

HARVARD ART LAW REVIEW

Volume II

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LETTER FROM THE EDITOR-IN-CHIEF

Dear Reader,

It is with great pride that I introduce the second volume of the *Harvard Art Law Review*. What we began last year as an ambitious effort to create a dedicated space for art law within Harvard has, in this short time, grown into a dynamic forum for exploring the legal structures that shape cultural production, preservation, and meaning. It has been a privilege to lead this publication, and I am delighted to share this volume with you.

The contributions in this issue reflect the breadth of the field of art law. From the transnational complexities of antiquities trafficking and restitution disputes to the human rights dimensions of cultural heritage, these pieces examine how law mediates our relationships with culture, our communities, and the past. At the same time, this volume looks toward the future. Several pieces grapple with the legal and artistic challenges posed by emerging technologies, particularly artificial intelligence, to the longstanding doctrines of authorship and originality.

This volume is a testament to international collaboration and intellectual curiosity that transcends borders and disciplines. I am honored to present a *Review* that brings together voices from across the world, across academic fields, and across stages of practice.

This issue would not have been possible without the passion and dedication of my editorial team, whose thoughtful engagement and hard work demonstrate the promising future of the *Review*. I am deeply grateful for their work, as well as for the authors who endeavored on this process with us.

Art remains a powerful and universal tool for expression, connection, and understanding. This *Review* seeks to contribute meaningfully to conversations about the vital role of art and the importance of its protection. As someone who believes that art is truly a fundamental part of the human experience, I hope that this issue inspires continued engagement with art and its many intersections with the law.

Sincerely,

Shira Fischer

Editor-in-Chief

Harvard Art Law Review

SEIZURE WITHOUT RESTITUTION: ANTIQUITIES DEALER
LEONARDO PATTERSON'S COLLECTION BEFORE THE
MUNICH ADMINISTRATIVE COURT

Paul P. Stewens and Donna Yates***

I. INTRODUCTION

On 11 February 2025, Leonardo Patterson died in Bautzen, Germany, at age 82,¹ ending a career in antiquities trafficking, forgery, and sale that spanned decades and at least four continents. Born in Costa Rica to poor Jamaican parents, Patterson claimed that by the time he was a teenager, he was working for a jeweller in San José, where he met people who looted Pre-Hispanic graves for sellable gold.² He soon became an intermediary between looters and dealers seeking to source looted antiquities, and after moving to the USA, he ended up an employee of Everett Rassinga, a notorious Latin American antiquities trafficker and dealer in his own right.³ In the decades that followed, Patterson would rack up, at the very least, a conviction for federal mail fraud in the USA for the attempted sale of a fake Maya fresco;⁴ was sentenced to prison for a probation violation after being stopped at the Dallas-Fort Worth airport in the possession of endangered sea turtle eggs and a Pre-

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¹ Clay Risen, *Leonardo Patterson, 82, High-Flying Antiquities Dealer Brought Low, Dies*, THE NEW YORK TIMES, Apr. 3, 2025, <https://www.nytimes.com/2025/04/03/arts/leonardo-patterson-dead.html>; Konstantin von Hammerstein, *The Dubious Market for Ancient Artifacts*, DER SPIEGEL, Apr. 14, 2016, <https://www.spiegel.de/international/business/the-dubious-market-for-ancient-artifacts-a-1086597.html>.

² Hammerstein, *supra* note 1.

³ KARL E. MEYER, *THE PLUNDERED PAST: THE STORY OF THE ILLEGAL INTERNATIONAL TRAFFIC IN WORKS OF ART* (1973).

⁴ D Elias, *FBI Arrests Pre-Columbian Art Dealer on Fraud Charges*, THE AGE, June 5, 1984. He was also reportedly trying to sell similar fake Maya artifacts in Switzerland at the time.

Hispanic figurine;⁵ forced a national change in the Australian tax code due to an antiquities importation/overvaluation/donation scheme;⁶ became a UN cultural attaché;⁷ was implicated in the smuggling of a recovered gold Peruvian headdress;⁸ was tried but not convicted in Spain for export violations related to his contested collection of antiquities;⁹ and was finally convicted on fraud charges concerning a fake colossal Olmec head among material in Munich in 2015.¹⁰ His life outside and within the law is almost unbelievable.

Because of the complicated transnational qualities of his criminal escapades and his resilience within the illicit trade in cultural objects despite what seems like constant legal intervention, Patterson's actions have been the subject of criminological analysis¹¹ and media scrutiny.¹² Yet, the exact facts of Patterson's civil and criminal cases are minimally represented. The result, at least in the media coverage of Patterson, is confusion and inconsistency regarding years, jurisdictions, charges, and other features of these cases. This adds to his mystique but restricts the ability of both scholars and the public to put Patterson in his proper legal context.

⁵ William H. Honan, *Art for Whose Sake?: Trading in Antiquities; Rare Pre-Columbian Relics, at Any Cost*, THE NEW YORK TIMES, July 31, 1995, <https://www.nytimes.com/1995/07/31/us/art-for-whose-sake-trading-in-antiquities-rare-pre-columbian-relics-at-any-cost.html>.

⁶ Donna Yates, *Museums, Collectors, and Value Manipulation: Tax Fraud through Donation of Antiquities*, 23 JOURNAL OF FINANCIAL CRIME 173 (2015).

⁷ Risen, *supra* note 1.

⁸ Sandra Laville, *Peruvian Headdress Recovered*, THE GUARDIAN, Aug. 18, 2006, <https://www.theguardian.com/uk/2006/aug/18/arts.artsnews>; Steve Connor, *Solved: Case of the Disappearing Headdress, the Mona Lisa of Peru*, THE INDEPENDENT, Aug. 17, 2006, <https://www.independent.co.uk/news/uk/crime/solved-case-of-the-disappearing-headdress-the-mona-lisa-of-peru-412391.html>.

⁹ Hammerstein, *supra* note 1; Marta Fernández, *El fabuloso tesoro del escurridizo señor Patterson*, EL PAÍS, Nov. 28, 2017, https://elpais.com/cultura/2017/11/25/actualidad/1511615674_833863.html.

¹⁰ Risen, *supra* note 1.

¹¹ Yates, *supra* note 7; Donna Yates & Shawn Graham, *Reputation Laundering and Museum Collections: Patterns, Priorities, Provenance, and Hidden Crime*, 30 INTERNATIONAL JOURNAL OF HERITAGE STUDIES 145 (2024); Shawn Graham et al., *Relationship Prediction in a Knowledge Graph Embedding Model of the Illicit Antiquities Trade*, 11 ADVANCES IN ARCHAEOLOGICAL PRACTICE 126 (2023); Donna Yates, *'Value and Doubt': The Persuasive Power of "Authenticity" in the Antiquities Market*, 2 PARSE 71 (2015).

¹² Elias, *supra* note 4; Alexandra Olson & Patrick McGroarty, *An Antiquities Legend in an "intrinsically Lawless" Field*, LOS ANGELES TIMES, Nov. 9, 2008, <https://www.latimes.com/archives/la-xpm-2008-nov-09-adfg-antiquities9-story.html>; Hammerstein, *supra* note 1; Fernández, *supra* note 10; Tom Mashberg, *New York Returns 142 Looted Artifacts to Italy*, THE NEW YORK TIMES, July 20, 2022, <https://web.archive.org/web/20220813223257/https://www.nytimes.com/2022/07/20/arts/design/new-york-italy-looted-artifacts-steinhardt.html>; Risen, *supra* note 1.

In this short piece, we offer notes on four cases that were heard in the Munich Administrative Court and the Bavarian Administrative Court¹³ that involved countries of origin requesting the return of pre-Hispanic antiquities seized from Patterson. By presenting these case facts and the decisions and rationales of the courts in English, but refraining from deeper analysis, we hope to encourage further collection of information about the history of Patterson's encounters with the law, and further reflection on how they can be understood through social and criminological frameworks.

II. SEIZURE OF PATTERSON'S COLLECTION

After Patterson transferred his collection from Spain (where it had been exhibited in 1997) to Germany in March 2008,¹⁴ German authorities seized it from a Munich warehouse on 23 April 2008 based on an international letter rogatory.¹⁵ The Bavarian State Criminal Police Office then produced CDs with images of all seized objects and made them available to the embassies of different Latin American countries in May and June 2009. Consequently, Costa Rica, Guatemala, Mexico, and Colombia all tried to negotiate a return of the artifacts with the German Foreign Office but were unsuccessful with their diplomatic efforts. In expectation of or reaction to, respectively, the repeal of the seizure order on 16 October 2009, each of those countries requested an interim order before the Munich Administrative Court between October and December 2009.

III. LEGAL BASIS

All four countries relied on provisions of the *Kulturgüterrückgabegesetz* (KultGüRückG) for their claims.¹⁶ This law implemented the 1970 UNESCO

¹³ The Munich Administrative Court is the court of first instance in administrative matters while the Bavarian Administrative Court hears appeals to decisions of administrative courts in all the Free State of Bavaria.

¹⁴ Fernández, *supra* note 10.

¹⁵ Anne Spletstößer, *Pre-Columbian Heritage in Contestation: The Implementation of the UNESCO 1970 Convention on Trial in Germany*, in *CULTURAL PROPERTY AND CONTESTED OWNERSHIP* 156 (2016).

¹⁶ Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern vom 18. Mai 2007 (Federal Law Gazette [BGBl.] Part I p. 757.

Convention¹⁷ for Germany; the 2016 *Kulturgüterschutzgesetz* replaced it.¹⁸ In § 6 KultGüRückG, the requirements for a country to request the return of cultural objects are listed. Pursuant to § 6(2) KultGüRückG, states parties to the 1970 UNESCO Convention could request the return of an object covered by the scope of the treaty if it was unlawfully removed from the requesting state's territory to Germany, and if that item was designated as being of special significance prior to removal. Such a designation required entering the object into a register of significant public and private cultural property in an individually identifiable manner. This register had to be publicly accessible within German territory without unreasonable obstacles. In the case of undiscovered archaeological objects unknown prior to the removal, the state party may perform such a designation within one year after its competent authority was able to become aware of the object. For the entitlement to a return claim, it would already be sufficient to launch such a procedure and publicise it.¹⁹

IV. DECISIONS

A. *Colombia*

The Munich Administrative Court rejected Colombia's claim of 77 pre-Hispanic objects based on § 8(2) KultGüRückG from 18 December 2009 because it considered the requirements of § 6(2) KultGüRückG not to be fulfilled.²⁰ The one-year period after Colombia could have obtained knowledge of the object's existence and thus designated them as significant had lapsed by 6 August 2009 at the very latest. Galician police had created a CD of all artifacts in the Patterson Collection located in Spain in 2007 and distributed it to affected countries via Interpol.²¹ This CD included photographs and information about all artifacts that Colombia now claimed. Moreover, Colombia could also have known about the artifacts from their 1997 exhibition by Patterson in Spain, which had had a published catalogue. Even if the period to designate these objects had not lapsed, Colombia would have still failed to demonstrate that its register was accessible within German territory; after all, the country itself had asserted that the designation was only undertaken through an expert letter to the embassy in Germany.

¹⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 (entry into force: 24 April 1972), 823 UNTS 231.

¹⁸ Kulturgutschutzgesetz vom 31. Juli 2016 (Federal Law Gazette [BGBl.] Part I p. 1914).

¹⁹ For a discussion of the legal requirements for return claims under the KultGüRückG see also: <https://doi.org/10.15542/KUR/2012/3-4/6>

²⁰ VG München, Beschluss vom 25.01.2010, Az. M 17 E 09.5962, BeckRS 2010, 35486.

²¹ Splettstößer, *supra* note 16.

In its appeal to the Bavarian Administrative Court, Colombia criticised the court of first instance's insufficient consideration of the facts of the particular situation and of the right enshrined in the 1970 UNESCO Convention for any state to determine which cultural objects it deems of special significance and worthy of protection. Colombia contended that Germany's implementation of the 1970 UNESCO Convention contained requirements almost impossible to fulfil, thereby violating the superior provisions of the 1970 UNESCO Convention. Besides, Colombia did not consider the one-year period to have lapsed. It argued that the window for designating the objects started on 19 May 2009, when it had received the Bavarian CD, rather than the Spanish one. According to Colombia, this was imperative since not all objects which were later transferred to Germany had previously been exhibited in Spain, and because the Spanish CD contained several pictures that showed groups of objects of which individual pictures were missing, meaning it was of little use for the appropriate identification of single pieces. Going further, Colombia argued that the period should only start after Colombian experts had the chance to inspect the objects in person, especially to confirm their authenticity.

The Free State of Bavaria, being the opponent of the claim, rejected the view that Germany's implementation of the 1970 UNESCO Convention was unreasonably restrictive as well as the idea that Colombia had a right to inspection. It further emphasised that the one-year period for designation had indeed lapsed, as it had started with the submission of the Spanish CD. It argued that Colombia had not substantiated its claim that the artifacts had been entered into a register that satisfies the criteria enshrined in § 6(2) KultGüRückG.

The Bavarian Administrative Court upheld the decision, finding the requirements of § 6(2) KultGüRückG not to be met.²² In the Court's view, Colombia could have gained knowledge about the objects in 1997 and in 2007. Even if the photos from the Spanish CD (and particularly their quality) were insufficient to definitively determine the national significance of the artifacts, they were indeed sufficient to obtain knowledge about them. An inquiry to Interpol Germany on 30 April 2008 represents further evidence of Colombia's knowledge of the artifacts, as does the launch of domestic criminal proceedings against Patterson. What is more, there had been no designation of special significance for the objects since Colombia could not demonstrate that it entered the artifacts into its register within the one-year period and that the register was publicly accessible within German territory. Finally, Germany's implementation of the 1970 UNESCO Convention was not found to be excessively strict. Despite the rule that German law needs to be interpreted in conformity with international law

²² VGH München, Beschluss vom 16.04.2010, Az. 7 CE 10.354, BeckRS 2012, 57877.

(*völkerrechtskonforme Auslegung*), this must not result in reversing the clear and unambiguous wording of the domestic provision, and Article 5(b) 1970 UNESCO Convention obligates states parties to maintain a national register either way. The Court also rejected a right to inspection under § 12(1)(2) KultRückG based on the wording of the provision.

B. Guatemala

Guatemala also relied on § 8(2) KultGüRückG to claim 369 objects seized from Patterson, but was equally unsuccessful before the Munich Administrative Court.²³ With regard to the one-year period to designate the objects, the Court found that only two of the claimed artifacts had not been included on the Spanish CD, which had provided Guatemala with enough information to initiate criminal proceedings against Patterson before the *Tribunal 1o. de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente Sacatepequez*. Moreover, Guatemala had submitted an inquiry via Interpol to the German authorities in April 2008 concerning most of the objects that it later claimed. These actions demonstrated Guatemala's awareness of the objects.

Guatemala appealed, arguing that it would be sufficient for an object to be considered protected if the internal procedure for designation has been launched, given that this process has been publicised. Concerning its knowledge, Guatemala explained that it had not become aware of the objects through the Spanish CD. Instead, it claimed that the information reached its authorities through the curator of the *Museo del Hombre Dominicano* in the Dominican Republic, who had been informed in 2007 that pre-Hispanic artifacts had been seized in Spain. Based on the photographs submitted to the curator, 124 of the 491 objects were identified as belonging to Guatemala's cultural heritage and consequently entered into Guatemala's register on 24 September 2007. The inspection of these 124 objects did, however, reveal the existence of more objects whose authenticity would need to be confirmed on-site. Therefore, the 2007 letter rogatory had only referred to those 124 items, with Guatemala asserting that it had been made aware of the remaining artifacts that it now claimed through the Bavarian CD on 22 June 2009. Guatemala also considered it to be in line with the spirit of the KultGüRückG and the 1970 UNESCO Convention not to require a claimant country to enter objects into a register if their authenticity has not been confirmed. As far as the requirement of public accessibility of an inventory was concerned, Guatemala argued that this would currently be unrealistic according to unanimous expert opinion. For security and conservation reasons, Guatemalan museums and cultural institutions limit

²³ VG München, Beschluss vom 25.01.2010, Az. M 17 E 09.5962.

access to their complete inventories. Guatemala argued that the security to be guaranteed by inclusion in a public register had already been provided in the present case by the applications for legal assistance submitted by the Guatemalan public prosecutor's office to the Spanish and German authorities, to which corresponding registers had been attached. As a result, Guatemala argued that the KultGüRückG did not do justice to cases such as the present one.

The Free State of Bavaria again rejected the view that Germany's implementation of the UNESCO Convention was unreasonably restrictive. In its view, Guatemala had no right to inspection under the KultGüRückG and could not unilaterally suspend one of the requirements of § 6(2) KultGüRückG and extend the one-year period (which Bavaria considered to have expired). Moreover, the *ratio* of the norm required an equally high publicity standard concerning the register and the announcement of the launch of a registration procedure. The idea that a letter rogatory would suffice was found to be "absurd" by Bavaria.

Ultimately, Guatemala's claim was unsuccessful.²⁴ Concerning the one-year period, the Bavarian Administrative Court not only assumed a chance to obtain knowledge for Guatemala, but indeed knowledge of the artifacts more than a year prior to its request for an interim order. For the Court, this was evidenced by Guatemala acknowledging itself that it had been made aware of the photos made by the Spanish police in 2007 when those were submitted to the curator of the *Museo del Hombre Dominicano*, who subsequently shared them with Guatemala. Also, Guatemala maintained having registered some of the relevant objects on 24 September 2007 and inquired about them via Interpol to German authorities on 24 April 2008, claiming that artifacts imported from Spain were Guatemalan cultural heritage that were subject to a criminal investigation in Guatemala in 2007. Even back in 1997, according to the Court, Guatemala could have obtained knowledge of the artifacts. The Court rejected the notion that a letter rogatory would qualify as a designation of special significance within the meaning of § 6(2) KultGüRückG since, as a process purely internal to authorities, it lacked publicity. When Guatemala entered the objects into its national register on 24 September 2009, the one-year period had already lapsed, and Guatemala had also failed to demonstrate that the register was publicly accessible within German territory or that even the announcement that the process of registration had been initiated was sufficiently publicised. Germany's implementation of the 1970 UNESCO Convention was also not found to be excessively strict, even under the principle of *völkerrechtskonforme Auslegung*. The Court rejected a right to inspect the objects as well.

²⁴ VGH München, Beschluss vom 13.04.2010, Az. 7 CE 10.258, BeckRS 2010, 48583.

C. Mexico

Mexico brought a claim to 690 objects based on § 8(2) KultGüRückG on 20 October 2009, but the Munich Administrative Court rejected the request. It found that Mexico's register was not publicly accessible in Germany with a reasonable effort. The explanatory memorandum on the KultGüRückG suggested that while the internet would be the easiest form of access, providing a written copy of the register to an official institution in Germany would be sufficient, too. In any case, said register would need to be in an internationally common language, preferably English or French, instead of Spanish.²⁵ Mexico appealed, claiming that the Court had interpreted the public access requirement too narrowly, advocating for an individual case-by-case assessment instead, and that the Court, by inappropriately using text blocks from another decision, had violated Mexico's right to a fair hearing. Moreover, Mexico argued that it had created online access to its register in the meantime.

The Bavarian Administrative Court upheld the judgment. It found the wording "accessible within German territory" clearly required more than accessibility from German territory, and no support for a case-by-case assessment of this question. As a justification for adhering to such a high threshold, the Court emphasised that any state party to the 1970 UNESCO Convention wishing to use German authorities or courts to enforce its return claim must comply with the registration and publicity standards which German law required for that purpose. It went on to underline the importance of transparency for public registers: if a register cannot be comprehensively and continuously accessed so that changes become traceable, the potential for abuse (e.g., through backdating) threatens the fundamental right to property and the interests of the art market. Maintaining such a register was also found not to be unreasonable for states that subject all or most of their national cultural objects to export restrictions, such as Mexico, since it can be provided in digital form and can be limited to particularly important artifacts or those that are already known to have been stolen. According to the Court, the 1970 UNESCO Convention did not require any greater leniency from Germany in this regard. Since Mexico had not entered the artifacts into a register that met the requirements under German law, it could not bring a claim based on the KultGüRückG.²⁶

²⁵ VG München, Beschluss vom 16.04.2010, Az. M 17 E 09.4958.

²⁶ VGH München, Beschluss vom 16.07.2010, Az. 7 CE 10.1097, BeckRS 2012, 57876.

D. Costa Rica

Costa Rica chose a slightly different approach, relying not on § 8(2) KultGüRückG but on § 13(1) KultGüRückG, which allowed for return claims under administrative law against the current possessor of the items in question, with the remedy of choice being an interim order pursuant to Section 123 of the Code of Administrative Court Procedure. According to Costa Rica, the objects in question had been exported in violation of its domestic law, and their authorities had had no knowledge of them until it received the Bavarian CD from the German Foreign Office. Consequently, no export permit had been granted for them. Patterson's representative argued that the criteria for a claim under § 6(2) KultGüRückG were not fulfilled. The objects were said to have been removed from Costa Rica before 26 April 2007 and had not been designated as possessing special significance and entered into a proper register. They further emphasised that Costa Rica could not simply claim it had no knowledge of the objects but had to prove that it could not have known about them. However, the seizure of the collection had been undertaken upon the initiative of Costa Rica, which then announced to the Bavarian Ministry of Justice its intention to send an expert for inspection in May 2008. To Patterson's representative, this demonstrated that Costa Rica could have inspected the collection and did have knowledge of the objects' existence in at least mid-2008. Moreover, such knowledge could have been obtained during their 1997 public exhibition in Spain. The fact that some of the objects were claimed by several states, according to Patterson's representative, showed that Costa Rica was unable to unambiguously determine the provenance of the individual artifacts. By the time of Costa Rica's request, the one-year period after having had the possibility of obtaining knowledge²⁷ was claimed to have expired, too.

While the Munich Administrative Court found Costa Rica to have successfully demonstrated an *Anhaltungsgrund* (i.e., a demonstrated necessity for an interim measure), it failed to substantiate a right that would need to be secured in such a way (*Anhaltungsberechtigung*).²⁸ Costa Rica's assertion that the objects had been exported without the necessary permits was accepted, and the Court went on to state that a removal from Costa Rica prior to 26 April 2007 did not prevent an application of the KultGüRückG since only the import into Germany must have taken place after that. The several assumed interim stations on the artifacts' way to Germany did not prevent the application of § 6(2) KultGüRückG either, since even such a trajectory could not 'overwrite' the initial country of origin. As evidence for this, the Court cited the statute of limitations of § 11(1)(3) KultGüRückG, which

²⁷ § 11(1)(1) KultGüRückG.

²⁸ VG München, Beschluss vom 27.01.2010, M 17 E 09.4833, BeckRS 2010, 35497.

started at the time when the object is removed from its country of origin.²⁹ Instead, the obstacle to Costa Rica's claim was seen in the lack of timely designation as an object of special significance. The registration had only been completed once Costa Rica received the Bavarian CD, and by then, the one-year period of § 6(2)(1) KultGüRückG had already expired. According to the Court, Costa Rica could have obtained knowledge in 1997, and the fact that it actively sought the seizure of the objects, together with competing claims to some artifacts, made Costa Rica's argumentation seem unconvincing. The Court also found Costa Rica to have failed to demonstrate that its register met the requirements enshrined in § 6(2) KultGüRückG. Costa Rica tried to appeal this decision, but failed in the admissibility stage since it was not represented by an attorney of record, which is mandatory for a Higher Administrative Court pursuant to Section 67(4)(1) Code of Administrative Court Procedure.³⁰

V. CONCLUSION

Nearly all of the primary actors involved in the widespread looting of Pre-Hispanic heritage sites in the 1960s through 1980s³¹ have died. Their passing represents the definitive end to an era that has permanently left its mark on the archaeological sites of Central and South America. With their death, we also lose the information about crimes related to cultural objects that they, understandably, have not shared. This leaves the objects of their focus, the so-called illicit antiquities, without provenances and proveniences.

In a situation where information about these objects has died with their dealers, it grows ever more important to collect the information that is available. If our goal is to either reconstruct the histories of these objects or, perhaps more realistically, the history of the crimes that divorced them from their rightful contexts, we need to consider how courts have treated these objects (and their people). The documents submitted and the arguments made on all sides about these objects offer forms of preserved information that may not exist elsewhere.

²⁹ The Court also notes that including such a provision represents a deviation in German legislation from the UNESCO Convention which did not foresee for anything similar.

³⁰ VGH München, Beschluss vom 12.04.2010, Az. 7 CE 10.405, BeckRS 2010, 49160.

³¹ Clemency Chase Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART JOURNAL 94 (1969); Clemency Chase Coggins, *United States Cultural Property Legislation: Observation of a Combatant*, 7 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 52 (1998); P.D. Sheets, *The Pillage of Prehistory*, 38 AMERICAN ANTIQUITY 317 (1973); Merle Greene Robertson, *Monument Thievery in Mesoamerica*, 37 AMERICAN ANTIQUITY 147 (1972); Donna Yates, *Failures and Consequences of Antiquities Antitrafficking Policy in Mesoamerica*, in THE MARKET FOR MESOAMERICA: REFLECTIONS ON THE SALE OF PRE-COLUMBIAN ANTIQUITIES 189 (Cara G. Tremain & Donna Yates eds., 2019).

In this instance, we have focused on relatively recent cases where public documentation, personal accounts, and institutional memory have not yet faded, though we contend that by presenting these cases in English, we bring them to a new audience. Where the collection of case information may truly count is within the dimmer, more distant history of dealers and their deeds. As an example, one author's knowledge of the particulars of Patterson's federal wire fraud conviction in a US court in the early 1980s stems in no small part from discussing the case with some of the experts and witnesses who participated in the proceedings. Those people, too, are slowly passing away, and a presentation of the cold case facts would be an important supplement to the extent of their memories. At the time of writing, the authors do not have access to files related to that case. To use another practical example relating to Patterson, several years after his unsuccessful prosecution in Spain, one author discovered that at least some key figures on the Spanish prosecution's side were unaware of Patterson's tax manipulation case in Australia in 1979/80.³² While it is unlikely that knowledge of such history would have made any difference in that case, the existence of a case note about that old but significant case may have helped them paint a more complete picture of Patterson's criminal career up to that point.

We end with a call for more case notes on art crime and antiquities trafficking cases, particularly those that relate to important but older and harder-to-access cases and cases from jurisdictions that are rarely considered in English-language art law journals. One researcher's case note is another researcher's clue.

³² Yates, *supra* note 7.

THE SAPI-PORTUGUESE IVORIES AS ‘NATIONAL TREASURES’ OF THE REPUBLIC OF SIERRA LEONE: A MORAL CASE FOR REPATRIATION

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Pieter van den Keere. *Guinea*, 1600-1649. Wikipedia Commons. Public Domain.

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I. INTRODUCTION

This is a theoretically ambitious article that borrows broad concepts from legal studies, moral philosophy, history, ethnography, and political science to propose a moral-legal argument for the repatriation of Sapi-Portuguese ivories in foreign collections to Sierra Leone's Monuments and Relics Commission. This article is a modest contribution to long-standing debates about the rightful ownership of ancient artifacts and what claims, if any, their modern-day countries of origin and Western institutions and collectors have to such objects. Artifacts that were stolen, trafficked, or unlawfully exported from their countries of origin in the twentieth century have been more easily restituted than artifacts unjustly taken from their original contexts in prior centuries. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property outlines measures for the return of ill-gotten artifacts. As of 2025, 148 Member States of UNESCO have ratified the agreement. Kenya, in particular, has successfully invoked the Convention to reclaim its stolen cultural property.¹

Among artifacts of African origin now in the possession of Western collectors, the Sapi-Portuguese ivories sit in a very unique category. Their histories do not register a punitive or archaeological plunder analogous to Nigeria's Benin Bronzes or Egypt's Bust of Nefertiti. Furthermore, there is no evidence attesting to their theft or illegal export in violation of national or international law. As commissioned artworks, some of the earliest Sapi-Portuguese ivories passed into European hands, in the late fifteenth century, through non-illicit channels. Current historical research suggests the Sapi-Portuguese ivories possibly left *Serra Leoa* through "fair trade" exchange networks. The ivories thus appear to fall outside of the scope of soft-law instruments such as the non-retroactive UNESCO Convention and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Yet, I argue that from a human rights perspective, there is an ethical justification for the legal repatriation of the Sapi-Portuguese ivories to Sierra Leone. The ivories' return will uphold epistemic justice and affirm indigenous peoples' collective ownership rights of their ancestral cultural property.

¹ In 2008, America's Illinois State University and Hampton University Museum returned two sacred *vigango* statues to the Kenyan village from which it was stolen in 1985. Kenya's restitution claim referenced a violation of the 1970 UNESCO Convention. See Marc Lacey, *The Case of the Stolen Statues: Solving a Kenyan Mystery*, *N.Y. Times*, April 16, 2006.



Figure 1. Unknown Sapi Master. *Sapi-Portuguese Saltcellar*, 1490-1530. © The Trustees of the British Museum. Shared under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0) license.

The Sapi-Portuguese ivories' entire tenure abroad has been morally problematic from the very beginning. Moreover, there are beneficiaries living today who would benefit from the repatriation of the Sapi-Portuguese ivories. I believe these beneficiaries' vested ownership of the ivories is more legitimate than any foreign collector's ownership claim. In what follows, I will give some historical background on who the Sapi people were, and why their ivories should be considered the 'national treasures' of Sierra Leone. Next, I will problematize the logic of the so-called fair exchange that saw the ivories' entry into European collections. I will explore the applicability of the posthumous harm principle to this case. Finally, I will outline the quasi-legal procedure through which the ivories could be repatriated to Sierra Leone.



Figure 2. Unknown Sapi Master. *Sapi-Portuguese Horn*, 1490-1530. Courtesy of Yale University Art Gallery. Public Domain.

In their ground-breaking 2018 report, which was commissioned by French President Emmanuel Macron, Felwine Sarr and Bénédicte Savoy repeatedly used the term “restitution” to refer to African cultural property in European collections, which they deemed to be morally eligible for return to their originating cultures.² In their report, the two authors wrote: “To restitute [...] means to return an item to its legitimate owner. The legitimacy of restitution rests upon a morally reprehensible act (rape, pillaging, spoliation, ruse, forced consent, etc.). The gesture of restitution is very clearly the recognition of the illegitimacy of [...] the ownership [of the cultural property] no matter the duration of time passed.”³ In this article, I

² Following decades of impasse by the French government to grant restitution requests for African artifacts held in France’s public museum collections, President Emmanuel Macron finally commissioned a report from French historian Bénédicte Savoy and Senegalese economist and writer Felwine Sarr. Their 252-page report was published in November 2018; and it called for the full return, not long-term loaning, of artifacts taken “without consent.”

³ Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, MINISTÈRE DE LA CULTURE (Nov. 2018), <https://www.unimuseum.uni->

use the term “repatriation” in lieu of “restitution” in reference to the Sapi-Portuguese ivories because the ivories were not taken from *Serra Leoa* through brutal or nefarious means. The term repatriation refers to the act of restoring something or someone to its natal place. It is a more appropriate term for the Sapi-Portuguese ivories, given their unique history. All at once, I make a case for their return, while acknowledging that the artifacts were not taken abroad fraudulently or violently.

Why call for the repatriation of the Sapi-Portuguese ivories? Why not other artifacts of Sierra Leonean cultural heritage, such as *sowei* masks and *nomoli* (fig. 3) soapstone statuettes, which are also scattered in museums worldwide? Indeed, some Sierra Leonean artifacts holding ethnic or spiritual significance were indiscriminately exported from Sierra Leone during the dawn of decolonization. In 1961, Guy Massie-Taylor, a former teacher in the British Colonial Service, absconded to England with a trove of Mende art objects and other items of ethnographic interest.⁴ I acknowledge and call for every single cultural artifact unlawfully taken from Sierra Leone to be returned to the nation. The uniqueness of this article is its focus on cultural objects taken out of Sierra Leone before the country’s modern-day state formation. More specifically, this article calls for the return of African artifacts that were exchanged without coercive force or through illicit acquisition. In this context, the Sapi-Portuguese ivories are a singular case study in debates about stolen African artifacts in Western collections.

tuebingen.de/fileadmin/content/05_Forschung_Lehre/Provenienz/sarr_savoy_en.pdf (last visited Oct. 8, 2025).

⁴ The Massie-Taylor scandal directly led to an amendment of the Sierra Leone 1962 Monuments and Relics Act regarding the unauthorized exports of Sierra Leone’s cultural patrimony. Paul Basu, *Object Diasporas, Resourcing Communities: Sierra Leonean Collections in the Global Museumscape*, 34. *Mus. Anthropol.* 28, 36-42 (2011).



Figure 3. Unknown Sapi Master. *Nomoli*, Before 1550. Courtesy of The Metropolitan Museum of Art. Public Domain.



Figure 4. Unknown Sapi Master. *Sapi-Portuguese Pyx*, 1490-1530. Courtesy of The Walters Art Museum. Public Domain.

The Sapi-Portuguese ivories feature a combination of European and African design motifs (fig. 4) such as biblical scenes, heraldic emblems, tropical animals, hunting scenes, and scarified bodies. Other Luso-African ivories exist, but Peter Mark argued that many ivories from *Serra Leoa* were misattributed to the former kingdoms of Benin and Kongo based on flawed evidence.⁵ Of all the surviving Luso-African ivories that are now in Western collections, the Sapi-Portuguese ivories are the most widely documented, with approximately 100 Sapi-Portuguese ivories known to have survived, while countless numbers are now lost.

⁵ Per Peter Mark, African art scholars such as Ezio Bassani attributed Sapi-created ivories to sculptors from the Benin Kingdom without providing adequate sources that referenced stylistic similarities or contemporaneous historical research. Peter Mark, “*Bini, Vidi, Vici*”—*On the Misuse of “Style” in the Analysis of Sixteenth Century Luso-African Ivories*, 42 *J. Afr. Hist.* 323-334 (2015).

Once imported into Europe, the Sapi-Portuguese ivories entered papal collections and the curiosity cabinets or *kunstkammern* of European patricians. Collectors of Sapi-Portuguese ivories included the Medici family of Florence, the Grand Dukes of Tuscany, the Elector of Saxony in Dresden, the Habsburgs, Albrecht V of Bavaria, Archduke Ferdinand of Tyrol, Charles II of Spain, Ferdinand and Isabella of Castile, the Dukes of Braunschweig, Sweden's Gustav Adolphus II, and Albrecht Dürer, among others.⁶ Even though some Sapi-Portuguese ivories have disappeared into private collections, a catalogue raisonné from a 1988 art exhibition showed that museums in America, Scotland, Denmark, France, Austria, Italy, Germany, England, the Netherlands, Russia, Switzerland, Portugal, Australia, and Czechia all possess Sapi-Portuguese ivories in their collections.⁷ As of this writing, no Sierra Leonean museum is in possession of a single Sapi-Portuguese ivory. Per extant research, the Nigerian National Museum is the only public collection in all of Africa to possess a single Luso-African ivory.⁸

II. THE SAPI OF SERRA LEOA

Beginning in the mid-fifteenth century, Portugal dominated the seas and bested other European powers in being the first to establish relations with African and Asian cultures. Consequently, Portugal grew rich off the maritime trade, and “a greater taste for luxury spread throughout the upper levels of Portuguese society.”⁹ On the west coast of Africa, the Portuguese established relations with a range of coastal peoples whom they homogenized in a polity they called “the Kingdom of the Sapes” in the broader region they named *Serra Leoa*.¹⁰ The *Serra Leoa* of the Early Modern era was on the Upper Guinea Coast. It includes the geographical boundaries of modern-day Sierra Leone, parts of coastal Guinea-Conakry, and southern Guinea-Bissau. Historians Walter Rodney and Peter Mark, among others, have indicated that the Bullom/Sherbro, Nalu, Landuma, Temne, Limba, and Baga ethnic groups were among the Sape/Sapi mentioned in Portuguese sources. Over the past 500 years, *Serra Leoa* has experienced the social disruption of the Atlantic Slave Trade, warfare brought on by the Mane invasion, European

⁶ Ezio Bassani & William Buller Fagg, *AFRICA AND THE RENAISSANCE: ART IN IVORY* 53 (1988).

⁷ *Id.* at 225–50.

⁸ Kathy T. Curnow, *The Afro-Portuguese Ivories: Classification and Stylistic Analysis of a Hybrid Art Form* viii (Ph.D. dissertation, Ind. Univ. 1983).

⁹ Bassani & Fagg, *supra* note 6, at 51.

¹⁰ Several writers including Walter Rodney and Peter Mark have written about the Sapi peoples of *Serra Leoa*. The different lineages that made up the “Sapi” shared kin ties and quasi-structured political systems. Walter Rodney, *A Reconsideration of the Mane Invasions of Sierra Leone*, 8 *J. Afr. Hist.* 219–46 (1967).

colonization, regional civil wars, and population movements across the broader region.

Yet, the modern-day state of Sierra Leone is still home to large and geographically fixed communities of the aforementioned ethnic groups whom the Portuguese homogenized into a single Sapi polity over 500 years ago. As proposed beneficiaries of the ivories' ownership rights, contemporary Sierra Leoneans can show kinship descent from the ivories' creator community in *Serra Leoa*. The Mende, Sierra Leone's second-largest ethnic group, have an ethnically mixed lineage that includes the Mane conquerors who absorbed the Sapi into their polities.¹¹ The Temne are the largest ethnic group in Sierra Leone. The Bullom/Sherbro people are still found in the same coastal areas of southern Sierra Leone, just as described in Portuguese sources. The Limba are among Sierra Leone's extant indigenes. The numerically small, but culturally influential Krio people, are probable descendants of enslaved Sapi sold into Atlantic slavery and resettled in Freetown (Sierra Leone's capital city) beginning in the late eighteenth century. Enslavers in the Americas highly valued African captives from rice farming regions, which included *Serra Leoa*.¹² In the 1930s, linguist Lorenzo Turner identified a Mende burial song that had survived in the oral history of African Americans living in coastal Georgia.¹³

¹¹ *Id.* at 226.

¹² For more background on the ties between Atlantic chattel slavery and rice farming in the Americas, see J.A. Carney, *BLACK RICE: THE AFRICAN ORIGINS OF RICE CULTIVATION IN THE AMERICAS* (2001); E.L. Fields-Black, *DEEP ROOTS: RICE FARMERS IN WEST AFRICA AND THE AFRICAN DIASPORA* (2015).

¹³ *THE LANGUAGE YOU CRY IN: THE STORY OF A MENDE SONG* (California Newsreel 1998).



Figure 5. Unknown Sapi Master. *Nomoli*, Before 1550. Courtesy of The Metropolitan Museum of Art. Public Domain.

Duarte Pacheco Pereira, a Portuguese navigator who acted as governor of the São Jorge da Mina fort on the Gold Coast, noted the following about the Bullom in the early sixteenth century: “These negroes have their teeth filed and sharp as [if like] a dog.”¹⁴ Nearly a century later, in 1627, Alonso de Sandoval remarked that the Sapi sharpened their teeth for aesthetic reasons—and publicly shunned those of their tribesmen with uncut teeth.¹⁵ Ethnographic research by Frederick J. Lamp in Sierra Leone in the 1980s revealed that “the practice of filing or chipping of the teeth continues today among the Temne, Bullom, Kissi, and Limba.”¹⁶ Through linguistic evidence, archeological findings, traditional practices, customs, ethnic

¹⁴ Frederick J. Lamp, *House of Stones: Memorial Art of Fifteenth-Century Sierra Leone*, 65 *Art. Bull.* 223 (1982).

¹⁵ *Id.* at 223.

¹⁶ *Id.* at 224.

scarification patterns, and the specific rituals of secret societies, the historical evidence illuminates a kinship line of descent between modern-day Sierra Leoneans and the ivories' creator community. I claim they are the legitimate owners of their ancestral cultural property.

Although the *Serra Leoa* of the Early Modern era also covered coastal Guinea-Conakry and southern Guinea-Bissau, the current historical evidence marks the territorial boundaries of Sierra Leone as the regional origin of the Sapi-Portuguese ivories. Ezio Bassani and William B. Fagg identified formal stylistic similarities between the African motifs featured on some Sapi-Portuguese ivories and *nomoli* soapstone statuettes (fig. 6) found buried in parts of southern and inland Sierra Leone. The soapstone statuettes antedate the ivories. Even more concretely, historians Alan Ryder and Avelino Teixeira da Mota identified custom forms and tax documents in Portuguese archives that had miraculously survived the cataclysmic Lisbon earthquake of 1755. These documents reference a "Sherbro/Bullom" origin for the ivory art imported into Portugal in the early sixteenth century.¹⁷ Beyond the inquest of who might be the rightful heirs or descendants of the Sapi, a question that implicitly acknowledges, or presupposes, claimants' rights to Sapi artifacts, Sarr and Savoy have noted that restituting Africa's cultural heritage will "[...] serve the function of precisely abolishing the borders sketched by [...] [colonialism] through the mobilization of communities around material items symbolizing their unity and their fluid identity within geographies that transcend borders."¹⁸

From the Sapi sculptors, the Portuguese traders commissioned ivory salt cellars, decorative cutlery, hunting horns or oliphants, pyxes, and hilts for knives and daggers. These items, given their non-utility, functioned as luxury objects in European markets. Several Sapi-Portuguese ivory horns feature the coat of arms of Manuel I and João III, the father-son kings of Portugal. What accounted for the brisk trade in African-made luxury objects beginning in the late fifteenth century? In *Africa and the Renaissance: Art in Ivory*, Bassani and Fagg suggested there might have been a large supply of ivory in *Serra Leoa* in the fifteenth century. Furthermore, the Portuguese had the luck of encountering Sapi sculptors of "considerable talent and professional skill" who had an existing tradition of sculpting objects.¹⁹ Per the scholars, "it is inconceivable that objects of such high formal quality and refined elegance resulted solely from an alien demand or contact with European culture."²⁰ Kathy T. Curnow further noted that the Sapi sculptor was "constrained by habit and training to work in a familiar style, even when creating

¹⁷ Bassani & Fagg, *supra* note 6, at 60.

¹⁸ Sarr & Savoy, *supra* note 3, at 33.

¹⁹ Bassani & Fagg, *supra* note 6, at 57.

²⁰ *Id.* at 57.

untraditional works, for he [had] no reason to change his working methods, even temporarily, on the whim of an outsider.”²¹



Figure 6. Unknown Sapi Master. *Nomoli*, Before 1550. © Zemanek-Münster. Shared under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0) license.

²¹ Curnow, *supra* note 8, at 8.

Surviving treasury documents from the *Casa da Guiné*, the Portuguese customs house that dealt with the trade on the Upper Guinea Coast, and contemporaneous accounts by Portuguese navigators, Jesuit priests, and travelers, all provide first-hand and second-hand testimonies of the Sapi artists and their ingenious talent for carving ivory objects. In 1506, Valentim Fernandes, a Moravian scholar living in Portugal, wrote that “in [*Serra Leoa*] the men are very ingenious, and they make ivory objects that are wonderful to see, namely, saltcellars, spoons, and dagger-hilts.”²² Duarte Pacheco Pereira, the Portuguese governor of the São Jorge da Mina fort on the Gold Coast, also wrote about the talented ivory sculptors of *Serra Leoa*.²³



Figure 7. Unknown Sapi Master. *Sapi-Portuguese Saltcellar*, 1490-1530. Courtesy of The Metropolitan Museum of Art. Public Domain.

²² Bassani & Fagg, *supra* note 6, at 60.

²³ *Id.* at 60.

III. THE MAKING OF NATIONAL TREASURES

Under the Sierra Leone Monuments and Relics (Amendment) Act, 1962, the Sapi-Portuguese ivories can be considered articles of national interest because they fit the definition of “any work of art or craftwork [...] of indigenous origin [...] fashioned before the year 1937.”²⁴ Sierra Leone can also pursue restitution claims because it is a signatory to the 1989 *Déclaration des Etats d’Afrique, des Caraïbes et du Pacifique (ACP) sur le retour ou la restitution des biens culturels*. This is a UNESCO-recognized policy framework that affirms the rights of ACP countries to formally request the return of their cultural patrimony from foreign collectors. The Sapi-Portuguese ivories belong in Sierra Leone’s national archives because they are cultural records that depict how the ancestors of Sierra Leoneans engaged with the processes of globalization during the Early Modern era. The Sapi-Portuguese ivories represent Africans’ history as they engaged with the Other in a relatively collaborative relationship. These ivories materially represent a brief era in which the African-European relationship was relatively free from exploitation, oppression, and manifold violence before the cataclysmic rupture of Atlantic slavery and European colonization. That being said, some may suggest that designating the Sapi-Portuguese ivories as the ‘national treasures’ of the modern-day Republic of Sierra Leone is misleading on several fronts. Why would I impose Sierra Leone, a mid-twentieth-century nationalistic concept, onto a pre-nationalistic society? Why should these 500-year-old antiquities return to citizens of a modern state that was only officially established in 1961?

On the first point, the Portuguese seafarers of the Early Modern era laid the epistemic framework for how we are to engage with the ivories from an ethno-nationalistic perspective. The Sapi-Portuguese ivories entered documented history as the craftwork of the Sapi of *Serra Leoa*. The Portuguese middlemen who facilitated the commissioning of the ivories, and the diarists who first wrote about the ivories, all framed the European consumption of the Sapi-Portuguese ivories through an ethno-nationalistic lens. That the “Sapi” were in reality a grouping of fiefdoms united by a common culture, whom the Portuguese homogenized into a monarchical polity (Kingdom of the Sapes), does not erase the early epistemic conditions that saw the branding and marketing of their ivory art as the ethno-nationalistic objects of a Sapi polity. The Portuguese came to their own conclusions based on their observations of coastal West Africans. Walter Rodney suggested that “cultural homogeneity among the Sapi people was particularly noticeable with respect to language, dress, social structure, and systems of justice.”²⁵

²⁴ Monuments and Relics (Amendment) Act, Act No. 45 of 1962 (Sierra Leone).

²⁵ Rodney, *supra* note 10, at 219.

One might retroactively recognize that the Portuguese seafarers of the Early Modern era had a flawed understanding of the ethno-linguistic communities of *Serra Leoa*. However, to suggest that the Portuguese account of the “Kingdom of the Sapes” fails a ‘state test’ per twenty-first-century norms, would be an anachronistic application of the categorical elements of centralized state structures unto the Lusophone mode of belief about Sapi peoplehood in the Early Modern era. This would be a revisionist account inconsistent with the contemporaneous historical record. We cannot ignore or erase the ontological genesis of the Sapi-Portuguese ivories as ethno-nationalistic objects. The ivories entered documented history as such, and the original patrons of the artworks had an understanding that the ivories were the emblematic creations of a Sapi polity. For the foreign buyers of the ivories, the *telos* of the Sapi-Portuguese ivories was the metaphysical embodiment of a Sapi polity. That is to say, for both the creators and the buyers, the Sapi-Portuguese ivories functioned primarily as ethno-nationalistic objects of the Sapi people.

If, at the point of creation, the ivories were taken to be emblematic objects of Sapi peoplehood, then the artifacts retain their ethno-nationalistic significance through time and space. Furthermore, an objection might be raised about what might have been the artistic intentions of the Sapi sculptors. That is to say, if they too saw themselves as a part of a collective peoplehood in the so-called “Kingdom of the Sapes” and sculpted their ivories with the cognitive understanding that the objects would be consumed as ethno-nationalistic objects. Unfortunately, little to no written records have survived about the intentions of the Sapi sculptors. However, with the available historical evidence, one can reason inductively. The evidence suggests an ethnic referential ethos was at work in the workshops of the Sapi sculptors of *Serra Leoa*.



Figure 8. Unknown Sapi Master. *Sapi-Portuguese Horn*, 1490-1530. © The Trustees of the British Museum. Shared under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0) license.

On their ivories, the Sapi sculptors imprinted their signatures (fig. 8) in the form of recurrent markings; Janus imagery; animals such as serpents, dogs, parrots, water birds, and crocodiles, which were spiritually significant in Sapi cosmology; Sapi weaponry such as round shields; native burial customs; and scarified bodies. I theorize that, along with the European motifs from which they drew inspiration, these African motifs represent a thematization of Sapi artistic identity and agency. The sculptors' Sapi motifs connote an intentional ethnic specificity. In an analogous manner to the practices of Renaissance artists in continental Europe, the Sapi sculptors of *Serra Leoa* practiced a self-fashioning in their art and formulated "[...] their own public selves since their recognition was based primarily on objects that entered into the public sphere."²⁶ A Sapi-Portuguese salt cellar, titled the *Roman Executioner*, features a seated man holding an axe and a round shield.²⁷ Arranged in front of him is a row of severed heads. Frederick J. Lamp's research on the *nomoli* soapstone memorial statuettes, which antedate the Sapi-Portuguese ivories, offers a possible ethnographic explanation for this scene. Lamp identified several *nomoli* statuettes featuring male figures holding axes and round shields with severed heads arranged in front of them. Round shields fashioned out of elephant or buffalo leather were a characteristic weapon of the Sapi. In his research, Lamp

²⁶ Andrew R. Casper, *(As)Signing Artistic Identity in Early Modern Europe*, 28 *Renaiss. Stud.* 374 (2014).

²⁷ Bassani & Fagg, *supra* note 6, at 81.

also discovered Valentim Fernandes' account of the burial of a Sapi dignitary in 1506:

They place the deceased seated on a chair with most of the garments he owns [...] and they place a shield in his hand and in the other a spear and a sword in his belt [...] And if he is a man who has killed many men in battle, they put all the skulls of the men he has killed in front of him.²⁸



Figure 9. Unknown Sapi Master. *Sapi-Portuguese Pyx*, 1490-1530. Courtesy of The Walters Art Museum. Public Domain.

This burial custom is nearly identical to the scene carved on the *Roman Executioner*. By choosing to include motifs that derived their dictionary meanings from their indigenous culture, the Sapi sculptors signaled a reluctance to erase their ethnic identity to become creators of an anonymous, place-less origin, even though they were in the business of creating objects for European export. The decorative motifs on Sapi-Portuguese pyxes (fig. 9), small containers for the Eucharist in Catholic rituals, more closely follow European design references such as biblical

²⁸ Lamp, *supra* note 14, at 229.

dramas and heraldic arms. Yet, even on these selected items, “European identity is not signaled by physiognomic features, but by dress such as breeches [...] and long gowns [...] and long hair and a straight beard.”²⁹ Suzanne Preston Blier further noted that these European design references are not consistent on all the Sapi-Portuguese ivories because “breeches are sometimes combined with figures with shields, or individuals are depicted with European clothes and African scarification forms.”³⁰ Taken together, the first Portuguese buyers of the ivories consumed the Sapi-Portuguese ivories as ethno-nationalistic creations of a Sapi polity. In turn, the Sapi sculptors chose to incorporate visual representations of their Sapi culture onto their ivories’ designs even though the artworks were destined for foreign, non-Sapi patrons who were unlikely to understand the motifs’ dictionary meanings in Sapi cosmology. I believe this gives strength to my argument that the Sapi-Portuguese ivories are artifacts that connote an ethno-nationalistic ethos. My theory supports the ivories’ eligibility as the national treasures of Sierra Leone.

²⁹ Suzanne Preston Blier, *Imaging Otherness in Ivory: African Portrayals of the Portuguese ca. 1492*, 75 *Art. Bull.* 390 (1993).

³⁰ *Id.* at 390.



Figure 10. Albrecht Dürer. *Katherina*, 1521. Wikipedia Commons. Public Domain.

IV. REPARATIONAL JUSTICE FOR EPISTEMIC VIOLENCE

Why call for the repatriation of the Sapi-Portuguese ivories? If the ivories were originally created for European export, why should these artifacts be repatriated to Sierra Leone? Must the ivories not stay abroad, since they were destined for foreign lands from the very beginning? A disquieting moral question has always haunted the Sapi-Portuguese ivories. This troubled history problematizes the so-called fair exchange logic that underscored Europeans' consumption of African-made luxury goods between the fifteenth and nineteenth centuries. The case of the Sapi-Portuguese ivories is far more complex than a "buyer's keepers" mercantile logic. As Michael J. Sandel has proposed, markets are not morally neutral, and mutual consent is not always an infallible principle. Voluntary exchanges can be unfair and "[...] fall so short of mutual benefit that even

their voluntary character can't redeem it."³¹ Per Sandel, "[...] voluntary exchanges draw on the ideal of reciprocity because the obligation to fulfill them arises from the obligation to repay others for the benefits they provide us."³² Sandel's ethical position goes against an amoral market logic which suggests that contracts and voluntary exchanges are "[...] instituted by individuals who are atomized and [...] ontologically independent and rationally guided by their own interests."³³

There is a social element to trade and exchange because the mercantile relationship would not exist without a mutual recognition of each participant's autonomy and social worth as an economic actor and value provider. Economic and cultural exchanges, especially during the first few decades of African-European contact, were guided by reciprocity as an economic and cultural norm.³⁴ European collectors, who derived aesthetic enjoyment and connoisseurs' prestige from owning Sapi-Portuguese ivories, failed in their obligation to provide reciprocal benefits to the Sapi sculptors through artistic recognition and authorial attribution. This represents an act of epistemic violence that negatively marks the artifacts' centuries-long tenure in Western collections as morally problematic. This misattribution of the Sapi sculptors from their art was not a benign mistake. Eurocentrism and anti-African discourses between the sixteenth and nineteenth centuries facilitated, institutionalized, and circulated the misattribution of the Sapi from their art. Per Bassani and Fagg, attributions to India, Turkey, Italy, and Asia were frequently used "in older references to indicate objects that were in fact Afro-Portuguese, perhaps because Africans were considered unable to produce such refined work."³⁵

The misattribution of the Sapi sculptors' artistic authorship is seen starkly in the case of Albrecht Dürer, the German Renaissance painter, who purchased two Sapi-Portuguese ivories during a trip to the Spanish Netherlands in the mid-sixteenth century. In his diary, Dürer noted that the ivories were from Calicut, referring to an Indian port.³⁶ Dürer would not have been unfamiliar with Africans and Portugal's commercial links with the Upper Guinea coast, where the Sapi

³¹ Michael Sandel, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 146 (2009).

