

NOTES

LAW IS IN THE BIN: NEW FRONTIERS IN CONCEPTUAL ART AND LEGAL LIABILITY

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INTRODUCTION

On October 5, 2018, in the elegant Sotheby's showroom on New Bond Street in London,¹ a room crowded with potential buyers of modern art eagerly anticipated the next sale. Lot 67, by British street artist Banksy, was an unassuming stencil design spray-painted on canvas.² The most striking thing about the work was its unusually, almost disproportionately, ornate frame: "an integral element of the artwork chosen by Banksy himself," according to the description in the Sotheby's catalog.³

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1 See *Contemporary Art Evening Auction L18024, 05 October 2018*, SOTHEBY'S, <https://www.sothebys.com/en/auctions/2018/contemporary-art-evening-auction-l18024.html> [<https://perma.cc/84D5-X4GL>].

2 See *Lot 67: Banksy, Girl with Balloon*, SOTHEBY'S, <https://www.sothebys.com/en/auctions/ecatalogue/2018/contemporary-art-evening-auction-l18024/lot.67.html?locale=en> [<https://perma.cc/Z3SJ-94ZA>].

3 *Id.*

FIGURE 1: BANKSY, *GIRL WITH BALLOON*⁴

Since its first appearance in graffiti form under London's Waterloo Bridge in 2002, the original image ("Girl with Balloon") had reached such iconic status that it took first place in a 2017 poll of favorite British artworks.⁵ At this auction, Sotheby's estimated that Lot 67 would fetch

4 Banksy (@banksy), INSTAGRAM (Oct. 17, 2018), <https://www.instagram.com/p/BpDMo26h3Cu/> [<https://perma.cc/L9M5-5TB2>].

5 See *Girl with Balloon*, ARTSY: BANKSY, <https://www.artsy.net/collection/banksy-girl-with-balloon> [<https://perma.cc/4X5F-NZ8E>]; Katie Archer, *Banksy's 'Balloon Girl' Beats Paintings by Constable and Turner to Be Named Britain's Favourite Artwork*, INDEPENDENT (Aug. 24, 2017), <https://www.independent.co.uk/arts-entertainment/art/news/banksy-britain-s-favourite-artwork-balloon-girl-john-constable-jack-vettriano-jmw-turner-a7858856.html> [<https://perma.cc/TZT5-V6H6>]. For a 2004

a price of £200,000–300,000.⁶ However, the otherwise ordinary October evening at the auction house would soon take a sharp turn.

Video footage posted to Banksy's YouTube channel several days after the auction⁷ tells the story best. After the hammer falls on a winning bid of £860,000, Banksy, or someone representing him, triggers a remote device from within the crowd; immediately, a siren begins to beep and the painting hanging on the wall smoothly shreds itself, stopping at the halfway mark.⁸ As the startled onlookers realize that the lower half of the canvas is now hanging in ribbons out of the bottom of the frame, the room descends into chaos.⁹

FIGURE 2: BANKSY, GOING, GOING, GONE...¹⁰



photograph of the *Girl with Balloon* image in its original outdoor location on London's Southbank, see BANKSY, *WALL AND PIECE* 66 (2005).

6 Lot 67: Banksy, *Girl with Balloon*, *supra* note 2.

7 banksyfilm, *Shredding the Girl and Balloon—The Director's Half Cut*, YOUTUBE (Oct. 17, 2018), <https://youtu.be/vxkwRNIZgdY> [<https://perma.cc/B5RE-WTCH>]. Throughout this Note, I will refer to the event depicted in this video as the “shredding stunt.”

8 *Id.* at 2:05–2:12; see also Jason Daley, *Watch This \$1.4 Million Banksy Painting Shred Itself as Soon as It's Sold*, SMITHSONIAN MAG. (Oct. 8, 2018), <https://www.smithsonianmag.com/smart-news/watch-14-million-banksy-painting-shred-itself-soon-it-sold-180970486/> [<https://perma.cc/A8QV-U78L>] (describing the frame as “eating the painting, spitting half of it out the bottom”).

9 banksyfilm, *supra* note 7, at 2:11–2:34.

10 Banksy (@banksy), *Going, going, gone...*, INSTAGRAM (Oct. 5, 2018), <https://www.instagram.com/p/Bokt2sEhlsu/> [<https://perma.cc/4BPQ-FNSN>].

The incident received extensive media attention.¹¹ Banksy promptly claimed credit on his social media channels¹² and rechristened the partially shredded painting *Love Is in the Bin*.¹³ Sotheby's representatives initially expressed shock,¹⁴ but the auction house shortly recovered to produce a press release declaring that Banksy had "cleverly nestled himself in the pages of art history" and deeming the artwork the first to be "[c]reated [l]ive at [a]uction."¹⁵ The sale price would have been newsworthy in itself, as it was a personal record for the artist.¹⁶ However, experts soon began to estimate that the framed print had as much as doubled in value after the stunt, despite its damaged condition.¹⁷

11 See, e.g., Scott Reyburn, *Banksy Painting Self-Destructs After Fetching \$1.4 Million at Sotheby's*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/arts/design/uk-banksy-painting-sothebys.html> [https://perma.cc/2B2V-S27K].; Kelly Crow & Michael Wright, 'Going, Going, Gone...': Banksy Artwork Shreds Itself After Sale, WALL ST. J. (Oct. 7, 2018), <https://www.wsj.com/articles/going-going-gone-banksy-artwork-shreds-itself-after-sale-1538827181> [https://perma.cc/SUP3-SBDK]; *Banksy Artwork Shreds Itself After £1m Sale at Sotheby's*, BBC NEWS (Oct. 6, 2018), <https://www.bbc.com/news/uk-england-bristol-45770028> [https://perma.cc/H86P-G6V5]; *Darwin Alert!—Someone's Just Shredded a £40k Banksy Print*, MYARTBROKER, <https://www.myartbroker.com/artist/banksy/darwin-alert-someones-just-shredded-a-40k-banksy-print/> [https://perma.cc/MN48-AEZK] ("On Friday 5th October Banksy shocked the art world with a stunt at the auction house Sotheby's. If you have not seen or read about it, where have you been?").

12 See banksyfilm, *supra* note 7; Banksy (@banksy), *supra* note 10; Banksy (@banksy), "The urge to destroy is also a creative urge" – Picasso, INSTAGRAM (Oct. 6, 2018), <https://www.instagram.com/p/BomXijJhArX> [https://perma.cc/8MV4-5X2C].

13 Eileen Kinsella, *Banksy Authenticates and Renames His Shredded \$1.4 Million Painting—Which the Buyer Plans to Keep*, ARTNET NEWS (Oct. 11, 2018), <https://news.artnet.com/market/banksy-re-authenticates-shredded-1-4-million-european-buyer-will-keep-1369852> [https://perma.cc/UMP4-DN7E]. "Bin" is a British English term for wastebasket. *Bin*, CAMBRIDGE ESSENTIAL ENG. DICTIONARY (2d ed. 2011). The implication is that the work has been "trashed."

14 See James Pickford, *Banksy Painting 'Self-Destructs' on Podium in Auction Prank*, FIN. TIMES (Oct. 5, 2018), <https://www.ft.com/content/1c748f2e-c8ea-11e8-ba8f-ee390057b8c9> [https://perma.cc/3LDK-HW9Y] (quoting Sotheby's senior director Alex Branczik: "We've just been Banksy'ed"); Reyburn, *supra* note 11 (quoting auctioneer Oliver Barker, who was at the podium: "It's a brilliant Banksy moment, this. You couldn't make it up, could you?").

15 *Latest Banksy Artwork 'Love Is in the Bin' Created Live at Auction*, SOTHEBY'S (Oct. 11, 2018), <https://www.sothebys.com/en/articles/latest-banksy-artwork-love-is-in-the-bin-created-live-at-auction> [https://perma.cc/Q42U-V998].

16 See Reyburn, *supra* note 11. While the winning bid was for a hammer price of £860,000, the final sale price was £1.04 million with fees. *Lot 67: Banksy, Girl with Balloon*, *supra* note 2.

17 Jacob Jarvis, *Banksy Artwork 'Doubles in Value' After Being Shredded in Front of Stunned Onlookers Moments After It Was Sold for Over £1m at Sotheby's Auction*, EVENING STANDARD (Oct. 6, 2018), <https://www.standard.co.uk/news/london/banksy-artwork->

Reactions from the art world were mixed. Admirers cheered the event as the iconoclastic artist's most audacious work yet,¹⁸ while others accused the artist of exploiting the buyer and other bidders to shamelessly promote himself and his career.¹⁹ Conspiracy theories also began to circulate. Both Banksy²⁰ and Sotheby's²¹ discredited any notion that the auction house had had prior warning of the stunt. The swirl of commentary around the event reached its apex when the buyer, identified only as a "female European collector and a long-standing client of Sotheby's," indicated that she was "proceeding with the purchase at the same price"²² and that she was pleased to be the owner of the new work, which she described as "[her] own piece of art history."²³

selfdestructs-moments-after-being-sold-at-sothebys-for-1million-a3955111.html [https://perma.cc/QBA9-GAGG].

18 See Ben Davis, *Can We Just Admit That Banksy's Art-Shredding Stunt Is Actually Really Good?*, ARTNET NEWS (Oct. 10, 2018), <https://news.artnet.com/opinion/banksy-sothebys-art-shredded-1368280> [https://perma.cc/U4VZ-SLPP] (comparing the event's appeal to that of a "well-plotted heist" from a "caper movie").

19 See Daley, *supra* note 8 (suggesting that the work was "less of a social commentary and more of a self-promoting publicity stunt").

20 Banksy (@banksy), *Shredding the Girl and Balloon—the Director's Cut*, INSTAGRAM (Oct. 17, 2018), <https://www.instagram.com/p/BpDMo26h3Cu/> [https://perma.cc/N54X-MLFY] ("Some people think the auction house were in on it, they weren't.").

21 Mattha Busby, *Shredded Banksy: Was Sotheby's in on the Act?*, GUARDIAN (Oct. 13, 2018), <https://www.theguardian.com/artanddesign/2018/oct/13/shredded-banksy-was-sothebys-in-on-the-act> [https://perma.cc/JQ3D-4SVT] (quoting Sotheby's representatives disclaiming responsibility); Anny Shaw, *Banksy Renames Shredded Painting Love Is in the Bin as Work Sells to Winning Bidder After a Week of Negotiation*, ART NEWSPAPER (Oct. 11, 2018), <https://www.theartnewspaper.com/news/banksy-renames-shredded-painting-love-is-in-the-bin-as-work-sells-to-winning-bidder-after-a-week-of-negotiation> [https://perma.cc/YX4F-GNGY] ("Were we in on it? Absolutely not. Do you really think Banksy, who spent his youth stencilling walls in Bristol and dodging the local authorities, would want to collaborate with the art establishment? Come on, you should all know better . . .").

22 Sotheby's (@sothebys), INSTAGRAM (Oct. 11, 2018), <https://www.instagram.com/p/BozPjXSgveX/> [https://perma.cc/XAT7-LZEU].

23 See Mattha Busby, *Woman Who Bought Shredded Banksy Artwork Will Go Through with Purchase*, GUARDIAN (Oct. 11, 2018), <https://www.theguardian.com/artanddesign/2018/oct/11/woman-who-bought-shredded-banksy-artwork-will-go-through-with-sale> [https://perma.cc/28VD-F5E9].

FIGURE 3: *LOVE IS IN THE BIN* ON DISPLAY AT SOTHEBY'S BOND STREET GALLERIES²⁴



In triggering the remote-control shredder, Banksy was—whether deliberately or inadvertently—contributing to a debate that extended far beyond that October evening at Sotheby's. Banksy's shredding stunt fits squarely within the conceptual art tradition in modern art, the legal underpinnings of which have resisted definition since its inception. As the *Girl with Balloon* slid out of the bottom of its frame in shreds, Banksy was merely adding a novel twist to the legal difficulties that often face buyers of conceptual art. Banksy's visibility and popularity,²⁵ and the viewer response his work often inspires,²⁶ means that stunts like this one—in which a legal transaction between artist and buyer is part of the essential “concept” of a work of

24 Jake Greenberg, *Shredded Banksy Work Has Been Renamed and Its Sale Will Go Forward*, INSIDEHOOK (Oct. 12, 2018), https://www.insidehook.com/daily_brief/news-opinion/shredded-banksy-work-renamed [<https://perma.cc/48G9-5FZB>] (featuring an image by Ben Stansall).

25 Dani Deahl, *Please Don't Shred Your Own Banksy Print Unless You Want It to Be Worth £1*, VERGE: TL;DR (Oct. 10, 2018, 6:52 PM), <https://www.theverge.com/tldr/2018/10/10/17961788/banksy-shredding-print-prank-sothebys> [<https://perma.cc/5BZ9-PLSL>] (quoting art consultant Ian Syer: “Banksy is unique to the art world. No other artist captures the hearts and minds of the public like he does.”); Reyburn, *supra* note 11 (“For more than a decade, Banksy has created headlines with his daring, politically subversive artistic stunts.”).

