Though probably damaged by the skim-coat's installation and removal, the marks would still be the product of the original derivative work copyright holders. Just like any other work that deteriorates over time, a new work is not made when an old one falls apart or sustains damage. In addition, though The Menil and the LeWitt Estate may have had the authority to obliterate the work and end its visible life when they owned the house, they no longer own the physical marks—even deteriorated ones—on the wall. In this setting their efforts to deny authenticity of the work may be largely irrelevant. They can't steal their way into the Hitchcock abode in the dead of night and erase it with solvent and paint. Nor, in these circumstances, should any court find the newly revealed, but merely marred rather than destroyed, marks to be an infringement. Mere revelation of a still viable drawing in a private house might not be the same as creating a new copy.

The contrast between these two outcomes reflects a deep conflict between traditional rights over physical assets and rights in intellectual property—the rights split apart by Section 202 of the Copyright Act. The wall drawing marks on the wall of what is now the Hitchcock residence, as a traditional matter of real property, are owned and under the control of Georgia Hitchcock. Just like the studs that support the wall, she has physical control over whatever is inside the wall, whether it be under a skim-coat or deeper inside as part of the structure of the building. Why should anyone be able to bar her from taking a look at the wall drawing any more than she may be barred from bashing a hole in the wall and checking out the studs? The Menil Collection, however, claims that the term of the wall drawing's visible life has ended. If the museum claims the right to re-obliterate Wall Drawing #679, that must be based on the concept that the wall drawing, like a temporary exhibit on the streets of New York, may have a pre-determined lifetime. And once that lifetime is over, Dr. Hitchcock no longer has the right to maintain the visibility of the marks. That idea arises not because Hitchcock consciously bought a LeWitt for a limited time, but because those selling her the house sold her absolutely no access rights in the wall drawing. The notion may be similar in an odd way to a life estate. When a life estate ends on the death of the possessor there is nothing left for the successors in interest of the life

estate owners to take directly from that person. So too with a wall drawing whose life has terminated. Digging up a corpse, you might claim in a morbid moment, does not reinvigorate a dead life estate. And, the argument continues, nor can exposing a dead wall drawing bring it back to life.

Related issues arise with various Banksy works that have been restored, auctioned off, or moved to new locations, such as the previously mentioned *Muzzled Dog* in Toronto. One of the most highly disputed auctions involved *Slave Labor (Bunting Boy)*, a piece critiquing slave labor, stenciled onto the wall of a thrift shop in North London. It was surreptitiously removed, put up for auction in Miami, withdrawn from sale after widespread protests in London, and finally returned to London where it was auctioned off at another location for over one-million dollars.<sup>121</sup> Though many stories circulated suggesting that the work was stolen, it turned out that the owner of the building arranged for its removal and sale.<sup>122</sup> In both the Toronto removal, restoration, and relocation of *Muzzled Dog* and the removal and sale of *Slave Labor (Bunting Boy)*, Banksy owned the copyrights in the works, but not the physical marks on the walls. Thinking in property-like terms, the owners of the building owned the physical qualities of the Banksy creation. If they wanted to sell it, so be it. But Banksy has said that when he puts up a work in a widely visible location, his intention is to make a gift to the public, not to the owner of the building the creation rests upon.<sup>123</sup> Is it appropriate to offer up for sale a work the artist has dedicated to the public or declared to be non-transferable?

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<sup>121</sup> See *Disputed Banksy Graffiti Art Sold for \$1.1 in London*, CBC NEWS (June 4, 2013), <https://www.cbc.ca/news/entertainment/disputed-banksy-graffiti-art-sold-for-1-1m-in-london-1.1403535>.

<sup>122</sup> The saga of *Slave Labor (Bunting Boy)* continue unabated. The American artist Ron English purchased the piece for \$730,000 at another auction in Los Angeles on November 14, 2018 and claimed he would white wash it to discourage others from auctioning street art. And then in Banksy-ish style he turned around and said he would sell it for \$1,000,000, that he wasn't a fool. See Henri Neuen-dorf, *Ron English Will Whitewash the \$730,000 Banksy Mural He Just Bought to Protest the Removal of Street Art*, ARTNET (Nov. 15, 2018), <https://news.artnet.com/art-world/ron-english-will-whitewash-banksy-1397023>.

<sup>123</sup> See REYBURN, *supra* note 112.



Banksy's *Slave Labor (Bunting Boy)* Prior to Its Removal and Sale.<sup>124</sup>

Consider a slightly altered factual setting in the Wall Drawing #679 situation. Suppose that the LeWitt Estate, as owner of the copyright in the visible marks, wished to obliterate the work during Stern's life, but that Stern objected. Could the drawing be covered over anyway? In that setting, Stern owned the physical marks, much as the owner of a painting owns the physical attributes of the work. The copyright, however, would be held by others—the LeWitt Estate. Resolution probably depends on the deal made between LeWitt and Stern when they first arranged for installation of the work. If Stern understood that LeWitt or his successor could hide the work whenever they wished, or after a certain defined period of time, or when

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<sup>124</sup> *Banksy Slave Labor (Bunting Boy)*, London, 2012, LIVE AUCTIONEERS (Feb. 23, 2013) [https://www.liveauctioneers.com/item/15778020\\_banksy-slave-labor-bunting-boy-london-2012](https://www.liveauctioneers.com/item/15778020_banksy-slave-labor-bunting-boy-london-2012); see also *Now Bring Back Banksy Boy: Slave Labour Mural Withdrawn From Auction at Last Minute*, EVENING STANDARD <https://www.standard.co.uk/news/london/now-bring-back-banksy-boy-slave-labour-mural-withdrawn-from-auction-at-last-minute-8508403.html> (last Visited Feb. 17, 2019). After the work's removal, other graffiti appeared on the site, including a stencil warning of thieves, a picture of a frowning nun, and another image (surely a Banksy) of a rat. The rat is now covered with plexiglass to protect it.

Stern died, or when Stern sold the house to another person, then the terms of the deal would govern.<sup>125</sup> The visible installation sold to Stern was for a limited time. And that should hold true after LeWitt's or Stern's death as well. If the proper moment for removing the work was not reached, then covering it with a skim-coat of plaster was inappropriate.