³² *Id.* at 145.

³³ Paulo A. Niederle & Guilherme F. W. Radomsky, *Social Actors, Markets and Reciprocity: Convergences between the New Economic Sociology and the 'Paradigm of the Gift*, 4 *Teoria & Sociedade* 146–77 (2008).

³⁴ For more historical background on the norms that governed Afro-European trade relations during its early years in the mid-fifteenth century, see *THE VOYAGES OF CADAMOSTO AND OTHER DOCUMENTS ON WESTERN AFRICA IN THE SECOND HALF OF THE FIFTEENTH CENTURY* (G.R. Crone ed., 1937).

³⁵ Bassani & Fagg, *supra* note 6, at 53.

³⁶ See Jeffrey Chips Smith, *The 2010 Josephine Waters Bennett Lecture: Albrecht Dürer as Collector*, 64 *Renaiss. Q.* 1-49 (2011).

sculptors lived. While in the Spanish Netherlands, Dürer socialized with influential figures who had direct and indirect experience on the Upper Guinea coast. It was on that same journey, in 1521, that Dürer drew a portrait of Katharina (fig. 10), the African servant of João Brandão, a royal Portuguese commercial envoy to Guinea based in Antwerp. Given the proximity Dürer had to Portuguese informers with African trade links, what accounted for his silence about the Sapi sculptors of *Serra Leoa*? Perhaps the clue may be found in Dürer's anti-African beliefs? In 1528, he wrote the following in his *Vier Bücher von menschlicher Proportion*: "The faces of the Moors are rarely lovely due to their very flat noses and thick mouths."³⁷ If the Sapi sculptors' artistic ingenuity had been mentioned in Dürer's presence, who is to say the German painter did not wave away a hand in disbelief and disregard, given his low opinion of African phenotypes? The misattributions of the Sapi sculptors from their art were numerous. Their erasure is pervasive in the archival records of royal and aristocratic collections.

³⁷ Notions of the physical and moral beauty of the "Negro" became a point of discourse among intellectual circles in Europe beginning in the sixteenth century. See Steven F. Ostrow, *Pietro Tacca and His "Quattro Mori": The Beauty and Identity of the Slaves*, 36 *Artibus et Historiae* 161 (2015).



Figure 11. Unknown Sapi Master. *Sapi-Portuguese Saltcellar*, 1490-1530. © Sotheby's. Shared under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0) license.

A 1595 catalogue from the *kunstkammer* of Prince Christian of Saxony noted that the prince purchased in Leipzig “12 ivory spoons made in Turkey.”³⁸ Another 1689 catalogue for the royal Danish *kunstkammer* misrepresented Sapi-Portuguese ivories as “Two East Indian carved spoons, with lizards and snakes on the handles.”³⁹ Moreover, the Habsburg prince, Ferdinand II, left an estate that included six Sapi-Portuguese spoons and a salt cellar. In 1818, the curators of his collection assigned the ivories to an Indian origin.⁴⁰ In 1650, five Sapi-Portuguese spoons in the *kunstkammer* of Christoph Weickmann, a rich Bavarian merchant, were

³⁸ Bassani & Fagg, *supra* note 6, at 241.

³⁹ *Id.* at 232.

⁴⁰ Curnow, *supra* note 8, at 30.

misattributed to India.⁴¹ As previously mentioned, the Grand Duke of Tuscany, Cosimo I, was a collector of Sapi-Portuguese ivories. The 1791 and 1802 collection catalogues of his treasures misattributed five Sapi-Portuguese ivories to a Turkish origin.⁴² In 1850, a Sapi-Portuguese horn owned by the city of Tübingen was described as “an example of twelfth-century Italian work.”⁴³ A Sapi-Portuguese ivory horn featuring the motto of King João III later came into the possession of Alexander Barker, an English art collector. The nineteenth-century catalogue entry for this particular object read as follows: “Hunting-horn, in ivory, carved with hunting scenes, crocodiles, and angels supporting a shield of arms. Oriental work.”⁴⁴

The Sapi sculptors literally carved their indigenous ethno-cultural motifs on their ivories. Since these references derived their dictionary meanings from Sapi cosmology, I suggest that for the Sapi sculptors, the Sapi motifs are the sculptors’ demand for artistic recognition, professional respect, and authorial attribution. It is inconceivable that the Sapi sculptors would have consented to having their artistic authorship erased and falsely attributed to Indian, Turkish, Italian, or Asian creators while their ivories circulated through European collections over the centuries. Through stylistic analyses, historians have theorized that approximately eight Sapi workshops produced the extant Sapi-Portuguese ivories. With this curatorial insight, one can deduce that the Sapi artists enjoyed and upheld a corporate identity in their community in *Serra Leoa*. I suggest posthumous erasure would have alarmed the self-organized, self-regarding, Sapi sculptors. Father Manuel Álvares, a Jesuit priest who took up residence in *Serra Leoa* in the sixteenth century, remarked on how despondent the Sapi sculptors appeared when the Mane invasion disrupted their artistic production. Yet, even after social strife, the Sapi sculptors continued their profession with guild-like discipline as late as 1669.⁴⁵ They continued to create fine ivories for export with overt Sapi motifs on the ivories’ designs. European elites denied the Sapi sculptors their artistic recognition and authorial attribution. That was an act of posthumous harm. Joel Feinberg and Geoffrey Scarre have argued that this is a vulnerability which the dead can be subject to, because events that occur after a person’s death can harm the dead person’s interests by the frustration of goals to which they were committed, while

⁴¹ *Id.* at 32.

⁴² *Id.* at 30.

⁴³ *Id.* at 33.

⁴⁴ William Hart, *Alexander Barker’s Sapi-Portuguese Oliphant*, 49 *Afr. Arts* 78 (2016).

⁴⁵ Peter Mark, *Bini, Vidi, Vici’—On the Misuse of “Style” in the Analysis of Sixteenth Century Luso-African Ivories*, 42 *Hist. Afr.* 325 (2015).

alive.⁴⁶ This notion of posthumous harm was echoed in Aristotle's *Nicomachean Ethics* I. 10-11:

A dead man is popularly believed to be capable of experiencing both good and ill fortune, honor and dishonor, and prosperity and the loss of it among his children and descendants generally in exactly the same way if he were alive but unaware or unobservant of what is happening.⁴⁷

This epistemic violence against the Sapi sculptors would have distressed them. Father Manuel Álvares provided an eyewitness account of the Sapi sculptors' depressive emotional state when the Mane invasion disrupted their artistic production. We can therefore reason that the sculptors' mental health was impacted whenever negative situations corrupted and disrupted their artistic practice. The Sapi sculptors' ivory art reveal a deep understanding of symmetry, fine craftsmanship, and aesthetic taste. All the surviving Sapi-Portuguese ivories feature iconic motifs unique to Sapi cosmology. I argue that these Sapi motifs functioned as the sculptors' symbolic demand for recognition and professional respect as the art guild of *Serra Leoa*. I believe the posthumous erasure of their artistic authorship would have caused them extreme despair. The misattribution of their ivory art to non-Sapi creators is a posthumous harm that had reverberating consequences for their descendants and the historiography of Sapi culture. This epistemic injustice represents a violation of Article 23 of the UNESCO Mexico City Declaration on Cultural Policies, which states: "The cultural heritage of a people includes the works of its artists, architects, musicians, writers, and scientists and also the work of anonymous artists [...]."⁴⁸ Some may suggest that knowledge production is complex and that it is unreasonable to expect historical actors in different eras to have knowledge of, and access to, all available primary sources to make informed decisions about artistic provenance. If, for centuries, European collectors and antiquarians were unknowingly ignorant about the Sapi sculptors, I believe that pernicious ignorance was self-constructed by the societies in which Europeans lived, contributed to, and benefited from. This is not a case of moral anachronism. Let us note that there existed an intellectual choice to give the Sapi sculptors their artistic recognition and attribution. From the onset of the works' creation, there were contemporaneous accounts by individuals connected to the Portuguese trade

⁴⁶ See Joel Feinberg, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 45-68 (1980); Geoffrey Scarre, *The Vulnerability of the Dead*, in THE METAPHYSICS AND ETHICS OF DEATH: NEW ESSAYS 173 (James Stacey Taylor, ed., 2013).

⁴⁷ Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 *Ethics* 243-264 (1981).

⁴⁸ UNESCO Mexico City Declaration on Cultural Policies (Aug. 6, 1982).

in coastal West Africa, who provided testimonies of the Sapi and their ivories. In fact, as late as 1709, Father Filippo Bonanni described a Sapi-Portuguese hunting horn as “ex Africa allatum,” which means “bought from Africa.”⁴⁹



Figure 12. Albrecht Dürer. *Portrait of an African Man*, 1508. Wikipedia Commons. Public Domain.

The systematic injustice that facilitated the erasure of the Sapi sculptors from their ivory art was made epistemically possible by the intensification of Atlantic slavery, which saw Christian Europe produce an ideology that placed the European at the apex of civilization, and the African at the bottom, if there at all. This

⁴⁹ Bassani & Fagg, *supra* note 6, at 60.

European racial-caste project created an ideological environment and an economic system that dehumanized Africans for capitalist profit and political power. It fomented an international anti-Black socio-political system that disqualified the Sapi sculptors as the plausible creators of fine ivory objects. Anti-African racist discourse was raised to the level of scientific truth during the European Enlightenment. An illustrative trawl through Western philosophical thought unearths numerous examples of anti-African beliefs. Emmanuel Kant believed the “African barely has character, is barely capable of moral action, and therefore is less human.”⁵⁰ Per Kant, the African’s blood contained “phlogiston,” a supposedly inflammable substance that is responsible for their dark complexion. Kant theorized that this ‘difference’ in blood composition in comparison to the European was evidence that the African lacked talent.⁵¹ German philosopher George Hegel believed that for “[...] Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence [...] [and the African is] natural man in his completely wild and untamed state.”⁵²

In the eighteenth century, French naturalists and philosophers such as Voltaire, Montesquieu, Julien-Joseph Virey, and Bory de Saint-Vicent all promoted rabid anti-Black philosophical thought and compared Africans to animals.⁵³ Yet, even during the zenith of Atlantic chattel slavery, there existed an intellectual choice to reject anti-African discourses, as not all European thinkers accepted said ideologies. Justin E.H. Smith noted that the German theorist Johannes Gottfried Kraus praised “the natural genius” of Africa, its “appreciation for learning,” and its “inestimable contribution to the knowledge of human affairs.”⁵⁴ Johann Gottfried Herder, a former student of Emmanuel Kant, challenged Eurocentric thinking on race by suggesting the African had equally the same right to judge the European as abnormal for his white skin. Herder believed “a culture possesses intrinsic and essential value in itself without being inferior or superior to other cultures.”⁵⁵

British sociologist Paul Connerton identified seven types of forgetting in the discourses of cultural memory. To pick from Connerton’s proposal, I suggest the

⁵⁰ Wendy Sutherland, STAGING BLACKNESS AND PERFORMING WHITENESS IN EIGHTEENTH-CENTURY GERMAN DRAMA 24 (2016).

⁵¹ *Id.* at 16.

⁵² Georg Wilhelm Friedrich Hegel, THE PHILOSOPHY OF HISTORY 93 (J. Sibree trans., 1956).

⁵³ William B. Cohen, THE FRENCH ENCOUNTER WITH AFRICANS: WHITE RESPONSE TO BLACKS, 1530-1880 67 (1980).

⁵⁴ Justin E.H. Smith, *The Enlightenment’s ‘Race’ Problem, and Ours*, N.Y. Times (Feb. 10, 2013), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/02/10/why-has-race-survived/> (last visited Feb. 8, 2026).

⁵⁵ Sutherland, *supra* note 50, at 24.

erasure of the Sapi sculptors was made epistemically possible by acts of “repressive erasure” on the part of Christian European states, institutions, and intellectual elites.⁵⁶ For Connerton, this is the most “brutal form” of forgetting.⁵⁷ Repressive erasure involves the invalidation, the cancellation, and the obliteration of signs, symbols, and personages that are in clear conflict with the cultural and political aims of the contemporaneous power structures. Between the sixteenth and early twentieth centuries, the Christian West, as a collective project, was heavily invested in a master narrative for the justification of Africans’ enslavement and the colonization of Africa. The European racial-caste project defined the African as a godless savage, as invisible and unworthy of account within the annals of History. Under this ideological and socio-political regime, the Sapi sculptors of *Serra Leoa* became non-entities.



Figure 13. Wenceslaus Hollar. *Portrait of a Young African Woman*, 1645. Courtesy of The Folger Institute. Public Domain.

⁵⁶ Paul Connerton, *Seven Types of Forgetting*. 1 Mem. Stud. 60 (2008).

⁵⁷ *Id.* at 60.

The centuries-long epistemic violence that denied the Sapi sculptors their artistic authorship caused considerable harm. Western collectors and museum stakeholders must atone. Per Michel-Rolph Trouillot, there are four junctions in which silences enter the processes of historical production. These junctions are fact creation (the creation of sources), fact assembly (the creation of archives), fact retrieval (the crafting of narratives from the archives), and resignification of the facts (the universal legitimization of the crafted narratives).⁵⁸ The erasure of the Sapi sculptors began at the junction of fact creation when European elites misattributed their ivories to non-Sapi artists. The anti-African and racist philosophies that influential Europeans promoted and benefited from, socially engineered apathy toward indigenous African achievement in the ecosystem of ideas and cultural production. Therefore, I believe the primary sources that affirmed the Sapi sculptors' artistic authorship became non-texts for mainstream art historians and royal archivists. For the Christian West, the African deserved what Orlando Patterson called a "social death" and a "secular excommunication" from History.⁵⁹ The epistemic violence suffered by the Sapi sculptors for nearly 300 years casts a moral problem on any claims to unblemished Western ownership of the ivories. Although the Sapi-Portuguese ivories were legally acquired, in the *longue durée*, the transaction was not a fair exchange.

During the zenith of the Victorian imperial era, elite Europeans continued to misattribute the artistic authorship of the Sapi-Portuguese ivories. In January 1851, a gathering of scholars and hobbyist antiquarians met at London's Archeological Institute to discuss the origin of some carved ivory horns, which were in fact Sapi-Portuguese ivories. Their rapporteur, Mr. Forrest, stated in his report: "It has been conjectured that these objects were produced in some of the Portuguese settlements in Africa or the East, during the fifteenth or sixteenth century; a supposition which would account for the marked Asiatic character of some details of the design [...] [and] it seems highly probable that these horns were carved in the East, in imitation of Portuguese models [...]"⁶⁰ Although noting a possible African origin for the ivories, the rapporteur deferred to an "Asiatic" provenance. In attendance at this same meeting was the Hungarian author, nobleman, and traveler Ferenc Pulski. Pulski presented to the group a highly detailed drawing of a Sapi-Portuguese hunting horn. Pulski claimed "[...] ivory horns of this description are preserved in Hungary, and have been regarded as objects sculptured in the North of Europe [...]."

⁵⁸ Michel-Rolph Trouillot, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* 26 (1995).

⁵⁹ Orlando Patterson, *SLAVERY AND SOCIAL DEATH: A COMPARITIVE STUDY* 5 (1982).

⁶⁰ Forrest, *Proceedings at the Meetings of the Archaeological Institute*, 8 *J. Archaeol. Inst.* 101–2 (1851).

Pulski also mentioned a near identical ivory horn he had seen in person, which was attributed to a tenth-century Hungarian chief.⁶¹

In 1888, Alfred Hipkins was the first person to suggest a West African origin for the Sapi-Portuguese ivories after analyzing a Sapi-Portuguese horn owned by the Earl of Spencer.⁶² Since the 1950s, William B. Fagg and Ezio Bassani have published several books about the Sapi-Portuguese ivories. Other scholars including Suzanne Preston Blier, Kunz Dittmer, Peter Mark, Alan Ryder, Kathy T. Curnow, Philip Allison, and Avelino Teixeira da Mota further affirmed the Sapi sculptors' true craftsmanship. That the erasure of the Sapi sculptors is now corrected, does not in itself serve as an adequate form of reparational justice. The consequence of this historical silencing erased the Sapi sculptors from Art History for nearly 300 years. This represents an additional form of epistemic injustice for the descendants of the Sapi who were consequently denied their ancestral artistic heritage, from which they could have drawn intellectual and artistic inspiration to create canonical art. Sarr & Savoy noted the following in their report: "When we reflect on the question of cultural heritage objects, we must understand that it's not simply objects that were taken [...] But reserves of energy, creative resources, reservoirs of potentials [...]"⁶³

I acknowledge that a collection of Sapi-Portuguese ivories survived the centuries while being locked away in the curiosity cabinets of European patricians. Yet, this stewardship was not flawless. Today, only 100 Sapi-Portuguese ivories of all design types can be accounted for, even though the only surviving volume of the *Casa da Guiné* treasury ledger recorded import duties paid on "three ivory saltcellars and 131 spoons."⁶⁴ Additionally, we must question whether the continued foreign possession of these artifacts is justified. The Sapi-Portuguese ivories scattered worldwide in different collections come from eight identifiable Sapi workshops, and, in their current far-flung state, the ivories are decontextualized. The dislocated ivories lack curatorial integrity because audiences are prevented from appreciating the collective artworks in a coherent fashion. Repatriating the ivories to Sierra Leone is morally justified, and the act of doing so outweighs existing interests in keeping the artifacts abroad. Art critic Simon Njami proposed that repatriated African cultural objects must be given a new social function.⁶⁵ If returned to Sierra Leone and its Monuments and Relics Commission, I suggest the Sapi-Portuguese ivories could provide a new narrative to re-establish the legitimacy of ethnic pluralism in Sierra Leone, a country in which inter-ethnic

⁶¹ *Id.* at 101.

⁶² Curnow, *supra* note 8, at 33.

⁶³ Sarr and Savoy, *supra* note 3, at 40.

⁶⁴ Curnow, *supra* note 8, at 28.

⁶⁵ *Id.* at 30.

antagonism is rife and often violent. Foreign development aid funds from the European Union, which are earmarked for projects focused on social cohesion and democracy, should be used to build a world-class museum in Sierra Leone to permanently house the Sapi-Portuguese ivories. Admission to this proposed museum must be free for the citizens of Sierra Leone, Guinea-Conakry, and Guinea-Bissau. Such a project will be the right act of reparational justice for the Sapi sculptors of *Serra Leoa*.

V. THE COLLECTIVE OWNERSHIP RIGHTS OF INDIGENOUS PEOPLE

Per Article 18 of UNESCO's Mexico City Declaration on Cultural Policies, "[c]ulture springs from the community as a whole and should return to it; neither the production of culture nor the enjoyment of its benefits should be the privilege of elite cultures."⁶⁶ However, it remains to be seen whether courts, governments, Western museums, or private art collectors will recognize indigenous peoples' rights to the collective ownership of their ancestral cultural property. Per Evelien Campfens, the Amsterdam District Court dismissed a 2018 claim brought by the Chinese village committees of Yangchun and Dongpu.⁶⁷ The villagers had sought the return of a sacred Song Dynasty Buddha statue, the Zhang Gong Patriarch, which had been stolen from their local temple in 1995.⁶⁸ The statue, whose X-ray results revealed it to contain the mummy of a 1,000-year-old monk, was sold in Hong Kong to Dutch collector Oscar van Overeem. The Amsterdam District Court ruled that the village committees cannot be considered a "legal entity" and are therefore ineligible to file a claim as plaintiffs.⁶⁹ Undeterred, the Yangchun and Dongpu village committees pursued their art restitution case nationally in China and, in December 2020, the Sanming Intermediate People's Court in China's Fujian Province ruled that the Buddha statue must be returned by Oscar van Overeem. The Chinese court decreed that the statue was illegally exported; and the plaintiffs of Yangchun and Dongpu hold its collective ownership rights.⁷⁰ The case of the Zhang

⁶⁶ UNESCO Mexico City Declaration, *supra* note 48.

⁶⁷ Evelien Campfens, *Restitution of Looted Art: What About Access to Justice?*, 4 *Santander Art Cult. Law Rev.* 185-220 (2019).

⁶⁸ Mandy Zuo, *Dutch Court Rejects Chinese Villagers Claim to Have Their Buddha Mummy Returned*, S. China Morning Post (Dec. 13, 2018), <https://www.scmp.com/news/china/society/article/2177825/dutch-court-rejects-chinese-villagers-claim-have-their-buddha> (last visited Feb. 8, 2026).

⁶⁹ *Id.* at 1.

⁷⁰ The Supreme People's Court of The People's Republic of China, *Dutch Collector Ordered to Return Buddha Statue* (July 20, 2022), https://english.court.gov.cn/2022-07/20/c_790991.htm (last visited Mar. 28, 2026).

Gong Patriarch is inconclusive because China and the Netherlands have not mutually recognized this latest judicial ruling.

Yet, the case of the Quimbaya Treasure of Colombia, also known as the Filandia Collection, offers a way forward. In 2017, the Colombian Constitutional Court ordered the Colombian government to seek from Spain the restitution of 122 gold artifacts of the pre-Columbian Quimbaya civilization. President Holguín Jaramillo of Colombia had gifted the treasures to Spain's queen-regent, María Cristina, in 1893.⁷¹ The Quimbaya Treasure was part of a trove of 433 artifacts of the Quimbaya people acquired from private sources in the nineteenth century. Today, the Quimbaya Treasure is exhibited at the Museum of the Americas in Madrid. In its ruling, the Colombian Constitutional Court “found that the delivery of the Quimbaya Treasure, albeit attributable to the president, was invalid in the absence of Congress’ approval.”⁷²

In addition, the Court’s ruling recognized “indigenous peoples’ substantive rights, including the right to their ancestral cultural patrimony [...] and observed that while the non-retroactivity of the UNESCO Convention is to afford legal security to addressees of international obligations, it is not an absolute principle.”⁷³ In a 2018 Note Verbale, a formal but unsigned diplomatic statement, the Spanish Ministry of Foreign Affairs offered to replicate the Quimbaya Treasure for Colombia. The Spaniards declared that the artifacts are protected by the Law of Spanish Historical Patrimony of 1985 and that the treasures were gifted to Spain “in good faith.”⁷⁴ On May 9, 2024, the Colombian government officially requested the restitution of the Quimbaya Treasure to Colombia.⁷⁵ Paloma Villarreal Suárez de Cepeda noted that per Spanish law, the only legal solution to this issue is for Colombia and Spain to exchange cultural assets of “equal value and historical significance.”⁷⁶ The most interesting lesson of this case is that it sets a precedent,

⁷¹ Sally Palomino, *Colombia Rejects Asking Spain to Return Donation of Ancient Gold Pieces*, *El País* (Jan. 29, 2016), https://english.elpais.com/elpais/2016/01/29/inenglish/1454068125_773885.html (last visited Feb. 8, 2026).

⁷² Diego Dejá-Lemos, *The “Quimbaya Treasure,” Judgement SU-649/17*, 113 *Am. J. Int. Law* 124 (2019).

⁷³ *Id.* at 125.

⁷⁴ *Id.* at 127.

⁷⁵ Ministro de las Culturas, las Artes y los Saberes de Colom. & Ministro de Relaciones Exteriores, *Propuesta Para El Retorno de La Colección Quimbaya a Colombia* (May 8, 2024), https://pecadosdelarte.com/adjuntos/943/CARTA_SOLICITUD_COLOMBIA.pdf (last visited Oct. 25, 2025).

⁷⁶ Paloma Villarreal Suárez de Cepeda, *The Claim For the Filandia Collection or Quimbaya Treasure of Colombia Against Spain*, *HALO* (Mar. 13, 2025), <https://orgs.law.harvard.edu/halo/2025/03/13/the-claim-for-the-filandia-collection-or-quimbaya-treasure-of-colombia-against-spain/> (last visited Oct. 25, 2025).

albeit a fragile one, for indigenous people to be recognized as collective claimants in cultural property restitution cases. This case also concerned the repatriation of artifacts that were exchanged/gifted without intimidation or violent coercion. The ruling by the Colombian Constitutional Court gives strength to this moral-legal argument for the return of the Sapi-Portuguese ivories to Sierra Leone.

VI. A QUASI-LEGAL PROCEDURE FOR ART REPATRIATION

Although the situation is now rife with controversy, Nigeria set a historic precedent when it negotiated the return of its cultural heritage for the new Museum of West African Art in Edo, the modern-day regional state of the historic Benin Kingdom. In 1897, British colonial forces ransacked and looted Benin in a punitive expedition.⁷⁷ The Benin Dialogue Group, a coalition of Nigerian figures and European public museums, reached an agreement for the return of the looted Benin bronzes.⁷⁸ Beyond this singular case, most ownership disputes over cultural objects are resolved through alternative dispute resolution (ADR) mechanisms due to the fragmented legal systems of the world. As Evelien Campfens noted, “The legal approach to restitution claims [...] still mainly rely on [a] general framework for stolen property [...] where claims are time-barred and thus inadmissible before regular courts of law [...]”⁷⁹ Since the post-war period, Nazi-looted art has generated the most legal responsa, cases, settlements, and national committees for the assessment of cultural heritage property claims.⁸⁰ Contested African artifacts have not been given the same serious attention in Western legal systems. Most African claims for art repatriation or restitution are justified on ethical grounds.

What then could be the possible quasi-legal procedure for the repatriation of the Sapi-Portuguese ivories to Sierra Leone’s Monuments and Relics Commission? In 1988, the Center for African Art in New York presented *Africa and the Renaissance*, one of the world’s first exhibitions of Luso-African ivories, which

⁷⁷ Philip Oltermann & Eromo Egbejule, *Restitution Row: How Nigeria’s New Home for the Benin Bronzes Ended up with Clay Replicas*, *Guardian* (Oct. 12, 2025), <https://www.theguardian.com/news/ng-interactive/2025/oct/12/restitution-row-how-nigerias-new-home-for-the-benin-bronzes-ended-up-with-clay-replicas> (last visited Oct. 25, 2025).

⁷⁸ Catherine Hickley, *Nigeria Plans Museum for Art Looted from Benin*, *The Art Newspaper*, (Oct. 22, 2018), <https://www.theartnewspaper.com/2018/10/22/nigeria-plans-museum-for-art-looted-from-benin> (last visited Oct. 25, 2025).

⁷⁹ Evelien Campfens, *Restitution of Looted Art: What About Access to Justice?*, 2 *Santander Art & Cult. Law Rev.* 211 (2018).

⁸⁰ Per Evelien Campfens, these national committees for Nazi-looted art include France’s Commission for the Compensation of Victims of Spoliation, Britain’s Spoliation Advisory Panel, the Dutch Restitutions Committee, Germany’s Beratende Kommission, and Austria’s Kunstrückgabebeirat.

included the Sapi-Portuguese ivories. A technical and collaborative precedent was thus set for the rounding up of the ivories from approximately 46 public and private collections. In 2019, the Museo Civico Archeologico in Bologna, Italy, presented *Ex Africa*, a comprehensive exhibition of African art, which also featured some Sapi-Portuguese ivories from private and public collections. The Sapi-Portuguese ivories are over 100 years old. If repatriated to Sierra Leone, they will be exempt from export restrictions set by the U.S. Endangered Species Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁸¹

Given the unique history that saw their entry into Europe beginning in the late fifteenth century, the Sapi-Portuguese ivories are ineligible for the non-retroactive UNESCO Convention and the UNIDROIT Convention. However, with enough political will from the relevant Western museums, grant-making foundations, private collectors, and government stakeholders, I believe the ivories' return could be negotiated through the ICOM-WIPO Mediation Program.⁸² The Program was jointly developed by the International Council of Museums (ICOM) and the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center). With the guidance of appointed mediators, the ICOM-WIPO Program allows the concerned parties to address, or overcome, a plethora of issues, among which include the statute of limitations and transfer of ownership.

The ICOM-WIPO Program has had prior success in facilitating the return of African artifacts when other channels of communication were not successful, or when the dispute fell outside of the boundaries of the international legal system. In May 2010, the Barbier-Mueller Museum in Switzerland signed an agreement to donate the *Makonde Mask* to the National Museum of Tanzania.⁸³ The mask had been stolen from the country in 1984 along with sixteen other artifacts. The Barbier-Mueller Museum was first alerted to the mask's dubious provenance by Professor Enrico Castelli of the University of Perugia. In 1985, the Swiss museum contacted the ICOM to inform the organization that an artifact in its collection might have been fraudulently taken from the Dar es Salaam Museum. Prior to that, the museum had purchased the mask in good faith in Paris in September 1985.⁸⁴ Both parties, the Tanzanian government and the Barbier-Mueller, could not agree on the terms of return, and the dispute lasted for over twenty years. In 2006, affairs took an

⁸¹ As of October 2025, 185 countries are parties to the CITES Convention.

⁸² Sabrina Urbinati, *Alternative Dispute Resolution Mechanisms in Cultural Property Related Disputes: UNESCO Mediation and Conciliation Procedures*, in *ART CULTURAL HERITAGE AND THE MARKET. ETHICAL AND LEGAL ISSUES* 93–116 (Vadi Schneider ed., 2014).

⁸³ Folarin Shyllon, *Return of Makonde Mask from Switzerland to Tanzania: A Righteous Conclusion?*, 16 *Art Antiq. & L.* 79–83 (2011).

⁸⁴ Anne Laure Bandle, Raphael Contel & Marc-André Renold, *Affaire Masque Makondé – Tanzanie et Musée Barbier-Mueller*, Plateforme ArThemis, <https://plone.unige.ch/art-adr/cases-affaires/masque-makonde-tanzanie-et-musee-barbier-mueller> (last visited Oct. 25, 2025).

acrimonious turn when Tanzania filed a request for the mask's return with the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in case of Illicit Appropriation.⁸⁵ The Barbier-Mueller Museum responded by filing an official complaint against the Tanzanian government with the Swiss Federal Office of Culture. In what followed, the ICOM-WIPO Program offered a channel for ADR between the parties. A breakthrough finally came and, with the help of the ICOM-WIPO Program, an agreement was signed by the Barbier-Mueller Museum for the mask's donation to Tanzania.⁸⁶ For artifacts such as the Sapi-Portuguese ivories, the ICOM-WIPO Program offers a quasi-legal procedure for their return.

VII. ATONEMENT FOR THE SAPI SCULPTORS OF SERRA LEOA

For nearly 300 years, the Sapi sculptors of *Serra Leoa* were erased from art historical studies and denied their artistic recognition and authorial attribution. European collectors across time and space who gained aesthetic pleasure and connoisseurs' prestige from owning Sapi-Portuguese ivories, failed in their obligation to provide reciprocal benefits to the Sapi sculptors by acknowledging their artistic authorship. The racist and anti-African ideologies produced by the Christian West, for centuries, were acts of "repressive erasure" that made the Sapi sculptors of *Serra Leoa* non-entities in the global imaginary and facilitated the misattribution of their ivory art to Others. This caused posthumous harm to the Sapi sculptors and violated their moral and artistic rights. The Atlantic Slave Trade and Europeans' colonization of the African continent further debased the human, environmental, economic, and spiritual resources of Africa and derailed what could have been its endogenous process of development. Keeping the Sapi-Portuguese ivories abroad in storage compartments, and in lonesome exhibits, brings no justified benefits that supersede the good repatriation will bring to the descendants of the Sapi people in Sierra Leone.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

AUTHENTICATION EX MACHINA: ISSUES OF ADMITTING EVIDENCE OF AI ART AUTHENTICATION IN U.S. COURTS

Victoria Maatta *

I. INTRODUCTION

For better or worse, the use of AI is becoming increasingly common in daily life—the art market is no exception. AI technology has been created by several companies and academic institutions to aid in the authentication of artworks. Companies create these AI programs by feeding them datasets composed of known works by a given artist in order to teach the AI to detect the differences between authentic versus inauthentic works. Some of these datasets include works that are attributed to an artist by connoisseurs.

Using AI to prove a work’s authentication can be advantageous because the tool is considered more “objective” than human authentication¹ and therefore, less prone to error. However, in one case, two different AI examinations of the same work purportedly by Raphael, the *De Brécy Tondo*, rendered differing results. This case study raised alarm, as the two programs theoretically should have reached the same conclusion, calling the accuracy and objectivity of these AI authentication systems into question.² This raises an important question: how unbiased can the AI be when they are developed based on subjective connoisseurship?

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¹ Giacomo Prideaux, *Artificial Intelligence and Art Authentication*, HEPHAESTUS ANALYTICAL (Aug. 2022), <https://www.hephaestusanalytical.com/blog/artificial-intelligence-and-the-detection-of-forgery-in-art-authentication>.

² Sharon Hecker, *Authenticity in Art: What if Artificial Intelligence is Not Objective? A Reflection After Raphael*, ART LAWYERS ASSOCIATION (Nov. 15, 2023), https://www.artlawyersassociation.com/post/authenticity-in-art-what-if-artificial-intelligence-is-not-objective-a-reflection-after-raphael?postId=0326cdf5-c1d4-4e30-b5f4-5938385bee2c&utm_campaign=cfd58eda-2b76-4ff5-b91a-34adea9cdd29&utm_source=so&utm_medium=mail&utm_content=a724bf3d-50ab-4438-880b-2e51674ed828&cid=fd509524-baed-43fa-be8e-3acaafe0147e.

In addition to the issues of whether AI is a truly objective means of authentication, using the results as evidence in court may be complicated. AI authentication is a unique combination of two authentication processes—subjective connoisseurship and technical analysis.³ Yet, courts have evaluated these two authentication regimes differently when deciding their admissibility and use as evidence.⁴ The AI’s process of combining the two methods thus leaves an open question as to how prospective courts will treat this new technology. Will AI blur the boundary between the two authentication regimes? Or will courts choose to categorize AI as a method of either technical analysis or connoisseurship?

This paper explores potential issues with admitting AI authentication results into evidence in United States Courts under the Federal Rules of Evidence (“FRE”) on expert testimony and impeachment. First, it examines the history and jurisprudential treatment of authentication through connoisseurship. Then, it discusses the use of AI in art authentication, including the Raphael case study. Finally, the paper addresses the legal framework under the FRE for admitting expert evidence and impeaching witnesses and discusses how the courts might apply the FRE to AI authentication cases in the future.

II. THE ROLE OF THE CONNOISSEUR IN ART AUTHENTICATION

Connoisseurship has been defined as “the study of works of art, based on form, decoration, and other aesthetic criteria to determine their authenticity.”⁵ Throughout art history, artworks were typically authenticated by connoisseurs,⁶ and for much of that history, connoisseurs were seen as imperative because of this role.⁷ Connoisseurs are able to attribute a work to an artist, or their school/workshop, as well as to a specific place and time.⁸ Art historian Gary Schwartz describes connoisseurship as a “close analysis and comparison as a means of judging the quality, authorship, and authenticity of works of art.”⁹ Brewer unpacks this

³ *OUR TECHNOLOGY*, <https://art-recognition.com/our-technology/> (last visited Aug. 19, 2024); *OUR AUTHENTICATION PROTOCOL*, <https://www.hephaestusanalytical.com/#authentication-section> (last visited Aug. 19, 2024); HASSAN UGAIL ET AL., *Deep Facial Features for Analysing Artistic Depictions – A Case Study in Evaluating 16th and 17th Century Old Master Portraits*, IEEE, 4 (Feb. 6, 2022).

⁴ *Hahn v. Duveen*, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

⁵ Patty Gerstenblith, *Keynote 1: Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, COLUM. J.L. & ARTS, Vol. 35, No. 3, 338 (2012).

⁶ David Ebitz, *Connoisseurship as Practice*, ARTIBUS ET HISTORIAE, Vol. 9, No. 18, 207 (1988).

⁷ *Id.*

⁸ *Id.*

⁹ John Brewer, *Evaluating Valuation: Connoisseurship, Technology, and Art Attribution in an American Court of Law*, OXFORD UNIV. PRESS, 90-93 (2015).

description: he explains that one portion of the role of the connoisseur is aesthetic—a judgment of quality—while the other is empirical—a judgment of whether an artist created the work.¹⁰

The connoisseur’s expertise and practice in authentication have made them highly valuable throughout history.¹¹ This expertise includes a deep knowledge and understanding of an artist’s processes, workshop practices, use of models, and labour division.¹² Connoisseurs have also been known to possess a unique skillset in recognizing quality, the ability to recreate an artist’s creations, a strong visual memory,¹³ and, of course, the “practiced eye.”¹⁴ The expert’s eye was thought to effectively identify the genuine works of artists.¹⁵ For example, in the case of the Old Masters, it is not uncommon for a painting’s attribution to be rooted in the opinion based solely on the expert’s eye.¹⁶ As such, attributions are often predicated on an intuitive assessment as to the quality or feel of the work.¹⁷

While connoisseurship in the 19th century was sometimes accompanied by historical/empirical analysis through provenance research,¹⁸ it does not de-emphasize the importance of the connoisseur’s eye throughout history. Though the intuitive aspect of connoisseurship expertise is considered a cliché, art historian Max Friedlander noted that “the first impression is deeper than all subsequent ones, of different kind and of decisive importance,” suggesting that the work’s visual quality takes priority in an assessment.¹⁹ Since connoisseurs relied on their intuition, it was commonly thought that some connoisseurs had a better *eye* than others²⁰ and different opinions could be reached by different connoisseurs.²¹ However, there is a notable debate in the scholarship, with many maintaining that connoisseurship on its own is unreliable in determining authenticity.²² This is because an attribution to a given work that was once accepted can become rejected

¹⁰ *Id.*

¹¹ Ebitz, *supra* note 6, at 207.

¹² *Id.* at 208.

¹³ Ebitz describes “visual memory” as that which allows a connoisseur to be able to internalize, categorize, and perceive visual components of works to render judgment on others.

¹⁴ Ebitz, *supra* note 6, at 208.

¹⁵ Gerrit Verhoeven, *Mastering the Connoisseur’s Eye: Paintings, Criticism, and the Canon in Dutch and Flemish Travel Culture, 1600-1750*, EIGHTEENTH-CENTURY STUD., Vol. 46, No.1, 36 (Fall 2021).

¹⁶ MARTIN WILSON, ART LAW AND THE BUSINESS OF ART 148-149 (2nd ed., 2022).

¹⁷ Ebitz, *supra* note 6, at 209-210.

¹⁸ Brewer, *supra* note 9, at 95.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Isabel Paintin, *The Art of Connoisseurship through Judicial Eyes: The Law of Negligence and Fine Art Attribution*, 20 ART ANTIQUITY & L. 101 (2015).

²² Gerstenblith, *supra* note 5, at 338.

later, oftentimes as a result of new technical analyses such as infrared imaging,²³ X-ray analysis,²⁴ or chemical analysis.²⁵

The connoisseur's role is most important in two areas of the art world: the market and the auction house. A work deemed authentic goes up in value exponentially compared to copies, fakes or forgeries.²⁶ To demonstrate,²⁷ a likely authentic *Salvator Mundi* by Leonardo da Vinci sold for \$450.3 million,²⁸ while a copy of *Salvator Mundi* was sold for €1 million (a staggering amount).²⁹ Meanwhile, the ability to confirm a work's authorship is "at the heart of the role of the auctioneer."³⁰ In the United Kingdom, for example, international auction houses are entitled to rely on their internal experts and connoisseurs when attributing works rather than needing to employ a technical analysis.³¹

For context, connoisseurs were of the utmost importance in the late 19th and early 20th century in the U.S. market due to a boom in demand for collecting Old Masters by the ultra-rich.³² Many of these wealthy collectors were uneducated on the arts, so they relied on connoisseurs to help them make smart purchases.³³ The increased demand for acquiring European art brought a similar demand for conclusive attributions.³⁴ As Friedländer noted, "[d]ealers and collectors are not

²³ *Id.*

²⁴ Paintin, *supra* note 21, at 106.

²⁵ Dea Sula, *New Tools for Old Problems: Artificial Intelligence as a New Due Diligence and Authentication Tool for the Art Market?*, CENTER FOR ART LAW (Sept. 20, 2023), <https://itsartlaw.org/2023/09/20/new-tools-for-old-problems-artificial-intelligence-as-a-new-due-diligence-and-authentication-tool-for-the-art-market/>.

²⁶ Gerstenblith, *supra* note 5, at 325.

²⁷ Connoisseurship is not the only factor that identified *Salvator Mundi* as a potential sleeper. The author solely uses this example to demonstrate the effects authenticity have on the art market on a disputed painting. See Tim Brinkhof, *Was the mysterious, \$450-million "Salvator Mundi" really painted by Leonardo da Vinci?*, BIG THINK (Sept. 30, 2022), <https://bigthink.com/high-culture/salvator-mundi-leonardo-da-vinci/#:~:text=Looking%20at%20the%20Salvator%20Mundi,everybody%20had%20been%20looking%20for.>

²⁸ Gareth Harris, *Leonardo's \$450m Salvator Mundi returns as an NFT*, THE ART NEWSPAPER (Aug. 8, 2023), <https://www.theartnewspaper.com/2023/08/08/leonardos-450m-salvator-mundi-returns-as-an-nft#>.

²⁹ Bendor Grosvenor, *Badly preserved Salvator Mundi copy—which sold for staggering €1m—could be more valuable than once thought*, THE ART NEWSPAPER (Jan. 23, 2023), <https://www.theartnewspaper.com/2023/01/23/does-paris-salvator-mundi-have-something-up-his-sleeve.>

³⁰ Wilson, *supra* note 16, at 144.

³¹ *Thwaytes v. Sotheby's* [2015] EWHC 36 (Ch).

³² Brewer, *supra* note 9, at 90-93.

³³ *Id.*

³⁴ *Id.*

served by suppositions; they demand a positive choice.”³⁵ Those acquiring cared for the artist’s genius more than the technical or physical traits of their works; this attitude creates a landscape where attribution establishes the work’s quality, as opposed to the quality establishing the attribution.³⁶

III. THE ROLE OF AI IN ART AUTHENTICATION

Art authentication is one of many AI technologies being put to use in everyday life.³⁷ Several companies, including Hephaestus Analytical (“Hephaestus”) and Art Recognition, as well as academics, like Professor Hassan Ugail, have developed AI programs to improve art authentication by creating “precise” and “objective” evaluations³⁸ intended to provide the art world with a “high[er] evidentiary standard.”³⁹ This paper refers to three AI systems collectively as “the Programs.”

Broadly, the Programs use neural networks⁴⁰ to create the algorithms that allow AI to sift through datasets and seek patterns to reach accurate and precise conclusions about a work in question.⁴¹ Portions of the Programs’ databases are derived from the existing records of authentic works by an artist. Ugail’s data seems to be substantially based on connoisseur opinion.⁴² However, it is less clear whether this is the case for Hephaestus and Art Recognition. While it is not public how much of the data is based on connoisseurship, much of art history relied on connoisseurship for authentication. As such, it is likely that a significant portion of the authentic work datasets are based on connoisseurship.⁴³

³⁵ *Id.*

³⁶ *Id.*

³⁷ Indeed, many works have become embroiled in science-based authenticity debates. *See e.g.* Noah Charney, *Is That Painting a Lost Masterpiece or a Fraud? Let’s Ask AI*, WIRED (Mar. 20, 2025) <https://www.wired.com/story/is-that-painting-a-lost-masterpiece-or-a-fraud-lets-ask-ai/>.

³⁸ SHAPING TOMORROW’S ART AUTHENTICATION WITH AI, <https://art-recognition.com> (last visited Aug. 19, 2024).

³⁹ HEPHAESTUS ANALYTICAL, <https://www.hephaestusanalytical.com> (last visited Aug. 19, 2024).

⁴⁰ Oxford Dictionary defines neural networks as “a computer system which is designed to work in a similar way to the human brain and nervous system.”

⁴¹ Tim Schneider, *Why A.I. Art Authentication Isn’t Necessarily the Game-Changer the Industry Wants It to Be (and Other Insights)*, ARTNET (Oct. 5, 2021) <https://news.artnet.com/market/rubens-art-recognition-ai-authentication-2017274>.

⁴² UGAIL ET AL., *supra* note 3, at 19.

⁴³ This also may depend on the artist. As discussed in *Section II*, Old Masters were often authenticated as a result of connoisseurship. As such, perhaps a Rubens dataset in the Programs would be largely based on the connoisseur’s eye.

Theoretically, each program should come to the same conclusion. However, in a case study of a potential Raphael, *de Brécý Tondo*, two programs yielded two different results after analysing the same work.⁴⁴ Ugail’s program determined that the work was “undoubtedly” a Raphael, while Art Recognition determined that it was 85% likely to *not* be a genuine Raphael.⁴⁵

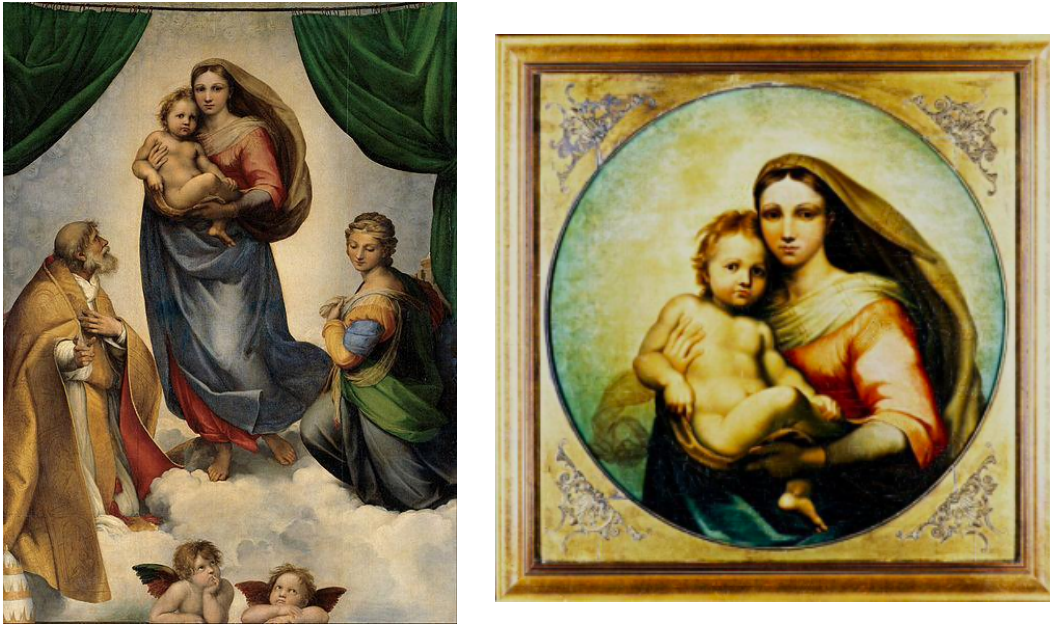


Figure 1. Raphael's Sistine Madonna and Child (left)⁴⁶ and *de Brécý Tondo* (right).⁴⁷

This discrepancy may be due to the differing processes or designs in the technologies used.⁴⁸ Ugail’s AI-assisted facial recognition found that the faces in *de Brécý Tondo* were “an exact match” and “identical” to the Madonna and Child in the Sistine Chapel, a conclusion which he reports could not be so surely made by the human eye.⁴⁹ Where there is a 75% similarity between faces, the faces are considered identical.⁵⁰ Here, there was a 97% similarity between the Madonnas of

⁴⁴ Hecker, *supra* note 2.

⁴⁵ *Id.*

⁴⁶ 2012, CC 2.0 via Wikimedia Commons.

⁴⁷ Hassan Ugail, *Mystery portrait is “undoubtedly” Raphael masterpiece, according to new scientific analysis*, UNIV. OF BRADFORD (Jan. 16, 2023), <https://www.bradford.ac.uk/news/archive/2023/raphael-discovered-by-facial-recognition-technology-.php>.

⁴⁸ RAPHAEL: THE DE BRÉCÝ TONDO, <https://art-recognition.com/case-studies/raphael-the-brecy-tondo/> [hereinafter “AR Raphael”].

⁴⁹ Ugail, *supra* note 48.

⁵⁰ *Id.*

the paintings and an 86% similarity between the two depictions of the Child.⁵¹ With this information, he concluded that the model in both works was the same person and therefore the works were by the same artist, Raphael.⁵² By comparison, Art Recognition creates datasets of high-quality images for a particular artist as well as a contrast set of works by known imitators and documented forgeries, which enables the AI to discern a real from a fake.⁵³ Additionally, Art Recognition's process examines the whole of the picture, not just the face.⁵⁴ The broader aspects of the work, such as the chromatics and brushstrokes, led the program to conclude that it was unlikely to be a Raphael.⁵⁵

There is a tension between the opinion of AI and that of art experts, as many experts also disagree with Ugail's finding.⁵⁶ One expert is quoted saying, "[w]hile I am always open to the use of new technologies and approaches, I would not support an assessment of authenticity that relies on AI. True connoisseurship relates to the expert judgment of the trained eye and is so much more than mechanically matching brushstrokes and images."⁵⁷ Another has said "[t]his story is so perfectly AI; it can't tell what's real or not [...]. One phone call to any half-decent Raphael scholar is all they needed."⁵⁸ Others believe that basing the authentication analysis on facial recognition misses the point: that the facial features were intended to match, because *de Brécy Tondo* was a copy.⁵⁹ These reactions reflect the view that connoisseurship is not only still relevant despite technical analysis options, but should not be cast aside in the wake of AI.

The technology is indistinguishable from a typical battle of the experts.⁶⁰ Since it is a technical analysis, though, it needs to be able to be repeated by a third-party neutral who can confirm the results independently.⁶¹ In these early days of AI authentication, relying on independent testing raises a number of issues, as

⁵¹ *Id.*

⁵² *Id.*

⁵³ OUR TECHNOLOGY, *supra* note 3.

⁵⁴ AR Raphael, *supra* note 49.

⁵⁵ Carina Popovici, *Two A.I. Models Produced Different Results When Authenticating a Raphael Painting. Here's Why That Doesn't Undermine the Tool's Potential*, ARTNET (Oct. 23, 2023), <https://news.artnet.com/art-world-archives/ai-authentication-raphael-painting-op-ed-2373793>.

⁵⁶ Gareth Harris, 'Clearly a copy from the 19th century'—Old Masters scholars reject AI-attributed Raphael, THE ART NEWSPAPER (Jul. 26, 2023) <https://www.theartnewspaper.com/2023/07/26/clearly-a-copy-from-the-19th-centuryold-masters-scholars-reject-ai-attributed-raphael>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Hecker, *supra* note 2.

⁶¹ Hecker, *supra* note 2.

exhibited by the case study and as discussed in *Section V(A)(iv)*. Without this possibility, the results may be too subjective to be likened to traditional technical analysis. Indeed, falling into the “objectivity trap” with AI should be avoided because humans are the ones controlling the programs, how they are designed, what data is used, etc., ultimately imbuing some human subjectivity into the results.⁶²

A. Case Law

Connoisseurs have made an indelible impact on art history, but their role in the courts is perhaps less widely known. Attributions premised on one’s intuition can invariably lead to legal disputes.⁶³ When faced with an attribution dispute, a court is faced with the difficult task of attempting to objectively review a highly subjective attribution.⁶⁴

The seminal case involving attribution by connoisseurship is *Hahn v. Duveen*.⁶⁵ In *Hahn*, the Hahn family sued art dealer Joseph Duveen for slander of title after Duveen told a reporter that the painting they owned, *La Belle Ferronnière*, was not a genuine Leonardo.⁶⁶ As a result, the Hahns claimed damages against Duveen for disrupting an ongoing negotiation for a museum’s acquisition of the work.⁶⁷

⁶² Schneider, *supra* note 42.

⁶³ Paintin, *supra* note 21, at 101.

⁶⁴ *Id.*

⁶⁵ 234 N.Y.S. at 185.

⁶⁶ *Id.*

⁶⁷ *Id.* at 186.

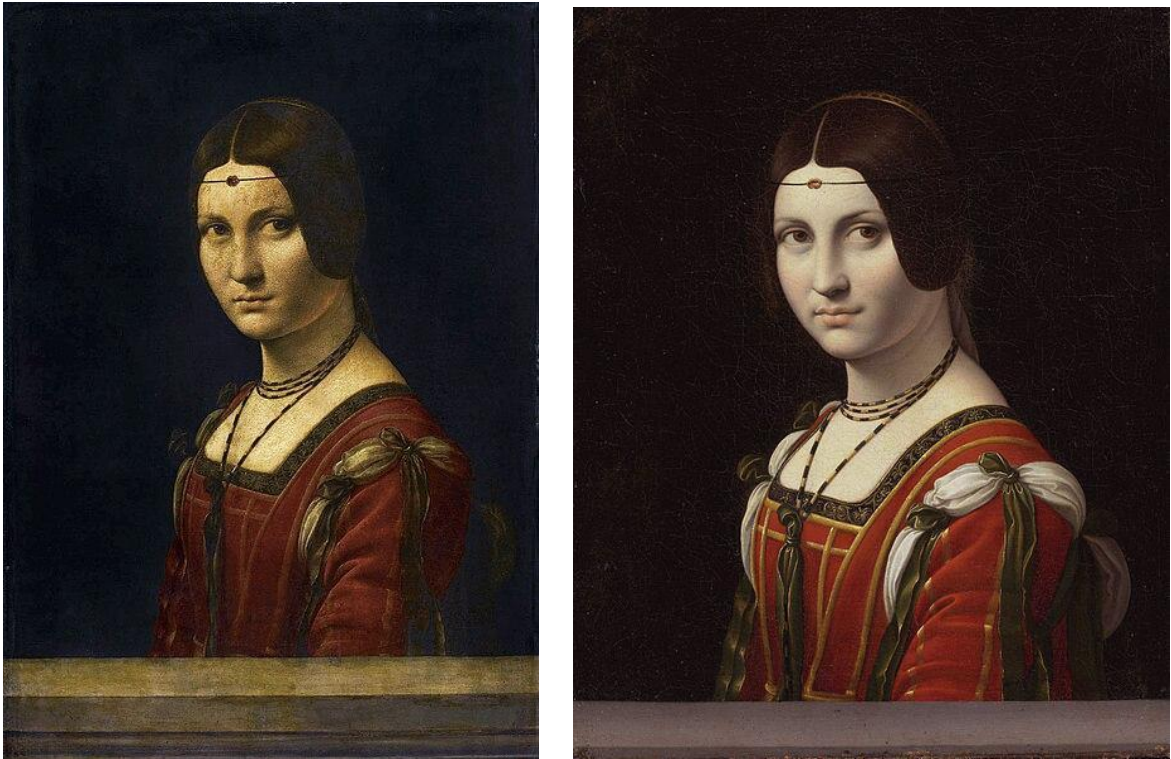


Figure 2. La Belle Ferronnière, Leonardo Da Vinci (left)⁶⁸ and Hahn’s La Belle Ferronnière (right).⁶⁹

Hahn focused on the dispute between different regimes and how they handle authentication,⁷⁰ ultimately turning the case into a battle of the experts.⁷¹ The weight given to the differing expert opinions in this matter was pivotal because the accepted evaluation of the work would profoundly impact its subsequent market value.⁷² The judge instructed the jury that there were two avenues through which to view the expert evidence: the authentication history of the painting offered by the expert and the methodology used by the expert.⁷³ This instruction highlights that documentary evidence and physical analysis are necessary to establish an attribution “founded on facts” over opinion.⁷⁴ Judge Black even cautioned that some experts will rely on speculation originating from a “psychological

⁶⁸ 2022, CC 2.0 via Wikimedia Commons.