26 See *infra* note 212.

conceptual art—will only become more common as other artists use Banksy’s contribution as the catalyst for their own creative projects.²⁷

If this buyer’s choice is only the first data point in a potential proliferation of such transactions, it tells us little. The obvious question remains: If such a buyer had decided *not* to accept the artist’s explanation that the destruction of her purchased item had independent artistic integrity, what legal recourse, if any, would she have had? And how would the reviewing court have addressed the question of whose definition of the work was authoritative?

Part I of this Note begins with a discussion of who Banksy is and why his work is important to this legal debate, finishing with a detailed description of the features of conceptual art that are relevant for legal analysis and an argument that the shredding stunt—the *event itself*, not the partially shredded canvas—is a work of conceptual art. Part II argues that the unique features of the shredding stunt, and of future works in the same artistic category, present a novel legal problem both for artists and for buyers. This novel problem is explored through the lens of the legal recourse available to buyers of modern art who become aware at the time of purchase that the artist had different plans for the tangible elements of the work than were communicated prior to purchase. Whether the court adopts the artist’s or the buyer’s definition of the “artwork” is crucial to the resolution of these disputes. Existing law governing sales of artwork indicates that a reviewing court is more likely to side with the buyer.

In light of the ramifications of the shredding stunt and the new questions it raises, Part III issues recommendations for artists seeking to realize their creative goals and buyers seeking to avoid harm to themselves and liability to third parties. In the absence of formal copyright protection for conceptual artworks, artists can avoid legal action from potential buyers by ensuring they only sell to willing buyers. While this option has adverse consequences for artistic integrity, as risk mitigation is antithetical to the element of surprise at the heart of works like the shredding stunt, artists might need to voluntarily accept this reality as a limitation on their ability to pursue any concepts they desire. Buyers, on the other hand, need to begin scrutinizing art transactions with more caution if they want to avoid becoming unwilling participants in conceptual artworks. In fully evaluating risk, buyers may also be able to rely on industry norms to incentivize artists to be mindful of their interests.

27 After the stunt, auctioneers reassured prospective bidders that no Banksy works due up for auction in the near future would “shred or explode.” Busby, *supra* note 23.

I. *LOVE IS IN THE BIN* IN ITS ARTISTIC CONTEXT

A. *The Banksy Phenomenon*

“Banksy” is a pseudonym used by an anonymous British graffiti artist believed to be from Bristol, England.²⁸ Banksy’s true identity, which is still unrevealed, is a continual subject of speculation.²⁹ While Banksy seems to be one person and is usually described that way, it is unknown whether the “Banksy” moniker in fact refers to a team of people.³⁰ The now-defunct original version of Banksy’s website provides this tongue-in-cheek insight: “I paint it all myself unless it’s illegal, in which case I’ve never seen any of it before, your honour.”³¹ Banksy’s anonymity certainly adds to the intrigue surrounding his work, but it also has the benefit of shielding him from criminal liability (as most graffiti installations are, in fact, illegal).³²

Banksy began his artistic career in the 1990s producing freehand graffiti, eventually developing a distinctive stencil-based style that makes his street art installations instantly recognizable.³³ Later in his

28 Debra N. Mancoff, *Banksy*, BRITANNICA, <https://www.britannica.com/biography/Banksy> [<https://perma.cc/96RP-666H>].

29 Lauren Collins, *Banksy Was Here*, NEW YORKER (May 7, 2007), <https://www.newyorker.com/magazine/2007/05/14/banksy-was-here> [<https://perma.cc/7UEU-Z2CP>].

30 Joe Sommerlad, *Who Is Banksy? The Suspects Linked to the Art World’s Biggest Mystery*, INDEPENDENT (Nov. 5, 2019), <https://www.independent.co.uk/arts-entertainment/art/features/banksy-who-artist-secret-likely-candidates-names-public-sothebys-auction-a8590041.html> [<https://perma.cc/W7LF-8PNS>] (outlining several theories, including the suggestion that Banksy is a “collective of artists”); cf. BANKSY, *supra* note 5, at 102 (making multiple references to a group effort—e.g., “we have to work quietly”—while narrating the installation of a large artwork on an overpass bridge).

31 *Frequently Asked Questions*, BANKSY, <https://web.archive.org/web/20120103163406/http://www.banksy.co.uk/QA/qaa.html> [<https://perma.cc/54PU-GVU4>].

32 See Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/> [<https://perma.cc/UDT3-U9W6>] (“Evading the authorities was one explanation—Banksy ‘has issues with the cops.’ But he also discovered that anonymity created its own invaluable buzz.”).

33 Pauli Poisuo, *The Untold Truth of Banksy*, GRUNGE MAG. (Aug. 31, 2020), <https://www.grunge.com/241915/the-untold-truth-of-banksy/> [<https://perma.cc/8FYF-XCUJ>]; see also *Graffiti Wars* (Channel 4 television broadcast, Aug. 14, 2011) [hereinafter *Graffiti Wars*] (exploring the origins of stencil graffiti art and Banksy’s contributions as one of the early pioneers of the medium); Mancoff, *supra* note 28 (noting that within the first decade of his career, Banksy’s early freehand technique began to be supplanted by stencil work to speed up on-site execution); BANKSY, *supra* note 5, at 13 (implying that he switched to stenciling to “cut . . . painting time in half” in order to avoid detection by law enforcement). For recent footage of Banksy

career, he began to explore other media; besides an extensive collection of street art installations worldwide, his artistic portfolio now includes several books,³⁴ limited edition prints of his best-known street art designs,³⁵ original visual artwork not connected to any site-specific installation,³⁶ an array of officially licensed “merchandise” (presented for sale with mock seriousness),³⁷ and several conceptual art stunts.³⁸ To preserve his anonymity, Banksy carries on all legal interactions with the art world, including sales and authentication, through an agency named Pest Control, incorporated in the United Kingdom.³⁹ Banksy is both a prolific artist and a modern pop culture icon. He was named one of the world’s 100 most influential people by *Time* in 2010,⁴⁰ a list that also included Barack Obama, Steve Jobs, and Lady Gaga.⁴¹ Banksy is also an established presence on social media, using his official Instagram and YouTube accounts to release new works and independently control his creative brand.⁴²

stenciling on-site, see banksyfilm, *London*, YOUTUBE (July 14, 2020), https://youtu.be/xKroEU3_SKY [<https://perma.cc/FZ8H-ADKD>].

34 Mancoff, *supra* note 28.

35 Benjamin Sutton, *Banksy’s Rapidly Rising Market, Explained*, ARTSY (Sept. 23, 2020), <https://www.artsy.net/article/artsy-editorial-collectors-banksys-market> [<https://perma.cc/65ZF-73K4>].

36 See, e.g., *Donuts*, HEXAGON GALLERY, <https://hexagongallery.com/catalog/artist/banksy/donuts/> [<https://perma.cc/2TFP-ED3G>] (describing this particular print as “an unusual Banksy artwork because it was never originally a public street art piece”); *Lot 106: Banksy, Show Me the Monet*, SOTHEY’S, <https://www.sothebys.com/en/buy/auction/2020/contemporary-art-evening-auction-2/banksy-show-me-the-monet> [<https://perma.cc/C9KD-PNWP>] (oil painting created for Banksy’s “first conventional gallery exhibition,” *Crude Oils*, in 2005); see also Sutton, *supra* note 35.

37 See GROSS DOMESTIC PROD., <https://shop.grossdomesticproduct.com> [<https://perma.cc/PF4S-J8WX>]; Lanre Bakare, *Banksy Launches Homewares Shop in Dispute Over Trademark*, GUARDIAN (Oct. 1, 2019), <https://www.theguardian.com/artanddesign/2019/oct/01/banksy-launches-homewares-shop-in-dispute-over-trademark> [<https://perma.cc/APZ3-96V6>].

38 See *infra* notes 108–10 and accompanying text.

39 FAQ, PEST CONTROL OFF. LTD., <https://pestcontroloffice.com/faq.asp> [<https://perma.cc/Q8H4-NXSU>]; see *Pest Control: A Guide to Verifying Banksy Prints for Buyers & Sellers*, MY ART BROKER, <https://www.myartbroker.com/artist/banksy/the-practical-guide-to-pest-control/> [<https://perma.cc/2VUJ-H6XV>] (describing the agency as a “not-for-profit handling service and point of sale for new works, to help authenticate genuine Banksy works and expose any forgeries”).

40 Shepard Fairey, *The 2010 TIME 100: Banksy*, TIME (Apr. 29, 2010), http://content.time.com/time/specials/packages/article/0,28804,1984685_1984940_1984945,00.html [<https://perma.cc/V4MM-54GU>].

41 Ellsworth-Jones, *supra* note 32.

42 See Michele Boroni, *Banksy: “Not on Facebook, Not on Twitter”*, ELLE DECOR (Feb. 6, 2019), <https://www.elledecor.com/it/best-of/a27734770/banksy-instagram-social-media/> [<https://perma.cc/D8F5-4VE7>].

An examination of the Banksy phenomenon reveals a visionary, genre-defying artist with strong opinions about the limited capacity of the art establishment to define artistic ownership, artistic valuation, and acceptable artistic context. Much of his public commentary and many of his artworks center around this defining concept. Banksy considers graffiti a legitimate art form, despite its emancipation from the gallery setting, and thinks its primary value is in its cheapness and ready accessibility to the public.⁴³ He asserts that advertisers invade the public space without the viewer's permission in pursuit of a profit motive; in his understanding, since the law protects this exploitative behavior, it should also protect street graffiti art, which is egalitarian in its independence from commercial interests.⁴⁴ As Banksy's images and other works from the street art genre began to enter the mainstream art market and fetch increasingly high prices—an artistic-cultural shift that has been described as the "Banksy effect"⁴⁵—Banksy's theme evolved in response.⁴⁶ Several of his later works explore the subjectivity of artistic merit and the illegitimacy of the art world's attempts to define and control it. An image from Banksy's 2006 *Barely Legal* exhibition, posted to his website after Sotheby's sold seven of his works for record prices in a sale of contemporary art,⁴⁷ is perhaps his bluntest expression of this idea prior to the shredding stunt. The picture depicts an art auction; the item on the block is a plain white canvas (in a gilded frame eerily similar to the frame used in the shredding stunt) that simply reads, "I can't believe you morons actually buy this sh*t."⁴⁸

43 BANKSY, *supra* note 5, at 6.

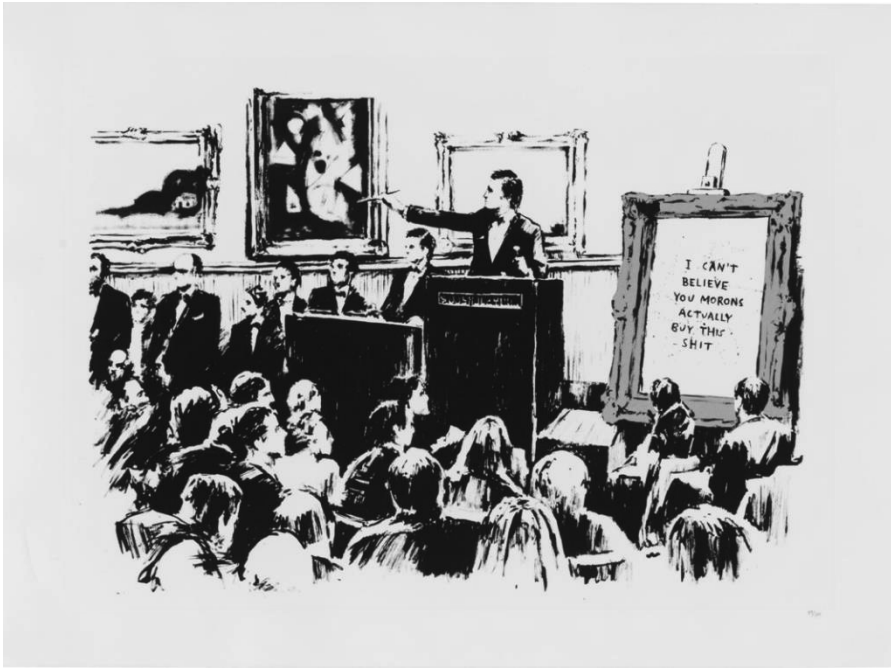
44 *Id.* at 160.

45 Poisuo, *supra* note 33.

46 See, e.g., *Greatest Hits*, PICTURES ON WALLS, <http://www.picturesonwalls.com> [<http://perma.cc/M8EA-C8BB>] (highlighting the paradoxical tension between the revolutionary nature of street art and its increasing status as a "tradeable commodity" in the art market).

47 Collins, *supra* note 29.

48 See *Morons*, HEXAGON GALLERY, <https://hexagongallery.com/catalog/artist/banksy/morons/> [<https://perma.cc/XE3H-ZWJN>].

FIGURE 4: BANKSY, *MORONS*⁴⁹

Banksy's views on the nature of art, and his argument that it should be made accessible to all, are intrinsically related to the artistic attributes of his defining category of works: unauthorized street graffiti. Street graffiti art is fragile and self-consciously—perhaps even intentionally—temporary.⁵⁰ Banksy's site-specific artworks on public streets seldom last long in their original form,⁵¹ as they are frequently altered by other artists,⁵² purposely removed by local officials,⁵³ or even

49 *Id.*

50 See Cathay Y.N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 259, 281, 287 (2014).

51 See, e.g., BANKSY, *supra* note 5, at 22 (two days); *id.* at 186–87 (several weeks); *id.* at 189 (twenty-two hours).