If nothing was said or written down between Stern and LeWitt, then which party has priority in the decisional power ranking about temporality? Such a decision is crucial in a setting where one or both parties have died. That, of course, was like the case of Wall Drawing #679 according to the Hitchcocks. Since the actual marks on the wall were transferred to Stern when the drawing was installed, he, like the owner of a painting or a building with graffiti on it, has control over their disposition. Unless LeWitt retained destruction rights when the work was made visible or there was a clear understanding that the nature of the work was inherently temporary Stern should be able to preclude removal of the drawing from his house. While Stern was alive, his objections to obliteration of the work would control. It would be just like the owner of the wall upon which Banksy's *Slave Labor* stencil was painted arranging for the work to be cut out and sold.

But in the real world, Stern was dead and Georgia Hitchcock purchased the house after the wall drawing had already been covered up according to the desires of the then building owner—the Menil Collection. The Menil then stood in the shoes of Stern or was like the owner of the building upon which *Slave Labor* was stenciled. The Menil's preferences would control. Is this traditional answer the best approach? Does moral right law have anything to say about it? A non-artist's ability to destroy or mutilate a work, at least during the life of the artist, rests in the hands of the artist, not in the owner of the physical work.<sup>126</sup> In the Wall Drawing #679 case, it was the owner of the copyright or that owner's successor and the owner of the building wishing to destroy it, not the original author. That is the opposite of traditional moral right claims. And

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<sup>125</sup> See 17 U.S.C. § 204 (2018). If there is a writing that obviously makes thing easier. Indeed, [this statute] may require a writing if an exclusive right was involved—here the right to display for a period of time.

<sup>126</sup> See 17 U.S.C. § 106A (d) (2018).

what of the original artisans? If they are living authors, their interests were never considered.<sup>127</sup> Problematical? Read on.

### B. MORAL RIGHTS: ATTRIBUTION, MUTILATION, DESTRUCTION, AND RESTORATION

Three aspects of American moral right law also are relevant to the status of works like LeWitt's Wall Drawing #679—those covering attribution, mutilation, and destruction of art works. The copyright code provides that during her or his life an artist has the right "to claim authorship" of a work of visual art<sup>128</sup> and to "prevent the use of his or her name as the author of any work of visual art which he or she did not create." In addition, the author—the artist—of a work of visual art may "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" and "prevent any destruction of a work of recognized stature."<sup>129</sup>

These provisions are part of the Visual Artist Rights Act (VARA) of 1990. VARA was adopted as part of a multi-year legislative process allowing the United States to join the Berne Convention for the Protection of Literary and Artistic Works—the principal international copyright agreement.<sup>130</sup> The convention requires each member nation to adopt a moral right provision,<sup>131</sup> but VARA

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<sup>127</sup> See RYZIK, *supra* note 113. The Banksy shredding prank is in another world. There the artist, not the owner of the physical copy, destroyed the work. Moral right law does not give an author authority to destroy a copy of a work over the protests of the copy's owner.

<sup>128</sup> See 17 U.S.C. § 101 (2018) (defining a "work of visual art"). Basically, it limits coverage to traditional two and three-dimensional works of fine art, along with photographs and prints made in editions of two-hundred or less that are signed and consecutively numbered by the artist.

<sup>129</sup> 17 U.S.C. § 106A (a)(2)-(3) (2018).

<sup>130</sup> See Berne Convention Implementation of 1988, H.R. 4262, 100th Cong. (1988). The United States acceded to the convention after adopting the act, effective as of March 1, 1989, lacked a moral right provision. At some point, such a provision had to be added in order to be able to claim the right to join the convention with a straight face.

<sup>131</sup> *Id.* The relevant article of the convention provides:

"Article 6*b* is:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have



is markedly less comprehensive than moral right laws in most other convention nations.<sup>132</sup> It protects only works of “visual art”<sup>133</sup> for the life of the creator<sup>134</sup> and allows creators of works to waive their moral rights.<sup>135</sup> Other member countries protect a variety of additional creative endeavors in addition to works of visual art, extend the term of moral rights to periods beyond the life of the author, and place significant limitations on transfer or waiver of the

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the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

<sup>132</sup> See generally ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (Stanford Univ. Press, 2009) (providing the most comprehensive analysis of moral rights in the United States and around the world); see also Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519 (2011) (providing additional commentary on the weak nature of American moral rights law); cf. Galia Aharoni, *You Can't Take It with You When You Die ... Or Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes from Israel, France, and The United States*, 17 U. BALT. INTELL. PROP. L.J. 103 (2009) (comparing Israel and France).

<sup>133</sup> 17 U.S.C. § 101 (2010) (defining a “work of visual art”). The part of the definition relevant here provides that this class of creative endeavors includes:

a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.

<sup>134</sup> 17 U.S.C. § 106A(d)(1) (2018).

<sup>135</sup> *Id.*

rights.<sup>136</sup> The reluctance of the United States to join the Berne Convention for much of the twentieth century stemmed in part from an important disagreement with much of Europe and other parts of the world about the justification for copyright law. The Berne Convention in general and its requirement for a moral right provision in particular arise from a sensibility that artistic endeavors should be protected because of the inherent value—a moral imperative—of creativity and the works it produces. Rather than using copyright to create markets for the primary purpose of distributing works to the greatest number of users—a deeply utilitarian instinct typically recited as the purpose for American law<sup>137</sup>—most of the rest of the world grants copyright protection because of the intrinsic importance of the work of a creative soul. The weakness of America's VARA provisions stems largely from a continuing antagonism by large players in the copyright marketplace toward treating artistic endeavors as inherently worthy rather than as commercial objects and granting authors rights that may not be transferred or sold. Nonetheless, the strange story of Wall Drawing #679's "life" presents a setting for thinking about the relationships between VARA and conceptual art works like those of LeWitt. This analysis, however, comes with a caveat. Since VARA provides protections only for the life of the artist, the work of LeWitt, who died in 2007, is no longer covered. The creations of other contemporary, living artists, such as Banksy, continue to trigger issues taken up in this essay. Similarly, the rights of any living artisans who installed LeWitt's may be quite relevant.