⁶⁹ 2011, CC 2.0 via Wikimedia Commons.

⁷⁰ In fact, Duveen wanted connoisseurs to gain legitimacy in the court system, so their opinion could weigh even more in the art market. Brewer, *supra* note 9, at 90, 98.

⁷¹ 234 N.Y.S at 193.

⁷² Brewer, *supra* note 9, at 89.

⁷³ 234 N.Y.S at 190.

⁷⁴ Brewer, *supra* note 9, at 101.

correlation.”⁷⁵ This caveat exemplifies how this dispute occurred at a point in connoisseurship history, where the tradition of understanding driven by informed intuition clashed with the forensic techniques that were being used by courts.⁷⁶

Duveen argued that scientific evidence should not be relied upon because it ignored the work’s quality.⁷⁷ While Duveen’s expert connoisseurs were reticent to even describe their qualifications to the court, Hahn’s expert provided X-ray evidence of the two paintings.⁷⁸ Though the expert explaining the X-ray was not an art expert, the jury found their explanation more compelling than the following statements made by Duveen’s experts. His first expert, Sir Martin Conway, explained his reasoning for rejecting the work’s authenticity as: “I simply look at the Hahn picture and the impression produced on my mind is that it is not by Leonardo.”⁷⁹ Similarly, Duveen’s second expert, Maurice Brockwell, testified that, “[i]t is a question of psychology, not of the magnifying glass; it is the mind of the great master that we see, the spiritual content, the psychological correlations.”⁸⁰ Lastly, Bernard Berenson described having a “sixth sense...dispirit acts almost unconsciously.”⁸¹ None of their testimonies were derived from any sort of technical analysis, instead, they were admittedly exercises in pure subjectivity and intuition.⁸² Judge Black instructed the jury that this intuitive outlook “is not based upon enough objectiveness to convey definite meaning to a jury.”⁸³ Reporting on the case, *Time Magazine* summarized the method: “Arguments on technique, expression, nuances of genius, only served to exhibit the latitude and variance of personal opinion.”⁸⁴

The decision ended with a hung jury, favoring Hahn.⁸⁵ When the question of a retrial was posed, Duveen’s lawyers interestingly rejected a retrial, arguing that the law cannot reach a determination on a matter of opinion over fact.⁸⁶ With its instruction and decision, the court did not accord legal legitimacy to connoisseurship.⁸⁷ The case offers a glimpse into the opposing views that

⁷⁵ 234 N.Y.S at 192.

⁷⁶ Brewer, *supra* note 9, at 95.

⁷⁷ *Id.*

⁷⁸ 234 N.Y.S at 193-195.

⁷⁹ Brewer, *supra* note 9, at 101.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ 234 N.Y.S at 192.

⁸⁴ Brewer, *supra* note 9, at 103.

⁸⁵ *Id.* at 104.

⁸⁶ *Id.*

⁸⁷ *Id.*

connoisseurs and courts have as to the reliability of technical analysis. The court clearly prefers technical analysis.

The *Hahn* court's logic was shared in *Greenberg Gallery, Inc. v. Bauman*, a case pertaining to the authenticity of a Calder mobile, where one expert mostly formed his opinion based on a "feeling," whereas an expert for the opposing party based her opinion predominantly on the "flawless" provenance.⁸⁸ The court found that the work was authentic, relying more on the documentary evidence, like the provenance, than the feel of the mobile in making their decision.⁸⁹ From this case, the court demonstrates that expert testimony on art is given more weight where the opinion derives from empirical data over subjective feeling.

This is not to say that courts (1) never trust the testimony of an art expert or (2) that they are eager to make an affirmative ruling on a work's attribution. In *Thome v. Alexander & Louisa Calder Foundation*, the plaintiff sought positive authentication of their Calder work from the Calder Foundation, because the work the plaintiff owned was not included in the catalogue raisonné.⁹⁰ The issue was whether private foundations are legally obligated to authenticate works.⁹¹ The plaintiff sought a judgment from the court declaring the work an authentic Calder.⁹² The court denied the plaintiff's request for declaratory judgment on the basis that authentication involves an expert's informed and subjective expertise, holding that "[t]he law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive."⁹³ This case is representative of the premise that authentication is made by the market and not by law.⁹⁴ However, *Thome* does not undermine the approach taken by the courts in *Hahn* or *Greenberg*. Instead, it simply holds that courts are not the venue by which to authenticate art.⁹⁵

B. Applicability to AI Authentication

The fact that a connoisseur's opinion has been too subjective for courts in the past leads to the question of whether the datasets used by AI tools may also be considered too subjective. This is a timely issue, because if this technology becomes more popular, and more people rely on its use prior to art transactions, the results of the technology could ostensibly be used in attribution disputes. Consider

⁸⁸ 817 F. Supp. 167 (D.D.C. 1993), aff'd, 36 F.3d 127 (D.C. Cir. 1994).

⁸⁹ 817 F. Supp. At 169, 174-5.

⁹⁰ 70 A.D.3d 88 (N.Y.A.D. 1 Dept., 2009).

⁹¹ *Id.* at 94-96.

⁹² *Id.* at 96.

⁹³ *Id.* at 99.

⁹⁴ *Id.* at 101.

⁹⁵ *Id.* at 99.

this hypothetical: Seller seeks an assurance as to a work's authenticity through an AI program before selling the work. Purchaser buys the work because of the AI's assurance as to the authenticity. Years later, Purchaser seeks to sell the work, but the authenticity is disputed, and the value of the work has decreased significantly since the time of purchase. She may seek a claim for misrepresentation and/or negligence and damages in court and try to introduce the AI's result into evidence. Under *Hahn* and *Thome*, her strategy presents the following issue: the AI is based on subjective connoisseurship but is also a form of technical analysis.

This case sets a precedent for the weight assigned to a connoisseur's opinion compared to technical analysis. Both judge and jury favoured the science over the connoisseur's eye because the eye can be too subjective of a standard. Yet, *Hahn's* and *Greenberg's* prioritization of technical and documentary analysis over connoisseurship might create an issue for the Programs. In a way, the Programs are a combination of both authentication regimes: they employ connoisseurship in their datasets, or otherwise engage in a degree of subjective analysis, but are simultaneously technical due to their scientific nature.

In the hypothetical posed, a party would seek to bring in evidence of the AI's report. At first blush, under *Hahn* and *Greenberg*, a court would likely favor the report's admissibility as it is based on a technical analysis, which theoretically limits subjectivity. This is because it would seem that the conclusion reached by the AI would be based on facts over opinion.⁹⁶ However, based on the hesitation to consider connoisseurs' opinions fully reliable (by scholars and courts), one may question if the datasets actually represent fact over opinion.

Though the Programs are technical, some of their makeup is psychological (which *Hahn* warns against). Who is to say that a work within an authentication set was not deemed an authentic Leonard because of a "sixth sense"? Without that work's attribution being bolstered by technical analysis and/or documentary evidence, the Programs' results would be seemingly no different than that of a connoisseur. In this vein, a court might not give the Programs the same weight that it gave other technical analysis in *Hahn*, blurring the boundary of how courts treat subjective connoisseurship and technical analysis.

IV. LEGAL FRAMEWORK AND ANALYSIS FOR ADMITTING EVIDENCE

Apart from the *Hahn* consideration, parties may have issues with admitting expert evidence based on the AI authentication results and may even be able to impeach such evidence. In any evidence analysis, one must first consider the thresholds to admissibility. To be admissible, evidence must be relevant to the

⁹⁶ *Id.* at 191.

matter at hand. Under FRE 401, evidence is relevant if it has any tendency to make a consequential fact more or less probable than it would be without the evidence. Evidence that is irrelevant is not admissible.⁹⁷ In an attribution dispute, the information produced by the Programs will likely be deemed relevant under FRE 401 if the judge concludes that the Programs' authenticity assessment makes it more or less likely that the work is authentic.

Further, the court must consider FRE 403, which requires the exclusion of relevant evidence where the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FRE 403 does not disqualify conflicting evidence; for example, the varying determinations in the Raphael case study could be admitted into evidence if needed. Therefore, under normal circumstances, it is unlikely that the Programs' evidence would be found to risk unfair prejudice to one of the parties, mislead the jury, be needlessly cumulative, or cause undue delay.⁹⁸

A. Expert Evidence

The admission of technical reports typically requires an expert to validate and explain them in order to be admissible.⁹⁹ Courts will need to look at whether the testimony will meet the requirements under *Frye* or *Daubert*. The expert in question would likely be a developer of the technology used by the program, who would be well-versed in the program's development and in interpreting the results.¹⁰⁰

1. *Frye*

Courts initially relied on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to determine the admissibility of expert evidence. Upon the defendant's conviction for second-degree murder, the case was before the court to determine whether

⁹⁷ Fed. R. Evid. 402.

⁹⁸ Fed. R. Evid. 403.

⁹⁹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 311, 329 (2009).

¹⁰⁰ To the author's knowledge, there are no present cases regarding the qualifications for an AI expert. *See e.g.*, *Cahoo v. Fast Enterprises LLC*, No. 17-10657, 2021 WL 1037727 (E.D. Mich. Mar. 18, 2021) (holding the defense was not permitted to admit expert testimony on whether the program in question was a form of AI because the opinion the examiners were not qualified to make such a conclusion). However, with the potential adoption of FRE 707, expert testimony may not be required. *See* Kristen Libonati, *Man vs. Machine: Proposed Federal Rule of Evidence 707 Aims to Combat Artificial Intelligence Usage in the Courtroom, Through Expert Testimony Standards*, Villanova Law Review (Sept. 22, 2025) <https://www.villanovalawreview.com/post/3458-man-vs-machine-proposed-federal-rule-of-evidence-707-aims-to-combat-artificial-intelligence-usage-in-the-courtroom-through-expert-testimony-standard>.

expert testimony regarding the results of a blood pressure test was admissible into evidence.¹⁰¹ The defendant took this test to determine whether he was either lying or guilty (thought to be linked to blood pressure) and the defendant's counsel sought to enter expert testimony on the test into evidence.¹⁰² To be admissible, “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁰³ Where the test in question had not been “generally accepted” among the appropriate scientific authorities, the information from such a test was inadmissible.¹⁰⁴

2. *Frye* Analysis

Under *Frye*, expert testimony on some of the Programs will likely be admissible where the AI is developed using a generally accepted practice. Many AI programs are based on neural networks.¹⁰⁵ For example, Art Recognition utilizes two types of neural networks to analyse details “from brushstroke patterns to color palettes.”¹⁰⁶ The process studies the elements of the work on a broad scale as well as minute details.¹⁰⁷ Smaller segments of the work are, in a way, zoomed into, and these minute details are extracted.¹⁰⁸ The tool also cross-validates the data to identify an efficient model, which “enhances the model’s strength and consistency.”¹⁰⁹ This type of coding and computer programming is in fact a generally accepted way to create AI programs throughout relevant scientific communities.¹¹⁰

On the other hand, Ugail’s program uses “deep-learning,” or convolutional neural networks, another generally accepted development method, which allows machines to “learn by example.”¹¹¹

Hephaestus, however, requires further analysis. The development of Hephaestus’ machine learning is a proprietary system called “Pictology,”¹¹² which

¹⁰¹ 293 F. at 1013.

¹⁰² *Id.* at 1014.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Schneider, *supra* note 42.

¹⁰⁶ OUR TECHNOLOGY, *supra* note 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Stefano Bianchini, Mortz Müller, Pierre Pelletier, “Artificial intelligence in science: an emerging general method of invention,” Elsevier, Vol. 51, 1 (Dec. 2022); *See also* Steven J. Frank, This AI Can Spot an Art Forgery, IEEE Spectrum (Aug. 23, 2021), <https://spectrum.ieee.org/this-ai-can-spot-an-art-forgery>.

¹¹¹ UGAIL ET AL., *supra* note 3, at 1.

¹¹² Prideaux, *supra* note 1.

is their stylometric algorithm.¹¹³ Similar to the other Programs, the learning is trained on high-resolution images comprising homogeneous data and including fixed variables.¹¹⁴ Where the information is proprietary, a court could potentially issue a Protective Order, which would allow the scientific method to be reviewed while also maintaining necessary confidentiality.¹¹⁵ As such, while it is likely that Hephaestus utilized a similar approach as the other Programs for their Pictology technology, it would require more investigation to determine whether the method used is generally accepted under *Frye*.

The *Frye* standard sets a low threshold. Research indicates that the processes by which these programs were developed are generally accepted by the scientific community. As such, the expert witnesses could provide support for admitting the results of the Programs into evidence under the *Frye* standard.

3. *Daubert* and FRE 702

Frye was replaced by the FRE and its interpretation under *Daubert*.¹¹⁶ However, the Supreme Court, before *Daubert*, did not formulate factors to determine expert testimony admissibility, so some circuit courts are conflicted as to the appropriate test.¹¹⁷ Therefore, some jurisdictions often still analyse a question of expert evidence under *Frye*.¹¹⁸

In *Daubert*, Merrell Dow, a major pharmaceutical company, was sued by plaintiffs to recover for birth defects that were claimed to be caused by a drug ingested by the mothers.¹¹⁹ The relevant issue was whether the admission of certain expert testimony by the District Court and the Court of Appeals was proper.¹²⁰ Both the District Court and the Ninth Circuit Court of Appeals reviewed the testimony under *Frye* and held that the petitioners' expert evidence did not meet the "general acceptance" standard.¹²¹ The US Supreme Court granted certiorari and heard the case.¹²²

¹¹³ Agata Becker, "Art Authentication: Interview with Denis Moiseev of Hephaestus Analytical," Institute of Art and Law (Jan. 29, 2024), <https://ial.uk.com/hephaestus-analytical/>.

¹¹⁴ Prideaux, *supra* note 1.

¹¹⁵ *See e.g.*, State v. Pickett, 466 N.J. Super. 270, 246 A.3d 279 (App. Div. 2021).

¹¹⁶ 509 U.S. at 579.

¹¹⁷ 1 Expert Witness Checklists § 1:301 (3d ed.).

¹¹⁸ *See e.g.* State v. David D., 53 Misc. 3d 1041, 37 N.Y.S.3d 685 (N.Y. Sup. Ct. 2016). However, courts will balance the interests, as it will depend on the information available and whether disclosure is necessary. *See e.g.*, Congoo, LLC v. Revcontent LLC, No. CV 16-401 (MAS), 2017 WL 3584205, 4 (D.N.J. Aug. 10, 2017).

¹¹⁹ 509 U.S. at 579.

¹²⁰ *Id.*

¹²¹ *Id.* at 584.

¹²² *Id.* at 579.

The Court looked to FRE 702, which does not provide “general acceptance” as a factor.¹²³ However, it places “appropriate limits” on an expert testimony’s admissibility, as the judge must ensure that the testimony is reliable and relevant.¹²⁴ The Court elaborated that the testimony must be scientific (i.e., “ground[ed] in the methods and procedures of science”) and connote knowledge that is “more than subjective belief” but “facts.”¹²⁵ However, the Court said that for the testimony to be “scientific knowledge,” it must be “derived by the scientific method,” as it then “establishes a standard of evidentiary reliability.”¹²⁶

The *Daubert* Court also looked to other factors: (1) whether the method can be tested, (2) if the method were subject to peer review and/or publication,¹²⁷ (3) the methodology’s rate of error, (4) any recognized standards, and (5) though not solely and not required, whether it is generally accepted.¹²⁸ The list is non-exhaustive, but each factor may bear weight on the admissibility.¹²⁹ In considering these factors, a court may look to the professional organization in question’s standards¹³⁰ or perhaps current regulations in the field.¹³¹ Inquiry into the testimony is flexible, and the focus should be on the methodology of how the expert reached the conclusion, not the conclusion itself.¹³² This is important because, under the rules and in comparison to FRE 701,¹³³ experts are allowed to provide an opinion on the case, even if they lack the personal knowledge or observation.¹³⁴

¹²³ *Id.*

¹²⁴ 509 U.S. at 579.

¹²⁵ *Id.* at 590.

¹²⁶ *Id.*

¹²⁷ There could be an instance where a science is too particularized or new to have been published. Courts must take this into account, as “good science” depends on peer review to determine any methodological errors. 509 U.S. at 593, citing J. Ziman, *Reliable Knowledge: An Exploration *594 of the Grounds for Belief in Science 130–133 (1978); Relman & Angell, How Good Is Peer Review?*, 321 NEW ENG. J. MED. 827 (1989).

¹²⁸ 509 U.S. at 593-594.

¹²⁹ *Id.* at 597.

¹³⁰ See *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978).

¹³¹ Gabrielle M. Haddad, *Confronting the Biased Algorithm: The Danger in Admitting Facial Recognition Technology Results in the Courtroom*, 23 VAND. J. ENT & TECH.L. 891.

¹³² 509 U.S. at 595.

¹³³ Fed. R. Evid. 701 covers the admission of opinion testimony by a lay witness, provided it “is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

¹³⁴ 509 U.S. at 595. Indeed, the Judicial Committee on Rules of Practice and Procedure is working to adopt FRE 707 to directly address “machine-generated evidence absent accompanying expert testimony.” With the rule, parties would be required to meet the FRE 702 analysis. See Libonati, *supra* note 101. The author does not consider this proposed rule in more depth, however, because it has not yet been adopted. However, it demonstrates the import of the subject matter.

4. *Daubert* and FRE 702 analysis

The first question is relevance. Similar to the FRE 401 and 403 threshold, FRE 702(a) and (b) contemplate the relevance of the expert evidence.¹³⁵ In an authenticity dispute, expert testimony on a program's findings could help a jury determine a painting's authenticity. Further, expert testimony on the subject may aid a jury in understanding the process for AI authentication; the processes are complicated, and a layperson would need an explanation to reach a verdict. Under FRE 702(b), there will need to be "sufficient facts or data" for expert testimony to be admissible, which is to be evaluated on a case-by-case basis.

A court will then look to the *Daubert* elements. First, these Programs are testable and the tests can be repeated. This is evident by the various case studies that each Program has published.¹³⁶ However, it needs to be repeatable by a third party. This may raise two sub-issues. The first sub-issue is a question of effectiveness and efficiency. As demonstrated in the Raphael case study, the testing of the Programs may depend entirely on the exact process. Repeating the tests would require substantial transparency regarding how the Programs are taught as well as access to the datasets. To gather every known work of an artist by one company is already a daunting task, of which scholars are questioning the possibility.¹³⁷ To have another company repeat this without the first company's disclosure would be equally or more daunting and probably not cost-effective. The second sub-issue raised is one of public access. Developers test their products to refine them.¹³⁸ For example, Art Recognition tests the training by looking at the evaluation's precision and recall to see how well the AI determined authenticity from forgery within the data set.¹³⁹ Their peer-reviewed publication does offer insight into the testing process and results, that the public and courts could easily access.¹⁴⁰ However, these types of tests are not typically publicly available, which creates a need to compel disclosure.¹⁴¹ Hephaestus and Ugail's programs do not have substantive information about testing available to the public. As such, this element weighs in favour of Art Recognition's admissibility. This is bolstered by

¹³⁵ *Id.* at 580, 591.

¹³⁶ See Hecker, *supra* note 2; Prideaux, *supra* note 1; Sula, *supra* note 25.

¹³⁷ Hecker, *supra* note 2.

¹³⁸ Haddad, *supra* note 133, at 905.

¹³⁹ OUR TECHNOLOGY, *supra* note 3 (emphasis added).

¹⁴⁰ JOHANN OSTMEYER ET AL., *Synthetic images aid the recognition of human-made art forgeries*, ARXIV (Dec. 22, 2023 rev. Feb. 15, 2024), <https://arxiv.org/abs/2312.14998>.

¹⁴¹ Haddad, *supra* note 133, at 905. The only dataset shared publicly relates to the Raphael case. See AR Raphael, *supra* note 49.

the decision in *Hahn*, because it favours the technical side of the program. The other two Programs may be less likely to admit evidence under this element.

Second, Art Recognition and Ugail's program have undergone a peer review, favoring admissibility under *Daubert*.¹⁴² It is not apparent if Hephaestus' program has been peer-reviewed. While Hephaestus could provide evidence of a peer review, the court would note its absence if none were conducted, and it would weigh against admissibility. Additionally, the proprietary nature of these programs could raise an issue: where a private company will not allow academics to study the inner workings of their technology, there is a question of how meaningful that peer review would be.¹⁴³

Third, the Programs each carry a favorable rate of error. Art Recognition has proven that a Van Gogh was authentic with a 97% accuracy rate,¹⁴⁴ Hephaestus has achieved a 98.2% accuracy rate in a study comparing a Canaletto to a Bellotto,¹⁴⁵ and Ugail says that facial recognition can reach up to 100% accuracy, depending on the data.¹⁴⁶ The Programs maintain higher accuracy than others that currently exist, which tend to yield 90% accuracy rates.¹⁴⁷ These are high levels of accuracy. However, the Raphael case study results undermine these rates. Further, an opposing party could raise the issue of subjectivity within the datasets, making the accuracy rate irrelevant under both *Daubert* and *Hahn*.

The fourth prong may consider two standards: art authentication standards and general AI standards. First, a court may note that there is not necessarily a singular recognized standard by which art is authenticated. In addition to technical analysis, art can be authenticated by a connoisseur, by a certificate of authenticity, by a work's inclusion in a catalogue raisonné, and via provenance research.¹⁴⁸ Again, technical analysis is preferred in the courts because it is more objective. For example, chemical analysis discovering an anachronistic paint pigment will prove that a work is inauthentic. Hephaestus and Ugail seem to use a holistic approach, including chemical analysis in their approaches.¹⁴⁹ Art Recognition's program uses brushstroke analysis,¹⁵⁰ a technical process that analyses surface topography.¹⁵¹

¹⁴² RESEARCH AND ACADEMIC PARTNERSHIPS, <https://art-recognition.com/research-academic-partnerships/> (last visited Aug. 19, 2024); UGAIL ET AL., *supra* note 3.

¹⁴³ Haddad, *supra* note 133, at 906.

¹⁴⁴ Sula, *supra* note 25.

¹⁴⁵ Prideaux, *supra* note 1.

¹⁴⁶ UGAIL ET AL., *supra* note 3.

¹⁴⁷ Frank, *supra* note 111.

¹⁴⁸ Prideaux, *supra* note 1.

¹⁴⁹ OUR AUTHENTICATION PROTOCOL, *supra* note 3; UGAIL ET AL., *supra* note 3, at 19.

¹⁵⁰ OUR TECHNOLOGY, *supra* note 3.

¹⁵¹ Benjamin Sutton, *Researchers train AI to attribute paintings based on detailed brushstroke analysis*, THE ART NEWSPAPER (Jan. 4, 2022),

Considering the historical legitimacy afforded to technical analysis and the support for this under *Hahn*, this element weighs towards admissibility.

The issue, however, will come from a secondary aspect of element four. AI is a relatively new technology, and law and policy are struggling to keep up. Regulatory standards on AI are presently quite limited; for example, there are no standards to ensure the accuracy of private companies' algorithms.¹⁵² There are also no regulations on data collection to develop and train algorithms or regulate the use of AI; meanwhile, laws that do exist are limited in their application.¹⁵³ The Biden Administration issued what is known as the “AI Bill of Rights,” which outlines principles for the safe development and use of AI.¹⁵⁴ Relevantly, the first principle calls for AI development by experts who will prevent extraneous or improper data from forming the algorithm to ensure safe and effective programs.¹⁵⁵ Though this executive order is not binding, a court could look to it for guidance in place of actual regulations. For example, in evaluating the Programs, a court could examine the process by which data is entered for machine learning and whether any of the data was improper. Since there are no binding standards yet, it weakens the probability that expert evidence would be admissible,¹⁵⁶ especially since the expert would be predominantly an expert in AI as opposed to an expert in AI art authentication programs specifically.

Finally, under *Daubert*, a court will again look at whether the method is “generally accepted.” In addition to the above analysis under *Frye*, a court will consider FRE 702(c).¹⁵⁷ However, that standard alone “should not be applied in federal trials.”¹⁵⁸ Again, it appears as though the Programs are likely to be considered generally accepted. However, the Raphael case study highlights an issue with reliability. The differing methodologies produced different results, which boils down to an opinion on the work rather than a testable scientific fact. Though the Programs are rooted in scientific methodology, the practice still seems to connote subjective belief and may be generally unreliable.

<https://www.theartnewspaper.com/2022/01/04/artificial-intelligence-attributes-paintings-brushstroke-analysis>.

¹⁵² Haddad, *supra* note 133, at 898.

¹⁵³ *Id.* at 899; HOPE ANDERSON ET AL., *AI Watch: Global regulatory tracker - United States*, WHITE CASE (May 13, 2024) <https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states#:~:text=Laws%2FRegulations%20directly%20regulating%20AI,AI%20albeit%20with%20imited%20application>.

¹⁵⁴ BLUEPRINT FOR AN AI BILL OF RIGHTS, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> (last visited Aug. 19, 2024).

¹⁵⁵ *Id.*

¹⁵⁶ Haddad, *supra* note 133, at 907.

¹⁵⁷ 509 U.S. at 584.

¹⁵⁸ *Id.* at 589.

While not discussed in *Daubert*, a court will also look to FRE 702(d). An expert on the Programs must demonstrate that the data was reliably applied. A court will not admit the expert testimony of a conclusion where the program was not properly used. For example, if a Program requiring a contrast set did not compare the work in question to a contrast set, it is likely that the court would find that the tool was not properly applied. In the Raphael case, a party could argue that Ugail's facial recognition technology is not holistic enough and is therefore unreliable for attribution. Alternatively, a party could claim that Art Recognition did not study the face reliably. As such, in that example, this factor may also weigh against admissibility.

The issues raised under *Daubert* may distinguish AI authentication from other forms of technical analysis that do not present these issues. For example, the Ninth Circuit found in favour of expert testimony as to the use of infrared imaging.¹⁵⁹ The court found that the methodology was reliable, met existing industry standards, and the methodology was capable of being explained.¹⁶⁰ Though the court in this case did not analyse every element, the methodology favoured toward admissibility¹⁶¹ for reasons that an expert on AI authentication may be inadmissible, emphasizing the above-noted issues.

In summary, a court might not readily admit expert testimony about the Programs for the following reasons: the logistical issues in testing the methodology due to the nature of art authentication, the obstacles in obtaining proprietary information to evaluate, the lack of AI industry standards by which to base the methodology, general unreliability, and, in the case of Hephaestus, the lack of peer-reviewed publications.

Yet, a court would balance such factors against others that weigh toward admissibility, such as the high accuracy rates, the fact that neural networks are a generally accepted way to develop AI programs, and the fact that the Programs are indeed capable of repeat testing. While bringing in evidence of an AI's determination on a work may be extremely convincing to a jury in an art dispute, having the expert testimony to explain it and make it accessible to a jury may not be readily feasible under *Daubert*.

B. *Impeaching a Biased Witness*

1. Bias

¹⁵⁹ Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807 (9th Cir. 2014).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

A benefit of using AI authentication is that AI is, purportedly, without bias because it is “a mechanical process rather than an individual’s personal opinion.”¹⁶² In fact, the Programs are marketed as *unbiased* authentication tools. Hephaestus published an article stating that “[w]hile human experts may rely on subjective judgments and personal biases, AI algorithms can provide consistent and evidence-based assessments, reducing the risk of human error and bias in the authentication process.”¹⁶³ Art Recognition uses cross-validation in their technology,¹⁶⁴ which is said to have a lower level of bias than alternative ways of checking a program’s efficiency.¹⁶⁵ Further, Art Recognition’s website advertises that their product is “100% objective and unbiased” and that the “[r]esults are purely data-driven, with no human intervention.”¹⁶⁶ In his paper, Ugail refers to the tool’s potential due to the “unbiased scientific analysis” it offers.¹⁶⁷

Nevertheless, many scholars question whether AI, generally, can be unbiased.¹⁶⁸ One study focuses on bias manifested through racial discrimination.¹⁶⁹ Emile Loza de Siles offers insight into the technological processes that can allow bias to arise in data, modelling, algorithm development, and use of AI programs.¹⁷⁰ To either eliminate bias, or make it apparent, it is essential to test for bias at each step in the process, such as in the data input stage.¹⁷¹ Selecting the input data is a “multistep set of processes by which data are sourced, vetted, corrected, augmented and transformed” and then are presented by algorithmic processes.¹⁷² Theoretically, it should be possible to eliminate any AI bias.¹⁷³ On the other hand, by eliminating or mitigating one bias, another may develop.¹⁷⁴ As such, there is a balance that AI program developers need to strike.

Bias in AI could look like “favouritism towards some things, people or groups over others.”¹⁷⁵ The origin of the bias could be varied, but could come from “biases within human cognition and societies.”¹⁷⁶ These subjectivities are then, in

¹⁶² Sula, *supra* note 25.

¹⁶³ Prideaux, *supra* note 1 (emphasis added).

¹⁶⁴ OUR TECHNOLOGY, *supra* note 3.

¹⁶⁵ *Id.*

¹⁶⁶ SHAPING TOMORROW’S ART AUTHENTICATION WITH AI, *supra* note 39.

¹⁶⁷ UGAIL ET AL., *supra* note 3, at 202.

¹⁶⁸ Emile Loza de Siles, *Artificial Intelligence Bias and Discrimination: Will We Pull the Arc of Moral Universe towards Justice?*, REVISTA FORUMUL JUDECATORILOR, 51 (2022).

¹⁶⁹ *Id.* at 42.

¹⁷⁰ *Id.* at 46.

¹⁷¹ *Id.* at 48.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 51.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

a way, coded into AI.¹⁷⁷ Further, bias could arise at varying stages in the process, but especially during data sourcing and collection.¹⁷⁸

The risk of bias in AI is widely acknowledged. For example, the Institute of Electrical and Electronics Engineers, a technical professional organization, has various working groups to create best practices around AI and bias.¹⁷⁹ However, regulations on bias in AI dataset collection are lacking. For example, President Biden's October 2023 Executive Order does provide some best practices for using AI responsibly and avoiding bias perpetuation and discrimination, but the order does not provide any guidance on dataset best practices to avoid bias in the first place.¹⁸⁰ Where best practices do exist, they are not always consistently followed and these companies often "pick and choose" what information to disclose in an enquiry.¹⁸¹

While the scholarship on AI does not contemplate bias in the sense of human subjectivity *per se* (focusing more on discriminatory effects) the notion that AI authentication is unbiased is questionable at best. Furthermore, the lack of objectivity is also raised by the Raphael case study.

2. *Abel*

The next means that could present an issue with AI authentication evidence is impeachment. The FRE covers a party's ability to impeach a witness by "attack[ing] the witness's credibility."¹⁸² Under *United States v. Abel*, 469 U.S. 45, 50–51, 105 S. Ct. 465, 468, 83 L. Ed. 2d 450 (1984), bias can be a valid form in which to impeach a witness. In *Abel*, the court examined the admissibility of testimony from the defendant's fellow gang member.¹⁸³ The gang's tenets to "lie, cheat, steal [and] kill to protect each other" caused concern for allowing the testimony into evidence.¹⁸⁴ In this case, the District Court admitted the testimony that impeached the defendant's witness.¹⁸⁵ The Court of Appeals found that the

¹⁷⁷ Schneider, *supra* note 42.

¹⁷⁸ Loza de Siles, *supra* note 171, at 51.

¹⁷⁹ *Id.*

¹⁸⁰ Exec. Order No. 14110, 88 F.R. 75191 (2023).

¹⁸¹ Arpit Gupta, *Industry AI "Standards" May Be a Good Band-Aid, But We Need Enforceable Standards in the Long Run*, TECHPOLICY.PRESS (Apr. 15, 2024) <https://www.techpolicy.press/industry-ai-standards-may-be-a-good-bandaaid-but-we-need-enforceable-standards-in-the-long-run/>.

¹⁸² Fed. R. Evid. 607.

¹⁸³ 469 U.S. at 45.

¹⁸⁴ *Id.* at 48.

¹⁸⁵ *Id.* at 46-47.

admission was improper.¹⁸⁶ The Supreme Court granted certiorari and ultimately held that the District Court did not err in admitting the evidence.¹⁸⁷

Successful demonstrations of a witness's bias would make the facts to which they testified seem less probable to the jury than if that testimony were absent.¹⁸⁸ The court in *Abel* defines bias as:

a term used in the ‘common law of evidence to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favours of or against a party. [...] *Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony.* The ‘common law of evidence’ allowed the showing of bias by extrinsic evidence [...].¹⁸⁹

The gang’s tenets demonstrated that the witness had a strong motive to bias his testimony in favour of the respondent, leading the court to find that the evidence of the bias was admissible and could be used to impeach the witness.¹⁹⁰

In addition to cross-examination, parties may introduce extrinsic evidence to demonstrate bias.¹⁹¹ This contrasts with FRE 608(b), which permits impeachment of a witness’s character for truthfulness through cross-examination but prohibits the use of extrinsic evidence. Allowing extrinsic evidence to show bias highlights the significance of proving it in court.

3. *Abel* Analysis

A party seeking to impeach the Programs’ results as biased could cite *Hahn*’s note that expert opinions based on “psychological correlation” are “too introspective and subjective to be the basis of any opinion a jury can pin its faith upon.”¹⁹² Such a party may also consider citing *Daubert*’s standard of “knowledge” which favors facts over subjective belief.¹⁹³ While this type of bias is not exactly what the court in *Abel* contemplated, it is a risk to admit such evidence because the

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 51.

¹⁸⁹ *Id.* at 52. (emphasis added)

¹⁹⁰ 469 U.S. at 46, 54- 56.

¹⁹¹ See e.g., *Coates v. United States*, 113 A.3d 570 (D.C. 2015).

¹⁹² 234 N.Y.S at 192.

¹⁹³ 509 U.S. at 590.

core of the issue is the same: it allows a jury to review evidence that is skewed to one side rather than neutral information on which they could base their decision. This is because, again, the results can be likened to opinion over fact.

A component that poses problems in determining if an AI program is biased is the lack of transparency. AI programs are proprietary and their trade secrets are unlikely to be disclosed.¹⁹⁴ For example, some police departments use AI facial recognition but contract with private companies that will not disclose trade secrets if the information the technology yields is in dispute.¹⁹⁵ The issue goes deeper because there are currently no enforceable standards that will require companies that develop AI to disclose certain information about their engineering or programs.¹⁹⁶

Furthermore, it is unclear whether the Programs are developed in a biased or unbiased manner. Although the Programs do provide some public information on their processes, these processes have the intention to eliminate bias. The following process summaries by each company may help demonstrate how the Programs try to remain objective.

Hephaestus' AI is trained on high-resolution images that have been determined to be authentic artworks in conjunction with fixed variables,¹⁹⁷ which "eliminates the need for very large data sets that can be difficult to acquire and curate."¹⁹⁸ The technology creates a "fingerprint," which captures aspects of the work's creation, such as "the pressure exerted by a paintbrush on a canvas."¹⁹⁹ The AI will take the artist's specific characteristics and assign each characteristic a value that "assesses its contribution to the artist's style."²⁰⁰ Hephaestus then completes provenance research for the work in question, consults with a connoisseur, and conducts a chemical analysis to ensure the materials' ages align with the attribution.²⁰¹

Art Recognition's process starts with a database on each artist.²⁰² For the system to identify fakes, the company integrates a contrast set of works.²⁰³ The contrast set also includes forgeries in the style of the artist that is created by generative AI.²⁰⁴ The company creates multiple versions of the image which vary

¹⁹⁴ Haddad, *supra* note 133, at 903.

¹⁹⁵ *Id.*

¹⁹⁶ Gupta, *supra* note 184.

¹⁹⁷ OUR AUTHENTICATION PROTOCOL, *supra* note 3.

¹⁹⁸ *Id.*

¹⁹⁹ Prideaux, *supra* note 1.

²⁰⁰ *Id.*

²⁰¹ OUR AUTHENTICATION PROTOCOL, *supra* note 3.

²⁰² OUR TECHNOLOGY, *supra* note 3.

²⁰³ *Id.*

²⁰⁴ *Id.*

in contrast, luminosity, and hue so that the AI can more consistently identify authentic works despite how the photo of the work was taken.²⁰⁵

The dataset for Ugail's program uses deep learning to differentiate painting styles in addition to facial recognition data.²⁰⁶ The program is based on so-called "objective" expert determinations of authorship.²⁰⁷ It also provides facial data that is qualified as either "perfect" or "imperfect" to improve the datasets for each part of the face.²⁰⁸

While the processes and prevention for bias are extensive, the issue is that a portion of the datasets are based on subjective connoisseurship. This is especially the case for Hephaestus' and Ugail's programs because their datasets are not comprehensive. Hephaestus uses a limited sample of authenticated works in their datasets, while Ugail's do not seem to corroborate expert determinations with other means of authentication. Of course, information to the contrary that is not currently available to the public could be disclosed in discovery.

A final question to explore is this: how should a court treat this combination of subjective connoisseurship and technical analysis? Would the fact that some of the Programs employ further technical analyses, like chemical analysis, trump the psychological nature of the connoisseurship included in the dataset? Would a court dismiss the notion that subjective data could create a biased AI attribution?

Abel was concerned with the witness's propensity to lie on the stand, thus creating a biased witness who is not necessarily trustworthy in their testimony. This is an inherently different type of bias than the bias that may occur in AI art authentication. However, a party contesting the admission of the Programs' determinations could still present a valid argument under *Abel*. This is because of the court's definition of bias. While it does say that bias is a descriptor of the *relationship* between the party and the witness, it also includes that "which might lead the witness to slant, unconsciously or otherwise, his testimony in favours of or against a party."²⁰⁹ In theory, it is not the case that bias has to arise solely through the party's relationship to the matter.

Here, the results may be biased when the data includes degrees of subjectivity. Whether the data is fully or partially based on the determination of a connoisseur, that very subjectivity becomes part of the dataset. A connoisseur's determination of authenticity based on feeling only, without provenance research or technical analysis, may frankly result in an incorrect attribution. Basing an attribution on feeling could demonstrate a connoisseur's bias towards any number

²⁰⁵ *Id.*

²⁰⁶ UGAIL ET AL., *supra* note 3, at 19.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 469 U.S. at 52.

of things: a certain artist, period, subject matter, color use, style, and composition. For example, hypothetically, feelings of dislike toward a subject matter may subconsciously lead a connoisseur to deem a work inauthentic, in turn polluting the dataset. An incorrect attribution would then permeate the dataset and could create false positives when analysing another painting. Despite the various tests undertaken by the Programs, the final result is inherently biased as it favors one result over another. This may be impeachable because an undermined attribution could tarnish the evidence of the case and lead a jury to an incorrect result.

To prove bias, a party could present extrinsic documentary evidence. For instance, a party may show (1) the percentage of works in a “genuine works” dataset that were authenticated by a connoisseur and (2) the percentage of works in an “inauthentic works” dataset that were deemed inauthentic by a connoisseur. This statistical data would illustrate the inherent subjectivity within the dataset. However, this information will not always be publicly available. For example, Art Recognition made their Raphael dataset publicly accessible only after the controversy.²¹⁰ The public information includes each high-resolution image of authentic and inauthentic works used to train the AI.²¹¹ Additionally, they provided a spreadsheet with details about each work, such as its title, date, medium, and location.²¹² What is missing from this public information, however, is how much of this data is based solely on connoisseurship as there is no explanation for how, or why, a work was deemed genuine. The burden of disclosing this information would be on the impeaching party, but again, a court could require it in discovery (with a Protective Order).²¹³ If an arguing party could obtain information on the amount of data that is based on connoisseurship, then that party should be allowed to admit that information into evidence to inform a jury of the likelihood of a subjective result.

A party opposing impeachment would argue that a court may ultimately decide that the AI is not a witness at all. The New York Court of Appeals heard a case where the defendant sought to question the developer of an AI source code, arguing that the source code was a witness and that he had the right to question that witness.²¹⁴ Indeed, a source code is essential to understanding the inner workings of an algorithm.²¹⁵ The court, however, denied this argument, advising that the source code was not a testimonial witness and that the argument raised more of a

²¹⁰ ART RECOGNITION RAPHAEL TRAINING DATA SET, https://github.com/ArtRecognition/Raphael_Dataset (last visited Aug. 19, 2024).

²¹¹ *Id.*

²¹² *Id.*

²¹³ 466 N.J. Super. At 270.

²¹⁴ *People v. Wakefield*, 38 N.Y.3d 367, 195 N.E.3d 19, reargument denied, 38 N.Y.3d 1121, 192 N.E.3d 1152 (2022).

²¹⁵ Haddad, *supra* note 133, at 910.

discovery issue than an evidence issue.²¹⁶ This is essentially because the source code itself cannot be cross-examined.²¹⁷ This would also be the case with the Programs themselves. Of course, it would be impossible to call the AI itself to the stand (at least, with the current technology). However, technical reports, such as a lab report or an authentication report, are inadmissible unless a technician can validate the report.²¹⁸ It is necessary to have an agent to testify as to the report. The author argues that the information provided by the agent regarding the report may be impeachable due to bias. As such, the analysis concerning a party's ability to impeach the Programs' agents as witnesses stands.

The potential for bias in AI art authentication is a distinct reality. Parties should not immediately assume otherwise based on the preconceived notions of AI and should be able to impeach such information to ensure that a court's findings are based upon neutral information, not subjective opinions. While the Programs themselves are not the impeachable witness, the agents testifying on them would have to testify to the results reached from biased input, which could be impeachable.

V. CONCLUSION

While AI art authentication is likely the future of attribution—and may lead to the most accurate attribution results overall—using AI attribution as evidence in legal disputes may not be so straightforward. Due to the tradition of placing importance on a connoisseur's attribution, AI technology based on connoisseurs' opinions may create problems for admitting AI attributions as evidence.

Under *Hahn*, objective technical analysis is prioritized in evidence over subjective feelings or opinions. However, there are aspects to AI authentication technology that are subjective. Moreover, several implications must be considered when attempting to admit expert testimony on these Programs under *Daubert*. Finally, parties may have valid arguments for impeaching the AI reports due to bias under *Abel*.

These complications do not tend to shed light on which authentication regime would carry more weight in court, as AI authentication presents issues unique to both subjective and technical analysis. In fact, the analyses show that a party seeking to admit evidence of these reports could be blocked either on the technical methodology side under *Daubert* or by way of impeachment under *Abel*. Therefore, though AI authentication is a form of technical analysis, it may not be readily admitted.

²¹⁶ 38 N.Y.3d 378.

²¹⁷ 38 N.Y.3d 385.

²¹⁸ 557 U.S. at 308.

Though AI authentication has the potential to be the leading technology to accurately authenticate artworks, there will be hurdles to admitting such evidence when a court hears an attribution dispute.

COLOUR MARKS AS NON-TRADITIONAL TRADEMARKS: NOT AS SIMPLE AS BLACK AND WHITE

*Chiara Gallo**

I. INTRODUCTION: THE BLANC CANVAS

A. *Painting the Picture Behind the Research Question*

“*He made it because Anish Kapoor won’t share his black with anyone else.*”¹ These are the words that appear on the landing page for the *World’s Blackest Black Paint* on Culture Hustle – Stuart Semple’s website.² Stuart Semple, who has recently made the news in relation to a lawsuit brought by the rightholders of a well-known colour mark in the art world,³ is a British contemporary artist whose practice spans painting, performance, internet art, installation and art activism (“*artivism*”), especially when it comes to the monopolisation colours, which are considered basic features in many forms of art practices.

Specifically, his statement aimed at commenting on another famous artist’s acquisition of the exclusive rights to use the most common and basic colour in the

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¹ Stuart Semple, *You’re Looking at the World’s Blackest Black Paint*, CultureHustle (2025), <https://culturehustle.com/products/black-3-0-the-worlds-blackest-black-acrylic-paint-150ml>.

² Semple, *supra* note 1;

Sarah Cascone, *Anish Kapoor Owns the Rights to the Blackest Color Ever Made. So another Artist Made His Own Superblack – and Now It’s Even Blacker*, ArtNet (January 30, 2019), <https://news.artnet.com/art-world/stuart-semple-blackest-black-anish-kapoor-1452259>;

Kyle Munzenrieder, *The World’s “Blackest Black” and the Hilarious Artist Feud Behind It*, W Magazine Conde Nast, (May 26, 2017).

³ Karen K. Ho, *Artist Stuart Semple Loses Trademark Infringement Lawsuit to Yves Klein Estate*, Artnet (April 30, 2025), <https://news.artnet.com/art-world/yves-kleins-sued-stuart-semple-blue-paint-2637556>.

visual arts, *black*. Indeed, in 2016, Anish Kapoor, the British-Indian sculptor specialising in installation art and conceptual art, acquired the exclusive rights to use the *Vantablack* colour, which absorbs 99.965% of visible light. The peculiarity of this *super*-black colour is represented by, in addition to the retained uniform light absorption from almost every viewing angle, the fact that it can be artistically used only by Anish Kapoor in a comparable way as colour marks can be used to represent their commercial origin.⁴ Touching upon this resemblance, the article will focus the analysis on whether non-traditional trademarks, specifically colours, can enjoy the protection granted by being registered as trademarks. As colours have the power to create instant recognition for commercial products, especially in the creative industries, trademark protection grants a series of fundamental rights to the entities that have registered colour marks, and these rights include the ability to prevent others from offering goods or services under a mark that is confusingly similar.⁵ Colour is fundamental to brand and artistic identity, and, while not always registered as trademarks, when it comes to visual arts, it is possible to identify some artists' distinctive colours, namely Yves Klein's *Blue*,⁶ Van Gogh's *Yellow*, and Monet's *Manganese Violet*.⁷

This raises several challenges, including issues relating to whether the monopolisation of a colour in its entirety, in the form of an intellectual property right, results in the consequent monopolisation of all potential uses, shapes, and manifestations of the colour. This article will address how colours can be protected under trademark law in the United Kingdom, by specifically assessing whether artists can commercially monopolise specific colours and the related challenges. Specifically, the analysis will consider the law on trademarks, in particular the *Trade Mark Act 1994* and the retained European Union (EU) law on trademarks. The following step is to consider the law on non-traditional trademarks, by examining both the Court of Justice of the European Union ("CJEU") judgements and the *Nestlé v. Cadbury* case law on colours. The analysis will then move to the changes brought by the advent of Brexit and the example of colours monopolised

⁴ It is important to note that, while *Vantablack* is protected under patent law in the United States, commercially, the colour does not enjoy trademark protection, but the name does, as registered in the United States Patents and Trademarks Office. See -, *VANTABLACK – Trademark Details*, Justia.com (August 4, 2015), <https://trademarks.justia.com/791/56/vantablack-79156544.html>.

⁵ Francisco Marquez-Stricker, *Colours and Trade Marks*, 43 *LAWNOW* 26, 27 (2018).

⁶ *Yves Klein's 'open window to freedom': California, (IKB 71), 1961*, Christies.com (October 10, 2025), <https://www.christies.com/en/stories/yves-klein-california-ikb-71-1c6c1dfc76df4f598910f64c0df1ea81>.

⁷ Adelaide Saucier, *Color Blocking: How to Protect a Color*, *Center for Art Law* (April 10, 2019) <https://itsartlaw.org/2019/04/10/color-blocking-how-to-protect-a-color/>.

Robert Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 *CHI.-KENT L. REV.* 725 (1992).

by artists, by covering the *Vantablack* case study. The conclusion will reflect on the most important characteristics of this area of intellectual property law and on likely future developments.

B. Relevance

Historically, it has been difficult to register and enforce non-traditional trademarks. However, recently, various jurisdictions and courts have started to recognise the increasing importance of the way brands are communicated and of the role they play in helping consumers identify the source and origin of a specific product.⁸ Visual communication dominates over verbal communication, especially considering that consumers tend to remember the distinctive colours associated with the logos of brands.⁹ It is the case of *Starbucks*' green double-tailed mermaid and *Apple*'s white apple, or the colours linked to the packaging of products, like *Mattel*'s pink,¹⁰ *Rolex*'s emerald green and *Tiffany & Co*'s robin egg blue.¹¹

The article also identifies existing gaps. The first aspect considered in the article relates to the fact that intellectual property rights have been affected by changes due to the advent of Brexit.¹² Nonetheless, trademark law, with some

⁸ Michael Loney, et al., *The 10 Trade Mark Topics to Watch*, 267 MANAGING INTELL. PROP. 31, 35 (2017).

⁹ *Id.*

¹⁰ Pantone 219C or *Barbie Pink*.

¹¹ *Barbie Pink: What do Mattel's Rights in the Valuable Color Look Like?*, The Fashion Law, (July 20, 2023), <https://www.thefashionlaw.com/barbie-pink-what-is-it-and-what-do-mattels-trademark-right-look-like/>;

Rolex Watch Boxes: Evolution & Design from 1980 until Today, Watchmaster (July 26, 2022), [https://www.watchmaster.com/en/journal/brand-guide/rolex-boxes-2](https://www.watchmaster.com/en/journal/brand-guide/rolex-boxes-2;);

Our Story. Tiffany Story, Tiffany & Co. Newsroom (2025), <https://press.tiffany.com/our-story/tiffany-blue/>: the colour is identified as *1837 Blue* in the Pantone chart, and it has been a registered trademark for Tiffany and Co. since 1998.

¹² The Trade Secrets (Enforcement, etc.) Regulations 2018, SI 2018/597 (UK);

The Trade Marks (Amendments etc.) (EU Exit) Regulations 2019, SI 2019/269 (UK) (hereinafter "2019 TM EU Exit Regulations");

The Patents (Amendment) (EU Exit) Regulation 2019, SI 2019/801 (UK);

The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019, SI 2019/265 (UK);

The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, SI 2019/605 (UK);

The Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020, SI 2020/1637 (UK);

The Intellectual Property (Amendments etc) (EU Exit) Regulations 2020, SI 2020/1050 (UK) (hereinafter "2020 IP EU Exit Regulations");

Guidance. EU Trade Mark Protection and Comparable UK Trade Marks, GOV.UK (January 30, 2020), <https://www.gov.uk/guidance/eu-trademark-protection-and-comparable-uk-trademarks>;

procedural exceptions, is still EU-compliant, and the gaps relate to the manner of application of the new rights, which are still similar to European Union Trade Marks (EUTMs).¹³ The second aspect focuses on the fact that colour signs are considered to fall within the “*exotic marks*” categorisation and that they require a higher threshold to acquire protection. However, there are only a few instances in which these types of marks have been used in the artistic sector, especially considering how this sector is highly dependent on colours. This consideration is also relevant on the basis that the artistic sector has started to resemble a business, as represented by Kapoor’s acquisition of a new shade of the most basic colour available, *black*.¹⁴

II. THE BLACK SKETCH OF THE COMPOSITION ON THE WHITE CANVAS

A. Trademarks in the United Kingdom

1. Origin of the Current Trade Mark Law in the U.K.

The current UK law governing registered trademarks is set out in the *Trade Mark Act 1994* (“*TMA 1994*”).¹⁵ The statute was issued in order to repeal previous legal provisions on trademarks and to implement the *First Council Directive to approximate the laws of the Member States relating to trade marks* (“*Directive 89/104*”) to change the traditional function of trademarks on the basis of the European Union framework.¹⁶ With the introduction of the statute, more importance was given to the origin, as a guarantee, of a product or service.¹⁷ The *TMA 1994*, by setting out the grounds of refusal or invalidity, created for the first time in the United Kingdom the presumption that a mark ought to be registered unless there are specific objections to it. The latest amendments reflect the

Protecting Copyright in the UK and EU, GOV.UK (January 30, 2020), <https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period>;

Intellectual Property After Brexit, The Law Society (September 1, 2023), <https://www.lawsociety.org.uk/topics/brexit/intellectual-property-after-brexit>.

¹³ Tom Scourfield, *Annual Review of European Trade Mark Law. 2022 in Review*, 113 TRADEMARK REP 383, 385 (2023).

¹⁴ Cascone, *supra* note 2.

¹⁵ Trade Mark Act 1994 (as amended as of January 14, 2019), c. 26 (UK) (hereinafter “*TMA 1994*”);

The Trade Mark Regulations 2018, SI 2018/825 (UK) (hereinafter “*2018 Regulations*”).

¹⁶ First Council Directive 89/104/EEC (now repealed), 1989 O.J. (L 40) 1 (EU) (hereinafter “*89/104 Directive*”).