52 See, e.g., *id.* at 22–23 (Mona Lisa with rocket launcher “[I]ater converted to Osama Bin Laden by an unknown artist”); *Graffiti Wars*, *supra* note 33 (describing lengthy overpainting “feud” with London graffiti artist King Robbo); *Red Noses Appear on Banksy's Birmingham Homeless Reindeer Mural*, GUARDIAN (Dec. 10, 2019), <https://www.theguardian.com/artanddesign/2019/dec/10/red-noses-banksy-birmingham-homeless-reindeer-mura> [<https://perma.cc/6792-LC6T>].

53 *Pulp Fiction*, a 2002 installation on “Murder Mile” in the Hackney neighborhood of London, see BANKSY, *supra* note 5, at 105, lasted five years in its original location near a London Underground station before being painted over by Transport for London officials who claimed its presence contributed to local crime.

inadvertently destroyed by unwitting property owners.⁵⁴ Banksy's recognizable style and high cultural profile make his installations prominent "target[s]" for alteration,⁵⁵ and the enduring popularity and lucrative potential of his images also leave their site-specific manifestations uniquely vulnerable to commercial exploitation.⁵⁶ Some of Banksy's installations are removed intact by the property owners to be auctioned off as charitable fundraisers⁵⁷ or sold for

Iconic Banksy Image Painted Over, BBC NEWS (Apr. 20, 2007), <http://news.bbc.co.uk/2/hi/uk/6575345.stm> [<http://perma.cc/UT8K-6C7N>]. Another work, *Draw the Raised Bridge*, first appeared on an unused drawbridge over the River Hull in 2018. Banksy (@banksy), *RAISE THE DRAWBRIDGE! Hull.*, INSTAGRAM (Jan. 26, 2018), <https://www.instagram.com/p/BebMQ23j-E4/> [<https://perma.cc/XT2T-VC8R>]. Banksy's addition to the bridge eventually became the subject of fierce debate by local officials who planned to condemn the structure; the work was removed and relocated "in keeping with its intended artistic statement and context." *Banksy to Be Relocated as Artwork Site Needs to Be Demolished*, ITV NEWS (July 4, 2018), <https://www.itv.com/news/2018-07-04/banksy-to-be-relocated-as-artwork-site-needs-to-be-demolished/> [<https://perma.cc/2CG2-EHFR>]; *Hull Banksy Mural 'Should Be Cleaned Off' Says Tory Councillor*, ARTLYST (Jan. 28, 2018), <https://www.artlyst.com/news/hull-banksy-mural-cleaned-off-says-tory-councillor/> [<https://perma.cc/K8DE-GKRS>].

54 See, e.g., *Melbourne Banksy Rat Destroyed by Builders*, ABC NEWS (Feb. 17, 2015), <https://www.abc.net.au/news/2012-05-16/melbourne-builder-destroys-banksy-art/4014514> [<https://perma.cc/U6EA-JWR6>]; Joseph Smith, *Banksy Mural Accidentally Painted over by Shop's New Owners*, BRISTOLLIVE (Sept. 12, 2018), <https://www.bristolpost.co.uk/news/bristol-news/banksy-mural-accidentally-painted-over-1997277> [<https://perma.cc/PD35-TKKW>].

55 Tyson Mitman, *Why Taggers Hate Banksy*, N.Y. POST (Oct. 25, 2013), <https://nypost.com/2013/10/25/why-people-deface-banksys-work/> [<https://perma.cc/Q7GF-BB8C>].

56 This profit motive, in connection with municipalities' countervailing interests in having "their Banksy" on display in its original location to attract tourists, occasionally results in fierce disputes over ownership. See Jennifer Newton, *Banksy Artwork That Was Left on Boys' Club Door Is Valued by Antiques Roadshow for £400,000*, DAILY MAIL (May 31, 2014), <https://www.dailymail.co.uk/news/article-2644577/Banksy-artwork-left-Boys-Club-door-valued-Antiques-Roadshow-400-000.html> [<https://perma.cc/W5K9-MSNW>] (describing dispute over 2014 Bristol mural *Mobile Lovers*).

57 Tessa Solomon, *Banksy Donates New Artwork Celebrating Health Care Workers to British Hospital*, ARTNEWS (May 7, 2020), <https://www.artnews.com/art-news/news/banksy-southampton-general-hospital-game-changer-1202686284/> [<https://perma.cc/3G6E-3ACQ>] (*Game Changer*). This work is not a street art installation; however, its abandonment at this particular location, combined with the implication that the work is for the hospital's exclusive display and use, see *id.*, arguably makes it site-specific.

profit.⁵⁸ At least one has been stolen.⁵⁹ As one art journalist noted, the fleeting quality of Banksy's street art lends a certain "poignancy" to it: "When I recently wandered in London, searching for 52 previously documented examples of Banksy's street art, 40 works had disappeared altogether, whitewashed over or destroyed."⁶⁰ The shredding stunt is a particularly apt example of Banksy building on the role of the temporary in his street art and applying it to a new genre of creative work.⁶¹

The context-defined nature of Banksy's work is another of his distinctive hallmarks. Several examples are illustrative. In *Pulp Fiction*, Banksy's choice of location⁶² juxtaposed with his spoof on the famous image of John Travolta and Samuel L. Jackson from the 1994 film⁶³ may have been a subtle commentary on the neighborhood's reputation for criminal activity at the time.⁶⁴ The caption accompanying *Pulp Fiction* on the Pictures on Walls website suggests that Banksy perceives the location itself, not the underlying image, to be the key artistic element of the original installation: "An image that was mildly amusing and pretty ballsy when painted at night on a rooftop in Shoreditch, becomes a distinctly flimsy one-note joke on

58 Will Fyfe, *Banksy Artwork in Port Talbot Sold for "Six-Figure Sum"*, BBC WALES NEWS (Jan. 18, 2019), <https://www.bbc.com/news/uk-wales-46910294> [<https://perma.cc/FUV8-G2U3>] (*Season's Greetings*); Sarah Lyall, *Borough Searches for Missing Boy, Last Seen on Wall*, N.Y. TIMES (Feb. 28, 2013), <https://www.nytimes.com/2013/03/01/world/europe/give-us-our-banksy-mural-back-londoners-say.html> [<https://perma.cc/SR6H-HHA5>] (*Slave Labour*). See *infra* notes 66–71 and accompanying text for more on these works.

59 *Stolen Banksy Artwork Honoring Bataclan Victims Found in Italy*, USA TODAY (June 11, 2020), <https://www.usatoday.com/story/life/2020/06/11/banksy-stolen-art-honoring-bataclan-victims-found-italy/5341485002/> [<https://perma.cc/5FS4-2BJR>]; Kim Willsher, *Six Arrests in France over Theft of Banksy Artwork from Bataclan*, GUARDIAN (June 28, 2020), <https://www.theguardian.com/world/2020/jun/28/six-arrests-france-over-theft-banksy-artwork-from-bataclan-paris-attacks> [<https://perma.cc/Q2QP-8S8H>].

60 Ellsworth-Jones, *supra* note 32.

61 As will be detailed in Section I.B, *infra*, nearly all conceptual artworks share some transitory element.

62 See *supra* note 53.

63 *Pulp Fiction*, ARTSY, <https://www.artsy.net/artist-series/banksy-pulp-fiction> [<https://perma.cc/9CYR-9CWQ>].

64 Compare *id.* (speculating that Banksy may have been making a statement about the "wastefulness and stupidity of violence"), with Charlie Brinkhurst-Cuff, *Does 'Murder Mile' Still Deserve Its Name?*, HACKNEY POST (Mar. 15, 2016), <http://hackneypost.co.uk/murder-mile/> [<http://perma.cc/YB6D-JNWU>] (citing a 2002 news article that described the block where the work was located as "one of the most dangerous areas of London").

paper.”⁶⁵ The mural *Slave Labour (Bunting Boy)*, which appeared on the side of a Poundland discount store in south London in 2012, depicts a child sweatshop worker manufacturing a string of three-dimensional plastic Union Jack bunting like that offered for sale in the store.⁶⁶ Banksy’s placement was widely understood as an indictment of Poundland’s reliance on child labor in its supply chains.⁶⁷ The 2018 mural *Season’s Greetings*, installed on a garage wall in the industrial town of Port Talbot, Wales, jarringly combines the image of a child playing in the snow with the dust and smoke from a polluting dumpster fire.⁶⁸ Port Talbot is the site of one of the largest steelworks in Europe, and outcry about the poor air quality in the town had been building for some time when Banksy painted the image.⁶⁹ Banksy debuted *Season’s Greetings* by posting an on-location video to his Instagram profile.⁷⁰ At the end of the video, the drone filming the work pans out to reveal an array of smokestacks on the town’s skyline, directly incorporating the site-specific context into the artistic essence of the mural itself.⁷¹ It is arguably this pattern of contextualization, not the artistic style of his images or other inherent aesthetic elements of his work, that distinguishes Banksy’s oeuvre from that of other street taggers⁷² and leaves such a unique impression on viewers, contributing to his popular appeal.⁷³ It is also interesting to note that Banksy’s

65 *Greatest Hits*, *supra* note 46 (click on image of *Pulp Fiction* near top of gallery to display caption).

66 Susan Hansen & Flynn Danny, “*This Is Not a Banksy!*”: *Street Art as Aesthetic Protest*, 29 CONTINUUM 898, 901 (2015).

67 *Id.* (“Slave Labour’s *in situ* location, and three-dimensional bunting, implicates the Poundland store and its customers. The precise placement of the work recalls a high-profile public scandal over Poundland’s involvement in child sweatshop labour”); Peter N. Salib, Comment, *The Law of Banksy: Who Owns Street Art?*, 82 U. CHI. L. REV. 2293, 2294 (2015).

68 Mara Budgen, *Season’s Greetings, The Banksy Mural in Port Talbot Transforms Snowflakes into Air Pollution*, LIFEgate (Dec. 28, 2018), <https://www.lifegate.com/port-talbot-banksy-seasons-greetings> [<https://perma.cc/3D8J-X8CH>].

69 *Id.*

70 Banksy (@banksy), *Season’s Greetings*, INSTAGRAM (Dec. 19, 2018), <https://www.instagram.com/p/BrkqwhnlNjR/> [<https://perma.cc/2T4E-6CGP>].

71 *See id.*

72 *See Graffiti Wars*, *supra* note 33 (interviewing street artist Ben Eine, who considers the spontaneity of mainstream graffiti writing to be fundamentally “different” from Banksy’s style of work: “Going out and painting stuff with Banksy, we’d work out where it was we were going to paint it . . . when we could get away with it. A lot more thought went into it, a lot more preparation.”).

73 *See Why Is Banksy So Popular? What Makes Him a National Treasure? We’ve Found Out!*, MYARTBROKER, <https://www.myartbroker.com/artist/banksy/why-is-banksy-so-popular-what-makes-him-a-national-treasure-weve-found-out/> [<https://perma.cc/FG99-PKPP>] (citing a reader poll in which respondents praised Banksy’s street art as

awareness of the artistic potential of context, in both its site-specific and sociocultural dimensions, seems to have become more nuanced over time. Banksy's creative style—of which the shredding stunt is a quintessential example—is an excellent example of the artistic power of placement.⁷⁴

B. *What Is Conceptual Art?*

While Banksy's reauthenticated *Love Is in the Bin* is an ordinary tangible art object (albeit a partially shredded one), the shredding stunt fits within the conceptual art tradition. First developed in the early 1960s, the conceptual art approach is one of the most influential movements in modern art.⁷⁵ In conceptual art, the artist's motivating idea, or "concept," is preeminent, and the completed tangible art object is deemphasized.⁷⁶ Early conceptual artist Sol LeWitt, who was instrumental in defining the artistic theory of the genre, described the artist's idea as "a machine that makes the art."⁷⁷ In this way, conceptual art may be understood as a process: all the important creative work occurs beforehand, as the artist is developing his idea and planning its expression, and the execution itself is an afterthought.⁷⁸

Conceptual art's theoretical focus on the creative idea as artistic force is a direct challenge to the formalist emphasis predominant in art theory throughout the first half of the twentieth century.⁷⁹ Formalism understood the central artistic essence of an artwork to be contained in the chosen artistic medium (for example paint or clay) and the artist's methods of execution using that medium, rather than what the artist was trying to express.⁸⁰ Conceptual artists rejected formalism and reimagined artistic medium as a means of transmission of ideas, "a conductor from the artist's mind to the viewer's."⁸¹ The

"powerful yet simple to appreciate," "politically charged yet cheeky," and "complex and deeply emotive" (emphasis added)).

74 See Davis, *supra* note 18.

75 Lisa S. Wainwright, *Conceptual Art*, BRITANNICA, <https://www.britannica.com/art/conceptual-art> [<https://perma.cc/2TTZ-8EEQ>].