Despite the death of LeWitt, it is worth considering his possible role in the moral rights issues surrounding Wall Drawing #679 for two reasons. First, other settings like the wall drawing issue continue to surface. Thinking about LeWitt may help resolve some of those disputes involving living artists. Second, the limitation of the moral right provisions in the United States to the life of the author is difficult to justify. Attribution rights should not die with the au-

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<sup>136</sup> See KWALL, *supra* note 132, at 37-52 (summarizing various European rules) and 106-114. French rights may last forever. In Israel, moral right is tied to the length of the copyright term, generally life plus seventy years.

<sup>137</sup> See 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 (1982). There is much literature about the purposes and economics of American copyright law. This is one of the classics.

thor, even after their works have gone into the public domain. Why should anyone have the audacity, let alone a protected right, to switch the names on a work they did not author. The willingness of the Supreme Court to countenance such behavior in a trademark challenge to a name switch seems untenable as a matter of both ethics and traditional moral right law.<sup>138</sup> Thinking about the consequences of lengthening the term of moral right protections is worth it for its own sake.

## 1. ATTRIBUTION

Attribution rights under the Visual Artists Rights Act, 17 U.S.C. § 106A, read as follows:

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—  
Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . .<sup>139</sup>

Note that the rights provided by this section are separate and apart—“independent” in the language of the statute—from standard

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<sup>138</sup> See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). The purveyors of a video series based on a prior series edited the tapes and marketed them under new authorial names. How that evades censure is beyond me.

<sup>139</sup> Visual Artists Rights Act, 17 U.S.C. § 106A (2018).

rights protected by copyright law. The sale of a copyright in a work does not automatically include any moral rights.<sup>140</sup> Though such rights may be waived by a writing signed by the author, the waiver must be very specific about the work involved and the nature of the rights waived.<sup>141</sup> There certainly were no waivers in the case of any LeWitt wall drawings.

It is clear from the text of VARA that deciding authorship is critical to determining who may seek the benefits of VARA's attribution protections. The claim of the Menil Collection and the LeWitt Estate that an uncovered Wall Drawing #679 is not a "LeWitt" may be truer than they know. If the artisans who installed Wall Drawing #679, for example, are still alive and they are deemed to be authors of the derivative work, they may file a moral right claim if the work is erroneously attributed only to LeWitt or to no one at all. In addition, the work was, in the language of Jonna Hitchcock, "re-inked" ten years after it was first installed.<sup>142</sup> What might be the authorship status of those who, at least in part, reinstalled the work? Was it just a reinstallation or did the work require a significant degree of expressive talent? It is therefore possible that attribution under VARA would be due to LeWitt, the original installers, and the re-inkers, at least as long as any of them was alive when the piece was covered and perhaps later restored.<sup>143</sup> In this and other cases proper attribution of authorship may extend to more than one person.<sup>144</sup> The second attribution problem involves

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<sup>140</sup> The sale of a standard painting is, therefore, much more complex than most people realize. The purchaser typically buys the canvas and the right to transfer the canvas, but nothing else. That leaves behind the copyright in the painting and the moral rights in the painting. The copyright would be held by the artist or the artist's successors in interest. The moral right would be held by the artist during life in the absence of a very specific waiver. The three parts of the transaction would be covered by different contracts and different contractual provisions.

<sup>141</sup> See 17 U.S.C. § 106A(e) (1990).

<sup>142</sup> See HALPERIN, *supra* note 10. LeWitt apparently wished that his works be kept as fresh as possible. If they were to remain visible for significant periods of time they typically were reworked. See also CHRISTIE'S, *supra* note 50.

<sup>143</sup> See CHUSED, *supra* note 89, at 608. In another article, I joined the group of writers critiquing VARA's limitation to the life of an author.

<sup>144</sup> See *Wall Drawing 289*, MASS. MOCA, <https://MASSMoCA.org/event/walldrawing289/> (last visited Feb. 14, 2019). Interestingly enough, for some but not all public displays of LeWitt wall drawings, the artisans actually installing the work are listed on the plaque next to the work. Compare *Wall Drawing #372F*, YALE UNIVERSITY ART GALLERY,

not the discovery of those who actually authored some or all LeWitt installation, but the impact of uncovering Wall Drawing #679. Will the newly revealed work not be a “LeWitt” as the Menil Collection and those overseeing LeWitt’s estate now claim?

As noted above, the Menil Collection and LeWitt Estate have taken the position that any reappearance of the marks once making up Wall Drawing #679 would not result in the visibility of a “LeWitt,” but random marks on the surface of a wall.<sup>145</sup> Presumably, therefore, they contend that the Hitchcocks may not attribute the markings on the wall to “LeWitt.” Can an artist disclaim authorship of work that is intended to last a limited period, covered up at the behest of or with the acquiescence of the artist, and later restored? Can authorship be disclaimed if the copyright owner intends the work to last a limited time or asks that it be destroyed? Does the fact that the artist or a successor in interest—here the Menil Collection and the LeWitt Estate—may have damaged the drawing when they tried to obliterate it make a difference?

Similar issues are raised by Banksy’s refusals to authenticate some works removed from their original locations and sold. At least for some auction houses and galleries, inability to create a firm provenance for a work is the kiss of death. Sales of some works very likely to be by Banksy have failed as a result.<sup>146</sup> In the Toronto case of *Muzzled Dog*,<sup>147</sup> could Banksy claim the work is no longer his because it was removed from its original location, restored, installed in an elaborate vitrine radically different from its

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<https://artgallery.yale.edu/collections/objects/236948> (last visited Feb. 14, 2019) (comparing the online display of Wall Drawing #289 at MASS MoCA where the installers are noted with the display of Wall Drawing #372F at Yale, where the artisans are not noted online).

<sup>145</sup> See *supra* p. 15-16.