¹⁷ Laddie J in *Wagamama Ltd v. City Centre Restaurants plc* [1995] FSR 713 (UK);

Case C-251/95, *Sabel BV v. Puma AG, Rudolf Dassler Sport*, 1997 E.C.R. I-06191 (EU) (hereinafter “*Case C-251/95, Sabel*” and “*Sabel*”).

implementation of the *2015 EU Harmonisation Directive* (“*Harmonisation Directive*”), which, in the UK, became effective in January 2019.¹⁸

Under the law, the fundamental concept of a trademark is a badge of origin to indicate the source or the trade origin of the goods and services for which it is used.¹⁹ The same is used to distinguish the wares or services of one provider from those of another and to facilitate consumer purchasing decisions.²⁰ Consequently, it serves the dual purpose of allowing a consumer to know where the products are coming from, and they allow producers to build up a reputation within a particular market.²¹ An example of this in the art world would be *Christie’s*, the logo and related colour palette of the homonym auction house and art and luxury business with offices worldwide. These marks commercially identify the brand identity and distinguish its services from those of other traders in the same market, as for example is related to, according to the International trademark system, *class 35s*.²²

¹⁸ Christopher Morcom, et al., *Morcom on Trade Marks*, 5.1 (6th ed, 2021);

Agreement relating to Trade Related Aspects of Intellectual Property, April 15, 1994, LT/UR/A-1C (hereinafter “TRIPS”); European Communities Act 1972 (now repealed), c. 68, s. 2(2) (UK);

Council Directive 2015/2436, 2015 O.J. (L 336) 1 (EU) (hereinafter “Harmonisation Directive”);

Council Regulation 2017/2001, 2017 O.J. (L 154) 1 (EU) (hereinafter “EUTMR”);

The Patents and Trade Marks (World Trade Organisation) Regulations 1999, SI 1999/1899 (UK);

The Trade Marks (Proof of Use, etc) Regulations 2004, SI 2004/946 (UK);

The Trade Marks (International Registrations Designating the European Community, etc) Regulations 2004, SI 2004/2332 (UK);

The Intellectual Property (Enforcement, etc) Regulations 2006, SI 2006/1028 (UK);

The Trade Marks (Relative Grounds) Order 2007, SI 2007/1976 (UK) (hereinafter “2007 Relative Grounds Order”);

The Trade Marks (Earlier Trade Marks) Regulations 2008, SI 2008/1067 (UK) (hereinafter “2008 Earlier Trade Marks Regulations”);

2018 Regulations (UK).

¹⁹ James Mellor, et al., *Kerly’s Law of Trade Marks and Trade Names*, 2-003 (16th ed, 2020);

Harmonisation Directive, recital 16 (EU);

EUTMR, recital 11 (EU).

²⁰ Annette Kur, *Convergence After All? A Comparative View on the US and EU Trademark Systems in the Light of the “Trade Mark Study”*, 19 J. INTELL. PROP. L. 305, 306 (2012).

²¹ Case C-349/95, *Frits Loendersloot v. George Ballantine & Son Ltd. and others*, 1997 E.C.R. I-06227, 22-24 (EU);

Case C-39/97, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*, 1998 E.C.R. I-05507, 28 (EU);

Case C-299/99, *Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.*, 2002 E.C.R. I-05475, 30 (EU) (hereinafter “Case C-299/99, *Philips*” and “*Philips*”).

²² *Trademark: US500000074558226*, European Union Intellectual Property Office (2025) <https://www.tmdn.org/tmview/#/tmview/detail/US500000074558226>;

2. Section 1 of TMA: the Definition of ‘Trade Mark’ in the UK

Section 1 of *TMA* 1994 contains a comprehensive definition of “*trade mark*,” which covers both goods and services.²³ Indeed, in order to be registrable, a mark must be a sign that is capable of being represented in a manner that is clearly and precisely determinable by the public and capable of distinguishing goods and services of one undertaking from those of other undertakings.²⁴

The meaning of the word “*sign*” developed from representing anything that could convey information, as long as it was capable of being graphically and visually represented, to anything that is capable of being represented in the register in a manner that enables the competent public authorities and the public to determine the clear and precise subject matter of the protection and avoid unfair advantage. Consequently, marks have developed to the extent that, under the latest legal provisions, they can also be registered and presented electronically in a variety of formats, including as *MP3* and *MP4* formats or as *JPEG* files, in order to incorporate movement or sounds,²⁵ as long as the abuse of trademark law by obtaining an unfair competitive advantage is prevented.²⁶

3. Section 3 TMA: Grounds for Refusal

The following step is to consider the grounds for refusal of registration and for invalidation of a registration. These grounds are the basis for the refusal of the validity of marks when in conflict with the rights of other parties. Section 3 *TMA* 1994 lists the absolute grounds, namely specific characteristics for which the marks

Trademark: WO50000000949532, European Union Intellectual Property Office (2025), <https://www.tmdn.org/tmview/#!/tmview/detail/WO50000000949532>;

Class 35, World Intellectual Property Office (2025), https://www.wipo.int/classifications/nice/nclpub/en/fr/?class_number=35&explanatory_notes=show&gors=&lang=en&menulang=en¬ion=class_headings&version=20190101:auctioneering_services,auction_advice_and_consultancy_services,and_valuation_service.

²³ TMA 1994, s. 1 (UK).

²⁴ *Id.* at s. 1(1) (UK);

Lionel Bently, Brad Shreman, *Intellectual Property Law*, 694 (2nd ed, 2004).

²⁵ *Implementation of the EU Trade Mark Directive 2015*, GOV.UK (2025), <https://www.gov.uk/government/publications/implementation-of-the-trade-mark-directive-2015/implementation-of-the-eu-trade-mark-directive-2015>;

Harmonisation Directive (EU);

Changes to the UK Trade Marks Act and Rules, Franks & Co (January 11, 2019), <https://www.franksco.com/news/changes-to-the-uk-trade-marks-act-and-rules/>.

²⁶ Case C-321/03, *Dyson Ltd. v Registrar of Trade Marks*, 2007 E.C.R. I-00687, 34 (EU) (hereinafter “Case C-321/03, *Dyson*” and “*Dyson*”).

do not satisfy the definition of trademark, implementing and complying with the mandatory provisions of the *Harmonisation Directive*, and they include signs:

- (1) that do not satisfy the requirements of s. 1, lack of distinctiveness, are exclusively descriptive and consist in indications that have become customary in the current language or in the bona fide and established trade practices;²⁷
- (2) that represent “*shape*” marks that are descriptive in nature or give substantial value to the goods;²⁸
- (3) that are against public policy or morality, or that are aimed at the deception of the public;²⁹ or if the signs, or their registration, are prohibited in the United Kingdom,³⁰ or their application was made in bad faith.³¹

In addition, s. 5 provides for relative grounds for refusal.³² This category of grounds covers signs that present some conflict with the rights of another party, including the proprietor of a similar or identical mark, namely a trademark registered before the application for the new mark.³³ The relative grounds include signs:

- (1) that are identical with an earlier trademark and the goods or services for which the trademark is applied for are identical with the goods or services for which the earlier trademark is protected;³⁴
- (2) that present a likelihood of confusion on the part of the public and the likelihood of association with an earlier trademark;³⁵
- (3) identical or similar to earlier trademarks and the registration would cause unfair advantage or detriment to the reputation and distinctive character of the earlier mark;³⁶

²⁷ TMA 1994, ss. 1 and 3(1) (UK).

²⁸ *Id.* at s. 3(2) (UK).

²⁹ *Id.* at s. 3(3) (UK).

³⁰ *Id.* at ss. 3(4) and 4 (UK).

³¹ *Id.* at s. 3(5) (UK).

³² *Id.* at s. 5 (UK).

³³ *Id.* at ss. 5(5) and (6) (UK);

2007 Relative Grounds Order (UK);

The Trade Marks (Amendment) Rules 2007, SI 2007/2076 (UK);

2008 Earlier Trade Marks Regulations (UK).

³⁴ TMA 1994, s. 5(1) (UK).

³⁵ *Id.* at s. 5(2) (UK).

³⁶ *Id.* at s. 5(3) (UK).

(4) that are liable to be prevented by virtue of any law protecting unregistered trademarks or signs unused in the course of trade, or by virtue of an earlier right other than the ones already mentioned, in particular by the law of copyright, design right or registered designs.³⁷

In addition, s. 6 provides for the grounds related to the rights of an earlier (prior) mark.³⁸

4. Rights of Registered Trademarks

In the case in which a sign fulfils the description in s. 1(1) and no ground of refusal is raised successfully against the mark, the same can be registered as a trademark and, as such, can enjoy a series of rights. In particular, the proprietor of a registered trademark has exclusive rights in the trademark,³⁹ which include:

(1) the use of the sign, by affixing the sign to goods or their packaging, offering, or exposing goods for sale or on the market, importing or exporting goods under the sign, using the sign as a trade or company name or part of the same, using the sign on business papers and in advertising;⁴⁰

(2) the use of a sign in the course of trade in relation to goods or services.⁴¹

B. Colour Marks

1. The Main Characteristics

³⁷ *Id.* at s. 5(4) (UK).

³⁸ *Id.* at s. 6 (UK).

³⁹ *Id.* at s. 9(1) (UK).

⁴⁰ *Id.* at s. 10(4) (UK);

Beautimatic International Ltd. v. Mitchell International Pharmaceuticals Ltd. [2000] FSR 267 (UK);

Case C-567/18, *Coty Germany GmbH v. Amazon Services Europe Sàrl and others*, 2020 ECLI:EU:C:2020:267 (EU).

⁴¹ *Trebor Bassett Ltd. v. The Football Association Ltd.* [1997] FSR 211 (UK);

Case C-206/01, *Arsenal Football Club plc v. Matthew Reed*, 2002 E.C.R. I-10273 (EU);

Case C-48/05, *Adam Opel AG v. Autec AG*, 2007 E.C.R. I-01017 (EU);

Directive 89/104, art. 5(3) (EU).

Colour marks are one of the most successful non-traditional categories of registered marks.⁴² In the UK trademark system, colours were not initially considered within the scope of the *TMA 1994* and, consequently, not registrable as trademarks. The original definition of a trademark considered any sign capable of being graphically represented.⁴³ This definition excluded the protection, given by registration, to the use of a sign in other than a visual form. These signs are currently classified as being non-traditional marks, and included in the same category of sounds, smells, and tastes.⁴⁴ They were introduced in the trademark legal framework of the EU Member States in consequence of the European Court of Justice's ("ECJ") interpretation of the requirement of graphical representation of olfactory marks in the *Sieckmann* case.⁴⁵ However, historically, it had been more difficult to assess whether other non-traditional forms, including colours, were registrable.⁴⁶ The development of the law on trademarks in the United Kingdom resulted in the identification of a registrable mark as a sign that allows other traders to assess for themselves the scope of protection of the trademark.⁴⁷

In the specific case of colours, the developments in the law brought the legislator to include the word "colours" in s. 1(1) *TMA 1994*, to identify additional signs that could constitute a trademark.⁴⁸ The change was introduced with the

⁴² Mitchell Adams, Amanda Scardamaglia, *Non-traditional Trademarks: An Empirical Study* in Irene Calboli, Martin Senftleben (eds), *The Protection of Non-Traditional Trademark Critical Perspectives*, 47 (2018);

EUIPO Statistics for European Union Trade Marks, European Union Intellectual Property Office (September 2023), https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf;

⁴³ *TMA 1994* (as originally issued on October 31, 1994 and before the changes made with the introduction of The Trade Mark (Amendment) 1998 Rules), s. 1(1) (UK), <https://www.legislation.gov.uk/ukpga/1994/26/section/1/1994-10-31>;

The Trade Mark (Amendment) Rules 1998, SI 1998/925 (UK) (hereinafter "1998 Rules"), substituting a new r. 5, retained in The Trade Mark Rules 2000, SI 2000/136 (UK), when made, but subsequently removed.

⁴⁴ Simon Geiregat, *Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU*, 53 INT'L REV. INTEL. PROP. & COMPETITION L. 219, 220 (2022)

⁴⁵ Case C-273/00, *Ralf Sieckmann v. Deutsches Patent-und Markenamt*, 2002 E.C.R. I-11737, 18 (EU) (hereinafter "Case 273/00, *Sieckmann*" and "*Sieckmann*");

Case C-283/01, *Shield Mark BV v. Joost Kist*, 2003 E.C.R. I-14313, 55-59 (EU).

⁴⁶ Case C-273/00, *Sieckmann*, 18 (EU);

Non-traditional Marks – Still Struggling with Registration, Womble Bond Dickinson (February 3, 2020), <https://www.womblebond Dickinson.com/uk/insights/articles-and-briefings/non-traditional-marks-still-struggling-registration>.

⁴⁷ Mellor, *supra* note 19, at 2-003.

⁴⁸ *TMA 1994*, s. 1(1) (UK).

publication of the *Trade Marks (Amendment) Rules 1998* (“1998 Rules”),⁴⁹ and it was later confirmed to be in line with the general principles set by the European Union, as evidenced in both the CJEU case law and the domestic case law. The same case law, therefore, provided for the identification of registrable trademarks as not limited to the traditional understanding of a sign as a symbol, letter, or word, but “*any message which may be perceived by one of the five senses.*”⁵⁰

In relation to the registration of colour marks, in the case in which an applicant has complied with the requirements of the definition in s. 1(1),⁵¹ it is likely to encounter objections under s. 3(1)(b-d),⁵² namely for lack of distinctiveness, for being exclusively descriptive, or for being generic in relation to established *bona fide* practices. CJEU case law will be, thus, analysed both because of historical reasons and as it is possible to evidence similar considerations.

2. The EU Case Law: Case C-273/00, *Sieckmann*⁵³ and Case C-104/01, *Libertel*⁵⁴ on the Graphical Representation Condition

The earliest case before the Court of Justice of the European Union in relation to non-traditional marks questioned the meaning of the requirement of “*graphical representation*,” as considered in Article 2 of *Directive 89/104* and *Directive 2008/95 to approximate the laws of the Member States relating to trade marks* (“*Directive 2008/95*”).⁵⁵ In 2002, the *Sieckmann* case assessed the validity of an olfactory mark, namely a smell mark described as “*balsamic fruity with a hint of cinnamon*,” and held that graphic representation served legal certainty and the

⁴⁹ 1998 Rules, 43 (UK).

⁵⁰ Case C-321/03, *Dyson* (EU);

Jekaterina Kudrjavceva, *Issues Surrounding Registration of Colour Trade Marks*, 9 RGSL Research Papers, 15 (2012), <https://www.rgsl.edu.lv/uploads/research-papers-list/14/rp-9-kudrjavceva-final.pdf>.

⁵¹ TMA 1994, s. 1(1) (UK).

⁵² *Id.* at s. 3(1)(b)-(d) (UK).

⁵³ Case C-273/00, *Sieckmann*(EU).

⁵⁴ Case C-104/01, *Libertel Groep BV v. Benelux-Merkenbureau*, 2003 E.C.R. I-03793 (EU) (hereinafter “Case C-104/01, *Libertel*” or “*Libertel*”).

⁵⁵ Directive 89/104, art. 2 (EU);

Council Directive 2008/95/EC (now repealed), art. 2, 2008 O.J. (L 299) 25 (EU) (hereinafter “Directive 2008/95”);

Case C-273/00, *Sieckmann*, 5, 9, 11, 14, 18-19, 27-32, 39, 43-46, 55-56 (EU);

Case C-104/01, *Libertel*, 9, 29-37, 41, 47-66, 77-78, 105, 107 (EU);

Harmonisation Directive, which repealed the previously issued Directives (Directive 89/104, and Directive 2008/95), by removing the “*capable of being graphically represented*” requirement and introducing the wording, recital 13, “[a] sign should therefore be permitted to be represented in any appropriate form using generally available technology, and thus not necessarily by graphic means, as long as the representation offers satisfactory guarantees to that effect” (EU).

assurance that a sign is precisely identifiable, on the basis of its nature and of its scope, in the trademark register.⁵⁶ In the case at hand, the smell mark was also supported by its structural formula. The domestic authority refused the application on the grounds of the impossibility of graphical representation. In the ECJ decision, the delineation of fundamental requirements aimed at defining the mark itself and at ensuring that the precise subject of trademark protection could be established. There was the necessity for the mark to be self-contained, easily accessible, and intelligible, and continuously perceived in the same unambiguous manner, while the representation had to be unequivocal and objective.⁵⁷ In applying this definition to colour marks, a number of issues can be raised, especially in relation to the manner in which a colour can be described and to the identification of the nature of a colour mark.⁵⁸ This stems from the fact that colours are abstract; they have no shape, no contour, and no spatial delimitation, thus preventing the necessary degree of objectivity as established in the *Sieckmann* case, meaning that a colour requires another object for it to be representable in a meaningful way.⁵⁹

As a result, *Libertel* provided an important basis in the application of the *Sieckmann* criteria to colour marks registrations. In the case at hand, a Dutch telecommunication company sought to register a colour for the services it provided. The colour mark application consisted of the word “orange” without reference to any colour code supplementing the description of an orange rectangle.⁶⁰ The Court, in accordance with Article 2 of *Directive 89/104*, found that a mere sample of a colour would not suffice if not supplemented by a designation of the same colour using an internationally recognised identification code, as for example the *Pantone Matching System*, *RAL*, *Toyo*, *Focoltone* and *Munsell Color* or the *RGB* colour model.⁶¹ Colour identification codes provide for certainty as words are not

⁵⁶ Case C-273/00, *Sieckmann*, 30-33, 37, 46 (EU).

⁵⁷ *Id.* at 52-54 (EU).

⁵⁸ Case C-104/01, *Libertel*, 43-45, 92 (EU).

⁵⁹ *Id.* at 43-45 (EU).

⁶⁰ *Id.* at 15 (EU).

⁶¹ *Id.* at 37 (EU);

Decision of the Third Board of Appeal of February 12, 1998 in Case R 7/97-3, *Orange Personal Communications Services Ltd.*, 12 (EU) (hereinafter “Case R 7/97-3, *Orange*” and “*Orange*”);

Caroline McCubbin, *Brexit Blues: an Explanation of How the UK Legal Systems protect Colour and How This May Be Affected by Recent Legal and Political Developments*, 21 J. INT’L COLOUR ASSOCIATION 36, 40, (2018), https://www.aic-color.org/resources/Documents/jaic_v21_03.pdf;

Manual of Trade Marks Practice, GOV.UK (September 5, 2023), <https://www.gov.uk/guidance/trade-marks-manual/the-examination-guide>;

RGB, CMYK, PMS – What’s the Diff?, Design the Planet (February 15, 2012), <https://www.designtheplanet.com/rgb-cmyk-pms-whats-the-diff/>.

exhaustive enough to precisely describe the shade of a colour, and perception of colour is subjective.⁶²

3. Other CJEU Case Law

The CJEU has further interpreted the provisions on EU trademarks in relation to colour marks in Case C-49/02, *Heidelberger Bauchemie*,⁶³ where a combination of colours, “*blue and yellow*,” was used as a sign representing products used in the building trade. The Court held that referring to the disposition of colours in every conceivable form does not satisfy the *Sieckmann* criteria, as it does not provide for certainty and the sign cannot be precisely defined, and it could result in risk of abuse of the trademark rights.⁶⁴ This would allow the colour mark in question to enjoy a remarkably high level of protection, while infringing the ordinary understanding of fair and free competition.⁶⁵ Another reference to the *Sieckmann* criteria was made in the CJEU’s ruling of Case C-321/03, *Dyson Ltd. v. Registrar of Trade Marks*.⁶⁶ It considered that abstract representations and all the “*conceivable shapes of a transparent bin or collection chamber*”⁶⁷ cannot be identified as signs falling within the scope of Article 2 of *Directive 89/104*,⁶⁸ because they lacked distinctiveness.⁶⁹

⁶² Ann Bartow, *The True Colors of Trademark Law: Greenlighting a Red Tide of Anti Competition Blues*, 97(2) KY L.J. 263, 266 (2009);

Opinion of AG Lèger in Case C-104/01, *Libertel*, 43: “*shade can easily change with intensity of light, the distance from which it is seen and the individual eyes*” (EU).

⁶³ Case C-49/02, *Heidelberger Bauchemie GmbH v. Deutsches Patent- und Markenamt*, 2004 E.C.R. I-6129 (EU) (hereinafter “Case C-49/02, *Heidelberger Bauchemie*” and “*Heidelberger Bauchemie*”).

⁶⁴ *Id.* at 2, 10, 33-35 (EU);

Decision of the First Board of Appeal of July 1, 2005, in Case R-799/2004-1, *Inter-IKEA Systems*, 21 (EU) (hereinafter “Case R-799/2004-1, *Blue/Yellow*” and “*Blue/Yellow*”).

Paul Ströbele, *The Registration of New Trademark Forms*, 32(2) INT’L REV. INDUS. PROP. & COPYRIGHT L. 161, 177 (2001);

Case C-273/00, *Sieckmann*, 52-54 (EU).

⁶⁵ Olav Kolstad, *Competition Law and Intellectual Property Rights – Outline of an Economics-Based Approach* in Josef Drexler (ed), *Research Handbook on Intellectual Property and Competition Law*, 11-13 (2008).

⁶⁶ Case C-321/03, *Dyson*, 37 (EU).

⁶⁷ *Id.* at 40 (EU).

⁶⁸ Directive 89/104, art. 2 (EU);

⁶⁹ *Id.* at art. 3(3) (EU);

TMA 1994, ss. 1(1) and 3(1) (EU);

Case C-321/03, *Dyson*, 6-7, 11-13 (EU).

David Bainbridge, *Smell, Sound, Colour and Shape Trade Marks: an Unhappy Flirtation?*, J. BUS. L. 219, 232 (2004);

Jeremy Phillips, Alison Firth, *Introduction to Intellectual Property Law*, 310 (4th ed, 2001).

Additionally, the case law identified that colours possess an indeterminate number of different shades that could possibly fall under the spectrum of that same colour.⁷⁰ For example, the term “blue” can identify a wide range of colours from *Alice Blue*⁷¹ to *Delft Blue*⁷² to *International Klein Blue*.⁷³ As a result, Case C-447/02, *KWS Saat AG v. OHIM*⁷⁴ confirmed that a colour is satisfactorily represented or described as a mark, where it is identified by reference to a standard code.⁷⁵ This is necessary to ensure the mark’s capability to identify the products or services, for which registration is sought, as originating from a particular undertaking and to distinguish that product or service from those of other undertakings.⁷⁶

See, for the requirement of distinctiveness at the EU level, Case C-342/97, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel*, 1999 E.C.R. I-03819, 22 (EU); Case C-196/11, *Formula One Licensing BV v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2012 ECLI:EU:C:2012:314, 40-41 (EU); Case T-434/05, *Gateway, Inc. v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2007 E.C.R. II-00163, 50-51 (EU); Case C-299/99, *Philips*, 39 (EU); Joined Cases C-53/01, *Linde AG*, C-54/01, *Windward Industries*, and C-55/01, *Rado Uhren AG*, 2003 E.C.R. I-03161, 40-41 (EU); Case T-137/08, *BCS SpA v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2009 E.C.R. II-04047, 29 (EU); Directive 2008/95, art. 3(1)(b) (EU); Harmonisation Directive, art. 4(1)(b) (EU); Council Regulation 207/2009 (now repealed), art. 7(1)(b), 2009 O.J. (L 78) 1 (EU) (hereinafter “CTMR”); EUTMR, art. 7(1)(b) (EU).

⁷⁰ Case R 7/97-3, *Orange*, 12 (EU).

⁷¹ *Alice Blue*: greenish white (sRGB 240,248,255).

⁷² *Delft Blue*: dark blue (sRGB 31,48,94).

⁷³ *International Klein Blue (IKB)*: deep blue (sRGB 0,47,167).

⁷⁴ Case C-447/02 P, *KWS Saat AG v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2004 E.C.R. I-10107 (EU).

⁷⁵ *Id.* at 77 (EU).

⁷⁶ *Id.* at 77 (EU);

Case T-173/00, *KWS Saat AG v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2002 E.C.R. II-03843, 25 (EU);

Geiregat, *supra* note 44, at 227;

Timo Buijs, *The Challenge of Securing Colours and Colour Combinations as Trademarks*, Novagraaf (December 7, 2018), <https://www.novagraaf.com/en/insights/challenge-securing-colours-and-colour-combinations-trademarks>;

Guidelines for Examination. Part B. Examination. Section 4. Absolute Grounds for Refusal, European Union Intellectual Property Office (March 31, 2023), <https://guidelines.euipo.europa.eu/binary/2058843/2000140000>;

Michael Gardner, *Colour Trade Marks and Branding – The Struggle Continues*, Wedlake Bell (July 19, 2017), <https://wedlakebell.com/colour-trade-marks-and-branding-the-struggle-continues/>. *See* other EU case law on colours: Case C-124/18 P, *Red Bull GmbH v. European Union Intellectual Property Office*, 2019 ECLI:EU:C:2019:641 (EU); Case T-193/18, *Andreas Stihl AG & Co. KG v. European Union Intellectual Property Office*, 2021 ECLI:EU:T:2021:163 (EU); Joined Cases T-101/15 and 102/15, *Red Bull GmbH and Marques v. European Union Intellectual Property Office and Optimum Mark sp z oo*, 2017 ECLI:EU:T:2017:852 (EU); Case C-433/17 P, *Enercon GmbH v.*

4. The UK Approach: *Nestlé v. Cadbury I*⁷⁷

Two cases are significant in UK domestic law in relation to the validity of colour marks. They are part of one of the longest-running disputes in the trademark world, namely the one between two of the largest food and beverages companies in the world, *Société des Produits Nestlé SA* and *Cadbury Limited*, over a specific shade of the colour purple, as identified in the *Pantone Matching System* as *Pantone 2685C*.⁷⁸

In the first case, taking place in the early 2010s, *Nestlé* had challenged the purple mark's acquired distinctiveness through use.⁷⁹ The issue at hand concerned the distinctiveness of the shade of purple as applied to the whole surface, or at least the majority of the same, of the wrapper of *Cadbury's* chocolate products. The Court of Appeal had to assess whether there was a sufficient description of the sign. The crucial point related to the verbal description of the graphic representation, as the word "*predominant*" was not clear enough, and it allowed for a multitude of different visual forms, especially if considered combined with other colours or included in other visual materials not displayed.⁸⁰ Consequently, the exact appearance and number of the other signs, bearing the colour purple and representing *Cadbury*, would not have been known to the trademark authority and competitors.⁸¹ The Court held that, lacking the *Sieckmann* criteria, a similar registration, by including the wording "*predominant*," was in conflict with the principle of legal certainty and with the principle of fairness by giving *Cadbury* a

European Union Intellectual Property Office, 2018 ECLI:EU:C:2018:860 (EU); Case C-218/01, *Henkel KGaA*, 2004 E.C.R. I-01725 (EU); Joined Cases C-456/01 P and C-457/01, *Henkel KGaA v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2004 E.C.R. I-05089 (EU); Case T-547/08 X, *Technology Swiss GmbH v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2010, E.C.R. II-02409 (EU); Joined Cases C-344/10 P and C-345/10 P, *Freixenet SA v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2011 E.C.R. I-10205 (EU); Case C-25/05 P, *August Storck KG v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2006 E.C.R. I-05719 (EU); Case T-293/10, *Seven Towns Ltd. v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2012 ECLI:EU:T:2012:302 (EU). See other non-traditional marks: Case T-305/04, *Eden SARL v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (O.H.I.M.), 2005 E.C.R. II-04705: "smell of ripe strawberries" (EU).

⁷⁷ *Société des Produits Nestlé SA v. Cadbury UK Ltd.* [2013] EWCA Civ 1174 (UK) (hereinafter "*Nestlé v. Cadbury I*").

⁷⁸ Becky Knott, Jan Jacobi, *Sweet Respite for Cadbury as the High Court Partially Upholds its Appeal*, The IPKat (July 14, 2022), <https://ipkitten.blogspot.com/2022/07/sweet-respite-for-cadbury-as-high-court.html>.

⁷⁹ *Nestlé v. Cadbury I*, [7] (UK).

⁸⁰ *Id.* at [7]-[10], [50] (UK).

⁸¹ *Id.* at [50] (UK).

competitive advantage.⁸² Nonetheless, it was confirmed that, in accordance with *Libertel*, if the colour satisfied all the criteria, it would have become registrable.⁸³

5. *Nestlé v. Cadbury II*⁸⁴

The most recent case in the *Nestlé v. Cadbury saga* concerned the application of three marks consisting of the already mentioned shade of purple.⁸⁵ The only difference that set apart the three marks related to the description of the context of use: in the first, the colour was “*applied to the whole visible surface of the packaging of the goods,*” in the second, the colour was “*applied to the packaging of the goods,*” and, in the third and last application, the protection was aimed at the colour as a *colour per se* without reference to the context of use.⁸⁶ *Nestlé* challenged all three applications.⁸⁷

While the Hearing Officer dismissed the opposition against the first mark, the Court of Appeal found the need to reassess the decision of the Hearing Officer to uphold *Nestlé*’s opposition for the second and third marks.⁸⁸

In particular, the Court considered the following questions:

- “Does [the second mark], by not referring to the degree of application to the packaging avoid the problem that the Court of Appeal found afflicted the mark in [*Nestlé v. Cadbury I*] 2013?”⁸⁹
- “Is [the third mark, as identified by the Court] as ‘Libertel form’, [namely] a colour per se as identified by Pantone designation but without reference to the [context of use,] capable of being a sign, or does it also run into the problems found by the Court of Appeal?”⁹⁰

⁸² *Id.* at [55], [63]-[65] (UK);
Case C-273/00, *Sieckmann*, 47-55 (EU).

⁸³ *Nestlé v. Cadbury I*, [59]-[65] (UK);
Case C-104/01, *Libertel*, 32-34, 36-37, 41-42 (EU).

⁸⁴ *Société des Produits Nestlé SA v. Cadbury UK Ltd.* [2022] EWHC 1671 (Ch) (UK) (hereinafter “*Nestlé v. Cadbury II*”).

⁸⁵ *Id.* at [7] (UK).

⁸⁶ *Id.* at [8] (UK).

⁸⁷ *Id.* at [3]-[4] (UK).

⁸⁸ *Id.* at [10] (UK).

⁸⁹ *Id.* at [17(i)] (UK).

⁹⁰ *Id.* at [17(ii)] (UK).

By considering the relevant key CJEU decisions on “*exotic trademark*” registrations,⁹¹ the Court came to the following conclusion. The second mark’s appeal was rejected as its description allowed for unlimited potential ways to apply the colour to the packaging of the goods, and the removal of the word “*predominant*,” which was the issue in the 2013 judgement, was “*cosmetic at best*.”⁹² The Court added that the new wording preserved all the practical problems highlighted in the previous decision.⁹³ Conversely, the third application’s appeal was successful because of six fundamental reasons.⁹⁴ Similar to a *Libertel* form mark, the sign was a *colour per se* and, conceptually, represented a single unambiguous thing. Secondly, the colour is used as the same sign in different contexts and not as a different sign for every individual use.

Thirdly, the Court did not identify ambiguity and multitude of forms in a sign which is a single *colour per se*. Fourthly, accompanying *colour per se* by a limitation to a single manner of use would be inconsistent with the CJEU’s case law, namely *Heidelberger Bauchemie*,⁹⁵ that provides for a *colour per se* to be validly a sign without the need for contours. Fifthly, the Hearing Officer’s reasoning was inconsistent between the second mark and the third due to the difference in the context of use of the two applications. Lastly, if context of use is required as a specific manner of use, no *Libertel* form mark would ever be valid.⁹⁶ As the literature on the topic highlights, without a context of use, the barrier to register a colour mark could be lower while the scope of protection could be broader.⁹⁷ In addition, when the context of use is provided, it needs to be extremely specific in order to avoid any ambiguity, which seems to be automatically removed in the case of colour marks without a description.⁹⁸ This case is significant in the jurisprudence of colour marks as it identified the ambiguity and excessive scope allowed to applications for the registration of trademarks characterised by a “*multitude of forms*.”⁹⁹ Recent case law has further stated that when the mark is the

⁹¹ See Case C-104/01, *Libertel* (EU); Case C-273/00, *Sieckmann*, (EU); Case C-49/02, *Heidelberger Bauchemie* (EU); Case C-321/03, *Dyson*, (EU); *Nestlé v. Cadbury II*, [23]-[24] (UK); Directive 2008/95, as the legal provision applying to the case at hand (EU).

⁹² *Nestlé v. Cadbury II*, [36] (UK).

⁹³ *Id.* at [36] (UK).

⁹⁴ *Id.* at [38] (UK).

⁹⁵ Case C-49/02, *Heidelberger Bauchemie*(EU); Case C-104/01, *Libertel* (EU).

⁹⁶ *Nestlé v. Cadbury II*, [38] (UK);

Nestlé v. Cadbury I, [58] (UK);

Case C-104/01, *Libertel* (EU).

⁹⁷ Jan Jacobi, *Context of Use in Colour Marks*, in Hayleigh Boshier and Eleonora Rosati (eds) *Developments and Directions in Intellectual Property Law*, 436 (2023).

⁹⁸ *Id.*

⁹⁹ Scourfield, *supra* note 13, at 408;

representation of the combination of primary colours, it can be deemed to be a basic and simple element not capable of distinguishing the goods in question, especially if they are colours that are frequently used in specific sectors or do not depart from industry norms. In other words, they need to create a distinct commercial impression to be granted a higher level of IP protection.¹⁰⁰

III. APPLYING THE COLOURS

A. *The Challenges Linked to Trademarking Colours*

Having analysed the law on colour marks, it is necessary to remember that the more distinctive a mark is, the stronger its level of protection will be.¹⁰¹ Two issues will be considered in the following paragraphs.

The first relates to the identification of the relevant differences between how trademark law for colours is applied in the UK and in the EU after the withdrawal of the former from the latter. The following section will focus on the aspect of free competition, on the possible application of the relevant trademark law to the *Vantablack* example, how this could infringe artistic freedom, and whether specific limitations to the enforcement of trademark law apply.

B. *After Brexit: Applying the Law of Colour Marks in the EU and the UK*

As Brexit came into effect with the UK's withdrawal from the EU, it is possible to consider the following points in the comparison between the two approaches to the application of trademark protection to colours. While the UK and the EU trademark systems have been operating independently since the end of the transition period after the withdrawal of the UK from the EU, it is still possible to notice a strong correlation between the two. As a result, the first consideration is

Tom Scourfield, *Annual Review of European Trade Mark Law. 2023 in Review*, 114 TRADEMARK REP 395 (2024).

¹⁰⁰ Tom Scourfield, *Annual Review of European Trade Mark Law. 2024 in Review*, 115 TRADEMARK REP 393 (2025);

Case T-426/23, *Chiquita Brands LLC v. European Union Intellectual Property Office*, 2024 ECLI:EU:T:2024:807: use of primary colours in the fresh fruit industry does not grant for distinctive character (EU);

Oberster Gerichtshof [OGH] [Supreme Court], Oct. 22, 2024, 4 Ob 100/24w: use of colour white in contexts associated with doctors, hospitals and medical equipment (Austria);

Case TOSL-2023-186489 (Oslo District Court, June 7, 2024): the court held that a colour may constitute a trademark, and that although colours rarely have sufficient inherent distinctiveness, it may be possible to both register and to acquire trademark protection through use of a color, as the threshold for obtaining distinctiveness through use is high (Norway).

¹⁰¹ Case C-404/02, *Nichols Plc v. Registrar of Trade Marks*, 2004 E.C.R. I-08499, 12 (EU).

that the relevant literature on trademarks still identifies UK cases as applying the relevant EUTM principles during the proceedings.¹⁰² Indeed, following the end of the Brexit transition period, more than two million trademarks resembling EUTMs were added to the UK national trademark register, and noticeable is the continuing relevance, at a European Union Intellectual Property Office (EUIPO) level, of prior UK rights on the remaining opposition and invalidity cases.¹⁰³ Consequently, for the time being, the UK domestic trademark legislation remains EU compliant and based on both the *Harmonisation Directive* and *Regulation 2917/2001 on the European Union trade mark (“EUTMR”)*, due to the lack of new legislation.¹⁰⁴ It has also been recognised that the UK market will continue to be of interest to any brand owner established and operating in Europe in an analogous way as the European Economic Area (“EEA”) already is.¹⁰⁵ Moreover, in the general case of trademark law, it is important to notice that under the *EU Withdrawal Acts*,¹⁰⁶ the UK trademark regime was affected and amended on the basis of the *2019 Trade Marks Amendments Regulation*,¹⁰⁷ and the *2020 Intellectual Property Regulation*.¹⁰⁸

Specifically, the amendments provided for the fact that the existing EUTMs would be enforceable in the EU but not in the UK, and a new functionally identical protection would be created at a domestic level in order to be enforceable only in

¹⁰² Scourfield, *supra* note 13, at 385.

¹⁰³ Case T-281/21, *Nowhere Co. Ltd. v. European Union Intellectual Property Office and Junguo Ye*, 2022 ECLI:EU:T:2022:139, 36, 42-46 (EU) (hereinafter “Case T-281/21, *Nowhere*” and “*Nowhere*”);

Scourfield, *supra* note 13, at 385-386.

¹⁰⁴ Tom Scourfield, *Annual Review of European Trademark Law. 2021 in Review*, 112 TRADEMARK REP. 465, 468 (2022);
2018 Regulations (EU);
Harmonisation Directive(EU);
EUTMR (EU).

¹⁰⁵ Scourfield, *supra* note 104, at 467.

¹⁰⁶ European Union (Withdrawal) Act 2018, c. 16 (UK);
European Union (Withdrawal Agreement) Act 2020, c. 1 (UK): both Acts, together, repealed the European Communities Act 1972, and implemented the Withdrawal Agreement by providing for an ‘implementation period’ during which EU law would still apply in the UK.

¹⁰⁷ 2019 TM EU Exit Regulations (UK).

¹⁰⁸ 2020 IP EU Exit Regulations (UK).

the UK.¹⁰⁹ In addition, the case *easyGroup v. Beauty Perfectionists*¹¹⁰ showed that in ongoing validity or infringing proceedings in UK Courts on IP Completion Day, the provisions regarding jurisdiction of the *EUTMR* would continue to apply.¹¹¹ In this case, the Court also held that the High Court of England and Wales can still grant pan-EU injunctions on infringement of EUTMs and interpreted Article 67 of the *Withdrawal Agreement* as providing for the retention of the same jurisdiction under the *EUTMR* as it had before the IP Completion Day.

While this principle has only been witnessed on rare occasions in relation to colour marks, it is possible to apply it to the case concerning *Nestlé v Cadbury II*.¹¹² The Court recognised that the relevant legal principles were to be identified by reference to the *Nestlé v. Cadbury I* case.¹¹³ Consequently, being an appeal that followed the 2013 Court of Appeal case, the Court considered that the legal system and jurisdiction that were to be taken into account, even after the IP Completion Day, reflected the applicability of the *2008/95 Directive*, as implemented into the *TMA 1994*, and the CJEU case law.¹¹⁴ This provided for further evidence that, if trademark proceedings were initiated prior to the end of the Brexit transition, EU law, as previously implemented in the UK, was still relevant and applicable.¹¹⁵

¹⁰⁹ *Guidance. Changes to International Trade Mark Registrations*, GOV.UK (September 27, 2021) <https://www.gov.uk/guidance/changes-to-international-trade-mark-registrations: Comparable-trade-marks>;

Mark Wilden, *UK High Court Can Continue to Grant EU-wide Injunctions in EU Trade Mark Cases That Were Pending at the End of Brexit Implementation Period*, 3PB Barristers (January 14, 2022), <https://www.3pb.co.uk/content/uploads/UK-High-Court-can-continue-to-grant-EU-wide-injunctions-in-EUTM-cases-pending-at-the-end-of-the-Brexit-implementation-period.pdf>.

¹¹⁰ *easyGroup Ltd. v. Beauty Perfectionists Ltd. and others* [2021] EWHC 3385 (Ch), [44]-[51], [58] (UK).

¹¹¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, art. 67, 2020 O.J. (L 29) 7 (EU) (hereinafter “Withdrawal Agreement”);

TMA 1994, sch. 2A, para. 20 (UK);

Case T-281/21, *Nowhere* (EU);

Scourfield, *supra* note 13, at 420.

¹¹² *Nestlé v. Cadbury II* (UK).

¹¹³ *Nestlé v. Cadbury I*, [12], [23]-[24], [29] (UK).

Nestlé v. Cadbury II, [22]-[23] (UK).

¹¹⁴ *Id.* at [22]-[23] (UK).

¹¹⁵ Scourfield, *supra* note 13, at 420. See Scourfield, *supra* note 98, at 399-400, where it is mentioned that an interesting post-Brexit “divergence” was identified in *Industrial Cleaning Equipment v. Intelligent Cleaning Equipment Co. Ltd. & Another* [2023] EWCA Civ 1451 (UK), as the UK Court of Appeal exercised its power to depart from existing CJEU case law under the European Union (Withdrawal) Act 2018, finding that the five-year period for assessing statutory acquiescence commences on the date the trademark proprietor obtains knowledge of use of an infringing mark (rather than its registration).

C. *Monopolisation of Colours v Freedom of Artistic Expression*

Another important challenge that arises in relation to colour marks relates to the issue of monopolisation of colours in light of free competition, also known as “colour depletion.”¹¹⁶ Indeed, it reflects two aspects, the fact that colours ultimately exist in limited supply and free competition must be safeguarded,¹¹⁷ and that availability of colours and their use stand at the basis of specific sectors, including the creative industries and the art market. Consequently, this section will consider the rights over colours as opposed to free competition, and it will later discuss the role of colour marks in the artistic sector and how this could affect artistic freedom.

1. Free Competition and Colour Market

The relevant legal instruments expressly state that free and fair competition is a fundamental principle of the internal market, and it must be safeguarded by a high level of protection, as prominently identified in recent CJEU case law, *Constantin Film Produktion v. EUIPO*,¹¹⁸ and Recital 27 of the *Harmonisation Directive* which identifies that artistic expressions must be safeguarded while ensuring fair trade practices.¹¹⁹ While the United Kingdom has withdrawn from the EU, it is still possible to notice that free competition is highly valued within the domestic market in order to ensure that no abuse by one or more undertakings is protracted as the result of a dominant position within the market in relation to a specific category of goods or a service.¹²⁰ Trademark rights do not confer

¹¹⁶ Barton Beebe, Jeanne Fromer, *Are We Running out of Trademarks: An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 977 (2018);

Qualitex Co. v. Jacobson Products Co., 514 U.S. 159 (1995).

¹¹⁷ McCubbin, *supra* note 61, at 41.

¹¹⁸ Case C-240/18 P, *Constantin Film Produktion v. European Union Intellectual Property Office*, 2020 ECLI:EU:C:2020:118 (EU).

¹¹⁹ Directive 89/104 (EU);

Council Regulation 40/94 (now repealed), 1994 O.J. (L 11) (EU);

Directive 2008/95, recital 7 (EU);

Harmonisation Directive (EU);

CTMR (EU);

EUTMR (EU);

Kolstad, *supra* note 65, at 5;

Consolidated Version of the Treaty on the Functioning of the European Union, arts. 101-106, 2012 O.J. (C 326) 1 (EU) (hereinafter “TFEU”).

¹²⁰ Withdrawal Agreement (EU);

Dev Gangjee, *United Kingdom*, in Martin Senfleben (ed), *Status Report on Protection Against Unfair Competition in WIPO Member States*, World Intellectual Property Office, 161-169 (2022), <https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo-strad-inf-8-prov.pdf#page161>;

European Union (Withdrawal Agreement) Act 2020 (UK);

exclusivity on the sign *per se*, but only as far as the latter designates the goods or the services concerned. Indeed, protection of a trademark is restricted to the industry concerned,¹²¹ especially considering that, as consumers become more familiar with a particular trademark, they tend to associate the same with the nature of a specific product.¹²²

As a result, in the case of colour marks, there could be the risk of threatened or restricted competition. This principle was identified by the Commercial Court of Valencia, Spain, which had to consider whether registration filed for a specific colour was made in bad faith, solely to disrupt a competitor.¹²³ Generally, *Libertel* highlighted that exclusive rights linked to colours could prevent third parties from using identical signs, or that could likely cause confusion, in the course of trade for a potentially unlimited period of time.¹²⁴ Therefore, the protection of the commercial monopolisation of a colour sign could extend too far, and this

TMA 1994, sch. 2A (UK): existing EUTMs are still protect trademarks in EU member states, and UK businesses can still apply to the EU Intellectual Property Office for an EUTM. For new filings, registrants must apply to both jurisdictions;

Emma Coffey, *Cutting Off the EU to Spite Its Face? How to Promulgate the UK's Contractual Choice of Law Rules to Ensure Stability Post-Brexit*, 61 B.C. L. REV. 1447, 1448-1449 (2020).

Tom Scourfield, *Annual Review of EU Trademark Law. 2020 in Review*, 111 TRADEMARK REP. 506, 506 (2021): “the decisions of UK courts, most commonly the High Court of England and Wales and the Court of Appeal, continued to hear cases relating to infringement of EUTMs and to apply EU trademark law. The UK ‘local’ trademark legislation, the Trade Marks Act 1994 ... remains EU law compliant, being based upon the ... [Harmonisation Directive (European Union)] ... and, absent new legislation, will continue to be through 2021 and beyond”;

Scourfield, *supra* note 104, at 467;

Scourfield, *supra* note 13, at 385;

Scourfield, *supra* note 99.

Jodi Balsam, *Timeout for Sports Trademark Overprotection: Comparing the United States, European Union, and United Kingdom*, 52 CAL. W. INT'L L.J. 351, 387-394 (2022).

¹²¹ Michael Bohaczewski, *Conflicts Between Trade Mark Rights and Freedom of Expression under EU Trade Mark Law: Reality or Illusion?*, 51(7) INT'L REV. INTELL. PROP. & COMPETITION L. 856, 857 (2020).

¹²² Katerina Shaw, *Likelihood of Coexistence: A Comparative Analysis of the Interplay between European Trademark Law and Free Competition*, 18 U. BALT. INTELL. PROP. L.J. 51, 51 (2009);

Peter Maggs, Roger Schechter, *Trademark and Unfair Competition Law, Cases and Comments*, 26 (6th ed, 2002).

¹²³ Case C-102/77, *Hoffman-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, 1978 E.C.R. 01139, 16 (EU);

Scourfield, *supra* note 98, at 452-456;

Case 313/2022 *Televés, S.A.U. v. Tecatel, S.L.*, (Commercial Court No. 3 of Valencia, February 27, 2023) (Spain). A similar consideration has been made at the EUIPO level when it comes to the art market in the Banksy trademarks case law. See Nedim Malovic, *Banksy's trade marks once again at the centre of attention, this time with repeat filings as bad faith*, The IPKat (January 6, 2024), <https://ipkitten.blogspot.com/2024/01/banksys-trade-marks-once-again-at.html>.

¹²⁴ Case C-104/01, *Libertel*, 49 (EU).

possibility requires a higher threshold for the standards of distinctiveness than traditional trademarks.¹²⁵ This is because colour is not restricted by certain shapes, logos, or, more generally, contours, and it can ideally be renewed for an unlimited number of times, as trademarks last as long as the renewal fees are paid, and the marks are used within a commercial context.¹²⁶

On one side, the rights granted to trademarks, if too extensive, can artificially restrict free competition and limit the rights of other undertakings and traders operating within the same market, while, on the other, both intellectual property law and competition law tend to aim at common goals, which include the promotion of innovation and of commercial activity.¹²⁷

i. In Favour of Colours

The following step is to consider whether the balance between the two aspects, namely colour marks and free competition, can be struck in favour of colours. In the distinctiveness test, when considering whether other traders can use a specific colour, the risk of the monopolisation of certain colours must not be included in the assessment, as considered in the CJEU *Windsurfing Chiemsee* case,¹²⁸ and the OHIM Case *Light Green/Leaf Green*.¹²⁹ The rationale behind the exclusion of this aspect from the assessment of distinctiveness is linked to the fact that, as considered in the cases in question, the 2008/95 Directive did not require a similar criterion in Article 3(3), and neither following nor current EU legislation does.¹³⁰ While not an issue in the CJEU case in question, it is possible to state that

¹²⁵ Dev Gangjee, *Paying the Price for Admission: Non-Traditional Marks Across Registration and Enforcement*, in Calboli and Senfleben, *supra* note 42, at 63-64.

¹²⁶ Case C-104/01, *Libertel* 49 (EU);

Stefan Enchelmaier, *Intellectual Property, the Internal Market and Competition Law*, in Drexler, *supra* note 65, at 432.

¹²⁷ Steven Anderman, Ariel Ezrachi (eds), *Intellectual Property and Competition Law: New Frontiers*, 4 (2011).

¹²⁸ Joined Cases C-108/97, and C-109/97, *Windsurfing Chiemsee Produktions und Vertriebs GmbH (W.S.C.) v. Boots- und Segelzubehör Walter Huber and Franz Attenberger*, 1999 E.C.R. I-02779 (EU).

¹²⁹ Decision of the Fourth Board of Appeal of August 28, 2002, in Case R-785/2000-4, *Colour Mark (Light Green/Leaf Green)* (EU).

¹³⁰ Directive 2008/95, art. 3(3) (EU);
Harmonisation Directive, art. 4(3) (EU);
CTMR, arts. 7(1) and 7(3) (EU);
EUTMR, arts. 7(1) and 7(3) (EU);
Case C-251/95, *Sabel*, 23 (EU);

Case C-498/07 P, *Aceites del Sur-Coosur and Koipe v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2009 E.C.R. I-07371, 84 (EU).

since the UK is still, currently, EU law compliant, the same criterion is not present in s. 3 *TMA 1994*.¹³¹ This approach provides for the favourable registrability of colour marks in light of free competition.

ii. *Against Colours*

While, in theory, this approach should aim at not considering the general interest of the free availability of colours when assessing the distinctiveness of a colour mark, in practice, the free availability of colours still plays an important role.¹³² Consequently, in some instances, it has been identified that colour marks could violate free competition. Colour is widely used in trade, for example, as a part of logos or advertising materials, and it is advantageous and helpful, as it attracts attention and creates instant recognition for commercial products.¹³³ In addition, visual inputs dominate over verbal communication, as consumers tend to remember more easily the distinctive colours associated with the logos of the most influential brands.¹³⁴ As it can affect consumers' minds, it is possible to suggest that it effectively fulfils the objectives of a trademark, by individualising the goods and services associated with it.¹³⁵ As a result, colour marks could potentially disrupt free competition by allowing these rights to interfere with the rights of other traders to use a specific colour for commercial purposes.¹³⁶ Moreover, in the case in which

¹³¹ TMA 1994, s. 3 (UK).

¹³² Kudrjavceva, *supra* note 50, at 37-38.

¹³³ Marquez-Stricker, *supra* note 5, at 26;

Bainbridge, *supra* note 69, at 232;

Sunila Sreepada, *The New Black: Trademark Protection for Color Marks in the Fashion Industry*, 19(4) FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1131, 1144 (2009).

¹³⁴ Loney, *supra* note 8, at 35;

Ralph Evans, *An Introduction to Color*, 230 (1948).

¹³⁵ Jill Morton, *Why Color Matters. Substantial research shows why color matters and how color plays a pivotal role in all our visual experiences*, Colorcom (2019), <https://www.colorcom.com/research/why-color-matters>;

Felix Wichmann, et al., *The Contributions of Color to Recognition Memory for Natural Scenes*, 28(3) J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY and COGNITION 509 (2002);

Jan White, *Color for Impact* (1997);

Business Papers in Color. Just a Shade Better, 34(7) MOD. OFFICE TECH. 98 (1989);

David Embry, *The Persuasive Properties of Color*, 9(10) MKTG. COMM'NS 50 (1984);

Virginia Johnson, *The Power of Color*, 41(7) SUCCESSFUL MEETINGS, 87 (1992);

Rudolf Arnheim, *Art and Visual Perception*, 336 (1974). See studies by: Secretariat of the Seoul International Color Expo 2004 and conducted by Xerox Corporation and International Communications Research from February 19, 2003, to March 7, 2003, and CCICOLOR - Institute for Color Research and University of Loyola, Maryland study.

¹³⁶ Bainbridge, *supra* note 69, at 232.

all the “*most desirable*” or the “*most appealing*” colours were to be protected as trademarks, new players in the trade of a specific category of goods or services would find themselves at a disadvantage.¹³⁷ Indeed, they would be prevented from choosing an appropriate identifiable colour that would allow them to compete effectively.¹³⁸ As mentioned above, being immediate and highly effective, a colour considerably helps brand recognition. Examples could include the recently introduced potential colour marks *Gucci’s Rosso Ancora* and *Burberry’s Knight Blue*,¹³⁹ in addition to the iconic *Red Sole Mark*¹⁴⁰ associated with the fashion brand *Christian Louboutin*,¹⁴¹ or, at a global level, the *Robin Egg Blue*¹⁴² known as *Tiffany Blue* and associated with the jewellery brand’s packaging.¹⁴³

Therefore, colour represents a powerful tool in the IP world, and it is highly likely to hinder competition as it prevents other traders from being associated with a specific colour that enjoys earlier rights.

2. “In the Field of Art”

i. Kapoor’s Exclusive Rights

¹³⁷ Glenda Labadie-Jackson, *Through the Looking Hole of the Multi-Sensory Trademark Rainbow: Trademark Protection of Color Per Se Across Jurisdictions: the United States, Spain and the European Union*, 7(2) RICH. J. GLOBAL L. & BUS. 91, 108 (2008).

¹³⁸ *Id.*;

Jean Hayes Kearns, *Qualitex Co. v. Jacobson Products Co.: Orange You Sorry the Supreme Court Protected Color?*, 70(2) ST. JOHN’S J. REV. 337, 342-343 (1996);

Qualitex Co. v. Jacobson Products Co., 514 U.S. 159 (1995).

¹³⁹ Eleonora Rosati, et al., [Guest Post] *Burberry ‘Knight Blue’ and Gucci ‘Rosso Ancora’: New Signature Colours and Also Trade Marks in the Making?*, The IPKat (September 25, 2023), <https://ipkitten.blogspot.com/2023/09/guest-post-burberry-knight-blue-and.html>.

¹⁴⁰ Pantone 18.1663TP;

Seeing Red: Can a Brand Trademark a Signature Color?, Knowledge at Wharton (February 21, 2018), <https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/louboutin-red-soles/>.

¹⁴¹ Case C-163/16, *Christian Louboutin and Christian Louboutin SAS v. van Haren Schoenen BV*, 2018 ECLI:EC:C:2018:423 (EU).

¹⁴² Pantone 1837;

Laurie Pressman, *Crazy About Tiffany’s: The Story Behind an Iconic Brand Colour*, Pantone.com (February 19, 2016), <https://www.pantone.com/articles/case-studies/crazy-about-tiffanys-the-story-behind-an-iconic-brand-color>.