76 *Conceptual Art*, TATE, <https://www.tate.org.uk/art/art-terms/c/conceptual-art> [<https://perma.cc/ZRK5-FRMF>].

77 Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, June 1967, at 80, 80.

78 *Id.* at 80–83.

79 Anna Lovatt, *Ideas in Transmission: LeWitt's Wall Drawings and the Question of Medium*, TATE PAPERS (Autumn 2010), <https://www.tate.org.uk/research/publications/tate-papers/14/ideas-in-transmission-lewitt-wall-drawings-and-the-question-of-medium> [<https://perma.cc/ST86-U7KR>].

80 See *Formalism*, TATE, <https://www.tate.org.uk/art/art-terms/f/formalism> [<https://perma.cc/XMB9-9MQG>].

81 Lovatt, *supra* note 79.

idea itself, as expressed by the artist, was the true medium.⁸² In a certain sense, conceptual art is more accurately described as *language* (something the artist is *saying* to the audience) than as *art* (the artist's *presentational means*). For conceptual artists, the artist's concept—what the work “says”—is the artistic core of the work. The necessary tangible and intangible materials that help the artist manifest the concept, while crucial to the realization of that concept outside the artist's own mind, are merely incidental.

Conceptual art was revolutionary in redefining the relationship between art and its audience.⁸³ Since conceptual artists understood perception as subjective, they embraced the possibility that their work could be interpreted in different ways by different audiences, overlaying new shades of meaning onto the artist's original concept as viewers responded to it.⁸⁴ Furthermore, as conceptual art closed the gap between artist and viewer, it challenged the nature of art itself and the role of the art establishment in defining art.⁸⁵ Rejecting the four borders of the painting and the four walls of the gallery, conceptual artists asserted that the expressive agency of the artist could transform commonplace materials, settings, and events into “art.” In transcending gallery walls, conceptual artists also explicitly sought to “expose and interrogate the art world's systems of distribution and consumption.”⁸⁶

Conceptual artworks share two legally relevant categories of defining features that distinguish this genre of works from others: *transitory intangible elements* (with the tangible elements of the work serving as the vehicle on which to fasten this intangible creative product) and *context*. Conceptual artists typically play with one or both of these facets of “idea” in manifesting their concepts.⁸⁷ While these fluid, nonformalistic elements are not “fixed,” in the legal sense,⁸⁸ they

82 See LeWitt, *supra* note 77, at 80.

83 Wainwright, *supra* note 75.

84 See LeWitt, *supra* note 77, at 80.

85 *Conceptual Art*, *supra* note 76.

86 Lovatt, *supra* note 79.

87 Robert Brauneis uses the terms “dynamic art” and “permeable art” to describe works in a “variety of . . . overlapping genres” that share these defining categories. Robert Brauneis, *How Much Should Being Accommodate Becoming? Copyright in Dynamic and Permeable Art*, 43 COLUM. J.L. & ARTS 381, 381 (2020). He understands “dynamic art” to refer to “art that is unstable or ephemeral . . . that may invite unpredictable change through the influence of natural or human forces,” while “permeable art” delineates art that “has and is meant to have weak, unclear boundaries” and in which the formalistic elements are intertwined with their context. *Id.*

88 Cf. 17 U.S.C. § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

are intrinsic to the work and inseparable from its core definition, as the artist conceives it.

The practical methods that conceptual artists employ to incorporate the transitory into their work can be grouped into four broad categories:

- *Interactivity*: Viewer is invited to directly contribute creative output, or the work is structured so that passive viewing itself constitutes part of its artistic essence.⁸⁹
- *Destruction*: The tangible elements are actively removed, altered, or annihilated by artist or viewer as part of the artistic experience. The work may also contain a mechanism for destroying itself.⁹⁰
- *Randomization*: Artist relies on an external matrix (e.g., random number table, basket of found objects) to produce creative content, such that the artistic experience proceeds differently every time it is manifested.⁹¹
- *Influence of Nature*: The passage of time or other environmental processes (e.g., wind, erosion, gravity) independently generates a creative product through interaction with the fixed, tangible elements of the work.⁹²

Conceptual artists' methods of incorporating context can be grouped into two categories:

- *Location*: Can be expressed with specificity (a particular address or room in a building) or as a general category (concert hall, forest). If the artwork is manifested outside the artist's chosen setting or category of settings, it is not the same artwork.⁹³ This type of conceptual art is called site-specific art. Like the conceptual art movement itself, this practice of defining the artwork as inseparable from its

89 See Meg Floryan, *Interactive and Participatory Art*, ART21 MAG. (June 3, 2010), <http://magazine.art21.org/2010/06/03/interactive-and-participatory-art/#.X8midC2cZhE> [https://perma.cc/PNZ5-JDF6].

90 See Barbara Pollack, *Under Destruction*, ARTNEWS (June 21, 2012), <https://www.artnews.com/art-news/news/under-destruction-551/> [https://perma.cc/E3Y8-AET7].

91 See, e.g., John Cage's *Music of Chance and Change*, ARTLARK (Sept. 5, 2020), <https://artlark.org/2020/09/05/john-cages-music-of-chance-and-change/> [https://perma.cc/SG6N-FNFN].

92 See, e.g., Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 335 (2016); Alastair Sooke, *He's Got the Whole World in His Hands*, TELEGRAPH (Mar. 24, 2007), <https://www.telegraph.co.uk/culture/art/3663966/Hes-got-the-whole-world-in-his-hands.html> [https://perma.cc/CLE7-GV96] (interview with sculptor Andy Goldsworthy).

93 This attribute of conceptual art is in contrast to more traditional categories of works (e.g., sculpture and other fine art, furniture and other decorative art) that retain their artistic essence across locations.

physical context was initially a reaction against the hyper-commercialization of the art object as a movable chattel and store of monetary value.⁹⁴

- *External Referents*: Any quality inherent in the tangible elements of the work that is readily apparent to both artist and viewer, imbuing the work with shared symbolic meaning. In the case of destructive art, the relevant contextual idea is usually inherently related to a distinctive feature of the object(s) being acted upon.⁹⁵

Despite the conceptual art movement's reaction against the commercialization of art, many conceptual artists sell their work. In doing so, these artists have developed certain patterns of interaction with real-world forums of creation and exchange. This Note is primarily interested in works with a fixed, tangible component that an artist would offer for purchase or license, whether the buyer is a private collector, a museum, or a nonprofit public arts council. The tangible component can take many forms: it can be an art object that embodies the concept, a photograph documenting the event, or a diagram envisioning how the work will proceed.⁹⁶ This transferrable object associated with the concept is the functional link between the artist's interests and the interests of other parties to the transaction.

Conceptual artists have a variety of ways of attempting to "transfer" their creative process to a buyer. Some conceptual artists explicitly concretize their concept prior to sale by producing some fixed expression of the core idea and requiring it to be transferred and displayed in conjunction with the tangible art object constituting the hook for that idea. *Secret Painting*, executed by Mel Ramsden of the Art & Language collective in the late 1960s, consists of a monochrome black canvas with an accompanying text panel explaining that the

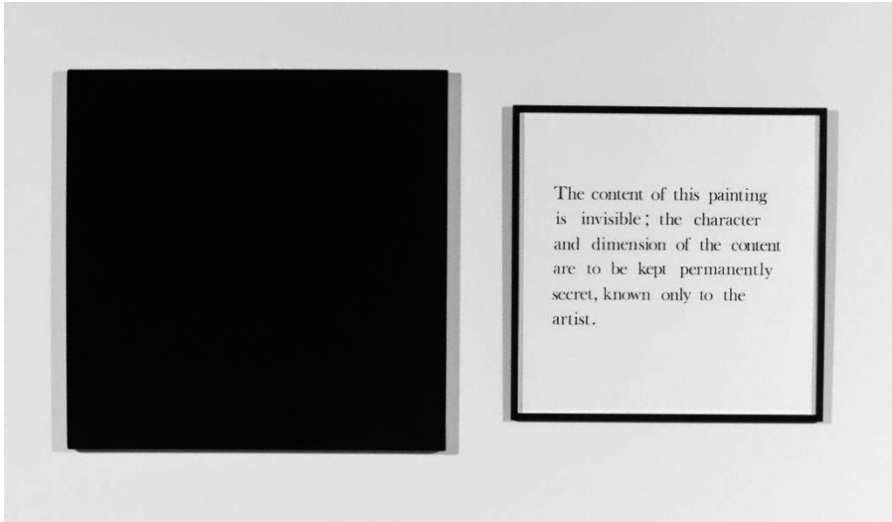
94 See *Site-Specific Art*, NAT'L GALLERIES OF SCOTLAND, <https://www.nationalgalleries.org/art-and-artists/glossary-terms/site-specific-art> [https://perma.cc/5C4J-826S].

95 For example, its value, its cultural symbolism, or the identity of its owner or creator. See Pollack, *supra* note 90 (describing Michael Landy's *Breakdown*); see also Ai Weiwei, *Dropping a Han Dynasty Urn*, 1995, GUGGENHEIM BILBAO, <https://www.guggenheim-bilbao.eus/en/learn/schools/teachers-guides/ai-weiwei-dropping-han-dynasty-urn-1995> [https://perma.cc/GQG7-K39M]; *Han Jar Overpainted with Coca-Cola Logo*, 1995, METRO. MUSEUM OF ART, <https://www.metmuseum.org/art/collection/search/78215> [https://perma.cc/VZ8G-NBNK].

96 Cf. *Conceptual Art*, *supra* note 76 ("Conceptual art can be—and can look like—almost anything. This is because, unlike a painter or sculptor who will think about how best they can express their idea using paint or sculptural materials and techniques, a conceptual artist uses whatever materials and whatever form is most appropriate to putting their idea across—this could be anything from a performance to a written description.").

“character and dimension of the content” of the “invisible” painting on the canvas are “known only to the artist.”⁹⁷ The “artwork” consists of both fixed elements, separate in purpose but inseparably united as one whole.⁹⁸ Ramsden’s decision to use the written word to embody his concept is common practice in conceptual art.⁹⁹

FIGURE 5: MEL RAMSDEN, *SECRET PAINTING*¹⁰⁰



In other conceptual art transactions, the tangible art object has not yet been realized at the time of purchase. Instead, the core item passed from artist to buyer is a certificate of authenticity signed by the artist and a diagram or description providing notice of how the buyer or a third party may manifest (“install”) the work.¹⁰¹ While it is usually this certificate and diagram that are transferred when a conceptual

97 *Art & Language, Secret Painting*, ART GALLERY OF NEW S. WALES, <https://www.artgallery.nsw.gov.au/collection/works/30.2003.a-b/> [https://perma.cc/QG7Q-JJ3L] (noting that by “bec[oming] a frame for the world rather than a representation of it,” the work incorporates viewer perception into its essence).

98 *Cf. id.* (referring to the “painting” as component *a* of the work and the “text” as component *b*).

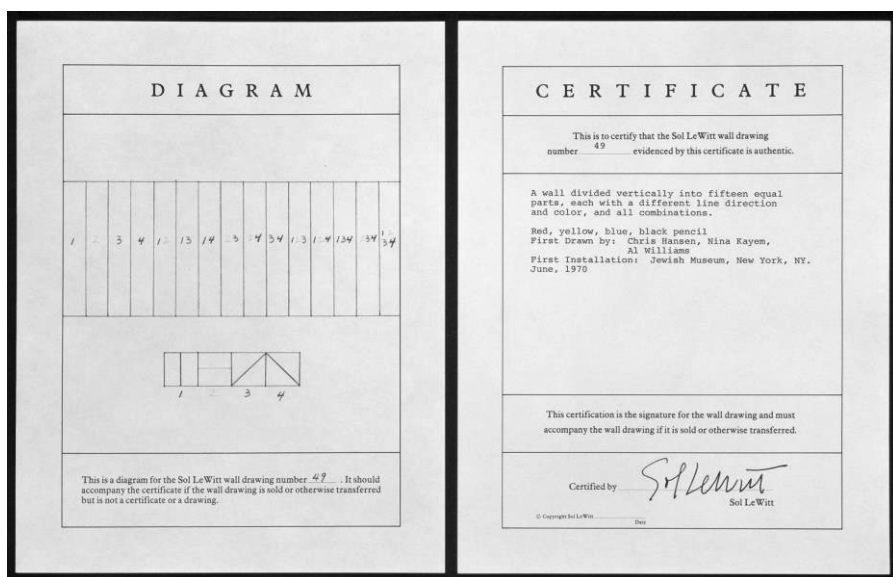
99 *Conceptual Art*, MOMA, https://www.moma.org/learn/moma_learning/themes/conceptual-art/language-and-art/ [https://perma.cc/3HA5-TL7F].

100 *Art & Language, Secret Painting*, *supra* note 97 (featuring Art & Language/Mel Ramsden’s image).