<sup>146</sup> See Isaac Kaplan, *A Banksy Appears on a Building Overnight. Who Gets to Cash In?*, ARTSY (Mar. 30, 2018), <https://www.artsy.net/article/artsy-editorial-banksy-appears-building-overnight-cash-in>; Danielle Rahm, *Banksy: The \$20 Million Dollar Graffiti Artist Who Doesn't Want His Art to be Worth Anything*, FORBES (Oct. 22, 2013 12:35PM), <https://www.forbes.com/sites/daniellerahm/2013/10/22/banksy-the-20-million-graffiti-artist-who-doesnt-want-his-art-to-be-worth-anything/#7d419d9b61ba>; Rachael Corbett, *Keszler & Banksy: Pest Control Stymies Keszler Gallery Sales*, ARTNET (Oct. 12, 2011), <http://www.artnet.com/magazineus/features/corbett/keszler-banksy-10-12-11.asp>.

<sup>147</sup> See *supra* p. 20.

original placement, and ensconced in a spot designed to enhance the money-making potential of the York Street development?

This is virtually unchartered territory.<sup>148</sup> Much contemporary art is intended to be temporary. Installations come and go. Exterior wall art (a.k.a. graffiti) is often written and overwritten with the permission or acquiescence of the artists. And, of course, many LeWitt wall drawings come and go as exhibitions open and close. Efforts to recover temporary art works after they disappear are rare, but they do occur. In addition to Wall Drawing #679, some Banksy creations have been restored. Sometimes, as in Toronto, they are moved. In other cases, as with *Snorting Copper* in London's East End, they are returned to their original location after painstaking, expensive restorations. And here too the question of whether the work is still a "Banksy" has been posed.<sup>149</sup>

There is, however, a critical difference between the case of LeWitt's Wall Drawing #679 and Banksy's *Snorting Copper*. The covering over of the LeWitt was at the instance of the owner (or at least one of them) of the copyright in the work and with the permission of the owner of the wall upon which it was installed. The Banksy was never mutilated or covered at the behest of the artist, though he surely knew it was likely to be marred. It resided in the graffiti world. Rather it was damaged and covered with paint and plywood by various actors. And the community council in the area was not particularly interested in its continued existence shortly after it first appeared. Both its hiding and its restoration proceeded without comment from Banksy. Nonetheless, though he never said anything about its authenticity or his role in creating it, *Snorting Copper* is widely recognized as a "Banksy." Given its return to the original location there is not an ongoing dispute about its authentic-

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<sup>148</sup> See Sinclair Marber, *They Can't Take That Away from Me*, 41 COLUM. J.L. & ARTS 319 (2018). This article nibbles most closely to the moral right attribution issues on the table here is a note. See also Nathan M. Davis, *As Good as New: Conserving Artwork and the Destruction of Moral Rights*, 29 CARDOZO ARTS & ENT. L.J. 215 (2011). The Marber note's primary focus was on providing a remedy to those harmed by inappropriate denials of authenticity or authorship. Davis wrote about conflicts between conservation and moral rights claims.

<sup>149</sup> *Banksy's Snorting Copper Back On The Beat After Restoration*, BBC (Oct. 6, 2017), <https://www.bbc.com/news/uk-england-41391021>. The image and caption are by BBC and the news article poses the question about whether the work is still a "Banksy."

ity. But if Banksy ever declares the restoration of *Snorting Copper* so altered the work that it is no longer his and its owner nonetheless portrays it as a “Banksy” would Banksy have a moral rights claim?



Chris Bull and his team worked for several months to restore the piece which had "seen better days."

The statute provides an author with the right to prevent both “the use of his or her name as the author of any work of visual art which he or she did not create”<sup>150</sup> and “the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>151</sup> Both subsections might apply in cases like this; the first is the focus of attention here. Banksy’s *Snorting Copper* was so seriously compromised by its treatment over the decade between its creation and rediscovery that the conservators were not sure they could bring it back to its original appearance. Such restoration work may not be a “distortion, mutilation, or other modification” violating moral right,<sup>152</sup> but may the

<sup>150</sup> 17 U.S.C. § 106A(a)(1)(B) (2018).

<sup>151</sup> 17 U.S.C. § 106A(a)(2) (2018).

<sup>152</sup> *Id.* (declaring that “[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence”). By its terms this subsection only applies to works that are mutilated or destroyed under § 106A(a)(3), but courts might apply a similar norm to (a)(2) vio-

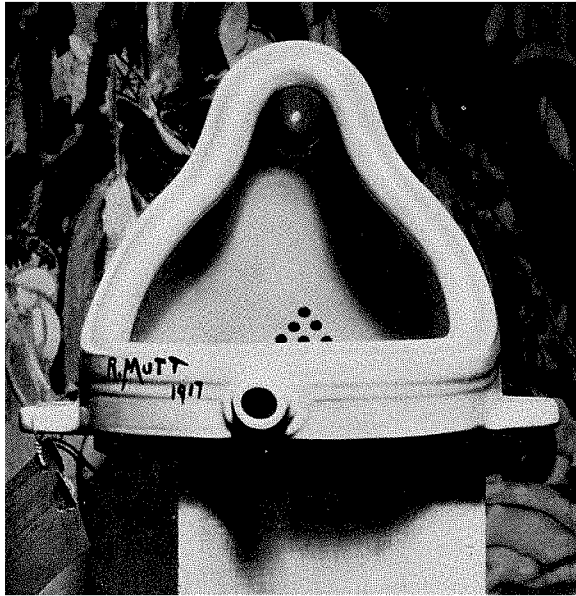
work no longer be attributed to Banksy because he did not create the restoration? Or, similarly, is the restored and relocated *Muzzled Dog* still a Banksy? Or in the tale most central to this essay, may Wall Drawing #679 no longer be attributed to LeWitt or the installers because he or they didn't do it or because it was never intended to be permanent?

There is an important sense in which the intent of an author controls the availability of copyright protection and the use of the label "author." Suppose, for example, a widely admired artist ventures into an art supply store and purchases a blank 4' x 4' canvas made of roughly woven linen, takes it back to her studio, and leans it against a wall. At that point, I don't think anyone would claim that the artist has authored a work of visual art. But suppose that this well-known artist—deeply involved in the making of conceptual art—hangs the unframed blank canvas on the wall of an important gallery as part of an exhibition, places a plaque on the wall next to it designating its title as *Blank Canvas #600 in Ecrú*, and adds a copyright notice to the wall plaque (leaving the canvas totally blank) with the name of the artist and the year of its creation. At that point might the canvas be a graphic work of visual art?