¹⁴³ Tiffany & Co. Newsroom, *supra* note 11.

Brief of Amicus Curiae Tiffany (NJ) LLC and Tiffany and Company in support of Appellants’s Appeal Seeking Reversal of the District Court’s Decision denying Appellants’ Motion for Preliminary Injunction in the case *Christian Louboutin SA v. Yves Saint Laurent America, Inc. et al.*, No. 11-3303-cv (2d Cir. Oct. 2011), E.C.F. No. 63, 3;

Christian Louboutin SA v. Yves Saint Laurent America, Inc. et al., No. 11-3303-cv (2d Cir. Oct. 2011).

There are specific industries in which colours, when considered “*basic*” and “*attractive*,” could pose relevant and potential issues when it comes to trademark laws and competition. In an analogous way to the fashion industry, which is one of the sectors in which colour is highly appreciated,¹⁴⁴ the artistic sector deeply relies on colours, as both of them employ a similar creative process which depends on colours serving an ornamental and aesthetic function.¹⁴⁵

In the creative industries, it has been argued that the colour black represents the most used colour and could fall within the *Light Green* case meaning of the term “*basic*,” namely a colour that is “*fashionably and commonly used to denote*” a specific characteristic of the product.¹⁴⁶ As the artist Christian Furr has stated, “*black is [...] dynamite in the art world*,” and every artist should be able to use it, as it has been witnessed throughout the years in artworks by J.W.M. Turner, Edouard Manet, and Francisco Goya.¹⁴⁷

Consequently, in the case of artists, the aspect of free competition closely relates to artistic freedom.¹⁴⁸ The wording “*in the field of art*” found in one of Kapoor’s exclusive licence clauses for the use of *Vantablack* translates into “*anything that’s meant to be observed purely as a work of art*.”¹⁴⁹ While it is not clear what type of exclusive rights were assigned to Anish Kapoor,¹⁵⁰ if trademark law were to be applied, given the relevance to the topic at hand, the following reasoning can be employed. The first step is to identify when a sign or a colour can

¹⁴⁴ Sreepada, *supra* note 133, at 1153.

¹⁴⁵ *Colour Coursework Guide*, Tate (2023), <https://www.tate.org.uk/art/colour-coursework-guide>;

Saucier, *supra* note 7;

Sreepada, *supra* note 131, at 1153.

Camilla De Laurentis, *Iconic Colors in Art History*, Daily Art Magazine (January 22, 2022), <https://www.dailyartmagazine.com/colors-art-history/>.

¹⁴⁶ Decision of the Third Board of Appeal of December 18, 2000 in Case R-122/1998-3, *Light Green*, 24 (EU).

¹⁴⁷ Truman Chambers, *The Vantablack Controversy: Anish Kapoor vs Stuart Semple*, The Collector (January 28, 2021), <https://www.thecollector.com/vantablack-anish-kapoor-stuart-semple-controversy/>.

¹⁴⁸ Martin Senftleben, *Safeguarding Freedom of Artistic Expression in the European Union. Toward a Legal Presumption of Fair Use* in Haochen Sun and Barton Beebe (eds), *Charting Limitations on Trademark Rights*, 121 (2023);

Martin Senftleben, et al., *The Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition: Guiding Principles for the Further Development of EU Trade Mark Law*, 37 EUR. INTEL. PROP. REV. 337, 339 (2015).

¹⁴⁹ Jessica Hullinger, *6 Facts About Vantablack, the Darkest Material Ever Made*, Mental Floss (March 16, 2016), <https://www.mentalfloss.com/article/77190/6-facts-about-vantablack-darkest-material-ever-made>.

¹⁵⁰ Cascone, *supra* note 2.

be distinctive. If taking as an example the *Vantablack* colour, it is possible to address the question related to whether artists could own a distinctive colour mark or other mark. There are many examples of trademarks distinctive of an artist (e.g., Michelangelo Pistoletto's *Terzo Paradiso*,¹⁵¹ Keith Haring, *Pisa 89*, EUTM: 018299751,¹⁵² and Andy Warhol, *Banana*, EUTM: 010903342),¹⁵³ but it is rare to find colour marks in the artistic sector. Moreover, *Vantablack* is a patented nano-material used as a free-space coating and not as a black paint, pigment, or fabric.¹⁵⁴ Nonetheless, Anish Kapoor is the only person who, in art, has the lawful right to use the colour, and the only person who can be associated with this nano compound in the artistic sector.¹⁵⁵

Since the *Sieckmann* criteria would apply, to be considered as a registrable mark, a colour used in the artistic sector must fulfil the same requirements, namely, it must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.¹⁵⁶ In addition, according to *Libertel*, a colour *per se* cannot be identified as durable enough to be registered as a trademark.¹⁵⁷ Nonetheless, a verbal description or an international code added to the sample, as a printed colour, could be enough to pass the *Sieckmann* test.¹⁵⁸ Therefore, in the majority of instances, colours possess little inherent capacity for communicating specific information, even though the same can pass the distinctiveness test in the cases in which it is considered to be able to distinguish the goods and services of a specific undertaking from others, and in the case in which it serves as a badge of origin for the product.¹⁵⁹

The colour *Vantablack*, in the art world, helps the public in identifying Anish Kapoor as the artist of many sculptures, paintings, and art installations, including the works *Void Pavilion V* presented at the Venice Biennale in 2018 and the *Non-*

¹⁵¹ Chiara Gallo, *Michelangelo Pistoletto's Terzo Paradiso: A Case of Dual Protection under Copyright and Trade Mark Law*, Institute of Art and Law (April 24, 2025), <https://ial.uk.com/pistolettos-terzo-paradiso/>; trademark registered as n. 302017000082126 with the Italian Trade Marks and Patents Office.

¹⁵² EUTM: 018299751, European Union Intellectual Property Office (2025), <https://euipo.europa.eu/eSearch/#details/trademarks/018299751>.

¹⁵³ EUTM: 010903342, European Union Intellectual Property Office (2025), <https://euipo.europa.eu/eSearch/#details/trademarks/010903342>.

¹⁵⁴ *About Vantablack*, SurreyNanoSystems.com (2023), <https://www.surreynanosystems.com/vantablack/science-of-vantablack>.

¹⁵⁵ Alberto Bellan, *Paint it Vantablack -- Artists Owning Colours and the Dark Side of IP*, The IPKat (April 25, 2016), <http://ipkitten.blogspot.be/2016/04/paint-it-vantablack-artists-owning.html>.

¹⁵⁶ Case C-273/00, *Sieckmann*, 55 (EU).

¹⁵⁷ Case C-104/01, *Libertel*, 68 (EU).

¹⁵⁸ *Id.* at 15 and 37 (EU).

¹⁵⁹ *Id.* at 41 (EU).

Object Black 2019.¹⁶⁰ The nano-material can be perceived as a colour, thus allowing it to be assessed as serving as a badge of origin for Kapoor's artworks.

Kapoor's example shows that art is not just a commodity, but a brand.¹⁶¹ Since art can be seen as business, artists tend to resort to methods aimed at acquiring immaterial assets, including intellectual property rights, in order to distinguish their products, their artworks and creations, from those of other artists in the market.¹⁶² This, in the near future, could give rise to an increase in the monopolisation of specific colours by using trademark law. As a result, peculiar has been the response of a few artists, including Stuart Semple, as mentioned at the beginning of the article. In a similar context, having parodied several trademarked colours, he found himself at the centre a recent lawsuit filed by *Blue Bay Limited*, the owner of the international trademark "Yves Klein" which covers "paints and dyes of all colors" and "blue (dyes and paints)," *RUK*, the company formed by the late artist's widow, Rotraut Klein Moquay, as the manager of the copyrights to Klein works, and other Yves Klein's rightholders. Interestingly, while stating that they were not trying to assert monopoly over the use of the specific shade of blue, a primary colour, they were concerned with the fact that that "by using the artist Yves Klein's staging to market a painting of a color almost identical to the blue he had created, and by claiming to have improved it (arguing that their paint was not toxic, unlike the formula created by Yves Klein), [Stuart Semple] sought to follow the artist's footsteps and made unfair use of his reputation."¹⁶³

All of this leads to the conclusion that registering those colours that are deemed to be basic in the artistic sector, as highlighted by the Court in the *IKEA*¹⁶⁴ case in relation to the free availability of primary colours,¹⁶⁵ can compromise competition and reduce the likelihood of consumers viewing a single colour as distinctive of the goods and services of a specific undertaking. To protect competition in the market by not restricting the availability of colours, the Court in

¹⁶⁰ Bellan, *supra* note 155;

Lee Cheshire, *Anish Kapoor will Bring the 'World's Blackest Black to Venice's Academia*, *The Art Newspaper* (April 11, 2022), <https://www.theartnewspaper.com/2022/04/11/anish-kapoor-brings-the-worlds-blackest-black-to-venice>;

Jay Cheshes, *An Inside Look at Anish Kapoor's Next Act*, *Smithsonian Magazine* (November 2023), <https://www.smithsonianmag.com/arts-culture/anish-kapoor-next-act-venice-180983053/>.

¹⁶¹ Martin Wilson, *Opening Remarks*, *Executive Course Art and Law*, Florence (October, 2023).

¹⁶² Bellan, *supra* note 155;

European Union Intellectual Property Office, *supra* note 152;

European Union Intellectual Property Office, *supra* note 153.

¹⁶³ Ho, *supra* note 3.

¹⁶⁴ Case R-799/2004-1, *Blue/Yellow* (EU).

¹⁶⁵ *Id.* at 20 (EU);

Sreepada, *supra* note 133, at 1153.

Libertel stated that there is a necessity to assess the public interest in avoiding an “unjustified competitive advance for a single trader.”¹⁶⁶

ii. *The Vigeland Case and the Application of Public Interest to Colour Marks in the Artistic Sector*

While there are cases related to colour marks describing the relevant requirements to assess validity, the artistic sector has not yet provided the literature with a landmark case in applying the public interest approach to colour marks. Indeed, according to the general law on colour marks, the recourse to the public interest argument stems from the fact that “*the requirement of availability of colours [...] tends to constitute [...] a bar to registration of a mark consisting of a colour.*”¹⁶⁷ In the artistic sector, it is, thus, possible to make a comparison to the European Free Trade Association (“EFTA”) case concerning the application to register as trademarks a series of artistic creations located in Oslo, Norway, and made by the Norwegian artist Gustav Vigeland.¹⁶⁸ The case highlighted that freedom of the arts, especially if they are in the public domain, was part of the public interest, and registering creative works in order to prevent other players in the artistic world from reproducing the same works would have hindered competition.¹⁶⁹

Consequently, in applying the rationale to the registrability of colour marks in the artistic sector, it is possible to highlight that public interest could apply in an equivalent manner. There seems to be a high possibility of conflict with the concept of free competition, in the case in which colours lack of distinctiveness due to their potential common use, attractiveness and peculiarity, which are basic principles in this industry, in a similar manner in which the registration of trademarks is potentially in conflict with the public interests linked to creative works in the public domain. The courts tend to apply this rationale when there is the desire to register a mark in order to employ the trademark rights as brand exploitation instruments, under the current laws of both the EU, due to the similarities with the EFTA

¹⁶⁶ Case C-104/01, *Libertel*, 47, 54-55 (EU).

¹⁶⁷ Case T-97/08, *KUKA Roboter GmbH v. Office for Harmonisation of Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2010 E.C.R. II-05059, 44 (EU).

¹⁶⁸ Case E-5/16, EFTA Court, April 6, 2017, Municipality of Oslo, para 65-66, 92-96 (EFTA) (hereinafter “*Vigeland*”);

Martin Senfleben, *No Trademark Protection for Artworks in the Public Domain – A Practical Guide to the Application of Public Order and Morality as Grounds for Refusal*, 71(1) GRUR INT’L 3 (2022).

¹⁶⁹ Martin Senfleben, *Vigeland and the Status of Cultural Concerns in Trade Mark Law – The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain*, 48 INT’L REV. INTELL. PROP. & COMPETITION L. 683, 691 (2017).

approach,¹⁷⁰ and the UK, due to the fact that, at the moment of writing, is still compliant in respect to the EUTM principles.

3. How Can the Protection of Colour Marks Ensure Both Free Competition and Artistic Freedom?

It can be argued that denying protection for colour marks due to public benefit reasons in the artistic sector, in order to protect the availability of colours and one of the principal aspects on which art is based, could result in the complete impossibility of the registration and commercial protection of colours.¹⁷¹ Consequently, as the current legal provisions provide for the possibility of registering colour marks, the following step is to focus on the instances in which the protection of similar marks does not hinder competition in the artistic sector.

Competition is not hindered in the case in which a mark is used for non-infringing artistic purposes, and the use is deemed as compliant with the concept of honest practices in industrial and commercial matters.¹⁷² These practices are divided into categories by the relevant literature: referential use,¹⁷³ descriptive use,¹⁷⁴ non-distinctive use.¹⁷⁵ These defences allow for different uses of trademarks generally, and potentially in the specific case of colour marks. The first one relates to the case of parody to symbolise or criticise policies of the proprietor, as shown in the 2005 case of the German Federal Supreme Court that parodied the purple colour mark of the chocolate brand *Milka*.¹⁷⁶ The second type of use is related to

¹⁷⁰ *Id.* at 707. See similarities with the EU legal system in relation to trademarks/creative works in the public domain in Case T-435/05, *Danjaq, LLC v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2009 E.C.R. II-02100, 26 (EU).

¹⁷¹ Joshua Marshall, *Colour Trade Marks: Certainty, Utility or Impossibility*, 12(10) J. INTEL. PROP. L. & PRAC. 860, 864-865 (2017).

¹⁷² EUTMR, recital 21 (EU);
Harmonisation Directive, recital 27 (EU);
Sun, Beebe, *supra* note 148, at 122.

¹⁷³ EUTMR, art. 14(1)(c) (EU);
Harmonisation Directive, art. 14(1)(c) (EU);
Sun, Beebe, *supra* note 148, at 122-124;

Annette Kur and Martin Senftleben, *European Trade Mark Law. A Commentary*, 6.39-6.41 (2017).

¹⁷⁴ TRIPS, art. 17;
EUTMR, art. 14(1)(b) (EU);
Harmonisation Directive, art. 14(1)(b) (EU);
Sun, Beebe, *supra* note 148, at 124-125.

¹⁷⁵ Sun, Beebe, *supra* note 148, at 125-127.

¹⁷⁶ Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 3, 2005, Case I ZR 159/02, *Lila Postkarte*, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 583-584 (Ger.);

the fact that a mark can be used without infringing the proprietor's rights in the case in which the subject of the same mark represents a descriptive indication of a product, but not a decorative indication or the central element of the very contents of the product.¹⁷⁷ The last defence is based on the fact that non-distinctive signs or indications can be used without the risk of infringement. In the case a sign lacks the distinctive capacity to serve as an identifier of commercial source in respect to literary and artistic productions, it can be freely used by third parties.¹⁷⁸ A cultural sign never becomes the sole property of the trademark owner because the residue stemming from the sign's evolution in the cultural domain is beyond reach for the trademark owner, as similarly highlighted in the *Vigeland* case.¹⁷⁹

In applying one of the possible defences to the media dispute between Semple and Kapoor,¹⁸⁰ there could be the opportunity for the British *artist* to be able to use the colour, if considered as falling under the scope of trademark law, under the referential use defence. Indeed, he did create the *Black 3.0* and *Black 4.0* colours and the *Easy Klein* blue, not as identical colours to, respectively, the *Vantablack* and the *International Klein Blue*, but closely resembling forms of parody, in an analogous manner as he has already "*parodied*" the *Tiffany Blue* and *Barbie Pink*.¹⁸¹

Case C-408/01, *Adidas-Salomon AG and Adidas Benelux BV v. Fitnessworld Trading Ltd.*, 2003 E.C.R. I-12537, 39 (EU);

Annette Kur, *Confusion over Use? Die Benutzung "als Marke" im Lichte der EuGH-Rechtsprechung*, 1 GRUR INT'L 57 (2008);

Sun, Beebe, *supra* note 148, at 128.

¹⁷⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 24, 2008, Case I ZB 21/06, *Marlene-Dietrich-Bildnis*, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1093 (Ger.);

Case C-100/02, *Gerolsteiner Brunnen GmbH & Co. v. Putsch GmbH*, 2004 E.C.R. I-00691, 25-26 (EU);

Kur, Senfleben, *supra* note 173, at 6.23-6.27;

Lionel Bently, et al., *Intellectual Property Law*, 1068 (5th edn, 2018);

Case C-102/07, *Adidas AG and Adidas Benelux BV v. Marca Mode CV and others*, 2008 E.C.R. I-02439, 48 (EU);

Sun, Beebe, *supra* note 148, at 124-125.

¹⁷⁸ Sun, Beebe, *supra* note 148, at 126.

¹⁷⁹ Annette Kur, *Yellow Dictionaries, Red Banking Services, Some Candies, and a Sitting Bunny: Protection of Color and Shape Marks from a German and European Perspective*, in Calboli and Senfleben, *supra* note 42, at 103;

Bundespatentgericht [BPatG] [Federal Patent Court] Nov. 25, 1997, Case 24 W (Pat) 188/96, *Mona Lisa*, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1021-1023 (Ger.);

Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227, 1231 (2015).

¹⁸⁰ Chambers, *supra* note 147.

¹⁸¹ Semple, *supra* note 1;

Stuart Semple, *TIFF BLUE*, CultureHustle (2025), <https://culturehustle.com/products/tiff-blue>;

Stuart Semple, *Easy Klein*, CultureHustle (2025), <https://culturehustle.com/products/easyklein>;

4. Final Remarks on Non-infringing Uses

Lastly, it is important to remember that a sign will not be infringing in every case it is used. The relevant case law, namely *BCS SpA v. OHIM*,¹⁸² provides for the explanation that “*not every use of a sign [...] necessarily constitutes use as a trade mark.*”¹⁸³ The sign is used as a trademark in instances in which it serves for “*the purposes of the identification, by the relevant class of persons, of the product or service as originating from a given undertaking,*”¹⁸⁴ thus satisfying the criterion of distinctiveness and indicating the commercial origin.¹⁸⁵ Consequently, in art, a colour mark could be freely used without infringing the proprietor’s rights in the case its purpose is “*purely stylistic*” and not used in the course of trade.¹⁸⁶

IV. CONCLUSION: APPLYING THE COLOURS

It is well established that both in the EU and in the UK, colours *per se* are not usually capable of being signs that indicate the sole origin of the goods or services associated with them. Colour is usually considered as an element of decoration or a simple feature of an object or something else. Nonetheless, the CJEU case law, established during the period in which the UK was an EU Member State, provides for the possibility for pure colour marks to be capable of being registered as trademarks, namely as a monopoly right,¹⁸⁷ as long as they fulfil certain criteria.¹⁸⁸ In other words, as considered throughout this article, the question of whether colours can be registered and protected as trademarks is not at issue when it comes to trademark law in both the UK and the EU, as long as they satisfy all the

Stuart Semple, *Easy Klein, The Very First Klein Blue*, CultureHustle (April 21, 2025), https://culturehustle.com/pages/the-very-first-klein-blue-paint?srsId=AfmBOoo91aZXwzvzFjd09Wn_Kt4PyBx2dga76jABnIGjlvHWYlsdTAMh;

Stuart Semple, *Pinkie – The Barbiest Pink*, CultureHustle (2025) <https://culturehustle.com/products/pinkie>.

¹⁸² Case T-137/08, *BCS SpA v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (O.H.I.M.)*, 2009 E.C.R. II-04047 (EU).

¹⁸³ *Id.* at 35 (EU).

¹⁸⁴ *Id.* at 26 (EU).

¹⁸⁵ *Id.* at 37 (EU).

¹⁸⁶ *Id.* (EU);

Case C-371/18, *Sky plc and others v. Skykick UK Ltd. and Skykick Inc.*, 2020 ECLI:EU:C:2020:45, 74 (EU).

¹⁸⁷ Karolina Fryzlewicz, *A Crossroad of IP Rights: Registering Artistic Works as Trade Marks*, Mewburn Ellis (April 20, 2022), <https://www.mewburn.com/news-insights/a-crossroad-of-ip-rights-registering-artistic-works-as-trade-marks>.

¹⁸⁸ Scourfield, *supra* note 13, at 385.

requirements of the distinctiveness test and are capable of identifying the commercial origin of the product or service they are linked to. Nonetheless, the requirement of context of use is not always required, and when added, could create ambiguity in the scope of protection of a specific colour, as considered in *Nestlé v. Cadbury II*.

On the other hand, challenges can be raised in relation to whether the advent of Brexit has made relevant changes and whether registering a colour mark hinders free competition in certain sectors. The first point was addressed by assessing that, at the moment of writing, due to lack of new and amending legislation to the currently existing trademark laws in the UK, the same remains EU (law) compliant and, since the end of the Brexit transition period, it allowed for the creation of more than two million trademarks similar to EUTMs in the UK trademark register.¹⁸⁹ The second challenge was discussed by considering specific creative industries. These particular sectors, including the fashion industry and the art market, are highly dependent on the appeal of their products to consumers, and colours deeply affect this aspect as they have an ornamental and aesthetic function. In recent years, it has been argued that in the artistic sector, colour monopolisation through intellectual property rights could affect the ability of other traders in the same market to compete fairly and equally. The general purpose behind the grant of an intellectual property right is to provide its owner with certain exclusive rights to use that property, and to prevent third parties from using or exploiting these rights without the owner's consent. Moreover, this can be evidenced from the fact that the artistic sector, in recent years, has been seen increasingly as a business sector.¹⁹⁰ While there is the possibility that colour marks could potentially hinder the concept of competition and artistic freedom, due to the public interest in keeping available the limited range of colours, defences could apply in order to protect both free competition and artistic freedom. Indeed, even though reticent in providing a wider scope of protection, the legislation expressly provides for the possibility of registering colours. Consequently, applying the public interest argument too harshly could result in a conflict with the law currently in force.

¹⁸⁹ Scourfield, *supra* note 104, at 468.

¹⁹⁰ Aashit Shah, "The Abuse of Dominant Position" Under Article 82 of the Treaty of the European Community: Impact on Licensing of Intellectual Property Rights, 3 CHI.-KENT J. INTEL. PROP. 41, 41 (2003).

IN DEFENSE OF THE LACHES DEFENSE:
WHY CONGRESS SHOULD NOT BE PERMITTED TO BAR
COURTS FROM CONSIDERING THE LACHES DEFENSE WHEN
DECIDING CLAIMS BROUGHT THROUGH THE FEDERAL
HEAR ACT

*William L. Charron**

I. INTRODUCTION

The Holocaust Expropriated Art Recovery (“HEAR”) Act of 2016 is a preemptive federal statute that prescribes a nationwide, six-year statute of limitations over all state law causes of action that may be invoked to address allegations of Nazi-looted art.¹ Unless amended, the HEAR Act will sunset at the end of 2026.² Congress is deliberating amendments to the HEAR Act that would, among other things, make it perpetual.³ Another amendment under consideration is the elimination of the defense of laches from all restitution claims that allege Nazi-based duress transfers of art.⁴ Courts have widely held that the HEAR Act, in its present form, does not eliminate the laches defense from such claims.⁵

This article analyzes how an amendment that purports to eliminate the laches defense from HEAR Act-related claims would violate Article III of the U.S. Constitution and the Separation of Powers doctrine. Specifically, such an amendment would unlawfully purport to eliminate the power of the federal courts to fully exercise their vested equitable jurisdiction.

Congress may enact laws that constrain the Judiciary’s equitable jurisdiction, either by not providing for a cause of action with an equitable relief entitlement at

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¹ Holocaust Expropriated Art Recovery (“HEAR”) Act, 22 U.S.C. § 1621 note. For further background into the HEAR Act, see generally Simon J. Frankel, *The HEAR Act and Laches After Three Years*, 45 N.C.J. INT’L L. 441 (2020); Nicholas O’Donnell, *The Holocaust Expropriated Art Recovery Act: A Sea Change in US Law of Restitution*, XXII ART ANTIQUITY AND LAW 273 (2017).

² HEAR Act § 5(d)(2).

³ S. 1884, 119th Congr. § 6(b)(2) (as passed by Senate, December 10, 2025).

⁴ *Id.* § 2(a)(8).

⁵ *E.g.*, *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 192 (2d Cir. 2019).

all, or by expressing certain policy choices that the courts must respect in how they weigh the equities and fashion appropriate relief. The HEAR Act, however, expressly does not confer *any* cause of action or substantive rights. The HEAR Act is a purely procedural statute that engrafts a nationwide statute of limitations on *other* causes of action under state laws that may be invoked by claimants to seek restitution of alleged Nazi-looted art.⁶ The HEAR Act does not purport to divest courts of their equitable jurisdiction over such claims; to the contrary, the HEAR Act expresses the policy choice of having courts resolve Holocaust-era art disputes “in a just and fair manner” on the merits.⁷

Laches is an equitable defense that is rooted in principles of due process. A laches defense protects good faith purchasers of *allegedly* stolen art from being unable procedurally to defend their title because the critical evidence that is necessary to prove or disprove theft has been lost to time. Laches applies when the loss of such evidence is due to inexcusable delay by claimants or their predecessors in having investigated and acted to preserve the critical evidence.⁸

The laches defense serves a balancing function when a court, sitting in equity, is asked to weigh all relevant considerations in deciding between, on the one hand, an alleged victim of theft, and, on the other hand, an innocent, current owner.⁹ The proposed amended HEAR Act would command the courts to ignore when one side has been unduly deprived of the ability and right under due process to put on a meaningful case.

By eliminating the laches defense from state law causes of action that otherwise provide the right to equitable relief and thereby vest the courts with equitable jurisdiction, the proposed amended HEAR Act would unconstitutionally

⁶ See generally William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19 (2018).

⁷ HEAR Act § 3(2).

⁸ E.g., *Zuckerman*, 928 F.3d at 193-94 (“A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim.’ . . . [W]e conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in ‘deceased witness[es], faded memories . . . and hearsay testimony of questionable value,’ as well as the likely disappearance of documentary evidence.”) (citations omitted). The author of this article was co-counsel to The Metropolitan Museum of Art in the *Zuckerman* case.

⁹ See *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 307 (S.D.N.Y. 2011), *aff’d*, 500 F. App’x 6 (2d Cir. 2012) (“However laches is applied in this case, it will work a certain inequity on the losing party, and this Court is ‘in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss.’ On the one hand, a finding of no unreasonable delay would deprive Bakalar of property he purchased in good faith almost fifty years ago. On the other hand, a ruling for Bakalar will deprive Grunbaum’s rightful heirs of a Drawing that, but for the atrocities of the Holocaust, might have remained in the family until today.”) (citation omitted). The author of this article represented David Bakalar.

intrude on the province of such courts to develop appropriate factual records and “decide” for themselves what is “just and fair.” The HEAR Act’s proposed elimination of the laches defense would thus interfere with the Judiciary’s core, historical exercise of its equitable jurisdiction when such jurisdiction has otherwise been vested.

II. THE HISTORICAL UNDERPINNINGS OF THE LACHES DEFENSE

Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances. “[T]he nature of the equitable,” Aristotle long ago observed, is ‘a correction of law where it is defective owing to its universality.’ Laches is one such equitable doctrine. It applies in those extraordinary cases where the plaintiff “unreasonably delays in filing a suit,” and, as a result, causes “unjust hardship” to the defendant.”¹⁰

The doctrine of laches was expounded and embraced by the Supreme Court nearly 200 years ago in *Piatt v. Vattier*, a real property ownership dispute where the defendant had adversely possessed the property for 30 years.¹¹ The Court there explained:

The established doctrine, – or as Lord Redesdale phrased it, in *Hovenden v. Annesley*, “the law of courts of equity” – from its being a rule adopted by those courts, independently of any positive legislative limitations, is, that it will not entertain stale demands. . . . “A court of equity,” said he, “which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; *laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court.*” The same doctrine . . . has been acted on in the fullest manner by this court . . .¹²

¹⁰ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014) (Breyer, J., dissenting) (quoting THE NICOMACHEAN ETHICS 99 (Lesley Brown ed., David Ross trans., Oxford World’s Classics 2009) (citation omitted)).

¹¹ 34 U.S. 405, 416 (1835) (Story, J.).

¹² *Id.* at 416-17 (emphasis added) (citations omitted).

Laches is deeply rooted in the equitable jurisdiction of American courts.

III. THE ROLE OF THE LACHES DEFENSE IN ART RESTITUTION CLAIMS

The laches defense plays a prominent role in art restitution cases, including, although not at all limited to, cases arising out of the Holocaust. An oft-invoked cause of action in stolen art cases is replevin, which is an equitable claim for the recovery and return of chattel that is “directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the [chattel].”¹³ Because restitution claims—ordering the handover of property—are equitable, the equitable jurisdiction of courts is activated, thereby implicating the possibility of a laches defense.

To demonstrate laches, the current owner of art trying to defend title must prove: (i) that the claimant or the claimant’s predecessors knew or should have known of the existence of a claim for allegedly stolen art; (ii) that the claimant or the claimant’s predecessors inexcusably delayed in taking any action to bring a claim; and (iii) that the current owner was unduly prejudiced because, as a result of the claimant’s or their predecessors’ inactivity and the passage of time, evidence necessary to rebut the claim of theft has been lost or destroyed and material witnesses have passed away.¹⁴ Both “inexcusable delay” and “undue prejudice” must be shown.¹⁵

Numerous courts have applied the laches defense to bar art restitution claims arising out of the World War II era.¹⁶ These are principled rulings based on conclusions that it would have been unjust and unfair to wrest property from good faith owners when allegations of Nazi theft were unprovable due to the loss of critical evidence—and where such loss of evidence was caused by the claimants’ or their predecessors’ unreasonable delay in acting.¹⁷

In *Zuckerman v. Metropolitan Museum of Art*, for example, the plaintiff sought recovery of a Pablo Picasso painting that the plaintiff’s ancestors in Europe

¹³ *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991).

¹⁴ *E.g.*, *Bakalar*, 500 F. App’x at 8 (citations omitted).

¹⁵ *Id.*

¹⁶ Because New York is the United States’ art market hub, decisions from New York courts are most prominent in this area – particularly because New York law requires current, good faith owners of allegedly stolen art to *disprove* allegations of theft. *Lubell*, 77 N.Y.2d at 321; *see, e.g.*, *Matter of Peters v. Sotheby’s Inc.*, 821 N.Y.S.2d 61 (N.Y. App. Div. 2006) (“The delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of [the artwork] has prejudiced the good-faith purchaser since none of the parties to the original sale of the painting . . . are alive.”); *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, 752 N.Y.S.2d 295, 296-297 (N.Y. App. Div. 2002) (holding that a laches defense applied based on a similar analysis).

¹⁷ *See Lubell*, 77 N.Y.2d at 317.

had sold to a well-known, private art dealer in France in 1938 “to raise money to escape Hitler’s growing influence in Italy and relocate to Brazil.”¹⁸ The plaintiff sued pursuant to the HEAR Act and argued that her ancestors sold the painting “under duress” caused by the rise of Nazism.¹⁹

The court dismissed the plaintiff’s claims on the basis of laches. *First*, the court found that the plaintiff’s ancestors had themselves unreasonably delayed the seeking of restitution of the painting, explaining:

It is evident on the face of the complaint that the Leffmanns knew to whom they sold the Painting in 1938, and Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting. Indeed, over seventy years passed between the sale of the painting in 1938 and Zuckerman’s demand that the Met return the Painting in 2010.

It is eminently understandable that the Leffmanns did not bring any claim for the Painting during the course of World War II and even, perhaps, for a few years thereafter, given their specific circumstances. However, it is simply not plausible that the Leffmanns and their heirs would not have been able to seek replevin of the Painting prior to 2010. As noted above, the Leffmanns, being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses. This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a “masterwork” of Picasso, not an obscure piece of art.²⁰

Second, the court found that the plaintiff’s ancestors’ delay had unduly prejudiced the painting’s current owner, which could not longer adequately defend against the assertion of “duress,” finding:

Assuming *arguendo* that Plaintiff’s central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties. No witnesses remain who could testify on behalf of the Met that the Sale was voluntary, or indeed on behalf

¹⁸ 928 F.3d at 189-90.

¹⁹ *Id.* at 190.

²⁰ *Id.* at 193-94 (citation omitted).

of the Plaintiff that the Painting was sold “involuntar[ily],” because the Leffmanns “had absolutely no other alternative.” Nor are there first-hand witnesses who could testify to facts relevant to the Met’s possible affirmative defenses On these facts, “the original owner[s’] lack of due diligence and prejudice to the party currently in possession are apparent,” and the issue of laches can be decided as a matter of law.²¹

A similar result was reached in *Bennigson v. The Solomon R. Guggenheim Foundation*.²² In that case the plaintiffs, suing pursuant to the HEAR Act and asserting a similar claim of “duress,” alleged that their ancestors, who had “experienced severe persecution when the Nazis took over Germany and were forced to flee to other countries,” sold a different Pablo Picasso painting in 1938 to a well-known, Jewish, private art dealer in France “to raise cash to escape to Argentina.”²³

The court dismissed the case on the basis of laches, finding both unreasonable delay where no claim was made for the painting’s return for over 80 years, despite awareness of the painting’s circumstances and well-publicized reports of the painting’s bequest to the current owner in the 1960s, and prejudice caused by such delay in the form of lost, essential testimony from first-hand witnesses.²⁴

The *Bakalar v. Vavra* case is also notable because it arose out of the Holocaust, but the laches ruling applied to a claim of post-war, intra-family theft. The claimants in *Bakalar* alleged that an Egon Schiele drawing had been stolen from their ancestor by the Nazis in the late-1930s.²⁵ While certain documentary evidence survived the war and demonstrated that the claimants’ ancestor had owned a number of works by Schiele before his arrest and eventual murder at the hands of the Nazis, no documents proved that the ancestor had owned the drawing at issue or that the Nazis had ever seized the drawing.²⁶

Post-war documentation, however, demonstrated that the sister-in-law of the Holocaust victim had possessed and sold the drawing to a Swiss art dealer in the 1950s.²⁷ This evidence was sufficient to both establish an inference of the Holocaust victim’s prior ownership of the drawing, but also to rebut the claimants’ allegations of Nazi theft.²⁸

²¹ *Id.* at 194-95 (citations omitted).

²² 242 A.D.3d 567 (N.Y. App. Div. 2025).

²³ *Id.* at 568.

²⁴ *Id.*

²⁵ 500 F. App’x at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 8.

The claimants alternatively asserted that the sister-in-law (who had passed away in the 1970s) had stolen the painting from the Holocaust victim's estate (*i.e.*, because there were other potential heirs by intestacy who should have been entitled to proportional ownership of the drawing).²⁹ The court rejected this alternative theory on the basis of laches.³⁰

In particular, the court found that the surviving evidence demonstrated that the claimants' parents and grandparents were either aware of or close to the sister-in-law before she died, and therefore more likely than not knew of her possession of the drawing and had elected not to bring a claim against her.³¹ The claimants sued after the sister-in-law and those other family members, who had been more proximate to the events, had died. The court found that "[t]here can be no serious dispute that the deaths of family members—[the sister-in-law] and others of her generation, and the next—have deprived [the current owner] of key witnesses."³² Because the current owner no longer had a reasonable ability to rebut the allegations that the sister-in-law had been a thief, the court applied laches and barred the claim for replevin.³³

These and numerous other cases arising out of the Holocaust demonstrate that laches exists as a form of due process protection for good faith current owners of art *alleged* to have been stolen: laches protects *bona fide* current owners from being placed in the position of not having a reasonable opportunity to develop a factual record and rebut allegations of theft due to the loss of evidence, where the loss of evidence is attributable to undue delay by the claimant in having sued.³⁴

Moreover, as stated above, the laches defense is often successful in art restitution cases that do *not* arise out of the Holocaust. In *Platt v. Michaan*, for example, the court dismissed claims asserting that a grandson of the artist Louis Comfort Tiffany had violated a purported "Anti-alienation restriction" imposed on all family members not to sell Tiffany art to outsiders by selling two Tiffany

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (citations omitted).

³³ *Id.* at 9.

³⁴ *Cf. Miller v. French*, 530 U.S. 327, 350 (2000) ("[W]hether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns."); *Galicía v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005) ("[D]ue process requires . . . 'a meaningful opportunity to be heard' and a 'reasonable opportunity to . . . present evidence . . .'" (citations omitted)).

paintings to the defendant, who was not a Tiffany family member.³⁵ The evidence of such a restriction was equivocal, at best.³⁶ The court dismissed the claims brought by Tiffany's great-grandchildren on the basis of, *inter alia*, the laches defense, finding undue delay by their ancestors, who had failed to take any action sooner, and undue prejudice caused by such delay "because the key witnesses to the purported existence of the anti-alienation agreement" were all deceased and "cannot testify."³⁷

Thus, laches is not just a procedural, time-based defense, but also a defense focused on the quality of evidence that exists after a period of undue delay, and whether the possessor of allegedly stolen art has been left with a meaningful opportunity to make a rebuttal presentation. Indeed, laches does *not* apply in cases of undue delay alone. If conclusive evidence of Nazi theft continues to exist and is presented *notwithstanding* a period of undue delay by a claimant, the current owner cannot claim "undue prejudice" because the owner could not reasonably be expected to rebut the fact of theft.³⁸ Laches is not merely a time-based defense in this context: it is a defense founded on the quality of evidence that remains available regardless of delay.

III. CONGRESS SHOULD NOT PROHIBIT A COURT SITTING IN EQUITY FROM CONSIDERING EVIDENCE OF LACHES

A. Separation of Powers Dictates that the Judiciary "Decides" Cases

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³⁹ The "judicial Power" includes, most importantly, the power of the courts to "decide" cases and controversies. As the Supreme Court explained in *Plaut v. Spendthrift Farm, Inc.*:

³⁵ 695 F. Supp. 3d 420, 437 (S.D.N.Y. 2023). The author of this article represented Allen Michaan in the *Platt* case.

³⁶ *Id.* at 441-43.

³⁷ *Id.* at 447-48 ("Because Plaintiffs *and* their predecessors . . . knew or should have known of the circumstances giving rise to the claim by no later than [the alleged family thief's] death . . . the Court finds that there was an unreasonable delay The resulting prejudice of Plaintiffs' delay is clear. Plaintiffs' delay in pursuing their claim "makes it difficult to garner evidence to vindicate [Defendant's] . . . rights) (citations omitted).

³⁸ *E.g., In re Estate of Flamenbaum*, 22 N.Y.3d 962, 965-66 (2013) (finding in Holocaust-era antiquity context that laches was not shown where, even if claimant had not exercised due diligence, the current possessor was not unduly prejudiced because the evidence ultimately uncovered convincingly demonstrated that the antiquity had, in fact, been stolen).

³⁹ U.S. Const., art. III; *see also id.* at art. I, § 8, cl. 9.

The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy⁴⁰

Under the separation of powers doctrine, Article III prohibits Congress from usurping the power of the judicial branch to “decide” cases.⁴¹ “In the context of Article III, deciding a case means resolving it on the basis of legal reasons, not political or extra-legal reasons. . . . Separation [of the judicial branch] from the Legislature was paramount [to the Framers] because it protected the decisions of particular cases from political will or extra-legal bias.”⁴² Thus, the Judicial Branch alone must be in a position to weigh evidence and “decide” cases before it.⁴³ Chief Justice Roberts’s dissent in *Bank Markazi* is illustrative:

No less than if it had passed a law saying “respondents win,” Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties’ specific legal disputes to guarantee respondents victory. . . . “[T]he legislative body is, in truth, by no means competent to the determination of causes between party and party,” having exercised the judicial power “without being shackled with rules,” guided only by “crude notions of equity.”⁴⁴

To decide cases, moreover, courts must be able “to develop an accurate factual record Indeed, it is impossible to decide cases without a factual record If Congress prohibited courts from developing a record, they could not decide cases.”⁴⁵ This principle reflects a basic tenet of constitutional due process: litigants

⁴⁰ 514 U.S. 211, 218-19 (1995) (emphasis added); accord *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) (“Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.”) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

⁴¹ *Plaut*, 514 U.S. at 219 (“[A] ‘judicial Power’ is one to render dispositive judgments.’ By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.”) (citation omitted).

⁴² Dustin B. Benham, *Beyond Congress’s Reach: Constitutional Aspects of Inherent Power*, 43 Seton Hall L. Rev. 75, 84 (2013); see also *Bank Markazi*, 578 U.S. at 212 (“Necessarily, that endowment of authority [from Article III] blocks Congress from ‘requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.’”) (quoting *Plaut*, 514 U.S. at 218).

⁴³ E.g., *Plaut*, 514 U.S. at 218-19.

⁴⁴ 578 U.S. 237, 241 (Roberts, C.J., dissenting) (citations omitted) (emphasis added).

⁴⁵ Benham, *supra* note 44, at 77, 97.

must be given “a meaningful opportunity to be heard,” which includes the right to present evidence.⁴⁶ Accordingly, Congress may not enact laws that purport to supersede the Judicial Branch’s sole right to consider an appropriate factual record and to “decide” cases and controversies within their jurisdiction.

B. Once Vested with Equitable Jurisdiction, a Federal Court Must be Permitted to Exercise Its Equitable Discretion and to Decide Cases for Itself

When a cause of action gives a court jurisdiction to grant equitable relief, the court’s power is necessarily broad and flexible.⁴⁷ “An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. Exercise of that discretion . . . may require them to *withhold* their relief in furtherance of a recognized, defined public policy.”⁴⁸

Congress has the power not to vest courts with equitable jurisdiction over specific causes of action in the first instance. As explained by the Supreme Court in *Lockerty v. Phillips*: “The Congressional power to ordain and establish inferior courts includes the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.’”⁴⁹

Congress also may enact substantive laws that bar any right to an equitable remedy.⁵⁰ The HEAR Act, however, expressly does *not* “create a civil claim or

⁴⁶ See, e.g., *Miller*, 530 U.S. at 350 (“due process . . . principally serves to protect the personal rights of litigants to a full and fair hearing”).

⁴⁷ See, e.g., *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”) (citations omitted); Theodore K. Cheng, *Invading An Article III Court’s Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 Wash. & Lee L. Rev. 969, 1007-08 (1999) (“Equity courts were designed to provide remedies in those situations in which the award of monetary damages by a law court failed to remedy the harm.”)

⁴⁸ *Meredith*, 320 U.S. at 235 (emphasis added).

⁴⁹ 319 U.S. 1982 (1943).

⁵⁰ See *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (“Nothing in either the language or the legislative history of § 205(g) indicates that Congress intended to preclude injunctive relief in [Social Security Act] suits.”); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) (“Here Congress said nothing about the power of the Court of Appeals to issue stay orders under [the Communications Act of 1934]. But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts.”); *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 497-99 (2001) (finding that

cause of action under Federal or State law.”⁵¹ Nor does the HEAR Act bar a claimant’s entitlement to equitable relief. On the contrary, the HEAR Act embraces equitable remedies provided by the various state laws, including the remedy of restitution. The HEAR Act is a purely procedural statute that engrafts a nationwide, six-year statute of limitations over all state substantive laws that allow for the restitution of alleged Nazi-stolen artwork.⁵²

Because state law claims for replevin are equitable, they vest deciding courts with equitable jurisdiction.⁵³ The HEAR Act does not purport to deprive the courts of such jurisdiction; the HEAR Act is predicated on the existence of equitable jurisdiction.

As equitable jurisdiction is vested in the Judiciary to resolve claims asserting Nazi looting of art, the full range of equitable discretion should remain available to the Judiciary. As the Supreme Court explained in *Porter v. Warner Holding Co.*, “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”⁵⁴

While the Supreme Court has long held that Congress may proscribe the laches defense from actions at law by imposing statutes of limitation, the Court has recognized a demarcation with respect to the role of the laches defense in actions at equity.⁵⁵

courts exercising equitable jurisdiction under Federal Controlled Substances Act may not consider evidence of medical necessity as being part of the “public interest” because the statute made a “policy choice . . . as to what behavior should be prohibited” and “preclude[d] consideration of this evidence [of a medical necessity] . . .”).

⁵¹ HEAR Act § 5(f).

⁵² *Id.* § 5(a).

⁵³ *E.g.*, *Lubell*, 77 N.Y.2d at 321.

⁵⁴ 328 U.S. 395, 398 (1946); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-94 (2006) (“[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination [of infringement] [T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.”) (citations omitted); Cheng, *supra* note 49, at 1010 (“Although all federal courts except the Supreme Court are created by acts of Congress, the federal courts’ equity jurisdiction is an inherent component of their structure and should remain impervious to legislative regulation once created.”).

⁵⁵ *United States v. Mack*, 295 U.S. 480, 489 (1935) (“Laches within the term of the statute of limitations is no defense at law.”) (citations omitted); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 n.16 (1985) (“[A]pplication of the equitable defense of laches in an action at law would be novel indeed.”); *Petrella*, 572 U.S. at 686 (holding that laches cannot bar claim for damages under Copyright Act if claim is asserted within the act’s statute of limitations). The merger of law and equity in 1938 does not affect this analysis. *E.g.*, *Petrella*, 572 U.S. at 678.

In *Petrella*, for example, the Court held that Congress could bar laches as a defense under the Copyright Act to a claim for damages if the claim is brought within the congressionally prescribed limitations period.⁵⁶ The Court also specifically explained, however: “Should *Petrella* ultimately prevail on the merits, the District Court, in determining appropriate injunctive relief and assessing profits, may take account of her delay in commencing suit.”⁵⁷

Petrella had the effect of overruling the Fourth Circuit’s decision in *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, which found that, “when Congress creates a cause of action and provides both legal and equitable remedies, its statute of limitations for that cause of action should govern, regardless of the remedy sought.”⁵⁸ However, the HEAR Act does not create a cause of action or itself afford either legal or equitable remedies.⁵⁹ Thus, where Congress, through the HEAR Act, has neither conferred nor withdrawn the equitable jurisdiction of the courts to decide claims seeking restitution of alleged Nazi-looted art under other state laws, the courts should retain the ability to exercise the laches doctrine.⁶⁰

⁵⁶ 572 U.S. at 667.

⁵⁷ *Id.* at 668 (emphasis supplied; citation omitted); see also *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 235 (6th Cir. 2007) (“To the extent . . . that the relief sought by the plaintiffs exceeds what might otherwise be considered just, we recognize that a statutory limitation period on filing suit need not always trump equitable principles.”) (citations omitted); *New Era Publ’ns Int’l ApS v. Henry Holt and Co.*, 873 F.2d 576, 585 (2d Cir. 1989) (“Such severe prejudice, coupled with the unconscionable delay already described, mandates denial of the injunction for laches and relegation of *New Era* to its damages remedy”) (citations omitted); *Ivani Contracting Corp. v. City of N.Y.*, 103 F.3d 257, 259 (2d Cir. 1997) (“The Supreme Court long ago recognized that, while the doctrine of laches survived as a further limitation upon granting relief in equity, ‘[l]aches within the term of the statute of limitations is no defense at law.’”) (citations omitted); *Lubell*, 77 N.Y.2d at 321 (“Despite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the Statute of Limitations, our holding today should not be seen as either sanctioning the museum’s conduct or suggesting that the museum’s conduct is no longer an issue in this case. We agree with the Appellate Division that the arguments raised in the appellant’s summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting.”).

⁵⁸ 243 F.3d 789, 798 (4th Cir. 2001).

⁵⁹ HEAR Act § 5(f).

⁶⁰ It should be noted that there are federal circuit court decisions upholding CERCLA’s prohibition on the assertion of laches as a defense to liability – although not damages – in claims for environmental cleanup and contribution costs. *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1271-72 (7th Cir. 1994) (“[O]ur holding is limited to the simple proposition that CERCLA does not permit equitable defenses to [statutory] liability. We see nothing illogical or untenable about a statutory scheme that bars equitable defenses to liability but allows the consideration of equitable factors in apportioning costs between various responsible parties.”); *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993). While these courts characterized CERCLA cost-recovery claims as “equitable in nature,” they are nonetheless claims for money damages (*i.e.*, for the costs of environmental remediation); and, moreover, CERCLA

C. Congress May Do No More Than “Guide” the Courts’ Exercise of Equitable Discretion Through the HEAR Act

Congress may enact laws that have the effect of guiding courts to exercise their equitable discretion in a particular way to meet Congress’s dictated policy.⁶¹ Nevertheless, Congress must leave the final decision-making to the courts. In *Tennessee Valley Auth. v. Hill*, for example the Supreme Court considered the necessity of an injunction under the Endangered Species Act of 1973 against further water dam construction, where it was found that completion of the dam threatened to eradicate a population known as the snail darter.⁶² The Court began its analysis by explaining:

It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. This Court made plain in *Hecht Co. v. Bowles* that “[a] grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances.” . . . Thus, in *Hecht Co.* the Court refused to grant an injunction when it appeared from the District Court findings that “the issuance of an injunction would have ‘no effect by way of insuring better compliance in the future’ and would [have been] ‘unjust’ to [the] petitioner and not ‘in the public interest.’”⁶³

The Court also explained, however, that while it is the province of the Judiciary to interpret the law: “Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws *and for the courts to enforce them when enforcement is sought.*”⁶⁴ Where the judicial fact-finding demonstrated that completion of the dam threatened extinction of the snail darter, the Court concluded that there was no choice but to enjoin further work on the dam.⁶⁵ The Court explained:

permits courts to “tak[e] into account relevant equitable considerations” in apportioning such damages. *Munster*, 27 F.3d at 1270-71 (citation omitted). These decisions, therefore, should not be viewed as altering the Supreme Court’s hostility to the notion that Congress may outlaw an Article III court’s consideration of the laches defense when the court has been vested with equitable jurisdiction.

⁶¹ See, e.g., *Meredith*, 320 U.S. at 235.

⁶² 437 U.S. 153, 193-94 (1978); 16 U.S.C. § 1536.

⁶³ 437 U.S. at 193-94 (citations omitted).

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Id.*

We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the [dam]. *Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities* Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.⁶⁶

Thus, the Court determined that an injunction had to issue because there was no other way to “balance the equities” to adequately protect both the snail darter and the continuation of the dam’s construction, and Congress’s statute had made the clear policy choice to protect the interests of the snail darter over the interests of the dam. The determination to enjoin the dam’s construction was nonetheless a “decision” made by the Court; the Endangered Species Act neither deprived the Court of its equitable discretion nor mandated the issuance of an injunction *per se*.⁶⁷

A similar result was reached in *Miller*. In that case, the Court considered the propriety of injunctive relief in connection with a claim brought by prisoners under the Prison Litigation Reform Act of 1995 (the “PLRA”).⁶⁸ Congress had amended the PLRA to establish “new standards for the enforcement of prospective relief” and had “restricted courts’ authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right.”⁶⁹ The prisoners argued that Congress had unconstitutionally “prescribed a rule of decision” for the Article III courts because no prospective relief could be awarded until a “final decision on the merits” issued in accordance with the statute’s high standards.⁷⁰ The Court rejected the prisoners’ argument, finding that “[r]ather than prescribing a rule of decision, [the statute] simply imposes the consequences of the court’s application of the new legal standard *The PLRA does not deprive courts*

⁶⁶ *Id.* (emphasis added).

⁶⁷ See also *Weinberger*, 456 U.S. at 313-14 (“Of course, Congress may intervene and guide or control the exercise of the courts’ discretion In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity The purpose and language of the [Endangered Species Act] limited the remedies available to the District Court; *only an injunction could vindicate the objectives of the Act.*”) (citations omitted) (emphases added).

⁶⁸ 18 U.S.C. § 3626.

⁶⁹ *Miller*, 530 U.S. at 347 (citations omitted).

⁷⁰ *Id.* at 349.

of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.”⁷¹

Decisions such as *Tennessee Valley*, *Miller* and *Oakland Cannabis* demonstrate that Congress may guide how equitable relief may need to be granted by a court to satisfy a national policy. Nevertheless, once equitable jurisdiction is vested, the court retains the discretion to decide for itself whether to grant equitable relief.

The policy preference expressed by Congress in the HEAR Act is to resolve claims asserting Nazi looting of art in a “just and fair manner” and *on the merits*.⁷² By eliminating the laches defense, the HEAR Act would go well beyond an expression of national policy intended to guide the Judiciary’s exercise of its equitable discretion. Congress would be commanding the courts to restrain their equitable jurisdiction, and to overlook whether there is an absence of critical evidence necessary to prove or disprove allegations of Nazi theft or duress.⁷³

Ironically, eliminating the laches defense would conflict with Congress’s policy directive under the HEAR Act of arriving at “just and fair” resolutions. That conflict would be accentuated by courts continuing to apply the laches defense to arrive at “equitable” results in *other* art restitution cases that do not arise out of the Holocaust.

V. CONCLUSION

The HEAR Act embraces and relies upon the equitable jurisdiction of the courts in claims alleging Nazi-based duress transfers of art. By eliminating the laches defense, the proposed amended HEAR Act would have the effect of only partially divesting the courts of their equitable discretion in a manner that necessarily favors the claimants, thereby interfering with the courts’ vested jurisdictional right to “decide” such cases for themselves.

⁷¹ *Id.* at 349-50 (emphasis added); see also *Oakland Cannabis*, 532 U.S. at 499 (finding that Congress set a “public interest” standard that precluded consideration of evidence of medical necessity in deciding whether and how to exercise equitable relief).

⁷² HEAR Act § 3(2).

⁷³ The effect of this HEAR Act amendment, which would constrain the courts to overlook the lack of evidence that could either prove or disprove bare allegations of Nazi theft or duress, would be to create a *de facto* conclusive or irrebuttable presumption of Nazi theft or duress. Conclusive presumptions are generally found to violate Due Process rights. See, e.g., *Turner v. Department of Empl. Security*, 423 U.S. 44, 45-46 (1975) (*per curiam*) (finding the conclusive presumption that women are “unable to work” during period of pregnancy to violate Due Process, and explaining that “the Constitution require[s] a more individualized approach” to such questions) (citation omitted).