101 *See, e.g., Lot 434: Martin Creed, Work No. 200: Half the Air in a Given Space*, INVALUABLE, <https://www.invaluable.com/auction-lot/martin-creed-work-no200-half-the-air-in-a-giv-434-c-c0a4d8c99d> [https://perma.cc/PC7G-6VGA] (detailing artist’s instructions for installation and noting that the certificate of authenticity “will allow the purchaser to have the work realized at their own specifications and expense”).

artwork is “purchased,”¹⁰² these quasi-legal authorizing documents are not intended for display. Pioneering conceptual artist Sol LeWitt explicitly specified as such in the certificates of authenticity accompanying his wall drawings, which were installed (literally, drawn on the wall in pencil) by the buyer or a third-party designee following the artist’s written instructions.¹⁰³ In situations like these, the artist recognizes that the artwork itself does not actually exist until it is manifested by the buyer-installer.¹⁰⁴ These imperfect industry norms surrounding exchange of conceptual artworks leave open interesting questions—from both an artistic and a legal perspective—about what exactly is transferred in such exchanges.¹⁰⁵

FIGURE 6: CERTIFICATE AND DIAGRAM FOR SOL LEWITT WALL DRAWING #49¹⁰⁶



102 Richard Chused, “Temporary” *Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 *RUTGERS COMPUT. & TECH. L.J.* 1, 10–11 (2019).

103 See, e.g., Sol LeWitt, *A Wall Divided Vertically into Fifteen Equal Parts, Each with a Different Line Direction and Colour, and All Combinations*, TATE, <https://www.tate.org.uk/art/artworks/lewitt-a-wall-divided-vertically-into-fifteen-equal-parts-each-with-a-different-line-t01766> [<https://perma.cc/5ZHV-KNHB>] (“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.”).

104 See Chused, *supra* note 102, at 12–13.

105 See *infra* Section II.A.

106 LeWitt, *supra* note 103 (featuring the Estate of Sol LeWitt’s image).

C. Banksy As Conceptual Artist

As noted above,¹⁰⁷ Banksy has made several recent forays away from visual art and toward conceptual art statements. These included a series of “art attacks” in which a disguised Banksy slipped into such institutions as the Louvre, the British Museum in London, and the Metropolitan Museum of Art in New York, to deposit quirkily defaced artworks that would go unnoticed for days before being removed by museum officials.¹⁰⁸ One of these works, *Early Man Goes to Market*, was a slab of rock depicting fake prehistoric cave art and accompanied by a gallery sign describing the drawing as primitive graffiti.¹⁰⁹ The caption concluded with a concise statement of the motivating concept: “Most art of this type has unfortunately not survived. The majority is destroyed by zealous municipal officials who fail to recognise the artistic merit and historical value of daubing on walls.”¹¹⁰

As the most high-profile and most uniquely “Banksyish” art event in this line of art events, the shredding stunt may likewise be cogently understood within the conceptual art framework, as a work of conceptual art. The art world enthusiastically categorized the stunt as such;¹¹¹ Sotheby’s described the event in glowing terms as “the first time a piece of live performance art had been sold at auction,”¹¹² and art experts favorably compared Banksy to renowned conceptual artists Marcel Duchamp, Damien Hirst, Robert Rauschenberg, Jean Tinguely, and Michael Landy.¹¹³ Several features of the stunt itself support this

107 See *supra* Section I.A.

108 BANKSY, *supra* note 5, at 138–55; Randy Kennedy, *Need Talent to Exhibit in Museums? Not This Prankster*, N.Y. TIMES (Mar. 24, 2005), <https://www.nytimes.com/2005/03/24/arts/design/need-talent-to-exhibit-in-museums-not-this-prankster.html> [<https://perma.cc/96M9-NDYW>].

109 See BANKSY, *supra* note 5, at 155; *Cave Art Hoax Hits British Museum*, BBC NEWS (May 19, 2005), <http://news.bbc.co.uk/2/hi/entertainment/4563751.stm> [<https://perma.cc/5HC4-FJHY>]; Jeff Howe, *Art Attack*, WIRED (Aug. 1, 2005), <https://www.wired.com/2005/08/banksy/> [<https://perma.cc/FF3H-LCVJ>].

110 See *Cave Art Hoax Hits British Museum*, *supra* note 109.

111 See, e.g., Elizabeth Dee, *With His Viral Shredding Performance, Did Banksy Just Change the Market for Performance Art Forever?*, ARTNET NEWS (Oct. 9, 2018), <https://news.artnet.com/market/viral-shredding-performance-banksy-market-performance-art-1367125#> [<https://perma.cc/FD3W-WZTP>]; Seph Rodney, *Banksy’s Shredded Painting Stunt Was Viral Performance Art. But Who Was Really Trolling Who?*, NBC NEWS (Oct. 18, 2018, 6:49 AM), <https://www.nbcnews.com/think/opinion/banksy-s-shredded-painting-stunt-was-viral-performance-art-who-ncna921426> [<https://perma.cc/J7J4-AF6V>].

112 *Latest Banksy Artwork ‘Love Is in the Bin’ Created Live at Auction*, *supra* note 15.

113 Preminda Jacob, *Banksy and the Tradition of Destroying Art*, CNN STYLE (Oct. 23, 2018), <https://www.cnn.com/style/article/banksy-tradition-of-destroying-art/> [<https://perma.cc/ECW9-C2Y6>]; *Banksy Artwork Shreds Itself After £1m Sale at Sotheby’s*, *supra* note 11.

conclusion. The story told in Banksy's video documentation of the event¹¹⁴ convincingly indicates that he meant the event itself to be his artistic work, the execution or manifestation of his concept, with the physical shredded canvas as an afterthought. The stunt relied upon both destruction and interactivity, as the audience's stunned reactions documented in the video were crucial to the "feel" of the event. Ultimately, the sale at auction—centered on the legal transfer concluded on the fall of the hammer—is an inseparable element of the "concept," as the core contextual element of the work.¹¹⁵ This concept and its related contextual referents, coupled with the artist's agency in execution, is arguably what drives the doubling in value of the shredded canvas.¹¹⁶ The related formalistic concerns, including the shredding action itself and the shredded status of the canvas, are less important; the shredded canvas is merely a destroyed print.¹¹⁷ Recall that the buyer sees herself as owning a piece of art history.¹¹⁸

One of the difficulties with conceptual art is defining the legally relevant boundaries of a non-fixed artwork. The continued display of the canvas at Sotheby's Bond Street Galleries¹¹⁹ and the Staatsgalerie Stuttgart,¹²⁰ with the shredder latent in the frame,¹²¹ raises the possibility that the work is not "over." However, the removal of the shredded canvas from its core auction context, and the posting of the YouTube video (a fixed expression of Banksy's concept),¹²² likely means Banksy has achieved his artistic purpose and the work has terminated.

It is unclear whether Banksy sees himself as a conceptual artist. His motives and values, as well as the distinctive qualities of his artistic portfolio, harmonize with the movement. Banksy's habit of presenting his visual artwork alongside philosophical assertions is also shared by

114 See *banksyfilm*, *supra* note 7.

115 Cf. Deahl, *supra* note 25 ("[I]f Banksy decides to shred his piece in a very specific setting at a very specific time in order to add additional context, then that act becomes a part of the work.").

116 *Darwin Alert!—Someone's Just Shredded a £40k Banksy Print*, *supra* note 11; see also Deahl, *supra* note 25 ("If you're lucky enough to get an authentic Banksy here's a quick test to see if you should alter it: are you Banksy? If the answer is no, then don't.").

117 Cf. Rodney, *supra* note 111 (quoting street artist Shepard Fairey: "I think Banksy's idea here is that an appreciation for the concept is more important than an appreciation of the object.").

118 See *supra* note 23 and accompanying text.

119 *Latest Banksy Artwork 'Love Is in the Bin' Created Live at Auction*, *supra* note 15.

120 *Love Is in the Bin*, STAATSGALERIE, <https://www.staatsgalerie.de/en/exhibitions/review/2018/banksy.html> [<https://perma.cc/K3T8-YN3D>].

121 Richard Chused, *Protectable "Art": Urinals, Bananas, and Shredders*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 166, 210 (2020).

122 See *banksyfilm*, *supra* note 7.

conceptual artists.¹²³ However, there is convincing evidence that Banksy executes his stunts not to make artistic statements but to pursue profit and attention.¹²⁴ Commenters noted that despite Banksy's assertions that the canvas was meant to shred completely,¹²⁵ it only shredded halfway, conveniently becoming a transferable store of value and driving up future auction prices for all of his works.¹²⁶ Furthermore, Banksy's firm belief that art should be available to all reflects a potential resistance to being viewed as a member of a theoretical movement.¹²⁷ In fact, Banksy has openly criticized the arcane academic pretensions of modern art:

I don't think art is much of a spectator sport these days I don't know how the art world gets away with it, it's not like you hear songs on the radio that are just a mess of noise and then the d.j. says, "If you read the thesis that comes with this, it would make more sense."¹²⁸

If Banksy is in fact a skeptical critic of conceptual art, he would not be the only one.¹²⁹

Regardless of Banksy's intentions, however, it is useful to understand the shredding stunt as a conceptual art event, as the art world seems to have done. Future copycats will certainly perceive their own "shredding stunts" as conceptual works. More importantly, the unique nature of the Banksy event highlights some troubling problems with conceptual artists' broad definition of art, perhaps subtly reflecting Banksy's intimations that this definition is *overly* broad.

II. *LOVE IS IN THE BIN* PRESENTS A NOVEL LEGAL PROBLEM FOR ARTISTS AND BUYERS

Understood as a conceptual artwork, the shredding stunt poses different legal questions than other conceptual works. The ongoing

123 Compare BANKSY, *supra* note 5, at 152, 154, with *supra* notes 97–98 and accompanying text (*Secret Painting*).

124 See Daley, *supra* note 8; cf. Collins, *supra* note 29 (describing Banksy as "flipping off the art world and begging it to notice him at the same time").

125 banksyfilm, *supra* note 7, at 2:38–2:52.

126 See Daley, *supra* note 8 (asserting that the partial shredding is not a "real statement" because the canvas can be displayed or resold); Sutton, *supra* note 35 (noting that prints of *Girl with Balloon* offered for sale at a dedicated Banksy auction at Sotheby's in September 2020 went for double their high estimates).

127 Davis, *supra* note 18 ("Street art doesn't trade in images for the ages or subtle ideas. Its gestures are meant to work on you quickly, be temporary, and play to the person on the street.").

128 Collins, *supra* note 29; see also BANKSY, *supra* note 5, at 73 (image of a stencil on the steps outside the Tate Gallery reading "MIND THE CRAP").

129 See Steven G. Gey, *Deconceptualizing Artists' Rights*, 49 SAN DIEGO L. REV. 37, 86–92 (2012).

scholarly conversation regarding the legal status of conceptual artwork deals with the artist's ability to legally protect his own work, including questions of copyrightability and the scope of moral rights. However, in a work like the shredding stunt, in which a legal transfer is intrinsic to the artistic integrity of the event as conceptual artwork, the artist's right to define the work comes into direct conflict with the interests of an unwilling buyer. Because the buyer was offered no opportunity to choose to commit her resources to the artistic endeavor, works of this type result in a "shafted buyer" with no creative role, no opportunity to assess risk, and a valid claim of having suffered legally cognizable harm. While the artist asserts that the destruction of the buyer's property was in itself an artwork, a buyer can argue to the contrary, claiming instead that the artist (or a complicit seller) infringed upon her legal rights to enjoyment of the purchased item—the artwork. Ultimately, the definition of works like *Love Is in the Bin* matters in how the rights of the parties are balanced.

Under existing law,¹³⁰ this balance tips in favor of the buyer's interests and the buyer's understanding of the "artwork" at issue as a discrete (damaged) art object, not a creative process orchestrated by the intentions of the artist. This balance in favor of the buyer is fairly struck. As a result, an artist's ability to define "art" outside the existing legal framework—which, in the United States, excludes conceptual art—is rightly limited. The unique situation the shredding stunt poses thus reveals the practical limitations of the conceptual art genre.

A. *Existing Legal Problems Surrounding Works of Conceptual Art*

The primary legal difficulty facing conceptual artists is a lack of authorial control, which includes the artist's ability to define the work. The primary legal debate around conceptual art generally centers on whether authorial control should be expanded to allow artists to legally protect the intangible portions of the work, including their concept. In the United States, the scope of authorial control is litigated when conceptual artists bring claims under the Visual Artists Rights Act of 1990 (VARA)¹³¹ to prevent prejudicial modification of their work. In resolving these claims, courts must distinguish the elements of the work that are legally protectable from those that are not, which often requires them to evaluate the artist's definition of the work.

130 The degree of legal protection afforded to artists' creative control, including the scope of the moral right of integrity, varies across jurisdictional boundaries. W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1164–68 (2005). To simplify the analysis, Part II of this Note assumes a New York jurisdiction.

131 Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A.

Under VARA, an artist's creative control is understood in terms of the moral right of integrity, or his right to prevent alteration to or destruction of his work under certain specified circumstances.¹³² VARA applies only to works of visual art as defined in the statute, a definition that excludes works not subject to copyright protection.¹³³ American courts considering the VARA claims of conceptual artists have consistently concluded that the transitory and context-bound attributes at the core of a conceptual artwork make it ineligible for copyright protection, placing these works outside the scope of VARA.