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lations in order to make some reasonable sense of the statutory language. But (a)(1)(B) claims only require the artist to show she or he did not "create" the work. That might be the case with a work that was quite seriously damaged by human actions before its restoration).





I'm reminded of Marcel Duchamp's famous *Fountain*, originally exhibited in 1917 at Alfred Stieglitz's gallery 291. The work consisted of a porcelain urinal signed "R. Mutt." The whereabouts of the original is not known. But Duchamp later authorized the making of sixteen copies that are now in museums scattered all over the world. An image of the original is pictured here.<sup>153</sup> *Fountain* is widely viewed as one of the most important art works of the twentieth century. It loosened traditional constraints about the use of materials and formats. Found objects of all sorts became fodder for creative endeavors. Sculpture, collage, multimedia, and all sorts of other works using everyday items became commonplace. In such works, the intention of an artist can transform a "nothing" into a "something."

If the nature of a person's intention helps explain at least part of the line between making something that is not a copyrightable object and authoring a work properly called an original work of

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<sup>153</sup> See Marcel Duchamp, *Fountain*, WIKIMEDIA COMMONS, [https://commons.wikimedia.org/wiki/File:Duchamp\\_Fontaine.jpg](https://commons.wikimedia.org/wiki/File:Duchamp_Fontaine.jpg) (last visited Feb. 14, 2019). The image is sourced from *THE BLIND MAN: NEW YORK DADA NO. 2*, at 4 (Henri-Pierre Roche, Beatrice Wood, & Marcel Duchamp eds., 1917).

“art,” why can’t the opposite notion—an intention to terminate or destroy—help describe the difference between an authored art work and an item without an authorial parent? There are arguments on both sides. On the one hand, both the wall drawing and *Shorting Copper* are clearly recognizable as restored works of the original artists. There is no sense in which others have taken liberties with the original designs or motifs of the works. (That is much less so with respect to *Muzzled Dog*.) The restoration work done on the Banksy was of high quality and that planned for the LeWitt is likely to be top notch. Both involve respect for the aesthetic instincts and goals of the artist. Perhaps, therefore, they are not different from most of the now extant works of Kafka. The author, while deathly ill with tuberculosis in 1917, asked his literary agent Max Brod to burn all of his unpublished manuscripts after the disease worked its will.<sup>154</sup> Brod elected not to do so and oversaw their publication. The *Trial* and other works became some of the most important literary masterpieces of the twentieth century. Would anyone dare claim today that they may not be attributed to Kafka just because he wished them to be destroyed?

On the other hand, the original understanding and intention of the artist and others (including the artisans?) associated with the creation of the LeWitt wall drawing was that it should or would disappear at some point. In the case of LeWitt’s Wall Drawing #679, the Menil Collection and the LeWitt Estate contend it was *always* the desire of William Stern and the others associated with his gift to the Menil Collection to cover up the work after Stern died and his house was put on the market. And they actually put that intention into effect, or at least tried to do so. And in the case of Banksy, he, like many accomplished wall artists, assumed it was highly likely his public work would be obliterated by other artists, “pests,” building owners, or public authorities. And, here too, that typically happened. In short, very strong arguments may be made that artists’ expectations, like their expressed intentions, about the ways their work will or may be destroyed should govern the longevity of their creations, especially if they actually are obliterated. That was an important argument I have made elsewhere—contending that the opinion denying 5Pointz artists preliminary re-

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<sup>154</sup> See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 830-831 (2005).

lief to halt destruction of their aerosol work was erroneously reasoned.<sup>155</sup> And if artists should have such control, why is a “resurrected” work not the same as a work made by an infringing appropriation artist “cloning” the work of another.<sup>156</sup> If an artist intends a work to “die” at some point, it is appropriate to suggest that anyone who makes it last longer or brings it back from the dead has “created” a work not made by the original author. Though *The Trial* is one of the cherished reads in western literature, perhaps Brod should not have preserved it. Or, perhaps better put, perhaps neither the restored Wall Drawing #679 nor *The Trial* may be attributed to LeWitt, the artisans, or Kafka. *The Trial* may be best described and attributed as a novel once written by Kafka, but now the resurrected work of Brod’s intentions!<sup>157</sup>

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<sup>155</sup> See RUDICK, *supra* note 27, at 596-599.

<sup>156</sup> *Sturtevant: Double Trouble*, MUSEUM OF MODERN ART (Nov. 29, 2014-Feb. 22, 2015), <https://www.moma.org/calendar/exhibitions/1454> (last visited Feb. 14, 2019). Some fairly well-known artists have been quite successful in cloning work. They are very adept at adopting the styles and techniques of others to duplicate their works. Elaine Sturtevant, whose work was exhibited at the Museum of Modern Art in New York not long ago, is a prime example. Her 2014 show is memorialized at *Sturtevant: Double Trouble*. See JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* (1941). Sherrie Levine often operates in a related fashion, but sometimes uses photography to redisplay the work of others. Her most famous pictures are copies of the images taken by Walker Evans and published in this book. Metropolitan Museum of Art. See *After Walker Evans 4*, THE MET, <https://www.metmuseum.org/art/collection/search/267214> (last visited Feb. 14, 2019). The photographs are now in the collection of the Metropolitan Museum of Modern Art. See also *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TULANE J. TECH. & INTELL. PROP. 163 (2014). The work of Sturtevant and Levine is quite different from other appropriation artists, such as Shepard Fairey, Richard Prince, or Jeff Koons who make use of the work of others but typically make changes to suit their personal fancies and whims. Not surprisingly Levine, Fairey, Prince, and Koons all have been involved in copyright litigation.

<sup>157</sup> Kafka, of course, is far from the only creative soul who wished to destroy or actually destroyed their own work. The list is long. See M. H. Miller, *From Claude Monet to Banksy, Why Do Artists Destroy Their Own Work?*, THE NEW YORK TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/t-magazine/artists-destroy-past-work.html>.