Claims asserting Nazi duress in the transfers of art can often involve ambiguous and murky fact patterns. While allegations of Nazi duress must be credited by the federal courts as true at the pleadings stage under Federal Rule of Civil Procedure 12(b)(6), ultimate judgments should be the product of proof. Good faith current owners are entitled to defend their title by testing whether allegations of Nazi duress can be proved or disproved. If the critical evidence is gone—due to choices by claimants or their predecessors not to preserve critical evidence—then the courts are left with allegations that are both unproved and unprovable. The laches defense exists in acknowledgement of that fact, and to protect against judgments predicated on guesswork.

If Congress were to eliminate the laches defense, then it would no longer merely be guiding the courts towards a policy directive of reaching “just and fair” resolutions of claims asserting Nazi-looted art. Congress would be unlawfully depriving the courts of their vested equitable power under Article III.

THE INJURED SELF IN THE AESTHETICS OF CRIMINAL INSULT

*Gabriele L. Stark-Lütke Schwienhorst**

I. INTRODUCTION

In Germany, the Freedom of Arts guaranteed by Art. 5 para. 3 s. 1 of the German Federal Constitution¹ and the criminal law protection of honor outlined in Sec. 185 of the German Criminal Code² conflict with each other. This tension has preoccupied legal practitioners and artists for decades. Art is free from state censorship and content restrictions, providing a space for creativity and provocation. However, the German legal system also requires the protection of individuals' personal dignity and reputation. When a poem, caricature, or play attacks others harshly, the question arises: Where does the Freedom of Arts end, and where does criminal insult begin?

To locate this tension precisely in legal terms, first, we must understand the “operating mode” of German (criminal) law. While Anglo-American law is based on the authority of case law—the consolidation of judicial decisions into binding precedents—German legal doctrine is based on a codified system of norms. Rather than relying on case-centered precedent, this system is oriented toward a structure of abstract, general norms. The task of jurisprudence is to apply these norms to specific circumstances. This systematic structure is particularly pronounced in German criminal law. The three-stage structure of crime (“dreistufiger Verbrechenbau”)³—offence (“Tatbestand”), unlawfulness (“Rechtswidrigkeit”), and guilt (“Schuld”)—not only provides a methodological order for the

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¹ Hereinafter referred to as “GG”.

² Hereinafter referred to as “StGB”.

³ The widely accepted three-stage structure of crime in German criminal law systematically distinguishes between the offence of the case (is there a legal (offence) description?), unlawfulness (is the act permitted on grounds of justification?), and guilt (can the perpetrator be blamed?); for a more detailed description of the three-stage structure of crime, Claus Roxin & Luís Greco, *Strafrecht: Allgemeiner Teil Bd. I* § 10 20 et seq. (5th ed. 2020) (Ger.).

examination procedure but also expresses a fundamental dogmatic understanding that embeds the facts in a hierarchically structured sequence of evaluations.

In this context, the Federal Constitutional Court (“Bundesverfassungsgericht”) plays a pivotal role. Acting as the “guardian of the constitution”, it has developed fundamental guidelines for the relationship between the Freedom of Arts and the protection of honor. Its decisions are binding not only on the constitutional organs of the federal and state governments but also on all courts and administrative authorities (Art. 20 para 3 GG; Sec. 31 BVerfGG). This means that the Federal Constitutional Court does not merely decide on individual cases. Rather, it determines how relevant constitutional norms, e.g., Art 5 para. 3 s. 1 GG (Freedom of Arts) and Sec. 185 StGB (criminal liability for insult) are understood and applied throughout the legal system. The court's authority is therefore formative of German constitutional law, comparable to the Supreme Court's role in the United States, but grounded in a codified constitutional text rather than primarily in case law.

Landmark decisions by the Federal Constitutional Court—from the *Mephisto* case to the *Anachronistic Train* (“Anachronistischer Zug”) case to the *Strauß caricatures* (“Strauß-Karikaturen”) case—illustrate the complex tension between the Freedom of Arts and the criminal protection of honor in three ways. First, they demonstrate that Freedom of Arts, as an expression of creative self-determination, can sometimes take precedence. Second, they demonstrate that personal honor, as a legally protected right, can establish an independent boundary of the Freedom of Arts. Third, they demonstrate that establishing an abstract hierarchy between the two legal positions is not possible; rather, a careful weighing of each individual case is required, in which both principles are considered in relation to one another.

This article outlines the main lines of German constitutional court case law and reveals the theoretical premises on which they are based. Finally, it develops criteria to determine how the Freedom of Arts and criminal⁴ protection of honor can be harmonized.

II. AN OVERVIEW OF THE TERM “ART” AND THE FREEDOM OF ARTS IN GERMANY

A. *The Term “Art”*

⁴ In German law, the protection of personal honor (“Ehre”) is not exclusively a matter of criminal law. In addition, differentiated civil law protections are available. Those affected can demand cessation, revocation, or monetary compensation using the means of tort law (Sec. 823 para. 1 of the German Civil Code, in short: BGB), the right of defense (Sec. 1004 BGB by analogy), and general personal rights (Art. 2 para. 1 in conjunction with Art. 2 para. 1 GG).

“The limits of my language mean the limits of my world.” (in German: „Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt.”)⁵ What *Wittgenstein* formulates in his *Tractatus* (5.6) for thinking in general can also be applied to art to a certain extent. For it is not only the practice of art, but also—and especially—its intellectual comprehension that is bound to language. The attempt to determine the relationship between arts and criminal law in the context of interest here therefore, necessarily requires a conceptual approach to art itself. It should be noted that the law does not have a fixed definition of art, so this must first be determined in terms of content before a specific situation can be examined to determine whether or not it falls under the relevant definition of art.

However, the multitude of attempts in this regard shows that art makes conceptual fixation difficult, so art may appear to be a creation in resistance to the nameable.

Nevertheless, a conceptual understanding of what we call “art” is indispensable for the application of German law. This is true not only to think meaningfully about it, in accordance with *Wittgenstein's* thesis in his *Tractatus* (5.6), but also to reveal its meaning in German criminal law. Against this background, the present analysis is confronted with the challenging task of providing the concept of art with sufficient conceptual contours.

From a (criminal) law perspective, the term “art” belongs to the category of normative terms (“normative Begriffe”), which are concepts whose definition always requires an evaluative consideration.⁶ Therefore, even the legal definition of art should derive its essential characteristics from non-legal areas, particularly aesthetics, ethics, and legal philosophy.⁷

Consequently, the Federal Constitutional Court follows this line of reasoning, using three different concepts of art side by side in its established case law. The first landmark ruling was handed down in the so-called *Mephisto* case.⁸ The case concerned the distribution of *Klaus Mann's* novel “Mephisto: A Novel of a Career” (in German: “Mephisto – Roman einer Karriere”), which depicts the life of an opportunistic actor in the Third Reich.⁹ The artistic nature of the work was not in

⁵ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* § 5.6, at 67 (Werkausgabe Bd. I, 21st ed. 2014) (Ger.).

⁶ Martin Schick, *Kunstwerksgarantie und Strafrecht* 11 (1968) (Ger.).

⁷ Wolfgang Kries, *Schranken der Kunstfreiheit* 130 (1970) (Ger.).

⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173 (1971) (*Mephisto*) (Ger.).

⁹ The novel “Mephisto” depicts the protagonist Hendrik Höfgen, an opportunistic actor whose life story largely corresponds to that of Gustaf Gründgens; his adoptive son obtained a civil court injunction prohibiting the printing, distribution, and publication of the novel; Bundesgerichtshof [BGH] [Federal Court of Justice], 50 BGHZ 133, 133 ff. (1968) (Ger.); cf. Peter Jelavich, *Kunstfreiheit und Zensur in Deutschland* 12 ff. (1990) (Ger.).

dispute.¹⁰ Nevertheless, the court emphasized that art has structural characteristics that are unique to its nature and that these characteristics must form the basis for interpreting Art. 5 para. 3 s. 1 GG.¹¹ This led to the so-called “material term of art” (“materialer Kunstbegriff”), which describes art as free creative design through which impressions, experiences, and adventures are expressed using a specific formal language.¹² The intertwining of conscious and unconscious processes is essential to this concept.¹³ Through this interplay, the artist's intuition, imagination, and intellect form a unity, and these three elements combine to form a unity that is not primarily communication, but rather expression, through which the artist directly reveals his or her individual personality.¹⁴

The term “art” was described more clearly in the *Anachronistic Train* ruling (“Anachronistischer Zug”). The case involved a political street theater based on a poem by *Bertolt Brecht*¹⁵ that was performed during the 1980 federal election campaign and criticized *Franz Josef Strauß*.¹⁶ In contrast to *Mephisto*, the court stated that a universally valid definition of art could not be provided.¹⁷ However, the scope of protection granted by Art. 5 para. 3 S. 1 GG must be determined specifically in its application.¹⁸ Therefore, the court resorted to three terms: the material art term (“materialer Kunstbegriff”),¹⁹ the formal-typological art term

¹⁰ Bundesgerichtshof [BGH] [Federal Court of Justice], 50 BGHZ 133, 133 ff. (1968) (Ger.).

¹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 188 (1971) (*Mephisto*) (Ger.).

¹² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 189 (1971) (*Mephisto*) (Ger.); regarding art, the German Federal Constitutional Court states that all artistic activity involves an interplay of conscious and unconscious processes that cannot be resolved rationally. The basis of this understanding of art is the subjectivity of creativity, which is expressed in artistic creation through intuition, imagination, and artistic understanding. The focus is on expression, not communication, and the artist expresses his or her individual personality directly through his or her work, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 189 (1971) (*Mephisto*) (Ger.).

¹³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 189 (1971) (*Mephisto*) (Ger.).

¹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 189 (1971) (*Mephisto*) (Ger.).

¹⁵ Bertolt Brecht, *Die Gedichte* 943 ff. (1981) (Ger.).

¹⁶ *Franz Josef Strauß* (1915–1988) was a polarizing figure in German politics.

¹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 225 (1984) (*Anachronistischer Zug*) (Ger.).

¹⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 225 (1984) (*Anachronistischer Zug*) (Ger.).

¹⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 226 ff. (1984) (*Anachronistischer Zug*) (Ger.).

(“formaler Kunstbegriff”)²⁰—based on genre-specific requirements—and the wide-open art term “art” (“offener Kunstbegriff”),²¹ which defines art precisely through its complexity and the possibility of ongoing interpretation.

This line of reasoning continued in the *Strauß Caricatures* ruling of 1987. The case involved caricatures depicting *Franz Josef Strauß* in a crude and sexually suggestive manner. The decisive question was whether these depictions should be protected as art or classified as criminal insults. This issue required an examination of the constitutional limits of state intervention because any attempt to draw such a line would imply that public authorities were making a substantive evaluation of artistic quality. The Federal Constitutional Court clarified that distinguishing between “good” and “bad” art is unconstitutional, as it would constitute impermissible content control.²²

Similarly, the *Esra* ruling (2007), which concerned *Maxim Biller's* novel “Esra,” had far-reaching consequences. The novel drew close parallels with real people, who claimed it violated their personal rights.²³ The Federal Constitutional Court emphasized that art should be evaluated based on criteria specific to art (in German: “kunstspezifische Kriterien”), not the standards of the real world.²⁴ Thus, it established a standard specific to art for considering conflicts between the Freedom of Arts and personal rights²⁵

The “art” terms developed by the Federal Constitutional Court—material, formal-typological, and wide open—are not immune to criticism. The material art term emphasizes creative subjectivity too much and neglects formalized art styles, such as Bauhaus or New Objectivity.²⁶ The formal-typological art term is too narrow because it struggles to capture unconventional forms of expression, such as happenings.²⁷ The wide-open art term threatens to lose all clarity in its expansiveness.²⁸ Nevertheless, the Federal Constitutional Court combines the three

²⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 226 f. (1984) (Anachronistischer Zug) (Ger.).

²¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 227 (1984) (Anachronistischer Zug) (Ger.).

²² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 377 (1987) (Strauß-Karikatur) (Ger.).

²³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 119 BVerfGE 1 ff. (2007) (Esra) (Ger.).

²⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 119 BVerfGE 1, 23 ff. (2007) (Esra) (Ger.).

²⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 119 BVerfGE 1, 29 (2007) (Esra) (Ger.).

²⁶ Huber, Voßkuhle & Paulus, Grundgesetz, 8th ed. 2024, art. 5 para. 424 (Ger.).

²⁷ Claas Friedrich Germelmann, Dreier Grundgesetz, 4th ed. 2023, art. 5(3) para. 45 (Ger.); Huber, Voßkuhle & Paulus, Grundgesetz, 8th ed. 2024, art. 5 para. 425 (Ger.).

²⁸ Claas Friedrich Germelmann, Dreier Grundgesetz, 4th ed. 2023, art. 5(3) para. 50 (Ger.).

approaches to compensate for their respective weaknesses. These three approaches are therefore used cumulatively to avoid misguided decisions based on a single definition.

The case law from the Federal Constitutional Court demonstrates that a pluralistic approach is necessary to define the term “art.” This is not an expression of judicial arbitrariness; rather, it is the only viable way to acknowledge the diversity of artistic manifestations. In practice, courts regularly rely on art-historical expertise to reliably apply the legally relevant concept of art.

B. The Freedom of Arts

The evolution of the Freedom of Arts in Germany cannot be understood without considering its historical roots. Time and again, the Freedom of Arts has been caught between the demands of artistic autonomy and state control—a conflict that became particularly acute in the 20th century. The Weimar and National Socialist periods, in particular, demonstrated the fragility of artistic protection if it is not firmly anchored in a liberal constitutional order. In this context, the way the architects of the German Federal Constitution (“Verfassungsgeber”) designed the Freedom of Arts as a countermodel to earlier state appropriation is particularly noteworthy.

1. History, Purpose, and Intent

The historical development of the Freedom of Arts in Germany is essentially an ongoing conflict between artistic autonomy and state regulation. Examining this development reveals how the balance of power between art and criminal law has shifted within this area of tension over time.

Although the Weimar Constitution and earlier local regulations contained provisions that guaranteed the Freedom of Arts, neither the Constitution nor its concept of protection could ensure genuine artistic autonomy. Under the Third Reich (1933-1945), a dictatorship was established, and art was no longer free. Instead, art was brought into line and degraded to become an instrument of ideological rule. Anything that did not align with National Socialist ideology was defamed, banned, or destroyed. Today, the term “degenerate art” (“entartete Kunst”) still symbolizes the systematic persecution and suppression of artistic expression.

Following the collapse of Nazi rule, the architects of the German Federal Constitution declared their intention to enshrine artistic freedom as an

indispensable fundamental right in the new constitution.²⁹ Materials from the constitutional convention at Herrenchiemsee reveal that there were no substantial debates regarding the necessity or status of the Freedom of Arts in the German Federal Constitution. Instead, the Freedom of Arts was adopted without significant discussion and in direct connection with Art. 142 of the Weimar Constitution (Weimarer Reichsverfassung, in short: “WRV”). It was apparently taken for granted. Notably absent from these discussions were any substantive debates regarding the scope of the guarantee or the definition of “art.”³⁰ Instead, the Constitutional Convention focused primarily on discussion about potentially limiting the Freedom of Science, which was also enshrined in Art. 5 para. 3 s. 1 GG.³¹ There was no systematic justification for the Freedom of Arts or discussion of its special position within the Constitution's structure—a circumstance that considerably expanded the scope for interpretation in later legal and constitutional developments.

According to the prevailing opinion in the German expert literature, the Freedom of Arts enshrined in the German Constitution was conceived as a deliberate countermeasure to the National Socialist state's ideological appropriation and instrumental control of art.³² The protection of this freedom is a direct reaction to the Third Reich's artistic dictatorship, which aimed to suppress any artistic expression that deviated from the regime.³³ The architects of the Federal German Constitution guaranteed the Freedom of Arts unconditionally (“vorbehaltslos”) to prevent the state from becoming an “art judge” (“Kunstrichter”) and determining which forms of expression were permitted or prohibited.³⁴ This concept of Freedom

²⁹ Werner Matz, 1 Jahrbuch des öffentlichen Rechts N.F. 79, 89 ff. (1951) (Ger.); Joachim Würkner, *Freiheit der Kunst* 26 (1982) (Ger.).

³⁰ Throughout the negotiations, the only change to the catalog of fundamental rights was the reclassification of artistic freedom as a separate paragraph in Art. 5 GG, alongside with the Freedom of Science. This decision was made at a late stage, on 2 May 1949, by the General Editorial Committee and on 5 May 1949, by the Main Committee of the Parliamentary Council. Ernst Matz, 1 Jahrbuch des öffentlichen Rechts N.F. 79, 91 (1951) (Ger.).

³¹ Werner Matz, 1 Jahrbuch des öffentlichen Rechts N.F. 79, 89 ff. (1951) (Ger.).

³² Claus Dierksmeier, 55 *JuristenZeitung* [JZ] 883, 884 (2000) (Ger.); Günther Erbel, 84 *Deutsches Verwaltungsblatt* [DVBl.] 823, 865 (1969) (Ger.); Ulrich Meyer-Cording, 31 *JuristenZeitung* [JZ] 737, 739 (1976) (Ger.); Johanna Freiin von Proff zu Irnich, *Kulturelle Freiheitsrechte* 87 (1987) (Ger.).

³³ Claus Dierksmeier, 55 *JuristenZeitung* [JZ] 883, 884 (2000) (Ger.); Günther Erbel, 84 *Deutsches Verwaltungsblatt* [DVBl.] 823, 865 (1969) (Ger.); Ulrich Meyer-Cording, 31 *JuristenZeitung* [JZ] 737, 739 (1976) (Ger.); Johanna Freiin von Proff zu Irnich, *Kulturelle Freiheitsrechte* 87 (1987) (Ger.).

³⁴ Günther Erbel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 90 (1966) (Ger.); Heinrich Hempel, *Die Freiheit der Kunst* 27 (1971) (Ger.); Ulrich Meyer-Cording, 31 *JuristenZeitung* [JZ] 737, 739 (1976) (Ger.); Sieghard Ott, *Kunst und Staat* 108 (1972) (Ger.); Harro Otto, 58 *Juristische*

of Arts seamlessly fits into the overall structure of the German Federal Constitution. The German Constitution's free and democratic basic order was deliberately designed in opposition to the repressive, ideological structures of National Socialism.³⁵

By contrast, the German Constitution's enshrinement of the Freedom of Arts expressly protects a classical area of human personality development and places the right to artistic activity and creative self-expression at the center.³⁶ In subjective legal terms, it guarantees artists the freedom necessary to develop creatively without restrictions on content or method imposed by public authorities.³⁷

In line with this understanding, the Federal Administrative Court ("Bundesverwaltungsgericht") has emphasized the importance of the Freedom of Arts. According to the court, the Freedom of Arts is a conscious counter-concept to the state appropriation of art that emerged in the Weimar Republic and in an even more radical form during National Socialism.³⁸ In its famous 1955 ruling on the film "Die Sünderin" (The Sinner), the Federal Administrative Court clarified that the Freedom of Arts was intended to free art from the control of police law, which is rooted in authoritarian thinking.³⁹

The position of the Freedom of Arts, the framework of the Constitution, as well as its unconditional guarantee, makes it clear that the constitutional legislator intended to give it special significance.⁴⁰ Nevertheless, its practical relevance was limited in the early years of the German Federal Republic.⁴¹ This was primarily due to the narrow interpretation that prevailed at the time, which viewed the Freedom

Rundschau [JR] 1, 9 (1983) (Ger.); Joachim Würkner, Die Kunstfreiheitsgarantie des Grundgesetzes 38 (1982) (Ger.).

³⁵ Clivia v. Dewitz, NS-Gedankengut und Strafrecht 3 (2015) (Ger.); Timo Handel, 91 Juristische Rundschau [JR] 433, 434 (2016) (Ger.).

³⁶ Günther Erbel, Die Kunstfreiheitsgarantie des Grundgesetzes 91 (1966) (Ger.).

³⁷ Günther Erbel, Die Kunstfreiheitsgarantie des Grundgesetzes 117 (1966) (Ger.); Ulrich Meyer-Cording, 31 JuristenZeitung [JZ] 737, 739 (1976) (Ger.).

³⁸ Bundesverwaltungsgericht [BVerwG], 8 Neue Juristische Wochenschrift [NJW] 1203, 1204 (1955) (Ger.).

³⁹ Bundesverwaltungsgericht [BVerwG], 8 Neue Juristische Wochenschrift [NJW] 1203, 1204 (1955) (Ger.).

⁴⁰ Sven Mißling, Das Grundrecht der Kunst 2 (2012) (Ger.).

⁴¹ Thus, the Freedom of Arts seems to have received little attention in literature during the first decade of the German Federal Republic. There is hardly any case law on the Freedom of Arts from this period either. Although a few literary voices began addressing art from a constitutional perspective in the mid-1960s, the initial focus was on the freedom guaranteed in Art. 5 para. 3 s. 1 GG; see Günther Erbel, Die Kunstfreiheitsgarantie des Grundgesetzes 85 et. Seq. (1966) (Ger.); Josef Hoffmann, Die Kunstfreiheitsgarantie des Grundgesetzes und die Organisierung einer Mediengewerkschaft 202 (1971) (Ger.); Wolfgang Knies, Schranken der Kunstfreiheit (1967) (Ger.); Hans Rolf Ropertz, Freiheit der Kunst (1974) (Ger.).

of Arts as merely a right to defend against state intervention.⁴² It was not until the Federal Constitutional Court's famous *Mephisto* decision in 1971⁴³ that a turning point was reached. The court significantly broadened the art term and made it clear that the Freedom of Art is an objectively value-determining fundamental norm (“objektiv wertentscheidende Grundsatznorm”) that permeates the entire legal system.⁴⁴ It expressly emphasized that the Freedom of Arts protects processes that follow their own laws and aesthetic logic and must therefore remain free from state influence.⁴⁵ How artists encounter and shape reality should not be determined by public authority.⁴⁶ The guarantee of the Freedom of Arts excludes any influence on the methods, content, or tendencies of artistic creation, as well as the establishment of binding rules for the artistic process.⁴⁷

The classification of the Freedom of Arts as an “objectively value-determining fundamental norm” illustrates its far-reaching influence on art-related processes within the legal system.⁴⁸ It not only acts as a classic defensive right against state intervention, but also fulfills a function that preserves democracy.⁴⁹ In this sense, artistic freedom is a yardstick for the degree of freedom in a society and reflects its liberal attitude.⁵⁰

Even today, the Freedom of Arts is primarily understood as a subjective right of defense (“subjektives Abwehrrecht”).⁵¹ It protects both the artistic creative process and the communication of the artwork to the public from state

⁴² Sven Mißling, *Das Grundrecht der Kunst* 3 (2012) (Ger.).

⁴³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173 (1971) (*Mephisto*) (Ger.).

⁴⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 190 (1971) (*Mephisto*) (Ger.).

⁴⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 190 (1971) (*Mephisto*) (Ger.).

⁴⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 190 (1971) (*Mephisto*) (Ger.).

⁴⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 190 (1971) (*Mephisto*) (Ger.).

⁴⁸ This is relevant, for example, in the state funding, closure, or preservation of cultural institutions, the allocation of public funds for art and culture, building design regulations, media law, administrative and civil law restrictions, criminal prosecution of individual works, and tax and export law, cf. Sven Mißling, *Das Grundrecht der Kunst* 4 (2012) (Ger.).

⁴⁹ According to Marsch, the purpose of artistic freedom lies in its functional significance for democracy: by opening up counter-publics that elude social and scientific rules, it subjects them to constant scrutiny and creates space for the previously unthinkable. This open space for interpretation is worthy of protection precisely because of its fundamental incompleteness, Nikolaus Marsch, 76 *JuristenZeitung* [JZ] 1129, 1132, 1138 (2021) (Ger.).

⁵⁰ Friedhelm Hufen, 62 *Juristische Schulung* [JuS] 897, 905 (2022) (Ger.).

⁵¹ Hans von Mangoldt, Friedrich Klein & Christian Starck, *Grundgesetz*, 7th ed. 2018, art. 5 para. 413 (Starck/Paulus) (Ger.).

paternalism.⁵² This includes not only freedom of artistic expression, but also the communication process between artists and audiences.⁵³ It is crucial that the state neither establish binding rules for artistic activity nor limit the artistic creative process.⁵⁴

The wording of the Freedom of Arts in Art. 5 para. 3 s. 1 GG has remained unchanged since the German Constitution took effect. No substantial efforts have ever been made to change its content.⁵⁵ However, the main difference between the German Constitution and the Weimar Constitution lies in the binding nature of fundamental rights on all state powers, as stated in Art. 1 para. 3 GG. Thus, the Freedom of Art is considered as directly applicable law that takes precedence over ordinary laws and may not be restricted by them.

2. The Objective and Personal Scope of the Freedom of Arts

The scope of the Freedom of Arts can only be understood by precisely defining its area of protection. It is important to distinguish between objective protection (“sachlicher Schutzbereich”) and personal protection (“persönlicher Schutzbereich”) of the Freedom of Arts. This distinction is fundamental to both German constitutional and criminal law doctrine.

a) Objective Scope

The Freedom of Arts, as stated in Art. 5 para. 3 s. 1 GG, encompasses a distinct realm of human activity that is separate from other aspects of life, both factually and personally. This distinction is important not only in German constitutional law but also in criminal law. It determines whether behavior falls within the scope of fundamental rights protection and whether that could even render it non-punishable. In objective terms, the Freedom of Arts encompasses the entire sphere of life known as “art”. A dogmatic interpretation that excludes socially harmful or “evil” works of art from the concept of art—for example, due to a lack of “spirituality” (“Vergeistigung”) or for other reasons—contradicts the

⁵²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 119 BVerfGE 1, 2 ff. (2007) (Esra) (Ger.); Hans von Mangoldt, Friedrich Klein & Christian Starck, Grundgesetz, 7th ed. 2018, art. 5 para. 413 (Starck/Paulus) (Ger.).

⁵³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 224 (1984) (Anachronistischer Zug) (Ger.).

⁵⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 189 (1971) (Mephisto) (Ger.); Landgericht München I, 47 Neue Juristische Wochenschrift [NJW] 2630, 2631 (1994) (Ger.).

⁵⁵ Horst Dreier & Fabian Wittreck, Grundgesetz, 3rd ed. 2013, art. 5(3) para. 11 (Ger.).

constitutional guarantee and the purpose of preventing state censorship of art. Such an interpretation is also incompatible with a modern, open understanding of art.

As *Rand* correctly points out, art is inevitably linked to moral values in its structure. However, these values do not act as guiding principles; rather, they appear as a consequence of art's metaphysical orientation and are shaped by the artist's moral ideas.⁵⁶ According to *Rand*, art's actual focus is metaphysical, not ethical: Art is not the “maid of morality”, meaning its purpose is not specifically moral education.⁵⁷

In this respect, a parallel can be drawn to *Wittgenstein's* reflection in the *Tractatus*, according to which ethics concerns the unspeakable, while art as expression is a manifestation.⁵⁸ This makes it clear that art is not anchored in what ought to be, but in showing.

This insight—that art cannot be reduced to moral education or ethical guidelines—gives rise to the need to refrain from imposing legal restrictions on content. In both philosophical and legal terms, art is not bound to any specific content; rather, it is characterized by a fundamental openness to all subjects.⁵⁹ Every topic can potentially be expressed artistically,⁶⁰ and this diversity of content is one of the defining features of modern art.⁶¹ The Freedom of Arts is difficult to define without resorting to basic aesthetic assumptions because of the normative structure of the concept of art. Therefore, the Freedom of Arts protects all forms of expression, regardless of whether they correspond to classical aesthetic or moral standards.⁶² It is not permissible to limit the concept of art in terms of content. The constitutional limit lies solely in cases where art violates human dignity (“Menschenwürde”). It is precisely this renunciation of state control over content that forms the basis for the aforementioned case law of the Federal Constitutional

⁵⁶ Ayn Rand, *Das romantische Manifest* 10, 18 (1971) (Ger.).

⁵⁷ Ayn Rand, *Das romantische Manifest* 10, 18 (1971) (Ger.).

⁵⁸ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* §§ 6.421–6.422, at 83 (Werkausgabe Bd. I, 21st ed. 2014) (Ger.); *Wittgenstein* writes: “It is clear that ethics cannot be expressed; ethics are transcendental [...]” (Translation by the author, in German: “Es ist klar, daß sich die Ethik nicht aussprechen läßt. Die Ethik ist transzendental [...]”), Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* §§ 6.421–6.422, at 83 (Werkausgabe Bd. I, 21st ed. 2014) (Ger.).

⁵⁹ Fritz Bauer, 22 *JuristenZeitung* [JZ] 167, 169 (1967) (Ger.); Günther Erbel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 22 (1966) (Ger.); Martin Schick, *Kunstwerkgarantie und Strafrecht* 18 et seq., 28 et seq. (1968) (Ger.); Martin Schick, 25 *JuristenZeitung* [JZ] 645, 646 (1970) (Ger.); Spyridon Vlachopoulos, *Kunstfreiheit und Jugendschutz* 87 (1996) (Ger.).

⁶⁰Günther Erbel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 22 (1966) (Ger.); Martin Schick, *Kunstwerkgarantie und Strafrecht* 18 ff. (1968) (Ger.); Spyridon Vlachopoulos, *Kunstfreiheit und Jugendschutz* 87 (1996) (Ger.).

⁶¹ Spyridon Vlachopoulos, *Kunstfreiheit und Jugendschutz* 87 (1996) (Ger.).

⁶²Bauer, 22 *JuristenZeitung* [JZ], 167, 169 (1967) (Ger.).

Court, which consistently interprets artistic freedom as protection against state “artistic judgment” (“Kunstrichtertum”).

Therefore, it can be concluded that the Freedom of Arts is subject to the principle of freedom from value judgments. Therefore, it is fundamentally beyond the control of the state. As *Hillgruber* concisely states it: “[w]here freedom is guaranteed, there can be no obligation to truth, goodness, or beauty.”⁶³

b) Personal Scope

From a personal perspective, Art. 5 para. 3 s. 1 GG primarily protects artists.⁶⁴ However, constitutional protection extends much further. The wording (“art and science, research and teaching are free;” in German: “Kunst und Wissenschaft, Forschung und Lehre sind frei.”) explicitly refers to art itself and thus covers not only the artist's individual work, but also the broader context of “art.” Therefore, the entire process of creation and reception is also protected, not just the finished work.⁶⁵ According to the correct interpretation, this protection extends to technical intermediaries and the audience.⁶⁶ Since the state can influence the scope of artistic freedom by controlling access to works of art,⁶⁷ the communication process between the work and its recipients is included in the scope of personal protection.⁶⁸ This means that everyone involved in the mediation process is covered.⁶⁹ The scope of personal protection includes not only painters, writers, and composers, but also publishers, theater organizers, actors, and producers of sound recordings.⁷⁰

C. *Interim Conclusion*

⁶³Christian Hillgruber, *Die Religion und die Grenzen der Kunst*, in *Essener Gespräche zum Thema Staat und Kirche*, Bd. 36, 53, 65 (Heiner Marré et al. eds., 1999) (Ger.).

⁶⁴Andreas von Arnould, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VII, § 167 para. 47 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2020) (Ger.).

⁶⁵Josef Hoffmann, *Die Kunstfreiheitsgarantie des Grundgesetzes und die Organisation einer Mediengewerkschaft* 230 et seq. (1971) (Ger.).

⁶⁶Andreas von Arnould, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VII, § 167 para. 48 et seq. (Josef Isensee & Paul Kirchhof eds., 3d ed. 2020) (Ger.).

⁶⁷Andreas von Arnould, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VII, § 167 para. 49 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2020) (Ger.).

⁶⁸Andreas von Arnould, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VII, § 167 para. 49 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2020) (Ger.).

⁶⁹Josef Hoffmann, *Die Kunstfreiheitsgarantie des Grundgesetzes und die Organisation einer Mediengewerkschaft* 230 et seq. (1971) (Ger.).

⁷⁰Johann Friedrich Henschel, 43 *Neue Juristische Wochenschrift* [NJW] 1937, 1940 (1990) (Ger.).

In summary, the concepts of art and the Freedom of Arts in Germany are defined in a pluralistic and open manner. The German Federal Constitutional Court has deliberately avoided providing a rigid definition, instead developing a system of multiple concepts of art to account for the diversity of artistic expression. Therefore, the Freedom of Arts protects not only the creative process but also the communication and reception of art. Thus, it must be understood as a comprehensive freedom. At the same time, it has become clear that state authorities may not act as “art judges,” as such a role would inevitably entail impermissible content control. However, this raises the question of how artistic freedom applies in cases where artistic expression collides with the limits of criminal insult under Sec. 185 StGB—an issue that will be examined in more detail below.

III. ARTS AND CRIMINAL INSULT

The relationship between the Freedom of Arts and criminal insult is a classic example of the tension between German constitutional and criminal law. Although Art. 5 para. 3 s. 1 GG provides art with extensive protection, as demonstrated above, this protection may conflict with the personal rights of others. This tension is most acute when artists deliberately use provocative forms of expression to denounce political or social injustices, placing individuals—often public figures—at the center of their work.

In such cases, the fundamental question arises as to the extent to which the Freedom of Arts can justify infringements on the personal rights of others through insults motivated by artistic intent. When art deliberately relies on exaggeration and irritation, as in satire, caricature, or avant-garde provocations, it is important to remember that the scope of protection afforded by Art. 5 para. 3 s. 1 GG is not unlimited. The Freedom of Arts is not a license to insult. Rather, it is necessary to define the boundary where the Freedom of Arts and personal rights meet and limit each other simultaneously.

In the context of criminal insult, art proves to be a resonance chamber where wounded egos and the aesthetics of abuse collide. Legal discourse must determine if this is justified criticism expressed through art or an inadmissible, and therefore criminal, insult.

A. *BVerfGE 67, 213 – Anachronistic Train (“Anachronistischer Zug”)*

The *Anachronistic Train* (“Anachronistischer Zug”) case is one of the best-known and most significant cases involving the tension between the Freedom of Arts and criminal insult. It formed the basis for a landmark decision by the German Federal Constitutional Court on the interpretation of Art. 5 para. 3 s. 1 GG.

The street theater performance *Anachronistic Train* ties in with Bertolt Brecht's 1947 poem "The Anachronistic Train, or Freedom and Democracy" ("Der Anachronistische Zug oder Freiheit und Democracy").⁷¹ During the 1980 federal election campaign, political opponents of the then-CDU/CSU chancellor candidate, Franz Josef Strauß, used Brecht's poem as the basis for a political street-theater performance. In the poem, Brecht describes a train traveling through war-torn Germany with two signs bearing the words "Freedom" and "Democracy."⁷² Among those on the train were a priest marching under a cross with its hooks covered up,⁷³ gentlemen from the weapons industry,⁷⁴ teachers advocating for the education of German youth in the virtues of warfare ("Schlächtertugend"),⁷⁵ doctors seeking communists for experimentation,⁷⁶ gas chamber planners,⁷⁷ denazified Nazis in high office⁷⁸, Stürmer editors advocating for Freedom of the Press,⁷⁹ a judge who acquits all of "Hitlerism" ("Hitlerei"),⁸⁰ sowie and all the good people who were suddenly innocent ("all die Guten, die geschwind nun es nicht gewesen sind").⁸¹ In the "capital of the movement" ("Hauptstadt der Bewegung") six party comrades joined the procession: Oppression, Leprosy, Fraud, Stupidity, Murder, and Robbery. These comrades demand "Freedom" and "Democracy" as well.⁸² The procession began with a vehicle carrying a large bell inscribed with the words "Freedom and Democracy."⁸³ This was followed by other floats, including a vehicle with a "general" a military truck emblazoned with a rocket and accompanied by a military band, black limousines with license plates reading "SIE-MENS," "FLICK," and "THYS-SEN," a car with "members of the People's Court," and a car with black-uniformed members of a private security service.⁸⁴ Numerous banners with slogans such as "Freedom instead of butter," "For victory in World War III,"

⁷¹ Bertolt Brecht, *Die Gedichte* 943 et seq. (1981) (Ger.).

⁷² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁷³ Bertolt Brecht, *Die Gedichte* 943, 944 (1981) (Ger.).

⁷⁴ Bertolt Brecht, *Die Gedichte* 943, 945 (1981) (Ger.).

⁷⁵ Bertolt Brecht, *Die Gedichte* 943, 945 (1981) (Ger.).

⁷⁶ Bertolt Brecht, *Die Gedichte* 943, 945 (1981) (Ger.).

⁷⁷ Bertolt Brecht, *Die Gedichte* 943, 945 (1981) (Ger.).

⁷⁸ Bertolt Brecht, *Die Gedichte* 943, 945 (1981) (Ger.).

⁷⁹ Bertolt Brecht, *Die Gedichte* 943, 946 (1981) (Ger.).

⁸⁰ Bertolt Brecht, *Die Gedichte* 943, 946 (1981) (Ger.).

⁸¹ Bertolt Brecht, *Die Gedichte* 943, 946 (1981) (Ger.).

⁸² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

“Freedom instead of communism,” “For Germany within the borders of 1937,” “Freedom instead of politics,” “For the right to a BILD newspaper,” “Freedom instead of expropriation,” “Freedom for us,” and “Freisler instead of Spandau” were carried in a deliberate allusion to the CDU/CSU's election campaign slogan “Freedom instead of socialism.”⁸⁵ The parade ended with a so-called “plague wagon,” whose occupants and order were specified in the director's book. When terms such as “oppression” or “betrayal” were mentioned, corresponding figures, the so-called “plagues,” rose to their feet.⁸⁶ However, an actor wearing a *Franz Josef Strauß* mask pushed them back into their places, initially with success but with increasing difficulty.⁸⁷ These “plagues” were embodied by puppets of *Hitler*, *Göring*, *Goebbels*, and others.⁸⁸ During the performance, the actor turned to the puppets several times and held up a sign that read, “Hitler must be dead someday.”⁸⁹ Shortly before the performance ended, all six figures rose and blocked the actor's view, leaving only the sign he held aloft with the words “Freedom and Democracy” visible.⁹⁰

Following the performance of the *Anachronistic Train* (“Anachronistischer Zug”), *Franz Josef Strauß* filed a criminal insult complaint. Initially, the actor portraying *Strauß* was convicted by the Kempten District Court (“Amtsgericht”). However, the German Federal Constitutional Court later overturned the decision.⁹¹ Beyond the fundamental considerations of the term “art” in Art. 5 para. 3 s. 1 GG, and the scope of the Freedom of Arts, the court made groundbreaking statements about political art. It expressly recognized the *Anachronistic Train* (“Anachronistischer Zug”) as art under the German Federal Constitution, precisely because of its political objectives.⁹² At the same time, the German Federal Constitutional Court clarified that even when art directly addresses current events, no binding rules or content-related standards for artistic creation can be

⁸⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁸⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁹⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 214 (1984) (Anachronistischer Zug) (Ger.).

⁹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213 (1984) (Anachronistischer Zug) (Ger.).

⁹² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 227 (1984) (Anachronistischer Zug) (Ger.).

established.⁹³ It emphasized that “committed art” (“engagierte Kunst”) is fully protected by the Freedom of Art and cannot be excluded from this guarantee.⁹⁴ After the constitutional complaint was upheld, the actor who portrayed *Strauß* was acquitted of insult charges in a retrial at the Kempten District Court.⁹⁵

B. *BVerfGE 75, 369 – Strauß Caricatures (“Strauß-Karikaturen”)*

The so-called *Strauß Caricatures* (“Strauß-Karikaturen”) ruling by the German Federal Constitutional Court in 1987 is one of those borderline cases in which the freedom of artistic expression and the criminally protected honor of the individual are in particularly tense relation to one another.

The subject of the decision was whether the cartoons published by *Rainer Hachfeld* in the magazine “konkret,” which depicted then-Bavarian Minister-President *Franz Josef Strauß* as a sexually active pig, should be classified as artistic expressions protected by Art. 5 para. 3 s. 1 GG or as criminal insults under Sec. 185 StGB.⁹⁶

Specifically, the series of caricatures took the following form: The first drawing showed a pig with the prime minister’s characteristic facial features depicted copulating with a pig in a judge’s robe.⁹⁷ Above this image was the caption: “Satire can do anything. Can Rainer Hachfeld too?” (“Satire darf alles. Rainer Hachfeld auch?”).⁹⁸

The second drawing continued the theme by showing the two pigs, sometimes together and sometimes alone, engaged in various sexual activities.⁹⁹ The pigs’ characterizations as the prime minister and the judge were clear.¹⁰⁰

⁹³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 227 (1984) (Anachronistischer Zug) (Ger.).

⁹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 67 BVerfGE 213, 227 et seq. (1984) (Anachronistischer Zug) (Ger.).

⁹⁵ Amtsgericht Kempten, 38 Neue Juristische Wochenschrift [NJW] 987 (1985) (Ger.).

⁹⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

⁹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

⁹⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

⁹⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

¹⁰⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

The third caricature intensified the depiction in that a total of four pigs are now drawn, three of which are “mounting” the pig in front of them.¹⁰¹ Here, too, two of the animals depicted have the facial features of *Strauß*, while the other two are dressed in judicial robes and berets.¹⁰² This drawing is accompanied by the text: “Which is the correct drawing, Mr. Prosecutor?”¹⁰³ It should also be noted that this third drawing was preceded by an incomplete reproduction of a letter from *Rainer Hachfeld* to the editors of “konkret,” in which the artist expresses his frustration at having to repeatedly produce new “pig pictures” because the Minister President was obviously unwilling to let the matter rest.¹⁰⁴

As a result of these publications, the complainant was convicted of insult in three cases and fined a total of 100 daily rates. However, the constitutional complaint lodged against this ruling was unsuccessful. While the German Federal Constitutional Court indisputably considered the caricatures to be art under Art. 5 para. 3 s. 1 GG, it noted that artistic representations can lose their constitutional protection when they violate the inviolable core of human dignity, which is protected under Art. 1 para. 1 GG.¹⁰⁵ The German Federal Constitutional Court affirmed this point in the case involving the depiction of *Strauß* as a sexually active pig.¹⁰⁶

As a result, the court held the complainant's criminal conviction to be compatible with the German Constitution.

C. *Jan Böhmernann's “Defamatory Poem” (“Schmähgedicht”)*

A particularly sensational example of the tension between artistic freedom and criminal defamation is the so-called “Defamator Poem” (“Schmähgedicht”) case from 2016. The case sparked an international debate about the scope of satirical art. It began with the broadcast of the satirical song “Erdowie, Erdowo, Erdogan” on the satirical TV show “Extra 3.” The song sharply criticized Turkish

¹⁰¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

¹⁰² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

¹⁰³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

¹⁰⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 et seq. (1987) (Strauß-Karikatur) (Ger.).

¹⁰⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 380 (1987) (Strauß-Karikatur) (Ger.).

¹⁰⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 369 (1987) (Strauß-Karikatur) (Ger.).

President *Erdoğan's* repressive policies, particularly the persecution of journalists and restriction of the Freedom of the Press.¹⁰⁷

In response to *Erdoğan's* diplomatic intervention and demand to delete the poem,¹⁰⁸ *Jan Böhmermann* presented a satirical poem entitled “Schmähkritik” (defamatory criticism) on his show “Neo Magazin Royale” on 31 March 2016. The poem, which included phrases such as “stupid, cowardly, and uptight, that is Erdoğan the president” (in German: “Sackdoof, feige und verklemmt, ist Erdoğan der Präsident”)¹⁰⁹, was intended to demonstrate what was allegedly no longer covered by Freedom of Expression, Freedom of the Press, and Freedom of the Arts in a drastic form.¹¹⁰

The case took on special significance, primarily political and media-related, as *Erdoğan* subsequently filed a criminal complaint under Sec. 103 StGB (old version)¹¹¹ and the German federal government granted authorization for prosecution under Sec. 104a StGB (old version).¹¹² This prompted the criminal justice system to address the scope of artistic satire against a foreign head of state.

Admittedly, the explicit title “Schmähgedicht” and the drastic formulations might initially give the impression that it crosses the line into criminal insult. However, considering the ironic context and *Böhmermann's* introduction, as well as the coarseness and exaggeration of the poem, it could be seen as a satirical debate within the scope of the Freedom of Arts.¹¹³ The deliberate exaggeration and framing

¹⁰⁷ The video can be found at the following URL, among others: https://www.ndr.de/fernsehen/sendungen/extra_3/videos_daserste/Song-Erdowie-Erdowo-Erdogan,extra11036.html (1 January 2026 at 18:01 CET).

¹⁰⁸ <https://www.faz.net/aktuell/politik/ausland/tuerkei-erdogan-bestellt-deutschen-botschafter-wegen-satire-ein-14149181.html> (1 January 2026 at 18:02 CET).

¹⁰⁹ The full text of the poem is available (in German only) at the following URL: <https://www.musikexpress.de/zdf-zensiert-erdogan-gedicht-von-boehmermann-517449/> (1 January 2026 at 18:04 CET).

¹¹⁰ <https://www.ndr.de/fernsehen/sendungen/zapp/Erdogan-Gedicht-Chronik-eines-Skandals,boehmermann208.html> (1 January 2026 at 18:05 CET).

¹¹¹ <https://www.theguardian.com/world/2016/apr/11/turkey-germany-prosecute-comedian-jan-boehmermann-erdogan-poem> (1 January 2026 at 18:10 CET); <https://www.washingtonpost.com/news/worldviews/wp/2016/04/07/a-german-comedian-read-a-lewd-poem-about-turkeys-erdogan-now-he-could-face-jail-time/> (1 January 2026 at 18:11 CET); <https://www.nytimes.com/2016/04/12/world/europe/jan-boehmermann-erdogan-neo-magazin-royale.html> (1 January 2026 at 18:13 CET); Sec. 103 StGB in its previous version (“Insulting foreign heads of state”) was repealed in 2018.

¹¹² The prosecution of *Böhmermann* sparked controversial reactions both at home and abroad. At the time, Sec. 103 StGB was considered anachronistic and inappropriate for modern democracies. See, for example, the reporting at: <https://www.deutschlandfunk.de/renate-kuenast-zur-causa-boehmermann-merkel-scheint-100.html> (1 January 2026 at 18:15 CET).

¹¹³ Ines Molitor, *Ist die Kunst wirklich frei?* 124 (2018) (Ger.).

of the poem suggest that it could be considered an excessively pointed artistic statement addressing a serious fundamental problem.¹¹⁴

The public prosecutor's office in Mainz has discontinued its investigation of *Böhmermann* for alleged insults under Sec. 103 (old version) and Sec. 185 StGB. The office decided to drop the case because it could not prove beyond a reasonable doubt that *Böhmermann* intended to commit a crime.¹¹⁵

D. Protected Legal Interest

Whether Sec. 185 StGB can interfere with the scope of protection of the unconditional Freedom of Arts guaranteed under Art. 5 para. 3 s. 1 GG largely depends on whether the provision protects a legal interest of constitutional rank. This question is answered in two steps: first, by identifying the protected legal interest; then, by determining the level of unlawfulness.¹¹⁶

Sec. 185 StGB is generally considered to protect the honor.¹¹⁷ However, it is recognized that honor is only one aspect of human dignity, and it is not entirely synonymous with human dignity or the general right of personality derived from it.¹¹⁸ Still, there is some controversy about what exactly is meant by the term “honor.”¹¹⁹

According to the factual concept of honor (“Faktischer Ehrbegriff”), honor consists of a subjective component, a personal sense of honor, and an objective

¹¹⁴ Ines Molitor, *Ist die Kunst wirklich frei?* 124 (2018) (Ger.).

¹¹⁵ Landgericht Hamburg, BeckRS 2017, 101443 (Ger.).

¹¹⁶ This distinction follows the three-stage structure of crime, which is the prevailing opinion in Germany (see above).

¹¹⁷ Friedrich Bassenge, *Ehre und Beleidigung* 3 (1937) (Ger.); Winfried Brugger, 128 *Archiv des öffentlichen Rechts* [AöR] 372, 377 (2003) (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 156 (1989) (Ger.); Georgios Gounalakis, 49 *Neue Juristische Wochenschrift* [NJW] 481, 483 (1996) (Ger.); Elisa Hoven & Alexandra Witting, 74 *Neue Juristische Wochenschrift* [NJW] 2397, 2397 (2021) (Ger.); Klaus A. Fischer, *Die strafrechtliche Bewertung von Werken der Kunst* 87 (1995) (Ger.); Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 54 (2004) (Ger.); Gabriele Kett-Straub, 120 *Zeitschrift für die gesamte Strafrechtswissenschaft* [ZStW] 756, 756 et seq. (2008) (Ger.); Georg Küpper, 44 *Zeitschrift für Rechtspolitik* [ZRP] 249, 250 (1991) (Ger.); Jörg Tenckhoff, *Die Bedeutung des Ehrbegriffs für die Systematik der Beleidigungstatbestände* 16 (1988) (Ger.); Peter J. Tettinger, 38 *JuristenZeitung* [JZ] 317, 318 (1983) (Ger.); Ernst Amadeus Wolff, 81 *Zeitschrift für die gesamte Strafrechtswissenschaft* [ZStW] 886, 900 (1969) (Ger.).

¹¹⁸ Bundesgerichtshof [BGH] [Federal Court of Justice], 36 *Entscheidungen des Bundesgerichtshofs in Strafsachen* [BGHSt] 145, 150 (1990) (Ger.); Bundesarbeitsgericht [BAG], 68 *Neue Juristische Wochenschrift* [NJW] 2061, 2062 (2015) (Ger.); Hans J. Hirsch, *Ehre und Beleidigung* 59 (1967) (Ger.).

¹¹⁹ See the list of numerous honorary titles at: Hans J. Hirsch, *Ehre und Beleidigung* 1 et seq. (1967) (Ger.); Jörg Tenckhoff, *Die Bedeutung des Ehrbegriffs für die Systematik der Beleidigungstatbestände* 26 et seq. (1988) (Ger.).

component, social prestige.¹²⁰ Social prestige manifests itself in a person's reputation within society.¹²¹ In his conception of this term, *Liepmann* distinguishes between an objectified and a subjectified form of honor.¹²² He describes the former as the recognition of our value by others, the social standing we possess, the good reputation or renown of a person, while the latter refers to the individual's self-image: the feeling of self-worth that arises in us through our own qualities and their appreciation by others, the sense of honor.¹²³

*Binding*¹²⁴ understood honor as a good that encompasses both a personal and a social dimension: he defined it as the value that accrues to a person as such and on the basis of his actions, i.e., by virtue of the extent to which he fulfills his moral and legal duties, i.e., his moral and legal integrity.¹²⁵ In his conception, honor is therefore partly a good that is “innate” to human beings by virtue of their mere existence, but also partly a good that is “earned” through their moral and legal behavior.¹²⁶

According to the normative concept of honor (“Normativer Ehrbegriff”), the legal interest protected by the elements of insult is the value accorded to human beings by virtue of their dignity, or their “inner” honor.¹²⁷ *Hirsch*, for example, describes this honor as an inherent human value that manifests as a claim to validity (“Geltungswert-Status”) and gives rise to a legally protected right to respect.¹²⁸

On the other hand, case law and much of the literature are based on a dualistic concept of honor¹²⁹ (“Dualistischer Ehrbegriff”), according to which honor is

¹²⁰ M. Liepmann, *Beleidigung* 14 (1912) (Ger.); see also Hans J. Hirsch, *Ehre und Beleidigung* 1 (1967) (Ger.); Jörg Tenckhoff, *Die Bedeutung des Ehrbegriffs für die Systematik der Beleidigungstatbestände* 57 et seq. (1988) (Ger.).

¹²¹ M. Liepmann, *Beleidigung* 14 (1912) (Ger.); for further representatives of the factual concept of honor, see the evidence at Hans J. Hirsch, *Ehre und Beleidigung* 1 (1967) (Ger.); Jörg Tenckhoff, *Die Bedeutung des Ehrbegriffs für die Systematik der Beleidigungstatbestände* 57 et seq. (1988) (Ger.).

¹²² M. Liepmann, *Beleidigung* 14 (1912) (Ger.).

¹²³ M. Liepmann, *Beleidigung* 14 (1912) (Ger.).

¹²⁴ *Karl Binding* (1841-1920) was one of the most influential criminal law scholars of the 19th century, whose writings had a decisive influence on the systematic structure of criminal law in Germany and continue to have an impact today.

¹²⁵ Karl Binding, *Lehrbuch des Strafrechts* 136 (1902) (Ger.).

¹²⁶ Karl Binding, *Lehrbuch des Strafrechts* 136 (1902) (Ger.).

¹²⁷ Ernst Bockelmann, 29 *Juristische Rundschau* [JR] 327, 329 (1954) (Ger.); Hans J. Hirsch, *Ehre und Beleidigung* 3, 29 et seq. (1967) (Ger.); Hans J. Hirsch, 90 *Zeitschrift für die gesamte Strafrechtswissenschaft* [ZStW] 978, 986 (1979) (Ger.); Georg Küpper, 17 *Juristische Ausbildung* [JA] 453, 454 (1985) (Ger.).

¹²⁸ Hans J. Hirsch, *Ehre und Beleidigung* 3, 30 (1967) (Ger.).

¹²⁹ Bundesgerichtshof [BGH] [Federal Court of Justice], 11 *Entscheidungen des Bundesgerichtshofs in Strafsachen* [BGHSt] 67, 67 (1957) (Ger.); Georg Küpper, 17 *Juristische Ausbildung* [JA] 453, 453 et seq. (1985) (Ger.); Klaus Geppert, 2005 *Juristische Ausbildung*

understood as both the personal value of the individual derived from human dignity (inner honor) and a socially mediated value (outer honor).¹³⁰

The prevailing view in literature today also follows a so-called normative-factual concept of honor¹³¹ (“Normativ-faktischer Ehrbegriff”), although the specific definition of what constitutes honor remains a subject of divergent opinions.¹³² However, there is agreement that honor essentially refers to the value of a person derived from human dignity.¹³³ According to a widely held view, this value is determined by the moral and social behavior of the individual.¹³⁴ Every human being is entitled to honor in the same way on the basis of their personal dignity;¹³⁵ as a value based on this, it cannot be increased from the outset.¹³⁶ Special achievements and merits cannot therefore, justify an increase in honor; rather, the individual can only bring about a reduction in his or her claim to respect if he or she calls his or her moral integrity into question through his or her behavior, for example, by violating social and ethical obligations.¹³⁷

The distinction between inner and outer honor, as understood through a dualistic or normative-factual concept of honor, is also convincing from a constitutional standpoint. On the one hand, it recognizes honor as an expression of inviolable human dignity under Art. 1 para. 1 GG. On the other hand, it recognizes honor in its social dimension as the basis of every human being's right to respect. Honor cannot be “acquired,” but it can be diminished by socially and ethically unacceptable behavior. This concept corresponds to the constitutional principle of equality. Accordingly, an offense against honor occurs when a person is wrongly attributed a deficiency that would diminish their standing if it actually existed.¹³⁸

[JURA] 244, 244 (Ger.); Winfried Brugger, 2006 *Juristische Ausbildung* [JA] 687, 688 (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 163 (1989) (Ger.).