In *Kelley v. Chicago Park District*, the Seventh Circuit reviewed the claim of an artist who contested proposed alterations to *Wildflower Works*, a site-specific "living art" installation of his own design.¹³⁴ Despite the artist's argument that the work was a "living wildflower painting" and thus a qualifying work of visual art,¹³⁵ the *Kelley* court determined that the work was not a painting¹³⁶ and that it was also uncopyrightable, as it lacked sufficient permanency and stability to qualify as "fixed" under the Copyright Act.¹³⁷ The court explained that a living garden whose "constituent elements are alive and inherently changeable" cannot be "authored" in the legal sense, as it "owes most of its form and appearance to natural forces," not the agency of the gardener.¹³⁸

In *English v. BFC&R East 11th Street LLC*, the U.S. District Court for the Southern District of New York also construed VARA as inapplicable to certain site-specific artwork.¹³⁹ *English* involved a group of murals and sculptures installed in a public garden without city permission; the artist-plaintiffs alleged that the entire garden constituted an "environmental sculpture" and that removal of the illegal structures violated their moral right of integrity.¹⁴⁰ The court declined to reach the question of whether the garden and the individual artworks left there by the plaintiffs in fact constituted a

132 *Id.* § 106A(a)(3); see also Cathay Y.N. Smith, *Creative Destruction: Copyright's Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. 601, 608–10, 614–18 (2020) (describing the moral right of integrity as applied in the United States).

133 17 U.S.C. §§ 101, 106A(b); *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 298–99 (7th Cir. 2011).

134 *Kelley*, 635 F.3d at 291–95.

135 *Id.* at 300.

136 *Id.* at 300–01.

137 *Id.* at 303–06.

138 *Id.* at 304.

139 *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444, at *4–5 (S.D.N.Y. Dec. 2, 1997), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

140 *Id.* at *1–3.

single artwork.¹⁴¹ Instead, the court held that VARA did not apply to unauthorized public artworks—however defined—that are not removable from their surroundings.¹⁴² Like the court in *Kelley*, the court in *English* declined to take the artist’s asserted definition of the work, which assumed a context-bound artistic essence, as given.

Legal scholars have argued for a new conception of authorship that would expand the scope of copyrightability to include conceptual artworks. Shyamkrishna Balganesh notes that the traditional emphasis on originality and fixation within legal doctrines of copyrightability assumes a theory of authorship in which the connection between the artist’s agency and the creative output is tangible and externally verifiable, reflecting direct control.¹⁴³ To enable artists to assert legal rights in their work, Balganesh suggests, courts could recognize a more qualitative, “intentionalist” understanding of the causal relationship between artistic agency and creative output.¹⁴⁴ Christopher Buccafusco likewise notes that this statutory emphasis on control and predictability as intrinsic to the act of creation excludes conceptual art, which involves “depersonalization,” or a voluntary cession of some degree of authorial control over the artistic output.¹⁴⁵

While these proposals are compelling, they unacceptably minimize the valid argument advanced by the *Kelley* court that authorship rights in the United States are necessarily limited by constitutional constraints,¹⁴⁶ specifically that the constitutional term “writing” implies fixation in tangible form.¹⁴⁷ As doctrinally applied by courts, these constraints have a rich historical pedigree and efficiently serve the practical goals of federal copyright protection, which are primarily economic.¹⁴⁸ The conception of authorship underlying these constraints is also broadly applicable to many varieties of creative

141 *Id.* at *3.

142 *Id.* at *4–5.

143 Shyamkrishna Balganesh, *Do We Need a New Conception of Authorship?*, 43 COLUM. J.L. & ARTS 371, 372–74 (2020).

144 *Id.*

145 Christopher Buccafusco, *How Conceptual Art Challenges Copyright’s Notions of Authorial Control and Creativity*, 43 COLUM. J.L. & ARTS 375, 375–77 (2020).

146 *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (“Unlike originality, authorship and fixation are *explicit* constitutional requirements; the Copyright Clause empowers Congress to secure for ‘authors’ exclusive rights in their ‘writings.’” (quoting U.S. CONST. art. I, § 8, cl. 8)).

147 *Id.*; see U.S. CONST. art. I, § 8, cl. 8 (“...by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

148 See ANNE-MARIE RHODES, ART LAW & TRANSACTIONS 241 (2011) (describing copyright as a “creation of the Constitution” that “balances economic and proprietary rights among the author, the publisher, the public, and the sovereign”); Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 324–27 (2018).

expression commonly transferred in the United States.¹⁴⁹ Ultimately, the limitation of statutory moral rights protection to copyrightable works is a perfectly acceptable line for the legislature to draw.¹⁵⁰ As a result of these considerations, the understanding of authorship implicit in VARA is currently limited in scope and is likely to remain so.

At its core, this discussion deals primarily with the needs of the artist: how he may prevent infringement and realize economic rights such as resale royalties,¹⁵¹ and how he may assert creative control after the work has passed from his hands to a third party.¹⁵² Since these legal issues are artist-centric, the question of the validity of the artist's definition is a prerequisite determination, considered independently of the underlying legal question (e.g., whether the work was infringed)¹⁵³ or avoided altogether, if the reviewing court thinks the case can be decided on different grounds.¹⁵⁴ The shredding stunt abruptly changes the direction of this discussion by introducing the perspective of a third party whose interests the artist attempted to weave directly into the work itself without consent. Disputes over future works resembling the shredding stunt would force courts to consider the artist's definition of the work and the buyer's legal claims as one interconnected issue.

B. *This Work Was "Created Live at Auction"*

Existing law governing legal disputes that arise in an auction setting illustrates that the buyer's understanding of the work as a destroyed tangible object is more familiar to a court and more likely to prevail. The art auction process is a well-coordinated interaction between three parties—seller, auction house, and buyer—with the

149 See 17 U.S.C. § 102(a) (listing categories of works constituting permissible subject matter of copyright).

150 See *Kelley*, 635 F.3d at 299 ("This last exclusion simply reinforces the point that VARA supplements general copyright protection . . ."); cf. Smith, *supra* note 132, at 624 (reviewing arguments that an expansion of moral rights could conflict with existing fair use and First Amendment protections).

151 Amelia K. Brankov, *Does Art Need Copyright After All?*, 43 COLUM. J.L. & ARTS 367, 367, 369 (2020).

152 See Chused, *supra* note 102, at 4–10 (describing a definitional disagreement between Sol LeWitt's estate and the museum-owner of a home containing one of LeWitt's wall drawings).

153 See Brauneis, *supra* note 87, at 382 (asserting that an infringement analysis requires a prior determination of the boundaries of a work of authorship).

154 See *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444, at *3–5 (S.D.N.Y. Dec. 2, 1997), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999); Smith, *supra* note 132, at 617.

auction house ensuring the rights of all three are clearly delineated.¹⁵⁵ Legal disputes arise “when any one of the parties believes that the process was compromised.”¹⁵⁶ The general theory of an auction is that everyone has fair information and the bidding process determines the fair market value of the item sold.¹⁵⁷ Practices like by-bidding, in which a seller bids on his own item to fraudulently raise its price, are verboten because they are violative of good faith and unfairly manipulative of potential buyers’ economic exposure.¹⁵⁸

An auction is merely a sale, with the auction house acting as the agent of the owners of the lots offered for sale.¹⁵⁹ Auctions are subject to the Uniform Commercial Code (UCC),¹⁶⁰ as well as state and local law governing sales generally and auctions in particular.¹⁶¹ Any contract of sale requires both offer and acceptance; in the legal framework governing auctions, the bid is the offer and the fall of the gavel constitutes the acceptance and the creation of a binding contract.¹⁶² At common law, title passes to buyer at the fall of the gavel,¹⁶³ although auctions can provide otherwise in their Conditions of Sale, which contain the terms of the contract of sale between buyer and seller.¹⁶⁴ The buyer agrees to these terms when bidding.¹⁶⁵ Sotheby’s Conditions of Sale specify that while the contract is concluded at the fall of the gavel, title does not pass until the buyer pays.¹⁶⁶ Since the destructive action at the core of the shredding stunt occurred in this middle area between hammer and payment, the event was unprecedented.¹⁶⁷

The unwilling buyer who has just been subjected to a shredding stunt at a Sotheby’s auction could pursue either of two legal theories.

155 RHODES, *supra* note 148, at 53–54.

156 *Id.*

157 *Id.* at 66.

158 *Id.*

159 Jo Backer Laird, *Legal Aspects of the Auction Process*, 2020 A.L.I.-A.B.A. Course Materials § 1.A, SB004 ALI-CLE 685.

160 U.C.C. § 2-328 (AM. L. INST. & UNIF. L. COMM’N 2020).

161 See SCOTT HODES, *LEGAL RIGHTS IN THE ART AND COLLECTORS’ WORLD* 16 (Irving Sloan ed., 1986).

162 See U.C.C. § 2-328(2) (AM. L. INST. & UNIF. L. COMM’N 2020) (“A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner.”).

163 HODES, *supra* note 161, at 17.

164 For the terms of the agreement that governed the October 5 auction at which the shredding stunt occurred, see *Conditions of Sale*, SOTHEBY’S [hereinafter Sotheby’s Conditions of Sale], <https://www.sothebys.com/content/dam/sothebys/PDFs/cob/L18024-COS.pdf> [<https://perma.cc/2YNS-CEYK>].

165 *Id.*

166 *Id.*

167 See *Banksy Artwork Shreds Itself After £1m Sale at Sotheby’s*, *supra* note 11.

First, the buyer could bring an action in contract law on the theory that Sotheby's fraudulently failed to disclose relevant facts about the condition of the lot prior to sale that could indicate a shredding stunt was impending, and that she reasonably relied on those facts in bidding. If we assume the auction house was not explicitly colluding with the seller (or artist), the law in this area is well established. Sotheby's Conditions of Sale include thorough disclaimers of liability and provide that Sotheby's makes no warranty about the condition of the goods sold.¹⁶⁸ The Conditions of Sale also specify that the catalog description does not constitute a warranty.¹⁶⁹ The buyer would have to make the counterargument that she assumed Sotheby's was selling the tangible art object described in the catalog—which description betrayed no evidence of its self-destructive potential¹⁷⁰—and that Sotheby's nondisclosure constituted a misrepresentation that rendered the Conditions of Sale void.¹⁷¹ If we assume that the auction house *did* have notice of the artist's intentions and actively sought to conceal its knowledge from bidders, the buyer has an even better case, as she can bring a claim for fraudulent inducement.¹⁷²

A reviewing court would likely decide the buyer's claim under precedents governing disputes over authenticity. The authenticity determination is essentially a question of whether the art object sold "is or is not what it is described to be."¹⁷³ Disappointed buyers bring claims of misrepresentation or fraudulent inducement on the theory that their bidding decision—their decision to enter into contract—depended on their prior understanding of the authenticity of artworks offered for sale.¹⁷⁴ The buyer's reasonable reliance is a key element of these inquiries.¹⁷⁵ Caselaw governing authenticity establishes that auction house disclaimers preclude reliance and thus preclude a claim

168 Sotheby's Conditions of Sale, *supra* note 164.

169 *Id.*

170 See Lot 67: *Banksy, Girl with Balloon*, *supra* note 2 (catalog description for Lot 67).

171 Cf. RESTATEMENT (SECOND) OF CONTRACTS §§ 159–62, 164 (AM. L. INST. 1981).

172 Cf. *id.* § 162 cmt. a ("In order that a misrepresentation be fraudulent within the meaning of this Section, it must not only be consciously false but must also be intended to mislead another.").

173 RHODES, *supra* note 148, at 77.

174 See *Foxley v. Sotheby's Inc.*, 893 F. Supp. 1224, 1228 (S.D.N.Y. 1995) (noting buyer-plaintiff's allegation that "he would not have bid on the painting" if he had knowledge that statements about provenance were unreliable); cf. RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (AM. L. INST. 1981) ("A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.").

175 *Christie's Inc. v. Dominica Holding Corp.*, No. 05 Civ. 8728, 2006 WL 2012607, at *4 (S.D.N.Y. July 18, 2006).

for fraud.¹⁷⁶ It is the bidder's responsibility to inspect the work and verify the auction house's claims for herself; if she does not fulfill this responsibility, she is bound by the contract of sale.¹⁷⁷ The buyer only has a valid cause of action if the question of authenticity hinged on information peculiarly within the knowledge of the auction house.¹⁷⁸

The "peculiarly within knowledge" inquiry as applied to a shredding stunt situation would center on whether the auction house should have been aware that the stunt would happen. If the court considers the canvas to be the artwork, it will focus on the physical qualities of the item and the auction house's description of these qualities.¹⁷⁹ In the case of the shredding stunt, the relevant facts would relate to the nature of the frame.¹⁸⁰ The buyer might successfully show that she did not have reasonable access to the shredder.¹⁸¹ If the court considers the entire event to be the artwork, however, the relevant factual inquiry switches to whether the buyer had reasonable notice that Banksy might be planning a stunt. The catalog describes the frame as the "artist's frame";¹⁸² in light of this particular artist's reputation for being a prankster, it would not be outside the realm of possibility for a factfinder to conclude that the buyer should have been on notice! Thus, here, as before, whether the buyer wins the case could very well depend on how the court defines the work. And also, as before, this reviewing court would be likely to side with the buyer. All relevant caselaw in this area focuses on the physical features of the work, and the court would have no reason not to continue in this precedential pattern.