## 2. MUTILATION AND ATTRIBUTION OF RESURRECTED TEMPORARY WORK

As noted above, an artist also may disclaim authorship of a work “in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>158</sup> Restoration work, however, is not deemed to be distortion, mutilation, or modification unless it is done in a grossly negligent fashion.<sup>159</sup> The first consideration is whether restoration work performed to resurrect a “dead” work intended to have less than an eternal life is a distortion, mutilation, or modification that is prejudicial to the artist’s reputation. The most frequently cited case on the reputation issue is *Carter v. Helmsley-Spear, Inc.*<sup>160</sup> Using common meanings given to the phrase “prejudicial to the honor or reputation of the artists,” the court concluded that reputation may refer to both the artist and the work in issue and that the artist need not be well known to claim rights under VARA. Rather, the focus is on whether alteration or mutilation of a work “would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.”<sup>161</sup> Reputational harm does not necessarily refer to lowering of esteem, but to changes in public perceptions not intended by the author. Here too there are quite tenable arguments on both sides.

While the *Carter* test provides a broad, liberal construction of the statute, the temporary aspect of works like *Wall Drawing #679* creates special problems quite distinct from *Carter*; that case did not involve temporary qualities of artistic endeavors. Restoring a temporal work deemed “terminated,” for example, actually may enhance the artistic reputation of the artist by making a creation visible to a wider audience for a significantly longer period of time. Even if a work is under appreciated today, its importance may be recognized by future generations. In addition, the very idea that competently restoring a work is equivalent to mutilating it seems

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<sup>158</sup> 17 U.S.C. § 106A(a)(2) (2019).

<sup>159</sup> See 17 U.S.C. § 106A(c)(2) (2019).

<sup>160</sup> There are three reported opinions in the case, see *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994); *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

<sup>161</sup> *Carter*, 861 F. Supp. at 323.

facially preposterous and contrary to the terms of the statute. Doing so, the argument goes, hardly diminishes the reputation of an artist. Rather, the new visibility of the work makes its creativity available to larger numbers of people for longer periods of time, thereby enhancing its renown.

But, reputation, as *Carter* makes clear, measures an array of qualities other than the aesthetic appeal or longevity of a work. Good name and public esteem can refer to the qualities of the artist as a creative, inventive, interesting soul. If a work's temporal quality is inherent in the creativity of an artist and that quality is ignored or undermined, a strong argument may be made that the good name and esteem of the artist have been diminished. If this idea is taken seriously the resurrection of a work intended to be time-limited is not a restoration but a "mutilation" of the artist's aesthetic intentions. That intention is overridden just as surely as a grossly negligent restoration harms the contours of a traditional work designed to last as long as possible.

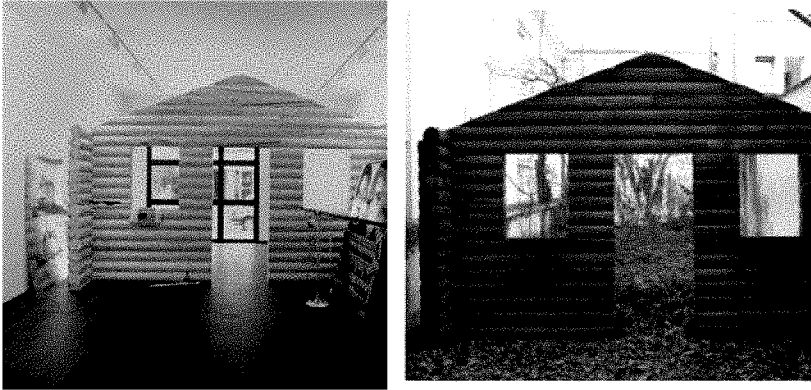
The most recent dispute raising questions about the sorts of restorations which may be grossly negligent was filed by Cady Noland against a range of parties involved in the reworking of her 1990 *Log Cabin Facade* in 2010 pictured below.<sup>162</sup> In 1991 she gave permission to the owner of the object, Wilhelm Schurmann, to stain it in a dark color. The stained version also is pictured below.<sup>163</sup>

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<sup>162</sup> See Julia Halperin & Eileen Kinsella, *Cady Noland Sues Three Galleries for Copyright Infringement Over Disavowed Log Cabin Sculpture*, ARTNET NEWS (Jul. 21, 2017), <https://news.artnet.com/art-world/cady-noland-copyright-infringement-log-cabin-1030649>. The unstained image is from the complaint. See also Second Amended Complaint, *Noland v. Galerie Michael Janssen*, ¶ 5, Civil Action No. 1:17-cv-05452-JPO, (S.D.N.Y. May 29, 2018). An interesting side of this case is that the Copyright Office has refused to register a copyright for the work on the ground that it is not original. I find that conclusion stunningly wrong. Everyday objects can be art. The fact that the front looks like a cabin and is made out of common materials is not decisive if the work is intended as artistic, placed in an unusual setting or in a museum environment, and is impossible to use as a utilitarian object. See Letter from Karyn A. Temple, U.S. Copyright Review Board, to Andrew Epstein, Esq., (on file with author) available at <https://www.copyright.gov/rulings-filings/review-board/docs/log-cabin.pdf> (last visited Feb. 14, 2019).

<sup>163</sup> This image is from Reconsideration for Refusal to Register Log Cabin. There also is another issue buried in this dispute. The Copyright Office has refused to register the work on the ground that it is not original. I find this conclusion stunningly wrong. Common, everyday objects have been used in art for over a

Schurmann, with the permission of Noland, then allowed it to be displayed outdoors by a museum in Aachen, Germany. It was placed directly on the ground for a significant period of time during which it deteriorated.<sup>164</sup>



She now claims that the owner and museum were grossly negligent in not insuring that the work was properly cared for, that the “restoration” replacing most of the wood with new logs went forward without any consultation with her and was unnecessarily comprehensive by replacing wood with fresh material, that her honor or reputation was injured, and that the resulting object was an infringing copy rather than her original work.