¹³⁰ Bundesgerichtshof [BGH] [Federal Court of Justice], 11 *Entscheidungen des Bundesgerichtshofs in Strafsachen* [BGHSt] 67, 67 (1957) (Ger.); Anja Brauneck, 2004 *Zeitschrift für Urheber- und Medienrecht* [ZUM] 887, 893 (Ger.); Winfried Brugger, 128 *Archiv des öffentlichen Rechts* [AöR] 372, 377 (2003) (Ger.).

¹³¹ Harro Otto, 58 *Juristische Rundschau* [JR] 1, 2 et seq. (1983) (Ger.).

¹³² *Tübinger Kommentar zum StGB* [TK] (Eisele & Schittenhelm eds.), *Strafgesetzbuch*, 30th ed. 2019, *Vorbemerkungen zu den §§ 185 et seq. para. 1* (Ger.).

¹³³ Klaus Geppert, 33 *Neue Zeitschrift für Strafrecht* [NStZ] 553, 557 (2013) (Ger.).

¹³⁴ Helmut Satzger, 38 *Juristische Ausbildung* [JURA] 1340, 1340 (2016) (Ger.).

¹³⁵ Winfried Brugger, 128 *Archiv des öffentlichen Rechts* [AöR] 372, 383 (2003) (Ger.); Ostendorf, Frahm & Doege, 32 *Neue Zeitschrift für Strafrecht* [NStZ] 529, 534 (2012) (Ger.).

¹³⁶ Ostendorf, Frahm & Doege, 32 *Neue Zeitschrift für Strafrecht* [NStZ] 529, 534 (2012) (Ger.).

¹³⁷ Karl Binding, *Lehrbuch des Strafrechts* 142 (1902) (Ger.); Hans J. Hirsch, *Ehre und Beleidigung* 72 (1967) (Ger.).

¹³⁸ Bundesgerichtshof [BGH] [Federal Court of Justice], 36 *Entscheidungen des Bundesgerichtshofs in Strafsachen* [BGHSt] 145, 150 (1990) (Ger.); Helmut Satzger, 38 *Juristische Ausbildung* [JURA] 1340, 1340 (Ger.).

E. Constitution of the Criminal Insult under Sec. 185 StGB in the Context of the Freedom of Arts

Now that the legal interest protected by Sec. 185 StGB has been determined, attention turns to the factual requirements for insult as they pertain to the Freedom of Arts. The question is whether and to what extent art can relativize or exclude criminal law's negative judgment when the elements of an offense are realized.

Artistic forms of expression, such as satire, caricature, and performative art, often operate in a gray area where permissible art and criminal insult overlap. Distinguishing between the two in this gray area requires increased demands on legal subsumption work and a deeper understanding of the function and significance of art in society.

At the same time, it is crucial to ensure that the legal protection of honor is not used to enforce repressive cultural or opinion policies aimed at silencing unwelcome artistic voices through the use of German criminal law.

1. Overview of the Elements of the Offence

In the context of Sec. 185 StGB, the criminal assessment of artistic expression first requires clarification of the elements of the offence norm.

Examining the wording of Sec. 185 StGB reveals that it provides little concrete information regarding the factual requirements for an insult. Sec. 185 StGB merely states that an insult is punishable by imprisonment of up to one year or a fine. If the insult is public, committed in a meeting, or disseminated via Sec. 11 para. 3 StGB, or by means of an assault, the punishment is imprisonment of up to two years or a fine.

2. Overview of the Objects of Attack Within the Meaning of Sec. 185 StGB

It is undisputed that Sec. 185 StGB covers defamatory value judgements against the person in question, as well as against third parties, provided these impair the person's social standing. It also covers factual assertions that, in their defamatory form, are likely to diminish the respect accorded to the person in question.

When assessing the criminality of a statement under Sec. 185 StGB, the focus is on the individual in question. Consequently, it must first be clarified which individuals are protected by criminal law and can therefore be the target of an insult within the meaning of Sec. 185 StGB.

According to general opinion, every living person is capable of being insulted and, by virtue of their general personal value, which derives from human dignity, is entitled to a minimum level of honor, regardless of their mental state, age or disability. This includes minors¹³⁹ and persons with physical or mental disabilities.¹⁴⁰

3. The Elements of the Criminal Insult in the Context of the Freedom of Arts

In the following, the specific requirements and particularities of the elements of the offense under Sec. 185 StGB in the context of artistic activity will be examined in more detail.

a) The Basic Offence of Insult under Sec. 185 hs. 1 StGB in Relation to the Freedom of Arts

The sole element of the basic offence of insult, as stated in Sec. 185 hs. 1 StGB, is the “insult” itself: “Insult shall be punished [...]” (In German: “Die Beleidigung wird [...] bestraft.”).

In terms of the elements of the offence, the prevailing opinion is that an insult presupposes an expression of contempt, disparagement or disregard for a person (in German: “Kundgabe einer Missachtung, Geringschätzung oder Nichtbeachtung einer Person”).¹⁴¹ It is irrelevant whether the disparagement is verbal or written, or manifests itself through images, gestures, symbolic actions or physical assaults; the decisive factor is whether the behavior in question is objectively insulting.¹⁴²

¹³⁹ Bundesgerichtshof [BGH] [Federal Court of Justice], 7 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 129, 132 (1954) (Ger.).

¹⁴⁰ Prevailing opinion, see BeckOK StGB, § 185 vor para. 5 (Brian Valerius ed., 64th ed. 2025) (Ger.).

¹⁴¹ BeckOK StGB, § 185 vor para. 16 (Brian Valerius ed., 64th ed. 2025) (Ger.); Dominik Brodowski, 78 Juristische Rundschau [JR] 513, 514 (2003) (Ger.); Winfried Brugger, 128 Archiv des öffentlichen Rechts [AöR] 372, 377 (2003) (Ger.); Elmar Erhardt, Kunstfreiheit und Strafrecht 165 (1989) (Ger.); Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 201 (2009) (Ger.); Gabriele Kett-Straub, 120 Zeitschrift für die gesamte Strafrechtswissenschaft [ZStW] 756, 763 (2008) (Ger.); Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 65 (2004) (Ger.); Andreas Kulczak, Strafrechtliche Einbruchstellen 151 (1993) (Ger.).

¹⁴² BeckOK StGB, § 185 vor para. 17 et seq. (Brian Valerius ed., 64th ed. 2025) (Ger.); Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 201 (2009) (Ger.); Andreas Kulczak, Strafrechtliche Einbruchstellen 153 (1993) (Ger.).

Artistic forms of expression can convey contempt or disparagement of a person.¹⁴³ A striking example is *Martin Kippenberger's* installation, “Zuerst die Füße” (First the Feet), which depicts a crucified frog holding a beer mug and an egg.¹⁴⁴ This caused considerable public outrage: the work was understood not only as a deliberate provocation of religious sensibilities in South Tyrol, where it was exhibited, but also as a possible impairment of the collective prestige of the Catholic community.¹⁴⁵ From this perspective, it was discussed as an attack on honor, which may be legally relevant under Sec. 185 StGB.¹⁴⁶

It should be noted that Sec. 185 StGB constitutes a personal offense of expression (“persönliches Äußerungsdelikt”), meaning that only those who express or cause their own contempt are guilty of the offense.¹⁴⁷ The disclosure of contempt expressed by a third party therefore does not constitute an offense.¹⁴⁸ Rather, the dissemination of a third party's contempt requires that the perpetrator recognizably adopts its content as their own.¹⁴⁹ This requires the disseminator to identify with the defamatory content in such a way as to create the impression of their own contempt.¹⁵⁰

For the elements of Sec. 185 StGB to be fulfilled, the recipient must recognize and understand the insulting meaning of the statement.¹⁵¹

b) Should Criminal Liability be Excluded for Works of Art?

Of particular importance to this investigation is the question of whether artistic forms of expression require special treatment at the level of the objective elements of the offence, for example, in the form of an unwritten exclusion of

¹⁴³ Oberlandesgericht Hamburg, 37 Neue Juristische Wochenschrift [NJW] 1130, 113 (1984) (Ger.); Klaus Geppert, 60 Juristische Rundschau [JR] 430, 430 (1985) (Ger.).

¹⁴⁴ <https://www.theomag.de/55/am258.htm> (1 January 2026); <https://tirv1.orf.at/stories/280539> (1 January 2026 at 18:16 CET).

¹⁴⁵ <https://www.spiegel.de/kultur/gesellschaft/das-kreuz-mit-der-kunst-frosch-bleibt-trotz-papst-protest-a-575239.html> (1 January 2026 at 18:17 CET).

¹⁴⁶ <https://www.spiegel.de/kultur/gesellschaft/das-kreuz-mit-der-kunst-frosch-bleibt-trotz-papst-protest-a-575239.html> (1 January 2026 at 18:19 CET).

¹⁴⁷ Eckel & Rottmeier, 41 Neue Zeitschrift für Strafrecht [NStZ] 1, 2 (2021) (Ger.).

¹⁴⁸ Eckel & Rottmeier, 41 Neue Zeitschrift für Strafrecht [NStZ] 1, 2 (2021) (Ger.).

¹⁴⁹ Nussbaum, 6 Kriminalpolitische Zeitschrift [KriPoZ] 215, 217 (2021) (Ger.).

¹⁵⁰ Nussbaum, 6 Kriminalpolitische Zeitschrift [KriPoZ] 215, 217 (2021) (Ger.).

¹⁵¹ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice], 9 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 17, 18 et seq. (1957) (Ger.); Oberlandesgericht Zweibrücken, 19 Neue Zeitschrift für Strafrecht – Rechtsprechungsreport [NStZ-RR] 246, 248 (2019) (Ger.); BeckOK StGB, § 185 vor para. 19 (Brian Valerius ed., 64th ed. 2025) (Ger.); Klaus Geppert, 33 Neue Zeitschrift für Strafrecht [NStZ] 553, 556 (2013) (Ger.); Elmar Erhardt, Kunstfreiheit und Strafrecht 165 (1989) (Ger.).

elements of the offence. This would be highly significant because, in such a case, no wrongdoing would be deemed to have occurred under the criminal code, meaning the act in question would be exempt from punishment.

Some case law and legal literature affirm this, stating that artistic expressions should be excluded from the scope of Sec. 185 StGB at the factual level.¹⁵² Others, however, advocate a restrictive constitutional interpretation of Sec. 185 StGB, thereby exempting artistic forms of expression.¹⁵³

It is not tenable to exclude artistic forms of expression from the scope of Sec. 185 StGB.¹⁵⁴ One argument against this assumption is that a defamatory work of art does not necessarily lose its offensive potential—and thus the actual wrongdoing—simply because it is considered art. One example would be a caricature depicting a public figure in a deliberately exaggerated and distorted manner. The artistic nature of the caricature does not eliminate the defamatory content: it remains capable of damaging the social reputation of the person concerned and thus fulfils the elements of the offence of defamation, regardless of its artistic form.

c) The Qualified Insult under Sec. 185 hs. 2 StGB in the Context of the Freedom of Arts

The applicability of the qualifying elements in Sec. 185 hs. 2 StGB¹⁵⁵ is particularly relevant in the context of artistic expression.

A qualified insult under Sec. 185 hs. 2 StGB occurs if the act is committed publicly, in a meeting, by disseminating content as defined in Sec. 11 para. 3 StGB, or by means of an assault. These qualifying circumstances were introduced by the Act to Combat Right-wing Extremism and Hate Crime (in German: “Gesetz zur Bekämpfung von Rechtsextremismus und Hasskriminalität”) on 30 March 2021 and came into force on 3 April 2021.¹⁵⁶ This dimension of the newly introduced qualifying circumstances is particularly significant in the context of Sec. 185 StGB, as it highlights the increased intensity of defamation that occurs when an insult is not confined to the private sphere, but instead occurs in public and has an impact there.

¹⁵² Kammergericht [KG], 12 Neue Zeitschrift für Strafrecht [NStZ] 385, 386 (1992) (Ger.); see also Ludwig Leiss, 15 Neue Juristische Wochenschrift [NJW] 2323, 2325 (1962) (Ger.).

¹⁵³ Günther Erbel, Die Kunstfreiheitsgarantie des Grundgesetzes 157 (1966) (Ger.); Andreas Kulczak, Strafrechtliche Einbruchstellen 165 et seq. (1993) (Ger.).

¹⁵⁴ See also: Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre, S. 286.

¹⁵⁵ In German criminal law, a qualifying circumstance is a provision that provides for a higher penalty for certain types of offences due to additional aggravating factors.

¹⁵⁶ Bundesgesetzblatt [BGBl.] I 441 (Ger.).

In the context of artistic expression, the recently enacted qualification criteria are particularly important. This is because, in accordance with their constitutionally protected sphere of influence, works of art are designed to have an external impact. Therefore, artistic creation is not merely the act of production; it also aims to be received by third parties, whether in a mediated, public or performative form. Consequently, it is always oriented towards communication.

In the context of disseminating content as stated in Sec. 185 hs. 2 StGB, particular reference should be made to the digital distribution and reception of artistic productions, such as entertainment or satire programs like the aforementioned *Extra 3* or *ZDF Neo Magazin Royale*, the online publication of caricatures in digital newspaper and magazine editions, and the retrieval of art-related content on social platforms. Assuming the presence of insulting statements, the element of a “meeting” can be fulfilled by live artistic performances, especially in the field of performance art. Publicity, as stated in Sec. 185 hs. 2 StGB, primarily, but not exclusively, occurs in the context of exhibitions in museums, street art or publicly accessible installations viewed by an indeterminate number of people. In contrast, insult by means of assault generally lacks independent significance in the context of artistic forms of expression. This is mainly because art typically uses symbolic rather than physically aggressive forms of expression. This is not changed by the fact that simulated and sometimes actual physical assaults, such as a slap in the face, may occur in theatre or film. Even if such an act is not only implied, but physically performed, it generally does not constitute an “assault” because it lacks the expression of personal contempt constitutive of Sec. 185 StGB.

Therefore, it can be concluded that the qualifying circumstances under Sec. 185 hs. 2 StGB, in relation to works of art, are generally limited to manifestations that affect the external impact and communicative reach of artistic expression.

d) The Interpretation of Statements in the Context of Sec. 185 StGB

Interpretation, i.e., determining the meaning of a statement, is a central challenge within the framework of Sec. 185 StGB, if not the central challenge. This is particularly true of works of art, as artistic forms of expression are often open to interpretation due to their multidimensional structure.

(i) Applicability of the General Principles of Interpretation in German Criminal Law

As with all offences of expression (“Äußerungsdelikte”) under German criminal law, Sec. 185 StGB stipulates that the relevance of a statement to the

offence must be determined based on its objective meaning in the specific case in question, taking into account all recognizable accompanying circumstances.¹⁵⁷ The social and ethical values of the relevant circles are decisive in this respect, meaning that one and the same statement can have different meanings depending on the context.¹⁵⁸ This can be seen in the theoretical example of a prominent contemporary figure being portrayed in a distorted manner in a performance accessible only to art experts. This may be understood as critical reflection within art-historical interpretation conventions, but could be perceived as personal disparagement outside this circle.

However, it should be noted that the meaning of a statement cannot be derived from circumstances that lie outside the actual act of expression and are not attributable to the person making the statement.¹⁵⁹ Rather, the behavior's objective meaning, as determined by its recognizable content and assessed from an uninvolved third party's perspective, is what is decisive.¹⁶⁰ In contrast, the subjective intentions and ideas of the speaker and the understanding of the listener are generally not taken into account when assessing the facts.¹⁶¹

The criminal assessment of a statement is always based on the prevailing values at the time of the offence. For this reason, older case law and literature can only be applied to current cases to a limited extent, since the social views that are decisive for interpreting a statement are constantly changing.¹⁶² It follows that a statement which was originally considered insulting may lose its offensive content over time.¹⁶³ The early works of *George Grosz* provide a vivid example of this: In the 1920s, his sharp and sometimes drastic political satires were considered not

¹⁵⁷ Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 56 et seq. (2004) (Ger.); Andreas Kulczak, *Strafrechtliche Einbruchstellen* 152 (1993) (Ger.); *Münchener Kommentar zum StGB [MüKoStGB]* (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 12 (Ger.); Helmut Satzger, 38 *Juristische Ausbildung [JURA]* 1340, 1340 (2016) (Ger.); Edward Schramm, in *Festschrift für Lenckner* 539, 550 (1998) (Ger.).

¹⁵⁸ See, e.g., Andreas Kulczak, *Strafrechtliche Einbruchstellen* 152 et seq. (1993) (Ger.).

¹⁵⁹ Dieter Grimm, 49 *Neue Juristische Wochenschrift [NJW]* 1697, 1700 (1996) (Ger.).

¹⁶⁰ Martin Eifert & Nora Wienfort, 78 *JuristenZeitung [JZ]* 270, 275 (2023) (Ger.); Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 56 (2004) (Ger.); Andreas Kulczak, *Strafrechtliche Einbruchstellen* 152 (1993) (Ger.); *Leipziger Kommentar zum StGB [LK]* (Eric Hilgendorf ed.), 13th ed. 2023, § 185 para. 17 (Ger.).

¹⁶¹ Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 56 (2004) (Ger.); Andreas Kulczak, *Strafrechtliche Einbruchstellen* 152 et seq. (1993) (Ger.); *Leipziger Kommentar zum StGB [LK]* (Eric Hilgendorf ed.), 13th ed. 2023, § 185 para. 17 (Ger.); *Münchener Kommentar zum StGB [MüKoStGB]* (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 12 (Ger.); Bijan Nowrousijan & Christian F. Majer, 2023 *Neue Justiz [NJ]* 62, 63 (Ger.); Helmut Satzger, 38 *Juristische Ausbildung [JURA]* 1340, 1340 (2016) (Ger.).

¹⁶² Lackner/Kühl, *Strafgesetzbuch*, 30th ed. 2023, § 185 para. 4a (Kühl) (Ger.).

¹⁶³ Georg Küpper, 17 *Juristische Ausbildung [JA]* 453, 457 (1985) (Ger.).

only blasphemous, but also serious insults against state and societal representatives, and were prosecuted accordingly.¹⁶⁴ While these depictions were considered an attack on the social standing of high-ranking personalities at the time, today, in light of changed social standards and an expanded understanding of the Freedom of Arts and the Freedom of Expression, they are considered permissible political criticism.

(ii) Art-Specific Characteristics

Determining the meaning of artistic expressions can be difficult due to the unique characteristics of artistic forms of expression. When applying Sec. 185 StGB, the objective meaning must be determined through an interpretation specific to the art form in question, taking into account the forms of expression and principles of representation characteristic of that form of art.¹⁶⁵ This is particularly relevant for works that do not clearly reference reality: The level of expression is often detached from any direct reference to reality through the stylistic devices of alienation and distancing, which are characteristic of many forms of artistic expression.¹⁶⁶ In such cases, an approach is required that takes into account the inherent structure of the work and applies so-called “work-appropriate standards” (in German: “werkgerechte Maßstäbe”).

A problem specific to art when determining the insulting content of artistic expressions is that the person concerned must be recognizable, i.e., clearly identifiable or identifiable enough for third parties to recognize them.¹⁶⁷ It is not necessary to mention the person by name for this purpose.¹⁶⁸

In the case of works of art that make use of the stylistic devices of abstraction and alienation, it is often difficult to attribute defamatory statements to a specific person. Therefore, in individual cases, it is necessary to examine particularly carefully whether a reference to a specific person can be established. It should be noted that personal attribution does not necessarily have to result directly from the work itself, but can also be derived indirectly from its context.

¹⁶⁴ Rosamunde Gräfin von der Schulenberg, Neugebauer, George Grosz 148 et seq. (1990) (Ger.).

¹⁶⁵ Andreas Kulczak, *Strafrechtliche Einbruchstellen* 153 (1993) (Ger.).

¹⁶⁶ *Leipziger Kommentar zum StGB [LK]* (Eric Hilgendorf ed.), 13th ed. 2023, § 185 para. 24 (Ger.).

¹⁶⁷ Bundesgerichtshof [BGH] [Federal Court of Justice], 9 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 17, 18 et seq. (1957) (Ger.); Bayerisches Oberstes Landesgericht [BayObLG], 53 *Neue Juristische Wochenschrift [NJW]* 1584 (2000) (Ger.); Oberlandesgericht Hamburg, 37 *Neue Juristische Wochenschrift [NJW]* 1130, 1132 (1984) (Ger.).

¹⁶⁸ *Münchener Kommentar zum StGB [MüKoStGB]* (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 33 (Ger.).

These principles are particularly important in the context of art, which is usually intended for an open audience, such as visitors to an exhibition, spectators at a performance or listeners to a piece of music. The question of the criminal relevance of the message can form a central focus of legal assessment precisely where artistic alienation and the distancing from reality inherent in art are expressed.¹⁶⁹

The literature rightly emphasizes that art referring exclusively to fictitious objects cannot damage the honor of an existing individual, but the application of Sec. 185 StGB is possible if a work of art disseminates insulting content about identifiable individuals.¹⁷⁰ This issue is particularly significant in the case of roman à clef (in German: “Schlüsselroman”), literary works that deal with real events under altered names and in a veiled form.¹⁷¹

(iii) The Role of Satire and Caricature in the Context of Sec. 185

Examining satire and caricature in this context is important because, unlike most other art forms, these forms of expression are caught between the Freedom of Arts and criminal law protection of honor. Their distinctive style, characterized by exaggeration, irony and provocation, not only makes them an effective means of social criticism, but also a key consideration in determining the extent to which art is protected under Art. 5 para. 3 s. 1 GG in relation to offences against honor. The following remarks therefore examine how satire and caricature are dealt with under criminal law, and the applicable constitutional standards. It should also be emphasized that this issue is particularly illuminating for understanding German criminal law as a whole, as it exemplifies the close intertwining of the dogmatic examination of criminal offences with constitutional guarantees of freedom.

(1) Basic Principles of the Relationship between Satire, Caricature and Sec. 185 StGB

The basic principles of the tension between satire, caricature, and Sec. 185 StGB can only be understood if the specific nature of these forms of expression and their particular proximity to and tension with criminal law protection of honor are taken into account. Satire and caricature are in a particular tension with Sec. 185

¹⁶⁹ Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 274 et seq. (2004) (Ger.).

¹⁷⁰ Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 274 (2004) (Ger.).

¹⁷¹ Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 274 (2004) (Ger.).

StGB.¹⁷² This can be explained by their specific nature, which, unlike factual expressions of opinion, is characterized by deliberate exaggeration, irony and targeted provocation. Their communicative purpose is not sober argumentation, but sharp exaggeration which regularly aims at friction rather than consensus and irritation rather than consideration. Since satire and caricature typically aim to make their subject appear misguided or ridiculous, often combining this with a derogatory judgement of individuals or groups, they can fulfil the elements of Sec. 185 StGB if the line into personal contempt is crossed.¹⁷³ This is precisely why they are particularly prone to coming into conflict with the criminal offence of insult under Sec. 185 StGB.

Therefore, it should be noted that an insult in satirical contexts should not be affirmed hastily. Not every personal offence caused by a satirical or caricatured representation constitutes a criminal offence of insult. The Reich Court (“Reichsgericht”) has emphasized that satire uses exaggeration to present a situation in a simplified form and must therefore be judged in the context of its specific distortion.¹⁷⁴ This line of reasoning continues to this day: the core message and the satirical presentation must be analyzed separately, with more lenient standards applying to artistic transformation.¹⁷⁵

This gives rise to two levels of interpretation. On the one hand, there is the hidden yet recognizable level of meaning—the actual core message reflecting the artist's intentions¹⁷⁶—which is subject to the same standards as any other work of art.¹⁷⁷ On the other hand, there is the satirical or caricatured presentation, which

¹⁷² Günther Erbel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 156 (1966) (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 6 (1989) (Ger.); Andreas Kulczak, *Strafrechtliche Einbruchstellen* 161 et seq. (1993) (Ger.); Sebastian Gärtner, *Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform* 202 et seq. (2009) (Ger.).

¹⁷³ Sebastian Gärtner, *Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform* 202 (2009) (Ger.).

¹⁷⁴ Reichsgericht in Strafsachen [RGSt], 61 RGSt 183, 183 f. (Ger.); see also 12 RGSt 141, 142 et seq. (Ger.).

¹⁷⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 81 BVerfGE 278, 294 (1990) (Bundesflagge) (Ger.); Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 255 et seq. (2004) (Ger.).

¹⁷⁶ Axel Beater, 61 *JuristenZeitung* [JZ] 432, 437 (2006) (Ger.); Kahl & Horn, 76 *Neue Juristische Wochenschrift* [NJW] 639, 641 (2023) (Ger.); Sebastian Koch, *Beschimpfung von Bekenntnissen* 129 (2010) (Ger.); Michael Steinbach, 81 *Juristische Rundschau* [JR] 495, 497 (2006) (Ger.).

¹⁷⁷ Michael Beater, 61 *JuristenZeitung* [JZ] 432, 437 (2006) (Ger.); Heller & Goldbeck, 52 *Zeitschrift für Urheber- und Medienrecht* [ZUM] 628, 629 (2007) (Ger.); Koch, *Beschimpfung von Bekenntnissen* 129 (2010) (Ger.); Armin Steinbach, 81 *Juristische Rundschau* [JR] 495, 497 (2006) (Ger.).

gives the work its special character.¹⁷⁸ However, this form of presentation should not be evaluated according to general standards, but rather requires a less strict assessment since the element of alienation is intrinsic to it and must be considered in the interpretation.¹⁷⁹ Both levels must therefore be assessed according to standards that do justice to the specific nature of satirical and caricatured representations.¹⁸⁰

(2) Satire and Caricature: Art or Expression of Opinion?

The question of whether satire should be classified as art or merely as an expression of opinion is central, as this determines the scope of protection and thus the constitutional classification in relation to Sec. 185 StGB. The Federal Constitutional Court has emphasized that satire does not automatically fall within the scope of protection of the Freedom of Arts under Art. 5 para. 3 s. 1 GG.¹⁸¹ Rather, its external form may constitute mere expression of opinion, in which case only the Freedom of Expression under Art. 5 para. 1 GG is relevant.¹⁸² This question of demarcation is central to the present analysis, as it is only by classifying a satirical statement as falling within the scope of the Freedom of Arts or the

¹⁷⁸ Axel Beater, 61 *JuristenZeitung* [JZ] 432, 437 (2006) (Ger.); Heller/Goldbeck, ZUM 2007, 628, 629; Kahl & Horn, 76 *Neue Juristische Wochenschrift* [NJW] 639, 641 (2023) (Ger.); ; Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre*, S. 256; Sebastian Koch, *Beschimpfung von Bekenntnissen*, S. 129; Armin Steinbach, 81 *Juristische Rundschau* [JR] 2006, 495, 497 et seq. (2006).

¹⁷⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 81 BVerfGE 278, 294 (1990) (Ger.); Bundesverfassungsgericht [BVerfG], 2002 *Neue Juristische Wochenschrift* [NJW] 3767, 3767 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 156 BGHZ 206, 208 (2003) (Ger.); Oberlandesgericht Hamburg, 38 *Neue Juristische Wochenschrift* [NJW] 1654 (1985) (Ger.); Axel Beater, 61 *JuristenZeitung* [JZ] 432, 437 (2006) (Ger.); Heller & Goldbeck, 52 *Zeitschrift für Urheber- und Medienrecht* [ZUM] 628, 629 (2007) (Ger.).

¹⁸⁰ Heller & Goldbeck, 52 *Zeitschrift für Urheber- und Medienrecht* [ZUM] 628, 629 (2007) (Ger.).

¹⁸¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 81 BVerfGE 278, 294 (1990) (Ger.); Bundesverfassungsgericht [BVerfG], 55 *Neue Juristische Wochenschrift* [NJW] 3767, 3767 (2002) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 156 BGHZ 206, 208 (2003) (Ger.); Oberlandesgericht Hamburg, 38 *Neue Juristische Wochenschrift* [NJW] 1654 (1985) (Ger.); Axel Beater, 61 *JuristenZeitung* [JZ] 432, 437 (2006) (Ger.); Heller & Goldbeck, 52 *Zeitschrift für Urheber- und Medienrecht* [ZUM] 628, 629 (2007) (Ger.).

¹⁸² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 86 BVerfGE 1, 9 (1992) (TITANIC) (Ger.); Bundesverfassungsgericht [BVerfG], 55 *Neue Juristische Wochenschrift* [NJW] 3767, 3767 (2002) (Bonnbons) (Ger.); Friedhelm Hufen, in *Handbuch der Grundrechte in Deutschland und Europa*, vol. IV, § 101 para. 63 (Detlef Merten & Hans-Jürgen Papier eds., 2011) (Ger.).

Freedom of Expression that the relevant constitutional standards for criminal offences against honor can be determined.

The distinction between artistic and non-artistic satire remains controversial. Some argue that satire is always art because it often uses aesthetic techniques such as alienation, irony or exaggeration to communicate an opinion more effectively than mere words can.¹⁸³ Others argue that a presumption of artistic character is established if typical stylistic devices are recognizable, but this can be refuted if there is no recognizable formal design.¹⁸⁴ Another approach focuses more on content, arguing that if opinion-related content predominates, satire should be classified solely as opinion, not as art.¹⁸⁵ The mediating view, which considers both expressive content and creative design¹⁸⁶, seems convincing. According to this view, art, as stated in Art. 5 para. 3 s. 1 GG exists when a freely creative achievement can be assigned to a recognized style of representation or opens up a broad scope for interpretation.¹⁸⁷ If there is no recognizable artistic reference, however, satire remains within the scope of protection of the Freedom of Expression under Art. 5 para. 1 GG.¹⁸⁸

However, given the diversity of satirical forms of expression and their context-dependent interpretability, a rigid distinction between art and opinion is not possible.¹⁸⁹

(3) The interpretation of satire and caricature in the context of Sec. 185 StGB

When classifying satirical statements under criminal law, it is crucial that their particular form of expression is taken into account in a methodologically appropriate manner in order to accurately determine the statement's possible criminal content.

Therefore, when interpreting a statement with regard to its criminality under Sec. 185 StGB, it is essential to consider the multidimensional nature of satire. This

¹⁸³ Anja Brauneck, 2004 *Zeitschrift für Urheber- und Medienrecht [ZUM]* 887, 893 et seq. (Ger.); see also Jürgen Brummack, 45 *Deutsche Vierteljahrsschrift für Literaturwissenschaft und Geistesgeschichte* 275, 360 (1971) (Ger.).

¹⁸⁴ Bernhard von Becker, 106 *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 908, 911 et seq. (2004) (Ger.).

¹⁸⁵ See, e.g., Ines Molitor, *Ist die Kunst wirklich frei?* 111 (2018) (Ger.).

¹⁸⁶ *Münchener Kommentar zum StGB [MüKoStGB]* (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 25 (Ger.).

¹⁸⁷ *Münchener Kommentar zum StGB [MüKoStGB]* (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 25 (Ger.).

¹⁸⁸ *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court]*, 86 BVerfGE 1, 9 (1992) (TITANIC) (Ger.).

¹⁸⁹ Katja Kassing, *Ehrverletzende Personalsatire in Deutschland, Österreich, der Schweiz und England* 86 (2004) (Ger.).

necessitates a clear distinction between the statement's core message and its satirical presentation. If the core message, detached from form and exaggeration, can be interpreted as defamatory, then an offence under criminal law may be considered.¹⁹⁰

Conversely, if the core message is not insulting, such meaning may arise from the satirical or caricatured presentation. When interpreting this, it must be taken into account that exaggeration, distortion and the grotesque are typical stylistic devices of such forms of expression.¹⁹¹ In this context, the fundamental rights protection provided by Art. 5 para. 3 s. 1 GG requires that artists be granted a greater degree of creative freedom.¹⁹² Nevertheless, artistic presentation is not exempt from criminal liability in all cases, but rather finds its limits in criminal law where personal defamation is the primary focus.¹⁹³ In the case of the *Strauß caricatures* (“Strauß-Karikaturen”), for example, the Federal Constitutional Court affirmed that the elements of the offence of insult under Sec. 185 StGB had been fulfilled, as the then Bavarian Minister-President had been accused of exploiting the judiciary in an offensive manner to enforce his own interests and deriving “animalistic pleasure” from doing so.¹⁹⁴

F. *Unlawfulness in the Context of the Freedom of Arts*

¹⁹⁰ Münchener Kommentar zum StGB [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 26 (Ger.).

¹⁹¹ Bundesgerichtshof [BGH] [Federal Court of Justice], 57 Neue Juristische Wochenschrift [NJW] 596, 597 (2004) (Ger.); Oberlandesgericht Düsseldorf, 45 Neue Juristische Wochenschrift [NJW] 1335 (1992) (Ger.); Klaus Geppert, 60 Juristische Rundschau [JR] 430, 431 (1985) (Ger.); Münchener Kommentar zum StGB [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 26 (Ger.).

¹⁹² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 377 et seq. (1987) (Strauß-Karikatur) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 57 Neue Juristische Wochenschrift [NJW] 596, 597 (2004) (Ger.); Oberlandesgericht Düsseldorf, 45 Neue Juristische Wochenschrift [NJW] (1992) (Ger.); Klaus Geppert, 60 Juristische Rundschau [JR] 430, 431 (1985) (Ger.); Georgios Gounalakis, 48 Neue Juristische Wochenschrift [NJW] 809, 813 et seq. (1995) (Ger.); Münchener Kommentar zum StGB [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 26 (Ger.); Andreas Kulczak, Strafrechtliche Einbruchstellen 165 (1993) (Ger.).

¹⁹³ Bundesgerichtshof [BGH] [Federal Court of Justice], 57 Neue Juristische Wochenschrift [NJW] 596, 597 (2004) (Ger.); Oberlandesgericht Düsseldorf, 45 Neue Juristische Wochenschrift [NJW] 1335 (1992) (Ger.); Klaus Geppert, 60 Juristische Rundschau [JR] 430, 431 (1985) (Ger.); Münchener Kommentar zum StGB [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 26 (Ger.).

¹⁹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 379 (1987) (Strauß-Karikatur) (Ger.); see also Klaus Geppert, 60 Juristische Rundschau [JR] 430, 431 (1985) (Ger.).

Having examined the factual requirements of statements within the scope of Sec. 185 StGB in the context of the Freedom of Arts, the question of unlawfulness (“Rechtswidrigkeit”) arises. This raises the question of whether the Freedom of Arts can legally justify an offensive act. In legal terms, justification means that behavior is not considered wrongful, even if it fulfils the elements of a crime, because it is given special legitimacy by higher-ranking reasons, such as the exercise of fundamental freedoms. The central prerequisite for this is that the legal interest in honor protected by Sec. 185 StGB has constitutionally recognized protected status; only then can it limit the Freedom of Arts, which is guaranteed without reservation under Art. 5 para. 3 s. 1 GG. This overlap between criminal law and constitutional law is characteristic of German law, showing that the assessment of criminal acts is not confined to the German criminal code, but is always integrated into the broader constitutional framework—a methodological approach of fundamental importance for understanding German criminal law.

1. The Constitutional Status of the Legal Interests Protected by Sec. 185 StGB

Against this background, it must first be clarified at what point, if at all, the honor protected by Sec. 185 StGB can be enshrined in fundamental rights within the constitutional framework.

Some literature suggests that this is anchored in Art. 5 para. 2 GG, which expressly mentions the “right to personal honor” (in German: “Recht der persönlichen Ehre”) as a restriction on the Freedom of Expression under Art. 5 para. 1 GG.¹⁹⁵ Pursuant to this view, this is intended to clarify that criminal law norms serving to protect honor derive their constitutional legitimacy directly from this provision GG.¹⁹⁶ According to this view, Sec. 185 StGB does not require an additional link to the general right of personality or a more broadly understood “fundamental right of personal development” (“Grundrechtsgut personaler Entfaltung”).¹⁹⁷

However, it seems preferable to derive honor as an expression of the general right to personality (“Allgemeines Persönlichkeitsrecht”)¹⁹⁸ from Art. 2 para. 1 in

¹⁹⁵ Matthias Rahmlow, *Die Auslegung von Äußerungen im Strafrecht* 77 et seq. (2006) (Ger.).

¹⁹⁶ Matthias Rahmlow, *Die Auslegung von Äußerungen im Strafrecht* 77 et seq. (2006) (Ger.).

¹⁹⁷ Matthias Rahmlow, *Die Auslegung von Äußerungen im Strafrecht* 77 et seq. (2006) (Ger.).

¹⁹⁸ The general right of personality (“Allgemeines Persönlichkeitsrecht”) is more narrowly defined than other fundamental rights. It offers special protection to the personal sphere of life and the conditions necessary for its free development, provided these are not already covered by the classic civil liberties set out in Art. 2 para. 2 to Art. 17 GG. Its core purpose is to secure an autonomous private sphere for individuals, enabling them to develop and preserve their individuality; see, for example, the Federal Constitutional Court's fundamental decisions on general

conjunction with Art. 1 para. 1 GG, thereby establishing its constitutional status¹⁹⁹, since honor in the context of Sec. 185 of the German Criminal Code is an expression of personal dignity (“Personenwürde”).²⁰⁰ Even though, according to the established case law of the Federal Constitutional Court and the prevailing opinion in the literature, human dignity pursuant to Art. 1 para. 1 GG, human dignity functions as a guiding and interpretative norm of fundamental rights when determining the content and explaining the scope of the general right of personality.²⁰¹ However, in the case of a criminal insult, only Art. 2 para. 1 GG can be considered violated.²⁰² This means that, constitutionally speaking, even in the case of a criminal insult, there is, in principle, “only” a violation of the general right of personality pursuant to Art. 2 para. 1 GG.²⁰³ Nevertheless, in individual cases, a statement may reach such a degree of denigration that it also affects the inviolable sphere of human dignity within the meaning of Art. 1 para. 1 GG. In such cases, the act is qualitatively more wrongful, which is particularly significant for the question of weighing up fundamental rights against the Freedom of Arts.

2. Justification of Acts Pursuant to Sec. 185 StGB in the Context of the Freedom of Arts

The constitutional status of honor protected by Sec. 185 StGB derives from its anchoring in Art. 2 para. 1 in conjunction with Art. 1 para. 1 GG. This raises the question of the conditions under which artistic expressions that fulfil the objective elements of an offence of defamation can nevertheless be justified in light of their character as works of art. The focus here is on the tension between conflicting

personal rights, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 54 BVerfGE 148, 153 (1980) (Ger.); id. 79 BVerfGE 256, 268 (1988) (Ger.).

¹⁹⁹ Günther Erbel, Die Kunstfreiheitsgarantie des Grundgesetzes 156 (1966) (Ger.); Elmar Erhardt, Kunstfreiheit und Strafrecht 106 (1989) (Ger.); Alexander Ignor, Der Straftatbestand der Beleidigung 118 (1995) (Ger.); Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 40 et seq., 50 (2004) (Ger.); Klaus A. Fischer, Die strafrechtliche Bewertung von Werken der Kunst 88 (1995) (Ger.); Martin Kriele, 47 Neue Juristische Wochenschrift [NJW] 1897, 1898 et seq. (1994) (Ger.); Andreas Kulczak, Strafrechtliche Einbruchstellen 170 (1993) (Ger.).

²⁰⁰ Bundesgerichtshof [BGH] [Federal Court of Justice], 36 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 145, 148 (1990) (Ger.); id. 11 BGHSt 67, 70 et seq. (1957) (Ger.); Oberlandesgericht Düsseldorf, 54 Neue Juristische Wochenschrift [NJW] 3562, 3563 (2001) (Ger.); Susanne Beck, 12 Multimedia und Recht [MMR] 736, 737 (2009) (Ger.); see also Alexander Ignor, Der Straftatbestand der Beleidigung 118 (1995) (Ger.).

²⁰¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 27 BVerfGE 344, 251 (1970) (Ger.); see also Dieter Lorenz, 60 JuristenZeitung [JZ] 1121, 1125 (2005) (Ger.).

²⁰² Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 41 (2004) (Ger.); Edward Schramm, in Festschrift für Lenckner 539, 549 (1998) (Ger.).

²⁰³ Edward Schramm, in Festschrift für Lenckner 539, 549 (1998) (Ger.).

interests: the constitutionally guaranteed protection of the Freedom of Arts, and the criminally protected right to respect for one's personality. The decisive factor is the extent to which the artistic form of expression is suitable for justifying the violation of honor protection.

a) Applicable Grounds for Justification

In determining whether the artistic nature of a statement is sufficient to justify an offense under Sec. 185 StGB, the relationship between the constitutionally guaranteed Freedom of Arts under Art. 5 para. 3 s. 1 GG and the justification under Sec. 193 StGB for the protection of legitimate interests, which is regulated by ordinary law, must first be systematically determined. Pursuant to Sec. 193 StGB, critical opinions about scientific, artistic or commercial achievements, similar statements or acts constituting an offence under Sec. 192a StGB, which are performed to exercise or protect rights, or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors against their subordinates, official reports or judgments by a civil servant, and similar cases, only entail criminal liability to the extent that the existence of an insult results from the form of the statement or the circumstances under which it was made.

Although the Freedom of Arts pursuant to Art. 5 para. 3 s. 1 GG can in principle be invoked as an independent justification for insults within the meaning of Sec. 185 StGB,²⁰⁴ in this context, it is superseded by the justification of the pursuit of legitimate interests as *lex specialis*, as standardized in Sec. 193 StGB. Therefore, Sec. 193 StGB takes precedence. Artistic activity can therefore also serve as a justification within the framework of Sec. 193 StGB for the pursuit of legitimate interests.²⁰⁵

However, in the context of artistic expression, the “protection of legitimate interests” as defined in Sec. 193 StGB is limited to asserting the Freedom of Arts guaranteed by Art. 5 para. 3 s. 1 GG.²⁰⁶ In this context, Sec. 193 StGB does not operate as an independent assessment criterion alongside Art. 5 para. 3 s. 1 GG; rather, it serves as a simple legal transmission link in fundamental rights reviews.

²⁰⁴ This is the prevailing opinion. See, for example: Klaus A. Fischer, *Die strafrechtliche Bewertung von Werken der Kunst* 70 (1995) (Ger.).

²⁰⁵ Birgit Karpf, *Die Begrenzung des strafrechtlichen Schutzes der Ehre* 289 et seq. (2004) (Ger.); Jörg Tenckhoff, 1989 *Juristische Schulung* [JuS] 198, 200 (Ger.).

²⁰⁶ See *Regge/Pegel*, who argue that artistic works are justified by the fundamental right to Freedom of Arts under Art. 5 para. 3 s. 1 GG, provided they can be classified as the pursuit of legitimate interests under Sec. 193 StGB, *Münchener Kommentar zum StGB* [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 185 para. 47 (Ger.).

Consequently, applying Section 193 StGB leads to the same result as a direct justification review based on the standard of the Freedom of Arts.²⁰⁷

Therefore, Sec. 193 StGB represents a legal specification of the Freedom of Arts tailored specifically to offences protecting the honor. This highlights the close interplay between simple legal dogmatics and constitutional fundamental rights review, which is an essential feature for understanding German criminal law.

b) Requirements for Justifying an Act Pursuant to Sec. 193 StGB in Conjunction with Art. 5 Para. 3 S. 1 GG

The requirements for justifying artistic expression in the context of an offence under Sec. 185 StGB can only be determined if the standards according to which the Freedom of Arts prevails in the event of a conflict with the criminal law protection of honor are clarified. The decisive factor here is the manner in which the constitutionally guaranteed protection of the Freedom of Arts, as set out in Art. 5 para. 3 s. 1 GG is applied in practice via the justification enshrined in Sec. 193 StGB.

As the Freedom of Arts is guaranteed unreservedly but not without limits, it interacts with other constitutional values within the constitutional framework.²⁰⁸ In the context of Sec. 185 StGB, this interaction is particularly significant with regard to the general right of personality, including the right to honor under Art. 2 para. 1 in conjunction with Art. 1 para. 1 GG.²⁰⁹ In turn, the general right to personality is limited by the Freedom of Arts, so that, in the event of a conflict, a reciprocal relationship arises.

If a conflict of fundamental rights arises within the scope of Sec. 185 StGB, a weighing of interests in the sense of practical concordance (in German: “praktische Konkordanz”) is required, as is otherwise the case with conflicts of fundamental rights.²¹⁰ The aim of this approach is to achieve the greatest possible effectiveness for both positions concerned while preserving their constitutional

²⁰⁷ Münchener Kommentar zum StGB [MüKoStGB] (Regge & Pegel eds.), 4th ed. 2021, § 193 para. 58 (Ger.).

²⁰⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 193 et seq. (1971) (Mephisto) (Ger.); id. 67 BVerfGE 213, 228 (1984) (Anachronistischer Zug) (Ger.); id. 75 BVerfGE 373, 379 et seq. (1987) (Strauß-Karikaturen) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 28 Neue Juristische Wochenschrift [NJW] 1882, 1884 (1975) (Ger.); id. 36 NJW 1194, 1194 (1983) (Ger.); Oberlandesgericht Hamburg, 37 NJW 1130, 1131 (1984) (Ger.); Landgericht Berlin, 50 NJW 1371, 1371 et seq. (1997) (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 152 (1989) (Ger.).

²⁰⁹ Elmar Erhardt, *Kunstfreiheit und Strafrecht* 152 (1989) (Ger.).

²¹⁰ Daniel Beisel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 155 et seq. (1997) (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 106 et seq. (1989) (Ger.).

guarantees.²¹¹ The affected party must first assess the severity of the insult in question, taking into account the nature, intensity and scope of the disparagement, in order to fulfil the constitutionally required weighing of artistic freedom and protection of personality.²¹²

With regard to the Freedom of Arts, some literature calls for particular attention to be paid to the uniqueness, density and quality of the artistic creation.²¹³ Although this view concedes that evaluating content—understood as a kind of “level control” (in German: “Niveauekontrolle”)—is problematic, the degree of artistic alienation should nevertheless be an indispensable criterion for determining communicative content.²¹⁴ According to another view, proximity to a directly defamatory statement must be considered an aggravating factor, especially if alienation and transformation are dispensed with and the representation remains at the level of reality while claiming to be documentation, evidence or historical truth.²¹⁵

Attempting to link the scope of the Freedom of Arts to criteria such as “uniqueness,” “density,” “artistic quality,” or even the realism of the design, in the context of a constitutional assessment, raises considerable concerns. At first glance, it may seem plausible to give some weight to the degree of artistic alienation when determining the communicative content. However, even its proponents admit that such an assessment would ultimately amount to differentiation based on artistic quality standards and thus an evaluation of artistic content,²¹⁶ which is incompatible with the Freedom of Arts being guaranteed unconditionally in Art. 5 para. 3 s. 1 GG.

Art. 5 para. 3 s. 1 GG does not allow for a graduated concept of protection either. Rather, the fundamental right to Freedom of Arts is guaranteed unconditionally and covers all forms of artistic expression, regardless of their content or creative form.

Instead, constitutional review must consistently be based on objective normative criteria. While the degree of artistic alienation may be relevant in determining whether an artistic expression falls under the scope of the protection

²¹¹ Daniel Beisel, *Die Kunstfreiheitsgarantie des Grundgesetzes* 155 et seq. (1997) (Ger.); Elmar Erhardt, *Kunstfreiheit und Strafrecht* 106 et seq. (1989) (Ger.).

²¹² Elmar Erhardt, *Kunstfreiheit und Strafrecht* 106 et seq. (1989) (Ger.).

²¹³ *Tübinger Kommentar zum StGB [TK]* (Eisele & Schittenhelm eds.), 30th ed. 2019, § 193 para. 19 (Ger.).

²¹⁴ *Tübinger Kommentar zum StGB [TK]* (Eisele & Schittenhelm eds.), 30th ed. 2019, § 193 para. 19 (Ger.).

²¹⁵ *Leipziger Kommentar zum StGB [LK]* (Eric Hilgendorf ed.), 13th ed. 2023, § 193 para. 9 (Ger.).

²¹⁶ *Tübinger Kommentar zum StGB [TK]* (Eisele & Schittenhelm eds.), 30th ed. 2019, § 193 para. 19 (Ger.).

of the Freedom of Arts, it does not replace the relevant legal standard of review derived exclusively from the scope of Art. 5 para. 3 s. 1 GG.

This does not affect the fact that the nature of an artistic expression with insulting content, especially if it has a clearly recognizable connection to reality, can constitute a more intense infringement of the honor of the person concerned than other forms of expression. However, such an increased intensity of interference is not to be found within the scope of determining the extent of the Freedom of Arts claimed by the perpetrator, but rather must be taken into account when weighing up the conflicting personal rights of the person concerned. Similarly, the increased identifiability of the person concerned due to the proximity of the artwork to reality is logically reflected at the level of the legal interest impaired by the insult, but not at the level of the fundamental right that may justify it.

The idea of a general predominance of honor protection is just as unconvincing as the idea of an automatic priority of the Freedom of Arts.²¹⁷ Rather, as the Federal Constitutional Court rightly emphasizes, the social value and respect of the individual is no more superior to the Freedom of Arts than art may automatically override the general respect of human beings.²¹⁸ Accordingly, the principle remains that, in each individual case, an attempt must be made to achieve the greatest possible effectiveness for both legal interests through practical concordance.²¹⁹ This means that the Freedom of Arts must not be undermined by the schematic application of the defamation norm, nor must legitimate personal interests be suppressed wholesale.

c) Violation of Human Dignity

Depending on its intensity and meaning, an artistic violation of honor can affect general personal rights and, in particularly serious cases, human dignity itself.²²⁰

²¹⁷ Leipziger Kommentar zum StGB [LK] (Eric Hilgendorf ed.), 13th ed. 2023, § 193 para. 9 (Ger.).

²¹⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 173, 195 (1971) (Mephisto) (Ger.); Daniel Beisel, Die Kunstfreiheitsgarantie des Grundgesetzes 155 (1997) (Ger.).

²¹⁹ Beisel, Kunstfreiheitsgarantie, S. 155 et seq.; Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre, S. 263.

²²⁰ Klaus A. Fischer, Die strafrechtliche Bewertung von Werken der Kunst 89 (1995) (Ger.); Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 45 et seq. (2004) (Ger.).

According to some sources, a work of art may be considered to violate human dignity if it depicts objects of the intimate sphere in a grossly degrading or vulgar manner, for instance by mocking sexual behavior.²²¹

In contrast, *K. Fischer* advocates a more restrictive standard: according to this standard, an infringement of human dignity can only be assumed if the work of art questions the human being's fundamental worth or denies their value as an equal member of the community.²²² This narrow interpretation is supported by the fact that the concept of human dignity marks an absolute limit in its constitutional function and must not be devalued by an overly broad definition.²²³ Thus, within the framework of Sec. 185 StGB, justification of an act on the grounds of Freedom of Arts is out of the question if a work of art violates the human dignity of the person concerned.²²⁴ In such cases, the Freedom of Arts cannot be weighed against human dignity, as the latter forms an absolute limit that cannot be breached, even by the Freedom of Arts.²²⁵ This is precisely what the Federal Constitutional Court assumed in the case of the *Strauß Caricatures* by *Rainer Hachfeld*, and therefore rejected a justification based on the Freedom of Arts with regard to the violation of human dignity.²²⁶

A substantial part of the literature assumes that at least individual passages of the so-called “Schmähgedicht” (defamatory poem) by *Jan Böhmermann*, in particular those in which the Turkish president is accused of consuming child pornography or engaging in sexual acts with animals, constitute a violation of human dignity.²²⁷

In general, if a work of art fulfils the elements of Sec. 185 StGB, the first step in determining its criminality is to establish whether it touches on the inviolable

²²¹ Birgit Karpf, Die Begrenzung des strafrechtlichen Schutzes der Ehre 253 (2004) (Ger.).

²²² Klaus A. Fischer, Die strafrechtliche Bewertung von Werken der Kunst 91 (1995) (Ger.).

²²³ See also *Gärtner*, who for this reason also advocates a restrictive interpretation of violations of human dignity by statements protected under Art. 5 GG, Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 209 (2009) (Ger.).

²²⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 380 (1987) (Strauß-Karikatur) (Ger.); Daniel Busche, 44 Juristische Ausbildung [JA] 925, 929 (2022) (Ger.); Elmar Erhardt, Kunstfreiheit und Strafrecht 154 (1989) (Ger.); Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 209 (2009) (Ger.).

²²⁵ Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 209 (2009) (Ger.).

²²⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 75 BVerfGE 369, 380 (1987) (Strauß-Karikatur) (Ger.); see also Daniel Busche, 44 Juristische Ausbildung [JA] 925, 929 (2022) (Ger.).

²²⁷ Oberlandesgericht Hamburg, 2018 Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst [ZUM-RD] 484, 491 et seq. (Ger.); Christian Fahl, 36 Neue Zeitschrift für Strafrecht [NStZ] 313, 316 et seq. (2016) (Ger.).

sphere of the concerned person's human dignity. If so, justification is ruled out from the outset. Only if a violation of human dignity can be ruled out is there room for the constitutionally required balancing of the Freedom of Arts against the protection of honor.

d) Defamatory Criticism

In the context of criminal law examinations of its possible justification, classifying a statement as defamatory criticism ("Schmätkritik") is a particularly sensitive issue where the Freedom of Arts and the protection of honor are in direct conflict with each other.