The buyer's second possible legal theory is that the item suffered harm while in the care of the auction house. Sotheby's Conditions of Sale provide that purchased lots are at the buyer's risk either after collection or after thirty days from the date of the auction; however, until risk passes, Sotheby's promises to "compensate the Buyer for any loss or damage to the lot up to a maximum of the Purchase Price

176 See *id.*; *Foxley*, 893 F. Supp. at 1230.

177 See *Foxley*, 893 F. Supp. at 1229.

178 *Id.*; *Dominica Holding*, 2006 WL 2012607, at *4.

179 Cf. *Dominica Holding*, 2006 WL 2012607, at *3 (comparing the catalogue text to the condition of the prints at issue).

180 The Sotheby's representative in Banksy's video downplays the frame: "Yeah, so the artist put the frame on as well. You get that quite often with Banksy. He quite likes the romanticism of having that very ornate . . . National Gallery-esque frame." *banksyfilm*, *supra* note 7, at 0:45–0:55. Is he trying to offer a plausible explanation for its size and thus draw potential buyers' attention away from it?

181 Cf. *Dominica Holding*, 2006 WL 2012607, at *5 (agreeing with buyer-plaintiff that his failure to discover the latent defect in the prints was excused, as the necessary examination was essentially impossible).

182 Crow & Wright, *supra* note 11; *Lot 67: Banksy, Girl with Balloon*, *supra* note 2.

paid.”¹⁸³ Under these terms, the buyer could attempt to recover for breach of contract if Sotheby’s refused to compensate her and instead suggested she pay for the “new artwork,” that is, the art event as it proceeded on the day of the auction. A court facing such a case would only find breach of contract if it defined the artwork as the (damaged) tangible object, as a factual finding that the stunt was somehow “harmed” is incomprehensible, especially since the event proceeded as the artist intended.¹⁸⁴ Thus, the definition of the work is intrinsically tied to the buyer’s legal interests. Such a court is extremely likely to side with the buyer, interpret “damage” straightforwardly, and find that Sotheby’s had breached its contractual duty.

Ultimately, because it preserved the object’s value for the buyer, Banksy’s reauthentication of the shredded canvas likely prevented a lawsuit of this nature against the seller or the auction house.¹⁸⁵ However, auction houses cannot count on artists to respond in this way. Instead, auction houses should consider revising their existing Conditions of Sale. In their failure to account for the possibility that an artist might destroy or damage a lot bearing his name, the standard terms are unfair to potential buyers and could expose sellers and the auction house to liability if found unenforceable after a shredding stunt sale.

C. *This Work Incorporated a Legal Transfer*

The shredding stunt is legally distinctive from other conceptual art, not only because it took place at a live auction, but because a legal transaction is essential to the artistic integrity of the event as conceptual artwork. While an imitator of the stunt would likely prefer to emulate Banksy in selecting the auction context,¹⁸⁶ a stunt incorporating a legal transfer of a tangible art object outside the auction context would pose many of the same problems as Banksy’s stunt.

To illustrate this point, compare a scenario in which the artist triggers the shredding as the buyer is unveiling the new work in her

183 Sotheby’s Conditions of Sale, *supra* note 164. In the absence of this provision, the buyer assumes all risk of loss after the fall of the gavel. HODES, *supra* note 161, at 17.

184 Cf. 17 U.S.C. § 106A(3)(A) (encompassing “intentional distortion, mutilation, or other modification” of a work within the scope of the artist’s moral right of integrity).

185 If we assume that Banksy himself was not the unidentified seller, see *Lot 67: Banksy, Girl with Balloon*, *supra* note 2, then he was not in a contractual relationship with the buyer and thus not liable in contract.

186 Cf. RHODES, *supra* note 148, at 53 (noting that the excitement of a competitive auction makes it an attractive sales venue for sellers).

home a few days after the auction. While the resulting tangible art object would be the same (a partially shredded canvas), the concept itself is different, as the legal transaction does not trigger the shredding and thus does not constitute part of the artwork. The legal issue is also different, resounding only in tort rather than in contract.¹⁸⁷ While the buyer could also bring a tort action against the artist in the auction context¹⁸⁸—another possibility that Banksy’s reauthentication likely averted—she cannot sue the seller unless the legal transaction is part of the work. Ultimately, *any* conceptual artwork that uses the sale of an item as the triggering event for its destruction has certain unique legal ramifications, chief among which is the buyer’s inability to voluntarily enter into the agreement with full information. In some ways, the core problem is more clearly illustrated when the auction house middleman is removed and we assume a direct transfer from seller (gallery or artist) to unwilling buyer.

In such a case, the buyer may bring actions for mistake, fraud, and breach of warranty.¹⁸⁹ As in the auction context, the court’s definition of the work is intertwined with the various elements of these claims, impacting the buyer’s chance of success. Private transfers by a gallery or other art merchants are governed by the UCC and relevant state statutes, including the New York Arts and Cultural Affairs Law.¹⁹⁰ These statutory provisions are designed to “protect unknowing buyers from knowing sellers” who exploit an “unequal balance of information power” to advance their own interests at the buyer’s expense.¹⁹¹ These actions are typically brought when a buyer can show that a seller represented the purchased work as authentic when it was in fact a verifiable forgery.¹⁹² Questions of authenticity are likewise an appropriate precedential framework for this type of shredding stunt situation, as some essential quality of the work itself is at issue.

187 Cf. RESTATEMENT (SECOND) OF TORTS § 217 (AM. L. INST. 1965) (“A trespass to a chattel may be committed by intentionally . . . intermeddling with a chattel in the possession of another.”); *id.* § 218 (noting that liability attaches when “the chattel is impaired as to its condition, quality, or value”).

188 Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 17 (AM. L. INST. 2020) (elements of interference with contract).

189 Note that a buyer in the auction context is unlikely to succeed on a breach of warranty claim because the Conditions of Sale disclaim all possible warranties. See Sotheby’s Conditions of Sale, *supra* note 164.

190 2 THOMAS D. SELZ, MELVIN SIMENSKY, PATRICIA ACTON & ROBERT LIND, ENTERTAINMENT LAW § 9:122 (3d ed. 2002).

191 21 N.Y. JUR. 2D *Consumer and Borrower Protection* § 380, Westlaw (database updated Aug. 2021).

192 See Leila A. Amini, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L.J. 59, 100–08 (2016) (describing legal remedies available to victims of art forgery).

The buyer's successful assertion of mistake or fraud rests on the court's determination that the "artwork" is the damaged art object. A buyer's contractual duty is excused if he is mistaken at the time of contracting as to a basic assumption of the agreement, his mistake had an adverse "material effect on the agreed exchange of performances," and he did not bear the risk of mistake.¹⁹³ If the seller was unaware of the artist's intentions to destroy the item offered for sale, the buyer could have a claim for *mutual* mistake.¹⁹⁴ If the seller was in fact aware of the artist's intentions, however, the buyer could allege *unilateral* mistake.¹⁹⁵ Under New York law, a successful claim for unilateral mistake requires some showing of fraud.¹⁹⁶ A court's resolution of several elements of these mistake claims in the buyer's favor—including unconscionability,¹⁹⁷ intent to defraud,¹⁹⁸ and damage caused by reliance¹⁹⁹—requires a general conclusion that the buyer has *lost something*. A narrow definition of the "artwork" as the damaged physical object of sale is a necessary logical step in reaching such a conclusion.

The same is true for a buyer alleging breach of warranty. Under New York law, breach of warranty claims are governed by section 2-313 of the UCC: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."²⁰⁰ The related provision that a seller's description of the goods gives rise to a warranty of conformity to the description, if this description is made part of the basis of the bargain, is of special relevance to art authenticity disputes.²⁰¹ The "basis of the bargain" requirement implies some reliance on the part of the

193 RESTATEMENT (SECOND) OF CONTRACTS §§ 152, 153 (AM. L. INST. 1981). Buyer bears the risk of mistake if she voluntarily assumes it under the terms of the agreement or if she "chooses to act on . . . otherwise limited knowledge." *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 320 (S.D.N.Y. 2013) (quoting *P.K. Dev. Inc. v. Eleven Dev. Corp.*, 640 N.Y.S.2d 558 (N.Y. App. Div. 1996)); RESTATEMENT (SECOND) OF CONTRACTS § 154 (AM. L. INST. 1981).

194 See 22 N.Y. JUR. 2D *Contracts* § 116, Westlaw (database updated Aug. 2021) (specifying that "the facts about which the parties are mistaken must be material facts, and both parties must be mistaken as to the same fact" (footnote omitted)).

195 *Id.* § 118.

196 *De Sole*, 974 F. Supp. 2d at 319–20 (finding that the defendant art gallery's representation of a forged painting as authentic gave rise to a claim of unilateral mistake).

197 See 22 N.Y. JUR. 2D *Contracts* § 118, Westlaw (database updated Aug. 2021).

198 See *De Sole*, 974 F. Supp. 2d at 311.

199 See *id.*

200 U.C.C. § 2-313(1)(a) (AM. L. INST. & UNIF. L. COMM'N 2020); *Rogath v. Siebenmann*, 129 F.3d 261, 263 (2d Cir. 1997).

201 See U.C.C. § 2-313(1)(b) (AM. L. INST. & UNIF. L. COMM'N 2020).

buyer.²⁰² In a shredding stunt situation, the gallery's factual description of the tangible art object as a work of fine art, as defined in New York law,²⁰³ could give rise to a warranty;²⁰⁴ breach of that warranty would give a disappointed buyer a starting point for a claim if she could show that she relied on the seller's description in agreeing to purchase the item.²⁰⁵ This inquiry would require a full factual determination of what the seller said to the buyer about the item and whether the buyer also had independent knowledge.²⁰⁶

Ultimately, the court's evaluation of the merits of the buyer's claim, including its determination of which facts were relevant and whether they were false, would hinge on whether the court accepted the buyer's assertion that the "artwork" at issue was, in fact, a damaged work of fine art. Existing caselaw from the Second Circuit implies that a court is likely to join the buyer in focusing on the tangible art object, not the artist's ideas, as the source of relevant facts. In *Rogath v. Siebenmann*, a dispute over a seller's representations of a painting's authenticity, the reviewing panel considered only the *physical* characteristics of the painting at issue to be material.²⁰⁷ The court remained silent on other possible determinants of authenticity, such as whether the expressive features of the painting reflected the purported artist's intent.²⁰⁸

A shredding stunt could also transpire when a buyer makes a direct purchase from the artist, perhaps at an art fair or in a similarly informal environment. In such a case, the only warranty that can be legally inferred is that the work is done in such a manner that it will not immediately fade or disintegrate.²⁰⁹ For self-destructive art, this would seem to give a buyer an easy claim—if the court accepted the buyer's argument that the "work" that disintegrated was the destroyed

202 *Rogath*, 129 F.3d at 263–64.

203 See N.Y. ARTS & CULT. AFF. LAW § 11.01(9) (2018) ("'Fine art' means a painting, sculpture, drawing, or work of graphic art . . .").

204 See *De Sole*, 974 F. Supp. 2d at 317 (describing buyer-plaintiffs' allegations of express warranties under the U.C.C. and the New York Arts & Cultural Affairs Law).

205 See *id.*; *Rogath*, 129 F.3d at 264.

206 *Rogath*, 129 F.3d at 264–65 ("[W]hat the buyer knew and, most importantly, whether he got that knowledge from the seller are the critical questions.").

207 The authenticity controversy in *Rogath* rested on certain qualities of the paints used that suggested the painting was not genuine. See *id.* at 265.

208 See Denis Dutton, *Authenticity in Art*, in *THE OXFORD HANDBOOK OF AESTHETICS* 258, 260 (Jerrold Levinson ed., 2005). Unlike the Second Circuit, the trial court in *Rogath* highlighted evidence about the painting's expressive features, especially whether the elements and composition of the image were typical of the artist, alongside evidence about the paints used. See *Rogath v. Siebenmann*, 941 F. Supp. 416, 422–23 (S.D.N.Y. 1996), *vacated*, 129 F.3d 261 (2d Cir. 1997). The appellate court did not mention this additional evidence related to the painting's expressive elements.

209 HODES, *supra* note 161, at 25.

art object, and nothing more. In this scenario, with its elimination of middlemen and other variables, the balancing of rights reaches a theoretical singularity, leaving the court with a clear path to a simplistic summary of the event: this was a sale of fine art in which the artist has destroyed the object of the buyer's purchase, and the artist is liable to the buyer. This scenario most acutely reveals the practical impossibility of an artist's bid for legal recognition of the artistic integrity of alleged conceptual art (in the absence of formal copyright protection for such works). Put succinctly, existing law has made a determination that some concepts—those that infringe on an unwilling buyer's right to voluntarily enter into contract—are not legally defensible.