‘This is not a restoration—this is a copy,’ Noland’s lawyer Andrew Epstein told ArtNet News. By discarding the rotting logs and wooden elements that made up the cabin’s facade and replacing them with

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century. If presented with an intention to treat the object as artistic, in a setting like a museum or gallery where aesthetics typically is invoked, and widely recognized by others as a pictorial, sculptural, or graphic work, it is original. The mere fact that it is made of common objects is not decisive. This has been true since Marcel Duchamp’s famous use of urinal as an artistic object. The original has been lost. The Tate Modern in London, along with other important institutions, holds one of sixteen replicas made with the artist’s permission. *See Marcel Duchamp, The Fountain (1917, replica 1964)*, TATE, <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> (last visited Feb. 14, 2019).

<sup>164</sup> SECOND AMENDED COMPLAINT, *supra* note 161, ¶¶25-34.

new ones, the conservator essentially destroyed the original work and created an unauthorized reproduction, according to the lawsuit.

‘Wood can be restored, even rotting wood,’ Epstein said. “This is a forgery.”<sup>165</sup>

Noland’s case raises questions much like those in the LeWitt problem. Under what circumstances does a restoration move beyond the intention of those involved in the creation of a work, either by bringing a temporary work back to life or by taking drastic steps to bring a work back to something like its original appearance. And will such undertakings sometimes reach such a profound level that they prejudice the honor or reputation of the artist? In restoring temporary works or totally replacing materials without authorization, I think, the artists have strong attribution claims. The Menil Collection, therefore, may be correct in claiming that a restored Wall Drawing #679 may not be attributed to LeWitt. And, I might add, attribution to the artisans may also be inappropriate.

### 3. WORKS IN OR ON BUILDINGS: MUTILATION AND DESTRUCTION

Special moral right rules apply to works “in or on” buildings. 17 U.S.C. § 106A(a)(3) provides protections against “intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and “any destruction of a work of recognized stature.” These “integrity” claims are separate and apart from attribution rights, but inapplicable under certain circumstances. 17 U.S.C. § 113(d) provides that if “a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3),” and “the author consented to the installation of the work in the building” under the

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<sup>165</sup> *Mueller v. Janssen Gallery*, 225 F. Supp. 3d 201 (S.D.N.Y. 2017). Noland’s claim that the work was no longer hers led the owner of the object to sue those involved in the \$1,400,000 sale to him to compensate for the reduced value of the work. Noland had notified in 2010 that after the work that was done on the sculpture she disclaimed authorship. The owner’s claim was dismissed, the court holding that no fiduciary duty was owed to the purchaser.

terms of a written contract recognizing that the building owner has the right to destroy the work, then mutilation and destruction rights do not apply.<sup>166</sup>

While the applicability of these provisions to traditional art works is clear, their implication for certain types of temporary works, including the often temporary installations of conceptual art, is much fuzzier. Destroying a work *before* the temporal limits on its existence occur surely violates the statute. If, for example, part of a public sculpture exhibition intended to last six months is installed at various street locations in a city and is damaged or destroyed, the artist has a claim. But what about restoring a work intended by its artist to be short lived and covered over at her behest? Is that “mutilation” or “destruction” of the artist’s intentions and therefore of the underlying work? The same basic theories apply to analysis of the mutilation arm of this rule as those described above with respect to attribution. But with destruction of a work, the moral rights test is a different. Reputational inquiries shift to questions about whether the work is of “recognized stature.”<sup>167</sup> This legal construct also has been construed broadly to include not just the judgments of art aficionados but also of a large array of people in the broader community. There is no doubt that LeWitt and many other conceptual artists fulfill this arm of the statute. But as with mutilation, it is difficult to wrap one’s mind around the idea that bringing a work back to life is its destruction. How can the resurrection of a dead work be its demise? As long as the restoration is performed in a competent way, we will be blessed with the presence of a work for a significant period of time into the future. On the other hand, if the contours of a work include its anticipated demise, isn’t its continued or revived existence a destruction of the artist’s intentions? If a work is designed to be depleted over time but is maintained in its original “virgin” state indefinitely, doesn’t that destroy a central conception of the work?<sup>168</sup>

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<sup>166</sup> 17 U.S.C. § 113(d)(2). In addition, there is a provision allowing the owner of a building to give the artist 90 days to remove a work “which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work.”

<sup>167</sup> 17 U.S.C. § 106A(c)(2) (2019); *See also* Cohen v. G&M Realty, L.P., 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

<sup>168</sup> *See* Discussion of Felix Gonzalez-Torres, *supra* note 26.



Consider again the previously described De Kooning/Rauschenberg drawing episode.<sup>169</sup> When De Kooning agreed to give Rauschenberg a drawing to erase, it is safe to say that neither intended it to be “reborn.” Indeed, that was the point. Together, they intended to participate in the use of one work to create another, to destroy one work to give life to a second. In this setting, “restoring” the original De Kooning work literally requires the destruction of the Rauschenberg project. Wouldn’t that violate the integrity rights of both artists? Or think about Urs Fischer who is famous for crafting large wax candle sculptures, lighting them, and letting them turn into puddles of wax on the floor. One of the most famous involves wax figures of a man with hands in his pockets staring at a huge replica of Giambologna’s famous sculpture, *Rape of the Sabine Women*.<sup>170</sup> Can these works, forcing us to think about the temporary qualities of artistic preferences, to say nothing of life itself, legitimately be restored without agreement of the artist? Is LeWitt’s Wall Drawing #679 any different? While it’s restoration would not involve the destruction of a new work of visual art, it arguably would have a similar result. If LeWitt, like De Kooning and Fischer before him, contemplated the obliteration of a wall drawing or sculpture even as it was being installed for the first time, wasn’t that part of his artistic endeavor?

## V. CONCLUSION

Substantial cultural questions underlie much of the discussion in this essay. Finding the best answers for making decisions about conceptual art, therefore, may be just as likely to surface by probing the propriety of restoration as in plumbing the depths of traditional legal analysis. What is the right thing to do? Much of the literature about the ethics of restoring or conserving creative works

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<sup>169</sup> See *supra* p. 17.