This determination reflects a fair balance in favor of the buyer's very real interests. Most purchasers of conceptual artworks are aware that they are purchasing a conceptual artwork and do not operate under the delusion that they are purchasing a work of fine art. Rather, the buyer's assistance in manifesting the artwork is a component of the artwork itself; the expression, the idea, and the buyer's predefined role in future execution are all conveyed together to a willing buyer of a conceptual artwork.²¹⁰ A buyer with a minimum level of general knowledge about the unique nature of conceptual artworks therefore enters the exchange as an equal party. Since the law generally avoids dictating the content of voluntary contracts,²¹¹ a buyer who willingly accepts the artist's explanation of the work's artistic essence poses no legal problem to a conceptual artist. However, as demonstrated, the unwilling buyer involved in a shredding stunt will be able to overturn the artist's definition of the work.

III. NEW LEGAL FRONTIERS FOR ARTISTS AND BUYERS

Banksy's shredding stunt was a one-of-a-kind art intervention unlikely to be repeated to the same effect. While other artists have generated conceptual works explicitly inspired by Banksy's shredding stunt,²¹² it would be difficult for even the most enterprising artist to

210 See, e.g., *Lot 43B: Felix Gonzalez-Torres, "Untitled" (L.A.)*, CHRISTIE'S, <https://www.christies.com/lotfinder/Lot/felix-gonzalez-torres-1957-1996-untitled-la-5946584-details.aspx> [<https://perma.cc/7WZZ-B78C>] (noting artist's belief that "the owner is an integral part of this work" under the description of the lot).

211 See RESTATEMENT (SECOND) OF CONTRACTS § 5 reporter's note cmts. a & b (AM. L. INST. 1981) ("The choice of terms is primarily a power of the parties to a contract.").

212 See, e.g., Dan Patterson, *Blockchain Company Buys and Burns Banksy Artwork to Turn It into a Digital Original*, CBS NEWS (Mar. 4, 2021), <https://www.cbsnews.com/news/banksy-nft-injective-destroy-art-digital-token/> [<https://perma.cc/5MXL-CDEB>] ("We view this burning event as an expression of art itself . . . [w]e specifically chose a Banksy piece since he has previously shredded one of his own artworks at an auction.").

replicate the excellent placement and element of surprise that elevated the shredding stunt to its rightful place in art history. Buyers do need to be more cautious in purchasing tangible items claiming to be fine art, especially if they have clues that something unusual might begin to happen. However, the legal lessons from the shredding stunt are also applicable to other situations. They are particularly applicable when a buyer *does* have the advantage of full information about the artist's concept at the time of purchase or license but nevertheless decides to challenge or alter the artist's concept in a way the artist might not accept. The shredding stunt is illuminating in these situations because it indicates that the artist is not the only person with authority to define the contours of their artwork. Sometimes, the legal rights of others define an artist's work for them.

Under existing law, as discussed above,²¹³ a buyer litigating a dispute over a shredding stunt has several legal avenues to assert her rights and a real probability of success. While there is always the possibility that an artist could convince a court of the worthiness of his concept, existing law's lack of recognition for conceptual art as such makes this an uphill battle. Disappointed buyers who have lost significant sums thus have an enticing opportunity to challenge the artist's concept, especially if the artist does not emulate Banksy in ensuring all parties are satisfied in the aftermath of the stunt. Artists and buyers can escape this mutual problem and avoid costly litigation by developing more explicit legal norms for the transfer and execution of conceptual artworks, essentially defining the concept ahead of time.

Risk mitigation is a crucial process in art purchases, especially if the buyer is a museum facing potential legal exposure from patrons. Buyers should emphatically assert their rights to enter into voluntary contracts when purchasing artworks. Regardless of a sophisticated buyer's views on art theory, it is in the buyer's interest to clearly identify the object of transfer, including how the tangible portions of the work are defined and whether the buyer gains rights in the intangible portions of the work. The best way to mitigate risk in a conceptual art sale is through a comprehensive, well-drafted contract detailing not only the terms of sale, but the boundaries of the artwork itself and what the parties will do if those parameters must change.²¹⁴ While some buyers may already do this,²¹⁵ it's not clear that this is the norm, even

213 See *supra* Sections II.B and II.C.

214 For a detailed analysis of one conceptual artist's approach to selling his work, see generally Joan Kee, *Félix González-Torres on Contracts*, 26 CORNELL J.L. & PUB. POL'Y 517 (2017).

215 See *id.* at 517.

among sophisticated buyers.²¹⁶ The shredding stunt acutely illustrates the need for artists and buyers to agree in advance on what is being sold.

When considering methods of risk mitigation appropriate to this new category of works, artistic integrity is a looming concern. The artist may wish to preserve the element of surprise as part of the essential concept of the work. The artist's argument here is compelling from a practical standpoint. Compare the established First Amendment principle that forced alteration or dilution of the speaker's *mode* of expression impacts his right to articulate a particular *message*.²¹⁷ Artistically, the shredding stunt simply would not have been as compelling if Banksy had asked the buyer's permission first. However, even under the First Amendment's broad protection for a variety of expression, judicial deference to a speaker's mode of expression is not without potential limits.²¹⁸ The rights of others may present a barrier to the artist's realization of his concept.

Challenges to a conceptual artist's concept are not new. Conceptual art has always aimed to invite engagement with the concept, if not open controversy over it. Recall that the conceptual artist sees his work as a form of language, or an assertion directed at the viewer.²¹⁹ The artist's speech, in turn, invites a response. What is new after the shredding stunt, however, is the potential buyer's knowledge that her rights or those of a third party may intervene to

216 Cf. *Mass. Museum of Contemp. Art Found., Inc. v. Büchel*, 593 F.3d 38, 41 (1st Cir. 2010) (suggesting that legal dispute over display of an unfinished installation artwork could have been prevented had the parties "memorialized the terms of their relationship or their understanding of the intellectual property issues involved in the installation in a written agreement"). For a discussion of existing pseudolegal norms governing museum "ownership," display, and attribution of conceptual art, see generally Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. REV. 1147, 1179–1201. These norms often include discussions between museums and artists or their representatives about how the work will be displayed, but formal contractual agreements do not seem to be at the center of these discussions in most cases. See *id.* at 1187–88.

217 See *Cohen v. California*, 403 U.S. 15, 24–26 (1971); *Texas v. Johnson*, 491 U.S. 397, 416 (1989); cf. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 16 & n.59 (2001) (asserting that the reasoning in *Cohen* highlights the shortcomings of the idea/expression dichotomy in copyright law).

218 Note that defendants' chosen mode of expression in *Cohen* and *Johnson* did not cause any legally cognizable harm to befall observers, suggesting that a mode of expression that gratuitously inflicts such harm might not receive the same deference. See *Cohen*, 403 U.S. at 21–22 (citing only adverse emotional reactions); *Johnson*, 491 U.S. at 408 (same); cf. *id.* at 432 (Rehnquist, C.J., dissenting) (asserting that some modes of expression constitute "inarticulate grunt[s] or roar[s] . . . most likely to be indulged in not to express any particular idea, but to antagonize others").

219 See *supra* Section I.B.

define the boundaries of the artwork itself. Museum buyers in particular have a crucial responsibility to clearly define a conceptual artwork before agreeing to display it, since they invite patrons to view the work.²²⁰ Patrons with disabilities who are limited in their capacity to interact with certain conceptual artworks displayed in museums have already called for these museums to push back on the artists' execution of their concepts, arguing that these artworks' narrow understanding of "interactivity" unacceptably excludes certain patrons from the full museum experience.²²¹ These patrons directly criticize the artist—and the museum—for selecting a certain concept and executing it in a certain way.²²² Museums often defer to the artist's plans for the work's presentation, which is a laudable goal.²²³ However, to protect their own interests and the interests of their patrons, museums should feel free to push back on the artist's concept *prior* to execution, during the process of negotiating a sale or licensing agreement.

Artists should not balk at a museum or other buyer asking them to define their artwork in the form of a contract when transferring ownership or the rights to display the work. Museums and other spaces that bring art to a broad audience rightly place a premium on stability, consistency, and marketability. A museum must be able to capture the essence of a conceptual artwork in a clear and accurate way, whether visually or in a description, in order to attract potential patrons' interest in coming to see it. Marketability and its prerequisites are good for the artist, too, since these values support his ability to cultivate a personal brand over the long term. While spontaneity and experimentation are both core to the conceptual art genre,²²⁴ nothing prevents an artist from experimenting in a setting in which no contract is necessary because there is no potential for a subsequent legal dispute: at a salon in a friend's home, perhaps, or in his own private gallery space. However, the artist's goal of experimentation should be secondary to his goal of perpetuating his own creative power and expanding the audience for it. Conceptual art as a genre will be better

220 Cf. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 302 (1985) (noting that a museum's responsibility for patrons' safety takes precedence over artistic concerns).

221 See Claire Voon, *Museums Are Finally Taking Accessibility for Visitors with Disabilities Seriously*, ARTSY (Oct. 14, 2019), <https://www.artsy.net/article/artsy-editorial-museums-finally-accessibility-visitors-disabilities-seriously> [<https://perma.cc/KTH7-32PW>].

222 See *id.*

223 See Rub, *supra* note 216, at 1190.

224 Sol LeWitt, *Sentences on Conceptual Art*, in SOL LEWITT: THE MUSEUM OF MODERN ART NEW YORK: [EXHIBITION] 168 (Alicia Legg, ed., 1978) (noting that ideas may send an artist "off in unexpected directions").

accepted by the viewing public—even members of the viewing public who might otherwise be fine with more novel concepts—if it does not cause harm to innocent third parties. Fortunately, conceptual art theory recognizes that predictability in how an artwork proceeds can be a virtue.²²⁵ The shredding stunt builds on this theory by indicating that artists need to embrace the predictability associated with agreements, negotiations, and legal frameworks in order to preserve their work’s potential impact.

CONCLUSION

Ultimately, the definition of art is best reserved to the determination of willing parties to an agreement and not to courts; artists and buyers should both take action to ensure the opportunity to define artworks remains under their control. Happily, the conceptual art tradition contains within it the potential for fruitful artistic collaboration between artists, whose creative planning articulates the work’s core concept, and buyers, whose faithful execution shares this concept with other viewers. Conceptual artists have long recognized that an appreciation for the viewer’s response is necessary to the realization of their creative potential.²²⁶ This tradition builds a strong foundation for artists and art lovers to develop new, more robust industry norms clarifying the legal rights of everyone who will be part of the work.

For those artists who might be more contrarian, however, Banksy’s shredding stunt is a cautionary tale alerting them that certain concepts implicate the legal rights of third parties. The artist’s definition of the work as a conceptual art stunt cannot make these rights disappear. Until conceptual artworks are granted independent legal protection in copyright or moral rights, artists should continue to creatively work within industry norms—both to protect buyers and to protect themselves.

225 See LeWitt, *supra* note 77, at 80 (advising the artist to “eliminate[] the arbitrary, the capricious, and the subjective as much as possible” by “work[ing] with a plan that is pre-set”).

226 Compare *id.* (“It is the objective of the artist who is concerned with conceptual art to make his work mentally interesting to the spectator . . .”), with Felix Gonzalez-Torres, S.F. MUSEUM OF MODERN ART, https://www.sfmoma.org/artist/Felix_Gonzalez-Torres/ [<https://perma.cc/GK8Z-6JVW>] (“Without the public these works are nothing. I need the public to complete the work. I ask the public to help me, to take responsibility, to become part of my work, to join in.”).

Author's note: Just prior to publication of this Note, the rechristened *Love Is in the Bin* painting sold for \$25.4 million at auction at Sotheby's London, in the same room as the original sale in October 2018.²²⁷ The sale price was three times the high estimate and set another new record for the artist.²²⁸ Per Sotheby's spokesman Alex Branczik: "It has been a whirlwind to follow the journey of this now legendary piece."²²⁹

The resale provides an interesting opportunity to compare Sotheby's relative levels of risk mitigation. Emma Baker, a specialist employed by Sotheby's, explained that the auction house took several precautions before offering the partially shredded artwork for resale, including weighing the frame and visually examining the shredder to ensure the batteries and related electrical mechanism had been removed.²³⁰ Curators of various museums where the painting had been displayed after the original sale had already replaced the back of the frame with glass, which facilitated Sotheby's subsequent examination.²³¹ Baker said Sotheby's also reached out to Banksy's representatives to ask whether he planned to be "involved" in the sale, and was reassured that "nothing would happen this time."²³² While it is understandable that Sotheby's may not have had sufficient notice to take these exact steps prior to the original sale, their pattern of preparation for the resale is an instructive example of what due diligence might look like for sellers of works by high-profile conceptual artists.

227 Jill Lawless, *Shredded Banksy Artwork Sells for \$25.4 Million at Auction*, ASSOC. PRESS (Oct. 14, 2021), <https://apnews.com/article/business-lifestyle-london-banksy-arts-and-entertainment-2afc1f803d58f96dc21e485e40d785f0> [https://perma.cc/3AB4-HENF].

228 *Id.*

229 *Id.*

230 Kelly Crow, *Banksy's Shredded Artwork Sells for \$25.4 Million*, WALL ST. J. (Oct. 14, 2021), <https://www.wsj.com/articles/banksys-shredded-artwork-sells-for-25-4-million-11634234269> [https://perma.cc/8VQW-NQYL].

231 *Id.*

232 *Id.*