<sup>170</sup> See Jonathan Jones, *Time Flies at the Venice Biennale*, THE GUARDIAN (June 7, 2011), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2011/jun/07/time-venice-biennale-marclay-fischer> (The work was on display at the Venice Biennale in 2011.); see Pinar, *Classic Sculpture Replica is a Giant Burning Candle*: MY MODERN MET (July 2, 2012), <https://mymodernmet.com/urs-fischer-the-rape-of-the-sabine-women-untitled/> (This site contains images of the work in various stages of its decomposition.).

involves traditional art—typically the propriety of removing some or all of the material placed on a work in prior restoration efforts or of placing new substances on an old work to bring it closer to its original appearance. But the arrival of various types of modern and conceptual art in the last century has spawned a new set of concerns. Should a public work of Banksy that has deteriorated or disappeared beneath the depredations and paints of others be brought back to life? May the work of Urs Fischer be rebuilt, lit, and melt to the floor? Should we allow restoration of a temporary work that is covered but not destroyed by the artist or the artist's successor? Should we allow a work designated as not for sale to be sold? Should work that was intentionally designed as a deteriorating object be preserved in a certain state? Should the Hitchcocks restore Wall Drawing #679 or leave it buried?

Though probing questions of propriety can be as slippery as investigating legal norms, a different lens may provide a helpful conclusory point of view. Conceptual art like LeWitt's, as its name suggests, arises from a thought process, not from an actual physical manifestation of a work. LeWitt, of course, carefully stated in his certificates and diagrams that they were not actual wall drawings. They offered the general parameters of a project. And he carefully argued in his *Paragraphs on Conceptual Art* that his goal was to create plans, not traditional two- or three-dimensional art objects. I have opined here that the intention of an artist is an important consideration in attempting to figure out how best to cope with the alteration, deterioration, or reconstruction of a conceptual work no longer in its original condition.<sup>171</sup> Others, much better schooled than I in the non-legal, cultural, and ethical problems associated with restoration and conservation of modern and contemporary art, also have used intention as a guide.<sup>172</sup>

Intention, of course, also may be a slippery notion—not just because discerning motivations may be difficult, but also because many restoration decisions must be made long after an artist dies. Even if the American moral rights provisions were altered to extend protections beyond an author's life, the problem of discerning whether a work was supposed to be allowed to disintegrate might

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<sup>171</sup> See *supra* p. 23-26.

<sup>172</sup> See David A. Scott, ART: AUTHENTICITY, RESTORATION, FORGERY 384-409 (2016).

be challenging. Those sorts of issues permeate the life of Wall Drawing #679. In many ways it is the ineffable qualities of LeWitt's intentions about the work, or the intentions of others involved in its installation on a wall, that have made this essay so difficult to craft or confine in traditional categories. It is easy to claim that in general LeWitt understood his drawings would often come and go, that he often approved of multiple successive installations of any particular work, and that he found absolutely nothing morally or ethically wrong with allowing destruction of installed two-dimensional works. Quite the contrary. The concept, the plan, was the important thing for him. The end product was nice, but potentially repetitive and not always the same in each iteration.

But it's what we don't know that causes so much consternation. LeWitt died before Stern. No written contractual understandings between the artist and William Stern about any limits on the visible life of the wall drawing have surfaced. In the absence of specific knowledge of their frame of mind when the work was installed in 1991, it is difficult to determine precisely what their intentions might have been about covering over the work when the house was sold in 2014. Nor is it easy to discern what they might have allowed Dr. Hitchcock to do after she purchased the property. Abstracted from what we know about the events surrounding the creation, maintenance, sale, and attempted destruction of #679, and the conceptual characteristics of LeWitt's work, its demise may well have been intended. We can say with a certain degree of confidence that skim-coating the work was not out of the bounds of propriety for either LeWitt or the Menil Collection. We have no knowledge about what the artisans doing the installation might have preferred. But its restoration is another matter. On that score we are without guidance. Restoration preferences for the various actors in the drama are nowhere in the public record. Even if everyone would agree that the preferences of the artist, artisans, and various owners should be considered, we can only make intelligent guesses about their consensus, if one existed. While we might conclude that LeWitt would have viewed the visible life of the covered wall drawing as over and therefore that restoration is inappropriate, that result is no easier to justify than accepting its revelation as legitimate.

In short, conceptual art is a relatively new frontier and it is not easy to fathom what some notion of substituted or constructed in-

tent or desire might look like in this setting. It is one thing to say that LeWitt presumed his installations often disappeared. But it is quite another to construct an intention that such a disappearance was anticipated for Wall Drawing #679 upon Stern's death or the sale of the house to a third party. Nor is it possible to know what he might have thought about an effort to restore the now invisible installation. It certainly is plausible to suggest that the well-known understanding that his wall drawings often were temporary implied an intention to not bring them back to life in the same place by restoring the obliterated marks on a wall. But there is no way to know if that is an appropriate reflection of what he might have said if asked. In short, the conservation and restoration world, now often confronted with questions about whether to accept destructive intentions of artists, ignore them, or delay them, is at loggerheads with itself about how to proceed.<sup>173</sup>

But there is another, and perhaps equally important consideration. Even if an artist's purposes, aims, and objectives are well understood, even if intentions are very clear, it may still be difficult to discern the best ethical result. Brod's rescue of now classic works of Kafka is hardly the only example of a case where, at least in hind sight, most would say that overriding the desires of an author were proper. Scott tells the story of Edvard Munch, who was "interested in the defects of change and decay of his own work." He sometimes painted on cheap materials that naturally deteriorated over time or left work out in the yard while the weather accentuated the process of decay. "Munch took the view that his paintings had to fend for themselves in the organic process of their own degradation. When one of his many versions of *The Scream* (1893) was stolen and later recovered in a damaged condition, it is generally agreed that the artist's intention would have resulted in the recovered painting being left in that condition."<sup>174</sup> But it was immediately placed in the hands of conservators, perhaps to the delight of contemporary art aficionados. So even if our instincts suggest that LeWitt would have preferred to remove Wall Drawing #679 from the Stern house when it was sold, his work may be of such great, overriding importance that its rediscovery should immediately lead to it being placed in the hands of restoration artisans. Perhaps that

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<sup>173</sup> See Scott, *supra* note 171.

<sup>174</sup> SCOTT, *supra* note 171 at 397.

is the best place to end this journey—with a raft of legal and ethical conundrums for the art world to ponder.