According to prevailing case law and legal literature, the Freedom of Arts is generally not considered a valid justification for an insult under criminal law, even if a statement is classified as defamatory criticism.²²⁸ A statement is considered defamatory criticism if it does not serve the purpose of objective debate, but is clearly aimed at disparaging the person concerned, focusing on defaming them.²²⁹ The decisive factor in determining whether criticism is defamatory is therefore whether the dominant purpose of the representation is the violation of personal rights, with critical discussion serving only as a pretext or receding entirely into the background.²³⁰

In such cases, the attack is directed at the personal integrity of the person concerned, violating their right to respect and recognition much more severely than statements that still contain some factual basis.²³¹

Given the impact of defamatory criticism on the Freedom of Arts, its prerequisites must be interpreted restrictively.²³² Otherwise, there would be a risk that the constitutionally guaranteed protection of artistic forms of expression would be unduly devalued.²³³

It also follows from this that the mere fact that a statement is made in a polemical or deliberately exaggerated form is not sufficient to assume that it

²²⁸ Daniel Busche, 44 *Juristische Ausbildung* [JA] 925, 929 (2022) (Ger.).

²²⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 93 BVerfGE 266, 294 (1995) (Ger.); id. 82 BVerfGE 272, 283 et seq. (1990) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 27 *Neue Juristische Wochenschrift* [NJW] 1762, 1763 (1974) (Ger.); Daniel Busche, 44 *Juristische Ausbildung* [JA] 925, 929 (2022) (Ger.).

²³⁰ Christian Schertz, 33 *Juristische Schulung* [JuS] 721, 724 (2013) (Ger.).

²³¹ Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 205 (2009) (Ger.).

²³² Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 210 (2009) (Ger.).

²³³ Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 210 (2009) (Ger.).

constitutes defamatory criticism.²³⁴ Rather, a careful examination of all the circumstances of the individual case is required. This examination must consider the linguistic exaggeration in the context of the statement, taking into account the specific interpretation standards of art, in order to determine its actual objective.

e) Satire and Caricature

According to one view expressed in the literature, when assessing the justification of artistic satirical or caricatured representations, a value-dependent differentiation is required: the more the image conveyed by the work of art claims to correspond to the social reality of the person concerned, the more worthy of protection is that person's interest in a realistic representation.²³⁵ Conversely, the Freedom of Arts is given greater protection when the satirical intent is clearly recognizable in its exaggeration and deliberate distortion.²³⁶

Focusing on the realism of satire and caricature is incorrect, as Art. 5 para. 3 s. 1 GG does not contain a graduated concept of protection. Freedom of art is guaranteed unconditionally and covers all forms of artistic expression, including satire and caricature, regardless of content, theme or design. Consequently, when considering Freedom of Arts against the general right to personality in the context of satire and caricature, the general standards described above must also be applied.²³⁷ The line between satire and caricature and criminal liability is therefore often crossed when the representation merely defames or insults the person concerned, or can be regarded as an attack on their human dignity.²³⁸

f) Other Cases of Criminal Insults

Beyond cases of defamatory criticism and violations of human dignity—including satirical and caricatured exaggeration—there remains a broad field of artistic expression that requires careful, case-by-case assessment to determine its justification. When considering individual cases, the specific characteristics of the

²³⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 82 BVerfGE 272, 283 et seq. (1990) (Ger.); Sebastian Gärtner, Was die Satire darf, Eine Gesamtbetrachtung zu den rechtlichen Grenzen einer Kunstform 204, 210 (2009) (Ger.); Susanne Beck, 12 Multimedia und Recht [MMR] 736, 737 (2009) (Ger.); Gabriele Kett-Straub, 120 Zeitschrift für die gesamte Strafrechtswissenschaft [ZStW] 756, 767 (2008) (Ger.).

²³⁵ Bundesgerichtshof [BGH] [Federal Court of Justice], 84 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 237, 239 (1982) (Ger.); Axel Beater, 61 JuristenZeitung [JZ] 432, 438 (2006) (Ger.).

²³⁶ Axel Beater, 61 JuristenZeitung [JZ] 432, 438 (2006) (Ger.).

²³⁷ Systematischer Kommentar zum StGB [SK] (Rogall ed.), 9th ed. 2019, § 185 para. 27 (Ger.).

²³⁸ Andreas Kulczak, Strafrechtliche Einbruchstellen 173 (1993) (Ger.).

art in question must be taken into account, as must the constitutionally protected interests of those involved. The previously outlined standards remain decisive in this regard.

3. Interim conclusion

With regard to art as the perpetrator of an insult, it should be noted that artistic freedom offers a high degree of constitutional protection under Sec. 185 StGB. Expression covered by Art. 5 para. 3 GG is only punishable under Sec. 185 StGB if, after careful consideration, it outweighs the general right to personality and does not interfere with inviolable human dignity or constitute defamatory criticism. While criminal law must not be used to control the content of artistic statements, artistic contributions that constitute personal insults must also face the consequences in criminal law. In cases involving satirical or provocative forms of expression in particular, a case-by-case, art-specific interpretation is therefore essential to strike the necessary balance between artistic freedom and the protection of honor. This tension demonstrates that artistic freedom often has its limits when aesthetic exaggeration no longer serves the purpose of artistic expression, but rather the deliberate denigration of the “wounded ego.”

Based on an examination of Sec. 185 StGB in the context of artistic expression, the following theses can be formulated: The more an artistic expression relies on symbolic, alienating or abstract modes of representation, the more likely it is to be considered a work of art under Art. 5 para. 3 s. 1 GG, and the less likely it is to be considered an insult.

The clearer it is that an artistic expression aims to deliberately denigrate a specifically identifiable person (regardless of the form of the work of art chosen), the more likely it is that the protection of artistic freedom pursuant to Art. 5 para. 3 s. 1 GG will take precedence over the protection of honor pursuant to Art. 2 para. 1 in conjunction with Art. 1 GG. Finally, if a work of art can clearly be recognized as expressing a socially critical or discourse-oriented concern through polemical exaggeration, satirical distortion or grotesque exaggeration, and any violations of honor are merely a minor side effect, freedom of art will prevail when weighing interests against a possible violation of personal rights.

IV. CONCLUSION

Although the Freedom of Arts is guaranteed without reservation in Germany pursuant to Art. 5 para. 3 s. 1 GG, it does have its limits. Human dignity is insurmountable and, even where a representation amounts to mere defamation, artistic freedom takes a back seat. By contrast, Sec. 185 StGB protects honor as an expression of the general right to personality, and the law does not exclude artistic

forms of expression from the elements of the offence in general. Whether a work of art that fulfils the elements of the offence of insult is nevertheless justified and therefore not punishable is decided by Sec. 193 StGB. This provision serves as a legal concretization of Art. 5 para. 3 GG and leads to the same result as a direct review of fundamental rights. In each case, a balance must be struck between protecting the honor of the person concerned and artistic freedom. Decisive factors here are objective-normative criteria such as the identifiability of the person concerned, the intensity of the disparagement and the specific context, rather than aesthetic judgements about the “quality” of the art. This highlights a key feature of German criminal law: subsumption under a simple legal norm is not limited to the enforcement of the Criminal Code, but is always part of the constitutional value system. Thus, criminal law proves to be a safeguard of personal respect, while artistic freedom simultaneously keeps space open for provocation and social discourse.

TRAPPED BEHIND THE GLASS: HUMAN RIGHTS AND THE RESTITUTION OF CULTURAL OBJECTS

*Oscar Genaro Macias Betancourt**

I. INTRODUCTION

The relationship between cultural heritage and human rights remains largely overlooked in the specialized literature, with a few important exceptions.¹ Even though heritage treaties² and soft law instruments (most notably, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)),³ recognize the human rights dimension of cultural heritage, contemporary debates surrounding the restitution of cultural property often neglect this perspective.

Relying on precedents from human rights bodies and special rapporteurs, this article endeavors to evaluate objects and collections from the prism of human rights. It seeks to illustrate why failing to return cultural heritage objects to indigenous peoples can be detrimental to their full enjoyment of human rights. By

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¹ See Alesia Koush, *Illicit Trafficking in Cultural Property as a Human Rights Issue: Sovereignty over Cultural Resources and the Right to Self-Determination. Case Study of Iraq*, 32 INT'L J. CULTURAL PROP. 31 (2025); Ana Filipa Vrdoljak, *Human Rights and Cultural Heritage in International Law*, in INTERNATIONAL LAW FOR COMMON GOODS: NORMATIVE PERSPECTIVES ON HUMAN RIGHTS, CULTURE AND NATURE 139 (Federico Lenzerini & Ana Filipa Vrdoljak eds., 2014); Francesco Francioni & Lucas Lixinski, *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in HERITAGE, CULTURE AND RIGHTS: CHALLENGING LEGAL DISCOURSES 11, 11–34 (Andrea Durbach & Lucas Lixinski eds., Hart Publ'g 2017); ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006).

² See *Convention for the Safeguarding of the Intangible Cultural Heritage*, Oct. 17, 2003, 2368 U.N.T.S. 3, entered into force Apr. 20, 2006 [hereinafter *Convention of intangible heritage*]; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Oct. 20, 2005, 2440 U.N.T.S. 311, entered into force Mar. 18, 2007. [*Convention of Diversity of Cultural Expressions*]

³ See United Nations Declaration on the Rights of Indigenous Peoples, G.a. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007); Unesco, Universal Declaration on Cultural Diversity, UNESCO Doc. 31C/Res.25 (Nov. 2, 2001); Cultural Rights as Human Rights (3. impression ed. 1977).

focusing on cosmologies that consider objects unique, transcendental, or sacred, the text advocates for a critical examination of the complex ontologies of artifacts. Indigenous values are grounded in holistic and inter-generational viewpoints that prioritize common materials and spirituality. For indigenous communities, man-made cultural objects as well as environmental spaces⁴ act as vectors for philosophical, symbolic, and religious discourse.

This paper employs a theoretical framework inspired by critical theories of international law and cultural heritage.⁵ The first section presents a bird's-eye view of the colonial dynamics of museums and the art market to illustrate exclusion dynamics in museum settings. The next two sections delve into the shortcomings of *the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970* (UNESCO 1970) and *the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995* (UNIDROIT 1995). The final section details how human rights law can be used strategically to frame claims for restitution, to enrich provenance research, and to foster dialogue between different stakeholders, including communities, governments, and private actors.

Restitution matters for multiple reasons. Along with natural resource extraction, subjugation, and indigenous displacement, colonial plundering involves the systematic theft of cultural property used by the colonizer in exhibitions of “exotic” objects. After decolonization, a plethora of these items continue to be kept by ethnographic museums and private collections in northern geographies. Some of these items served significant social functions for their original owners. They served to connect individuals with past generations, to carry out religious and cultural ceremonies, and to embody tutelary deities. In the postcolonial context, the restitution of cultural property would help establish ethical relations between colonizing States and colonized peoples.⁶

Critical studies of international law promote a global system of norms that legitimizes, reproduces, and sustains the plunder and subordination of the Third

⁴ Human Rights Council, Promotion and Protection of the Rights of Indigenous Peoples with Respect to Their Cultural Heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/30/53, ¶ 4 (Aug. 19, 2015).

⁵ See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); Makau Mutua & Antony Anghie, *What Is Twail?*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 31 (2000); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights* 42 HARVARD INTERNATIONAL LAW JOURNAL 201 (2001); Makau Mutua, *Human Rights: A Political and Cultural Critique*, BOOKS (2002); LAURAJANE SMITH, THE USES OF HERITAGE (2006).

⁶ FELWINE SARR & BÉNÉDICTE SAVOY, *The Restitution of African Cultural Heritage: Toward a New Relational Ethics* 29 (2018).

World by the West.⁷ The existing international legal system can be explained as “a culture that constitutes the matrix... This culture is shaped and framed by the dominant ideas of the time.”⁸ The international understanding of cultural heritage is no exception. It is marked by “a Euro-American gaze of universalism, uniformity, protective custody, state sovereignty, and economic development.”⁹

Moreover, critical heritage studies have theorized that UNESCO’s regime operates in the realm of an “authorized heritage discourse” (AHD).¹⁰ Defined by Laurajane Smith, the notion of ADH refers to the hegemonic understanding and management of heritage by national governments and international lawmaking bodies. Under the ADH conception of heritage, experts and elites define which sites are architecturally significant and are privileged and protected, often at the detriment of alternative frameworks for understanding heritage.¹¹ Similarly, Critical heritage scholar Rodney Harrison explains that heritage is “neither ‘fixed’ nor ‘inherent, but emerges in dialogue among individuals, communities, practices, places, and objects.”¹²

Despite its shortcomings, international law does provide opportunities to address the subject of restitution. As will be demonstrated in Section V, existing institutions and human rights tools can be applied to better effectuate cultural heritage restitution.

II. ON THE COLONIALITY OF MUSEUMS AND THE ART MARKET

This section situates museums and the art market within the historical framework of colonialism and imperialism, without which these institutions cannot be adequately understood.

The idea of “universal” museums is closely linked to unequal power dynamics between sovereign nations and peoples categorized as “non-sovereign,”¹³

⁷ MUTUA & MAKAU & ANGHIE, ANTONY *supra* note 5.

⁸ B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMM. L. REV. 3, 15 (2006).

⁹ BHARATT GOEL, “All Asiatic Vague Immensities”: *International Law, Colonialism and the Return of Cultural Artefacts*, TWAILR: REFLECTIONS (2022), <https://twailr.com/wp-content/uploads/2022/02/Goel-International-Law-Colonialism-and-the-Return-of-Cultural-Artefacts.pdf>

¹⁰ Francesco Francioni & Lucas Lixinski, *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in HERITAGE, CULTURE AND RIGHTS: CHALLENGING LEGAL DISCOURSES 11, 11–34 (Andrea Durbach & Lucas Lixinski eds., 2017).

¹¹ SMITH, *supra* note 5.

¹² Rodney Harrison, *Beyond “Natural” and “Cultural” Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, 8 HERITAGE & SOC’Y 24 (2015).

¹³ ANTONY ANGHIE, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999).

wherein cultural objects were frequently acquired under conditions of profound imbalance or outright brutality. Through colonization efforts, colonizing powers generated a taste for collecting objects that glorified military achievements and conferred social prestige.¹⁴ It is through these practices that world, universal, and ethnographic museums became archives of colonial memory and spaces that served to disseminate ideas of racial superiority.¹⁵

The taking and exhibition of cultural objects from indigenous peoples play a fundamental role within the colonial project. This section challenges mainstream narratives that portray museums as neutral institutions, contending instead that museums and private collections played an active role in the entrenchment of Western ideas of racial superiority. Curation and the arrangement of cultural objects reflected a unilinear conception of human development, propagating a hierarchical scale of civilization that ranged from “primitive” to “civilized.”¹⁶

Anthropologist Linda Tuhiwai Smith, whose work critically examines the relationship between knowledge production and Western colonial power, explains that the eighteenth and nineteenth centuries constituted an era of highly competitive “collecting” among European powers. During this period, ethnography served as a key instrument for articulating Western superiority over indigenous peoples, while objects taken from colonized societies were re-presented and rearranged to match self-serving Western narratives.¹⁷

Philosopher Souleymane Bachir Diagne argues that ethnography was constituted at its colonial origin as the science of radical otherness, helping to fabricate strangeness, otherness, and separateness.¹⁸ He supports this claim through an examination of African art and the ways it encapsulates philosophy and metaphysics: “Where orality reigns, art becomes the script that unveils the metaphysical essence it embodies.”¹⁹ Consequently, the displacement of African masks, statues, and other objects to European ethnographic museums has rendered them akin to “cadavers,” severed from their original function and stripped of the divine presence they once embodied.²⁰

¹⁴ALEXANDRA SAUVAGE, *To Be or Not to Be Colonial: Museums Facing Their Exhibitions*, 6 CULTURALES 97 (2010).

¹⁵CARSTEN STAHN, *Confronting Colonial Heritage: Entanglements, Continuities, and Transformations* (2023).

¹⁶VRDOLJAK, *supra* note 1, at 46.

¹⁷LINDA TUHIWAI SMITH, *Decolonizing Methodologies: Research and Indigenous Peoples* 64 (2d ed. 2012).

¹⁸SOULEYMANE BACHIR DIAGNE, *Rhythms: L.S. Senghor’s Negritude as a Philosophy of African Art*, 1 Critical Interventions 51, 52 (2007).

¹⁹SOULEYMANE BACHIR DIAGNE, *African Art as Philosophy: Senghor, Bergson, and the Idea of Negritude* 42 (2023).

²⁰*Id.* at 42.

From this perspective, museums and similar institutions act as social agents for perpetuating past instances of epistemic violence in the present. Dan Hicks puts it in the following terms:

The museum may operate to stabilize and reproduce certain narratives, and to repress and diminish others – but only ever provisionally. Insofar as the museum is not just a device for slowing down time, but also a weapon in its own right [...] Museums are devices for extending events across time: in this case extending, repeating and intensifying the violence.²¹

The extraction and retention of cultural objects from colonized peoples have been defended through various justificatory discourses. In particular, restitution claims are often denied based on three main justifications: the rescue, the purchase, and the universality of heritage.

The “rescue” justification argues that objects were extracted to prevent their destruction and for the sake of preservation.²² If there is something left to exhibit, it is because of collectors’ altruism. Closely related to this view is the assumption that countries of origin are incapable of preserving their own heritage. It is therefore considered fortunate that former colonial empires preserve and exhibit treasures from other nations, not only for the enjoyment of their citizens but also for visitors from around the world.²³ The presence of non-Western objects in Western museums is therefore portrayed as a happy coincidence detached from its origins of colonialism.

The purchase justification is invoked to defend certain acquisitions claiming legality in the transaction. However, it is important to acknowledge that what may be described as a legal purchase or a form of gift often resembles what Felwine Sarr and Bénédicte Savoy have characterized as “rationalized systems of exploitation” that took place during scientific expeditions.²⁴

²¹ DAN HICKS, *The British Museum: The Benin Bronzes, Colonial Violence and Cultural Restitution* 6–15 (2020).

²² JOHN HENRY MERRYMAN, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

²³ See *Declaration on the Importance and Value of Universal Museums* (2002): “Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.” See also TIFFANY JENKINS, *Keeping Their Marbles: How the Treasures of the Past Ended Up in Museums and Why They Should Stay There* (Oxford Univ. Press 2016).

²⁴“Far from being a mere fortuitous addition of cultural items gathered from repeated missions, this large sum of items reveals the existence of a veritable rationalized system of exploitation, in

Lastly, the universality of heritage justification is grounded in “cultural internationalism,” which holds that cultural heritage is shared by all of humanity.²⁵ Ironically, cultural internationalism purports that policies governing heritage should prioritize preservation, integrity, and equitable access over nationalist agendas.²⁶ Despite its purported goals of promoting inclusion and access, the argument of universality generates an exclusionary effect. Since it is advanced primarily by the beneficiaries of colonial takings, the universality of heritage serves to legitimize instances of dispossession. As Fiona Macmillan observes, the universality of heritage results in “a kind of appropriation of cultural heritage through a discourse that claims their heritage as the patrimony of humankind – some sort of global patrimony.”²⁷

Many contemporary practices around cultural objects promote their commodification in ways that are deeply derogatory towards non-Westerners. Objects from diverse contexts are sold or exhibited under the rubric of “primitive art” and other outright degrading formulas.²⁸ For Ana Filipa Vrdoljak, the problem can be traced to the category of “cultural property,” which emphasizes the property law aspects of cultural expressions, reaffirming the categorization of cultural heritage objects as “resources,” thereby privileging one characteristic of objects often to the detriment of others.²⁹

III. THE CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY OF 1970 (UNESCO 1970).

During the 1960’s, the debate around restitution resurfaced as a result of the decolonization of Africa and persistent claims by formerly colonized states affected by looting.³⁰ Among those affected countries, Mexico raised claims regarding multiple instances of trafficking networks linked to foreign museums and

some ways comparable to the exploitation of natural resources.” in SARR AND SAVOY above note 5 at 57.

²⁵ *Id.*, “The Public Interest in Cultural Property”. *California Law Review* 77, n.º 2 (1989): 339-64: “despite cultural variations, people in most (all?) places care in special ways about objects that evoke or embody or express their own and other people’s cultures. The empirical evidence that people care about cultural objects is imposing: The existence of thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; brisk markets in art and antiquities [...]”

²⁶ *Id.*

²⁷ FIONA MACMILLAN, *The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural “Patrimony” or Private Property?*, 64 N. Ir. Legal Q. 351, 363 (2020).

²⁸ See STAHN, *supra* note 15.

²⁹ VRDOLJAK, *supra* note 1, at 7.

³⁰ See CLEMENCY COGGINS, *Archaeology and the Art Market*, 175 Science 263 (1972).

collectors.³¹ As a consequence, the Mexican government started a negotiation process to adopt a bilateral treaty with the United States on the subject of illicit trafficking of cultural artifacts. In that context, the Ministries of Education, Tourism, and Foreign Affairs agreed on the need to elevate that treaty to a multilateral instrument.³² The idea was later presented with the support of Mexico and Peru at the 11th UNESCO General Conference in 1960.³³

Prior to the 1960 General Conference, the subject of illicit trafficking was already on UNESCO's agenda. In 1956, the 9th UNESCO General Conference adopted a technical non-binding document entitled *Recommendation on International Principles Applicable to Archaeological Excavations*.³⁴ The document was drafted by a group of technicians who met at Palermo earlier that year to set principles to deter illicit excavations, enable restitution, and guide national authorities in law and policy-making. The document exhibits a fair equilibrium between obligations imposed upon affected states and duties upon market states.

Despite the fact that preventing illicit trafficking gained support in the years leading up to the 1970 UNESCO Convention, the drafting process was fraught with difficulties. In France's commentary to the draft, it stated: "It is important not to hamper lawful business and not to throw suspicion on bona fide merchants, collectors or exhibitors who, by their discovery of such objects or through their appreciation of them, have often themselves largely contributed to giving them a cultural as well as a commercial value."³⁵

From the perspective of the United States:

A strong argument can be made that the operation of the international art market has led to the discovery and preservation of numerous objects that otherwise would have been lost forever and

³¹ See generally GUILLERMO PALACIOS, *Los Bostonians: Yucatán y los primeros rumbos de la arqueología americanista estadounidense, 1875–1894*, REV. HIST. AM. 201 (2012); CLEMENCY COGGINS, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969); DAVID C. GROVE ed., *Ancient Chalcatzingo* (Univ. of Tex. Press 1987); MEGAN O'NEIL & MARY MILLER, *Stendahl Art Galleries in Europe: Expanding the Market for Pre-Hispanic Art at Mid-Century*, 7 JOURNAL FOR ART MARKET STUDIES (2023).

³² Memorandum from the General Direction of International Organizations, Ministry of Foreign Affairs, (August 25, 1959) (on file with author).

³³ UNESCO, *Preservation of the Cultural Heritage of Mankind*, 11C/Res. 4.412 (1960).

³⁴ UNESCO, *Recommendation on International Principles Applicable to Archaeological Excavations* (Dec. 5, 1956).

³⁵ UNESCO, *Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Final Report* 8, U.N. Doc. SHC/MD/5 (Feb. 27, 1970).

has contributed in a major way to the understanding of, and the recognition now accorded, many ancient cultures at home as well as abroad. Art objects are both excellent ambassadors of national traditions and expressions of the common heritage of mankind on this planet. Thus, important values are served by a reasonable flow of art objects and archaeological materials among nations.³⁶

The final version of UNESCO 1970 was greatly influenced by lobbyists in the art market. In particular, powerful museums and institutions sought to exclude art and antiquities already in their possession from the scope of the Convention. As a result, Article 7, the core provision of the 1970 UNESCO Convention on restitution, limits the obligation to return cultural property only to cases arising after the Convention entered into force for the concerned states.³⁷ Moreover, the Convention only applies to stolen objects from museums or similar institutions, excluding items acquired through illicit excavation.³⁸ It also incorporates “escape formulas,” such as the requirement to take measures “consistent with national legislation,” allowing domestic rules on ownership or statutes of limitation to weaken its effect. Finally, Article 7 safeguards individual property rights by requiring compensation for innocent purchasers.³⁹

“It is widely believed among curators that there is a strong lobby from the art trade against the 1970 UNESCO Convention.”⁴⁰ While the treaty was important in

³⁶ *Id.* at 20.

³⁷ Despite the fact that UNESCO 1970 enjoys 114 ratifications, major important market States did not ratify it until decades later: France (1997), United Kingdom (2002), Switzerland (2003), Germany (2007) and Belgium (2009).

³⁸ Article 7: The States Parties to this Convention undertake: (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

³⁹ UNESCO, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (U.N. Doc. C70/15/3.MSP/Operational Guidelines, 2015): In accordance with Article 7(b)(ii), the States Parties have undertaken, at the request of the State Party of origin, to take appropriate steps to recover and return any stolen cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices and shall be furnished, at the expense of the requesting Party.

⁴⁰ Geoffrey Lewis, *International Issues Concerning Museum Collections*, in *International Art Trade and Law* 76 (Martine Briat & Judith Freedberg eds., 1991), quoted in NINA LENZNER, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an*

bringing the issue of illicit trafficking and restitution into the international dialogue, it proved too disruptive to be meaningfully implemented into the domestic laws of many nations. The idea of stopping business and allowing the restitution of colonial displaced objects would hinder the trade of art and antiquities and harm economic and market interests.

Among the main achievements of the treaty was the creation of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP). Where neither the 1970 UNESCO Convention nor any bilateral or multilateral agreement applies, and bilateral negotiations have failed or are suspended, UNESCO Member States may submit a request to the ICPRCP. Article 3(2) of the ICPRCP statute explains that such requests must concern cultural property of “fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation,” which states consider to have been wrongfully taken. States may also rely on the Rules of Procedure for Mediation and Conciliation adopted by the ICPRCP at its 16th Session in 2010. Despite this seemingly robust institutional framework, it does not help to tackle the shortcomings of the Convention derived from non-retroactivity and national rules on property rights.⁴¹

IV. THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS OF 1995

The trade of art and antiquities is regulated by laws concerning ownership, which can differ significantly between countries. Nations with robust art markets often afford greater protection to possessors acting in good faith. Conversely, in some countries, the overarching principle remains *nemo dat quod non habet*—no one can transfer what they do not own.

As UNESCO failed to address private law aspects, the International Institute for the Unification of Private Law (UNIDROIT) formulated a convention to fill in this gap. UNIDROIT 1995 introduces the notion of due diligence in relation to innocent purchasers as “the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.” Instead of the claimant, it is the possessor who needs to prove their compliance with the standards of due diligence.

Effective Remedy for the Shortcomings of the UNESCO Convention?, 15 U. PA. J. INT’L L. 479 (1995).

⁴¹ Vrdoljak, *supra* note 1, at 211.

Along with its private law contributions, UNIDROIT 1995 applies to a wider range of pieces extracted from different contexts. Specifically, it includes the cultural heritage of indigenous peoples and employs the term “cultural objects” instead of “cultural property,” which addresses the concern of objects being reduced to merchandise or financial assets. Moreover, it allows for a domestic court or a competent authority to order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs the traditional or ritual use of the object by a tribal or indigenous community [...].⁴²

UNIDROIT 1995 faced minimal enthusiasm by market states, many of which threatened to denounce the 1970 UNESCO if UNIDROIT was meant to be supplementary to the UNESCO provisions.⁴³ In 1995, when UNIDROIT was adopted, only 80 countries were parties to the 1970 UNESCO Convention, so stakeholders aiming to combat illicit trafficking of cultural objects, including UNESCO, preferred not to jeopardize the progress achieved with the previous convention by connecting the two conventions. The solution was to decouple both instruments. Presently, only 57 countries are parties to UNIDROIT—a stark contrast to 114 parties to the 1970 UNESCO. Importantly, none of the market states has ratified it.

Both conventions are constructed with the vocabulary and grammar of free trade and liberal markets. They reproduce an understanding of cultural objects as commodities, as in objects for exchanging economic value.⁴⁴ Put differently, this market approach erases the profound and complex interpretations and functions intended by the creators of these objects.

Non-retroactivity and the lack of ratification reduced the effectiveness of these treaties. As a result, the discursive power of international law has served to stall discussion and innovation addressing the issue of restitution, without offering solutions to the structural tensions between market, museums, and non-hegemonic conceptions of cultural objects.

In this context, the decision of whether, and how, to address restitution claims is up to the discretion of the institution. For this purpose, multiple governments, private museums, and collections have established procedures to address restitution

⁴² See *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* arts. 3, 4, 5 and 6 June 24, 1995, 34 I.L.M. 1322.

⁴³ ALPER TAŞDELEN, *THE RETURN OF CULTURAL ARTEFACTS: HARD AND SOFT LAW APPROACHES* 79 (2016).

⁴⁴ See MACMILLAN, *supra* note 27.

claims.⁴⁵ The next section argues for the use of various international human rights tools in restitution procedures.

V. DECODING PIECES: HUMAN RIGHTS AND PROVENANCE RESEARCH

Dissolving the boundaries between international heritage law and human rights is a relatively recent yet increasing trend. According to the UN's special rapporteur for cultural rights, Alexandra Xanthaki, heritage was historically seen as outside of the domain of human rights and relegated to UNESCO's purview. Cultural heritage law is now widely viewed as a matter of concern for the state rather than subnational groups.⁴⁶ This section contains arguments favoring the injection of human rights into the assessment of cultural objects, especially in the restitution setting.

Farida Shaheed, the UN Independent Expert in the Field of Cultural Rights, was the first to suggest approaching cultural heritage from a human rights perspective. In 2011, she argued that we must consider the rights of individuals and communities when discussing objects and other manifestations of cultural heritage; that is, to consider heritage not in isolation, but in connection with its source of creation.⁴⁷

Building on those ideas, the following argument proposes that cultural objects, especially sacred items that perform a social function within a community, should be analyzed by museum managers and provenance researchers from a human rights perspective. Contrary to the approach of UNESCO 1970, UNIDROIT 1995, and the mainstream trend of cultural property as an ownership discourse, cultural objects should be viewed as actors that perform a social function. They must be recognized for the ways in which they encapsulate elements of individual and collective identity and for their intergenerational and environmental value.⁴⁸

⁴⁵ ARTS COUNCIL ENGLAND, *Restitution and Repatriation: A Practical Guide for Museums in England* (Aug. 5, 2022); SWEDISH NATIONAL HERITAGE BOARD, *Good Collections Management: Guidance for Managing the Return of Cultural Objects* (2020); HANNA PENNÖCK & RENATE MEIJER, *Provenance Research into Collections from a Colonial Context: A Guide* (2025).

⁴⁶ Alexandra Xanthaki, *International Instruments on Cultural Heritage: Tales of Fragmentation*, in INDIGENOUS PEOPLES' CULTURAL HERITAGE 1 (Alexandra Xanthaki *et al.* eds., 2017).

⁴⁷ HUMAN RIGHTS COUNCIL, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, ¶ 2, U.N. Doc. A/HRC/17/38 (Mar. 21, 2011); *see also* Alexandra Xanthaki, *International Instruments on Cultural Heritage: Tales of Fragmentation*, in INDIGENOUS PEOPLES' CULTURAL HERITAGE 1 (Alexandra Xanthaki *et al.* eds., 2017).

⁴⁸ HUMAN RIGHTS COUNCIL, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, U.N. Doc. A/HRC/17/38 (Mar. 21, 2011), ¶¶ 4, 6; *see also* HUMAN RIGHTS COUNCIL, *Study on the Promotion and Protection of the Rights of Indigenous Peoples with Respect*

The close relationship that communities have with sacred items is a necessary component of their cultures and spiritual lives, and must be protected by human rights law. Like regional territory and natural resources, cultural objects are a component of reticular systems. Their essence cannot be fully understood when isolated from the cultural importance that they hold.⁴⁹

Unlike international cultural heritage law, human rights law allows for non-Western components via the “open texture” of legal notions. A clear example can be found in the notion of culture as defined in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), for the Human Rights Committee:

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.⁵⁰

Similar reasoning has been advanced in the Committee’s case law regarding the protection of natural resources and access to traditional lands. In *Apirana Mahuika et al. v. New Zealand*, the claimants proclaimed that “fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories.”⁵¹ Similarly, in the *Jouni E. Länsman et al. v. Finland case*, the Sami submitted that “any new measure causing adverse effects on reindeer herding in the Angeli area would amount to a denial of the local Samis’ right to enjoy their own culture.”⁵² The connection to the land produces and sustains Sáminess, and through the connection, a Sami today can experience an affinity with the Sami that preceded them millennia ago.⁵³

The Committee on Economic, Social and Cultural Rights in its General Comment No. 21 called on states to “respect the rights of indigenous peoples to

to Their Cultural Heritage: Report of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/EMRIP/2015/2 (June 19, 2015).

⁴⁹ SARR AND SAVOY *supra* note 6, at 35.

⁵⁰ HUMAN RIGHTS COMM., *General Comment No. 23: Article 27 (Rights of Minorities)*, U.N. Doc. CCPR/C/21/REV.1/ADD.5 (Apr. 8, 1994).

⁵¹ HUMAN RIGHTS COMM., *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, ¶ 6.2, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

⁵² HUMAN RIGHTS COMM., *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, ¶ 2.7, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

⁵³ *Sanna Valkonen et al., An Ontological Politics of and for the Sámi Cultural Heritage: Reflections on Belonging to the Sámi Community and the Land*, in *Indigenous Peoples’ Cultural Heritage: Rights, Debates, Challenges* 154 (Alexandra Xanthaki et al. eds., 2017).

their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life”.⁵⁴

The Inter-American Court of Human Rights provides an alternative interpretation of property that better represents indigenous rights. In the *Awas* case, the Court interpreted the notion of property in a communal dimension, highlighting the bond of indigenous communities to their territory and resources:

Among indigenous people, there exists a communal tradition regarding a collective form of land ownership, wherein the belongingness of the land does not center on an individual but on the group and its community. [...] The close relationship that indigenous people maintain with the land should be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, the relationship with the land is not merely a matter of possession and production but a material and spiritual element that they should fully enjoy, even to preserve their cultural heritage and transmit it to future generations [...]⁵⁵

These examples show how various lawmaking and regulatory bodies for human rights bodies have interpreted legal notions expansively, opening space for understandings grounded in indigenous cosmovisions. In his study on colonial objects, Stahn argues that, beyond pieces of art or commodities, cultural objects can be defined in other ways, such as “witnesses to history,” “subjects,” or “ancestors.”⁵⁶ This interpretative flexibility provides an entry point to recontextualize the discussion of restitution within existing frameworks of hard law instruments and their tutelary organisms.

There are multiple reasons to look at cultural objects beyond the property or artistic paradigm. For Felwine Sarr and Bénédicte Savoy:

Within a rather particular modality of the articulation of the relations between the spirit, matter, and the living, they are the depositories of flows and energetic fields that turn them into animated objects

⁵⁴ COMM. ON ECON., SOC. & CULTURAL RTS., *General Comment No. 21: Right of Everyone to Take Part in Cultural Life* (Art. 15, ¶ 1(a) of the Covenant on Economic, Social and Cultural Rights), ¶ 49, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

⁵⁵ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 146, 148 (Aug. 31, 2001).

⁵⁶ Stahn, *supra* note 15, at 14.

and into active forces, thus mediating between the different orders of reality. These objects are also the bearers of a reserve of the imagination as well as the material manifestation of forms of knowledge [saviors]. Fishing nets that encode algorithms from fractals to anthropomorphic statues in passing by amulet-filled vests: the work of decoding the various forms of knowledge they conceal as well as the comprehension of the epistemes that have produced them remains largely a work to be done.⁵⁷

The intersection of human rights and cultural heritage is evident in the case of indigenous peoples. Being the flagship document for indigenous rights, the UNDRIP provides in Article 11 the right to practice and revitalize cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. Article 12 makes specific reference to restitution, stating that restitution protects the right of indigenous peoples “to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.” Finally, Article 31 establishes that “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions [...]”.

As recognized by international culture heritage law scholars Renold and Chechi, UNDRIP acknowledges indigenous peoples’ holistic conceptualization of cultural heritage, covering land, immovable and movable heritage, and tangible and intangible elements, and the symbiotic relationship between them.⁵⁸ In the same way, Xanthaki argues that UNDRIP is an expression of cross-fertilization of ideas and standards among the various bodies of international human rights law,⁵⁹ which can ultimately provide the normative backbone to extend human rights reasoning to restitution claims, connecting interpretative flexibility with internationally recognized legal standards. Moreover, Shaheed recognized that human rights issues arise whenever elements of the cultural heritage of specific communities are stored or displayed in cultural institutions—in particular museums—in a manner that disregards the social role of the object/subject. Indeed, preservation and exhibition purposes may antagonize the explicit wishes of the source community, especially

⁵⁷ Sarr & Savoy, *supra* note 6, at 57.

⁵⁸ Marc-André Renold & Alessandro Chechi, *International Human Rights Law and Cultural Heritage*, in *CULTURAL HERITAGE AND MASS ATROCITIES* 403 (James Cuno & Thomas G. Weiss eds., 2022).

⁵⁹ Xanthaki, *supra* note 48.

when the community believes that objects should be buried, burned, or otherwise destroyed upon a person's death.⁶⁰

On an important precedent, the Experts Mechanism of the Rights of Indigenous Peoples (EMRIP), a subsidiary body of the Human Rights Council with thematic expertise on the rights of indigenous peoples, issued a report stating the following:

[M]useums often contribute to the misappropriation of the cultural heritage of indigenous peoples. Many museums, both private and public, hold and display the cultural heritage of indigenous peoples without the consent of the peoples concerned. For example, the Swedish National Museum of Ethnography currently holds a ceremonial deer head (*Maaso Kova*), a sacred item of the highest spiritual and cultural significance for the Yaqui Nation, used in the Yaqui Deer Dance ceremony.⁶¹

The EMRIP referred to the *Maaso Kova*, which was returned in June 2021 to the Yaqui in Northern Mexico. The item had been taken during the Porfiriato, a period marked by the forced displacement of Yaquis from their ancestral lands and was later acquired by European anthropologists for a nominal sum.⁶² The *Maaso Kova* embodies a deity central to Yaqui cosmology, serving as a medium through which dancers communicate with nature during rituals. Recognizing the object's significance, the museum reframed the discussion from ownership to human rights and promptly withdrew the object from public display. The restitution of the piece to the Yaqui people in Sonora, Mexico, was consistent with Article 12(2) of UNDRIP and Article 15 of the 1970 UNESCO Convention and exemplifies how international human rights law can articulate fair and participatory mechanisms for restitution, setting a precedent for future claims grounded in indigenous cultural rights.

Traditional provenance research and evaluation of restitution claims inquire into whether the piece was acquired against the will of the original owners or traded on an equal footing. Contrary to this existing approach, a human rights approach allows us to look inward at the complex ontologies of items. While the determination of past facts is of enormous relevance to provenance, an assessment

⁶⁰ Human Rights Council, *Report of the Independent Expert on Cultural Rights*, Farida Shaheed, *supra* note 49, ¶ 16.

⁶¹ Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 51 at 69.

⁶² Shea Sterling, *The Journey Home: The repatriation of the Maaso Kova*, American Society of International Law, 27 *Asil Insights* (2023), <https://www.asil.org/insights/volume/27/issue/3>.

of the present implications of the withholding of a piece or a collection is a more urgent matter. This is particularly relevant when dealing with pieces or collections that perform a social role in their communities of origin. This shift from determining the object's past to observing its significance in the present allows restitution claims to strategically leverage international human rights law in contexts where identity, memory, and spirituality are materially embodied.

VII. CONCLUSION

International law perpetuates a paradigm of cultural objects that prioritizes a liberal, Westernized definition of an object's value. This perspective, evident in UNESCO 1970 and UNIDROIT 1995, reduces cultural objects to commodities and reinforces the curatorial othering of these objects. The history of the process of adopting both treaties illustrates multilateral diplomacy efforts towards challenging ruling paradigms. The 1970 UNESCO Convention was never intended to be the end of the process, and the originating states continued advancing a more comprehensive approach for illicit trafficking and restitution. Unfortunately, UNIDROIT 1995 was later curtailed by market states.

The true worth of cultural objects transcends their physical attributes or rarity. Their importance lies not intrinsically, but emerges from their association with people and the environment. It stems from the dialogue with subjectivities within a system of values and traditions. Sacred items serve as physical embodiments of transcendental entities or means of communicating with other actors inside reticular cosmologies. Acknowledging this relational value is crucial.

Approaching cultural objects from this relational standpoint, framed within human rights discourse, shifts the focus from the objects to the subjects and their cosmological contexts. Human rights provisions, including UNDRIP, can serve as the foundation for reevaluating the procedures in place for multiple museums and collections in different geographies, and to continue building bridges between heritage law and human rights.

Further, justificatory discourses must be unmasked. The credibility of the argument of rescue is challenged by considering the extensive historical harm perpetrated by looting and collecting networks. Similarly, it is hard to envision artifacts from the Global North permanently displayed in the Global South under the rubric of universal heritage. That is, the universality argument only works in one direction.

Finally, it is essential to acknowledge the complexities involved in the national implementation of restitution based on indigenous rights. Understanding the internal colonial dimensions is vital. If solely aimed at enlarging national museum collections, restitution is not a comprehensive solution. Instead, emphasis

should be placed on situating cultural objects within their communities and fostering collaboration with preservation experts.

Restitution serves as a diplomatic avenue. Conflicting interests between collectors, institutions, and the communities that were harmed by looting can be transformed into a channel for cooperation with mutually beneficial outcomes. That is, restitution must be understood as a space of cultural diplomacy between public and private stakeholders. Ultimately, the solution to the debate on restitution will not be settled by holding a new convention on the subject. Rather, it necessitates a profound shift in global consciousness. Sustained and transparent dialogues among governments, private actors, and affected communities are essential to instigate this change.

BETWEEN EXPRESSION AND PROPERTY:
THE LIMITS OF MORAL RIGHTS IN STREET ART UNDER U.K.
AND U.S. COPYRIGHT LAW

*Pauline Moorkens**

I. INTRODUCTION

“*Copyright is for losers.*”¹
- Banksy

Banksy’s statement made in 2005 was later used against him in a European Union Intellectual Property Office dispute concerning his work *Laugh Now*, highlighting the importance of copyright protection and the application of moral rights for street artists.² The world of street art and graffiti has often been associated with vandalism, trespassing, tampering, or destruction. However, in recent decades, the legal questions surrounding street art have been increasingly directed at intellectual property protection, and more precisely, copyright protection. Firstly, it is important to understand the nature and provenance of street art and its differentiation from a number of other art forms to further address the issue of copyright-protected street art. Precursory forms of street art originated as political and social commentary, activism and critique.³ The street art genre has evolved from its political roots; however, it still perpetuates activism and social commentary as one of its forms. Modern street art is believed to have largely originated in New York City during the Graffiti Boom in the late 1960s, with its peak during the 1980s in the Bronx and other areas of the city. During the rise of the movement, many renowned artists such as Keith Haring, Jean-Michel Basquiat and Richard Art

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¹ Eileen Kinsella, *The E.U. Rules Against Banksy In His Trademark Fight With A Greeting Card Company, Citing His Own Statement That 'Copyright Is For Losers*, ARTNET NEWS (May 20, 2021) <https://news.artnet.com/art-world/banksy-trademark-full-colour-black-1971339>

² *Id.*

³ Howard Smith, *Apple of Temptation*, THE VILLAGE VOICE, 1982 at 38.

Hambleton expanded diverse forms of street art with text-based but also visual-based conceptual art.⁴ IP protection has long been a source of debate when it comes to street art. Copyright grants the right to prevent those without given authority from reproducing or performing whole or part of a protected work.⁵ Certain countries, such as the U.S., allow for copyright protection for street art insofar as the art in question was put in place legally and can fulfill the following conditions: (1) originality, and (2) fixation in a tangible medium of expression.⁶ If these two conditions are met, copyright protection will endure throughout the artist's life and the 70 years following his or her death.⁷ However, for cases of illegal street art, copyright protection rules vary between countries and cases, making IP protection for street art an ongoing issue.

The current governing statute for copyright including moral rights in the U.K. is the Copyright, Designs, and Patents Act of 1988 ("CDPA"), whilst the Visual Artists Rights Act of 1990 ("VARA") confers moral rights protection to street artists in the U.S.⁸ The CDPA provides the scope for copyright-protected works, which includes that the work must be original.⁹ Street art can satisfy the originality requirement¹⁰ based on either the European Union's intellectual creation test¹¹ following *Infopaq International v. Danske Dagblades Forening*¹² or the U.K. originality test, which consists of an examination of skill, effort, labor and judgment.¹³ It is important to note that copyright protection is related to the expression of an idea, rather than the idea itself. Furthermore, if an author owns the copyright in a work, he or she has exclusive rights over certain uses of the work. These rights fall within two different categories: economic rights and moral rights.¹⁴ The Agreement on Trade-Related Aspects of Intellectual Property Rights

⁴ Katherine Drasher, *Avant's on the Street*, THE VILLAGER, June 30, 1983 at 31-32.

⁵ Emily Gould, Assistant Director of the Institute for Art and Law, Lecture at Queen Mary University of London: Copyright Subsistence and Protected Works (2022).

⁶ 17 U.S.C. § 102(a).

⁷ *Id.* § 302(a).

⁸ 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. (2014) at 260.

⁹ Copyright, Designs and Patents Act 1988, c. 48, Section 1 (UK).

¹⁰ Paula Westenberger, *Copyright Protection of Illegal Street and Graffiti Artworks*, in COPYRIGHT IN STREET ART AND GRAFFITI: A COUNTRY-BY-COUNTRY LEGAL ANALYSIS (2019) at 13.

¹¹ *Id.*

¹² Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening* 2009 E.C.D.R. 16.

¹³ Andreas Rahmatian, *Originality in U.K. Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure*, 44 INT'L REV. INTELL. PROP. & COMPETITION L. 4, 8 (2013).

¹⁴ *The Rights Granted By Copyright*, INTELLECTUAL PROPERTY OFFICE (March 26, 2015), <https://www.gov.uk/guidance/the-rights-granted-by-copyright>

(“TRIPS”),¹⁵ the World Intellectual Property Organization’s Copyright Treaty¹⁶ and Performances and Phonograms Treaty (“WCT” and “WPPT”), and others provide an international legal basis for moral rights.¹⁷ Article 6*bis* of the Berne Convention recognizes that moral rights subsist independently of economic rights and survive their transfer, granting authors the right to claim authorship and to object to derogatory treatment of their work.¹⁸ In the U.K., moral rights refer to the protection of non-economic interests, and are only applicable to literary, dramatic, musical, and artistic works, as well as films and some performances.¹⁹ There are four types of moral rights in the U.K.: the right to attribution, the right to object to derogatory treatment of a work, the right to object to false attribution, and the right to privacy of certain photographs and films.²⁰

This article examines the extent to which moral rights protections apply to street art under U.K. and U.S. copyright law, with particular attention to works created without authorization. It argues that, while neither jurisdiction formally excludes illegal street art from copyright or moral rights protection, courts increasingly resolve disputes at the intersection of moral rights and property law rather than through bright-line rules based on illegality. The article proceeds by first analyzing the application and limits of moral rights to street art under the U.K. Copyright, Designs and Patents Act, before turning to the U.S. framework under the Visual Artists Rights Act and related case law. It then presents a comparative analysis of the two systems, highlighting emerging judicial trends and the practical constraints faced by street artists, before concluding with reflections on the structural limitations of existing legal frameworks and the need for legislative reform.

II. APPLICATION OF MORAL RIGHTS TO COPYRIGHT-PROTECTED STREET ART IN THE UNITED KINGDOM

The first appearance of street art, and more precisely graffiti, in the U.K. occurred in London and Bristol in the 1980s and subsequently steadily developed through the 1990s.²¹ Despite popular belief, street art in 21st-century U.K. is more

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

¹⁶ WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

¹⁷ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis* (9 September 1886), 828 U.N.T.S. 221 (as last revised at Paris, July 24, 1971 and as amended September 28, 1979).

¹⁹ INTELLECTUAL PROPERTY OFFICE, *supra* note 14.

²⁰ *Id.*

²¹ HENRY CHALFANT & JAMES PRIGOFF, *SPRAYCAN ART* (1987), at 8-10.

often than not created legally, often through the availability of public spaces from local councils, such as Leake Street in London, which is also known as the Graffiti Tunnel.²² Independent of local councils, private property owners and businesses now also allow street artists to create graffiti art and other forms of street art on their property.²³ However, for street art done without permission, artists can be found guilty of nuisance, trespassing, and even destruction under the 1971 Criminal Damage Act.²⁴ Enrico Bonadio has noted the paradox of street art in the U.K. as both a cultural aesthetic practice and a criminal activity.²⁵ This paradox was demonstrated in the 2008 criminal conviction of the graffiti group DPM while the Tate Modern was holding an exhibit on street art, celebrating its more well-known artists like Os Gemeos, Nunca, Blu, JR and Sixeart.²⁶ While Section 4 of the CDPA expressly refers only to graphic works, sculptures, photographs and works of artistic craftsmanship, forms of street art such as posters, mosaics and, in some cases, yarn bombing may fall within these categories depending on their form and execution.²⁷ U.K. copyright law also provides paternity and integrity rights. The paternity right, also known as the right to be identified as an author, falls under Sections 77 and 78 of the CDPA. Section 77(4) provides that the author of an artistic work has the right to be identified whenever “the work is published commercially or exhibited in public, or a visual image of it is.”²⁸ Section 78(3) further provides that the right set out in Section 77(4) may also be asserted in relation to the public exhibition of an artistic work, provided that the author is identified when the original or an authorized copy is exhibited.²⁹ An artist must assert a paternity right to exercise it, and such an assertion can be performed through a signature or the artist’s name near the work.³⁰ Graffiti artists do not always sign their work with their names, but rather a pseudonym, either to avoid the legal consequences associated with graffiti or for ulterior reasons.³¹ While the right of attribution must be asserted under Sections 77 and 78 of the CDPA, Section

²² Enrico Bonadio, *Street Art, Graffiti, and Copyright: UK*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Enrico Bonadio ed., 2019), at 160.

²³ *Id.*

²⁴ Criminal Damage Act 1971 c. 48 (U.K.).

²⁵ Bonadio, *supra* note 22, at 160.

²⁶ *Id.*

²⁷ CDPA Section 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Enrico Bonadio, *Copyright Protection of Street Art and Graffiti under U.K. Law*, 2017 INTELL. PROP. Q. 1, at 15.

77(8) clarifies that identification may be effected through the use of initials or a commonly-recognized pseudonym.³²

Given that Section 80(2) CDPA expressly confines “treatment” to acts of alteration, adaptation, distortion, or mutilation, it excludes other forms of harm to an author’s honor or reputation.³³ This represents a narrower formulation than Article 6*bis* of the Berne Convention, which extends protection to any derogatory action affecting the work, whether or not it involves physical alteration.³⁴ Destruction and decontextualization are not addressed under U.K. law in the context of graffiti, as highlighted by the transposition and removal of some artworks like Banksy’s mural in Port Talbot, South Wales.³⁵ The location of graffiti impacts its artistic meaning, meaning that its relocation can divest the artwork of its significance.³⁶ The complexity of the right of integrity in regard to street art also lies in the question of whether the owner of the tangible object (e.g., the wall to which the graffiti was applied) can be prevented from destroying it on the basis of the application of the right of integrity.³⁷ *Harrison v. Harrison* highlights that the concept of “treatment” for the purposes of the CDPA could include the destruction of an artwork. While the case concerned literary works, its result holds important implications regarding integrity rights and the meaning of “treatment.” HH Judge Fysh QC found that the destruction of a work can fall within the concept of “treatment,” stating that treatment of a work is a broad and general concept and that it “implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work.”³⁸ Indeed, in the U.K., contrary to the U.S., the right of integrity does not usually extend to “the destruction of the original embodiment of a work.”³⁹ Furthermore, the right of integrity proves difficult to recognize in some cases, given that street artists are

³² CDPA Sections 77-78.

³³ *Id.*

³⁴ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis* (9 September 1886), 828 U.N.T.S. 221 (as last revised at Paris, July 24, 1971 and as amended September 28, 1979).

³⁵ Anny Shaw, *Fate of Banksy in Welsh Town Port Talbot Hangs in the Balance*, THE ART NEWSPAPER (Feb. 8, 2022), <https://www.theartnewspaper.com/2022/02/08/where-now-for-the-port-talbot-banksy>

³⁶ CEDRIC LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION (2008).

³⁷ Enrico Bonadio, *Conservation of Street Art, Moral Right of Integrity and a Maze of Conflicting Interests*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Enrico Bonadio ed., 2019), at 71.

³⁸ *Harrison v. Harrison* [2010] E.W.P.C.C. 3 (UK).

³⁹ Westenberger, *supra* note 10, at 10.

often anonymous, and thus damaging their honor or reputation is a difficult violation to contemplate due to their anonymity.⁴⁰

Another important aspect when discussing the extent of application of moral rights on copyright-protected street art in the U.K. is the temporary nature of certain forms of street art. A notable case which highlighted this aspect of copyright law was the *Merchandising Corporation of America v. Harpbond* (1983), in which artist Adam Ant's face makeup did not meet the requirements to be considered a painting and thus attain copyright protection.⁴¹ The court found that "if the marks are taken off the face there cannot be a painting. A painting without a surface is not a painting."⁴² *Creation Records v. News Group Newspapers* (1997) also addressed the temporary nature of art. The Court held that the arrangement of objects for an Oasis album cover was "intrinsically ephemeral."⁴³ The cases discussed above suggest that a degree of permanent fixation within a medium is generally required for artworks to qualify for copyright protection. In the context of street art and graffiti, however, fixation raises particular difficulties. Street art is typically characterized by its ephemeral nature, as works are often executed directly onto walls or urban surfaces and remain vulnerable to removal, destruction, or overpainting.⁴⁴ That said, there is no uniform standard across street art practices. Certain artists deliberately pursue more durable forms of fixation. For example, the street artist Cityzenkane physically attaches his works to urban surfaces by screwing or adhering them onto walls, thereby creating a stronger claim to permanence. This method highlights the tension between the generally transient character of street art and the legal requirement of fixation, rather than negating the broader norm of ephemerality.⁴⁵

III. APPLICATION OF MORAL RIGHTS TO COPYRIGHT-PROTECTED STREET ART IN THE U.S.

In U.S. copyright law, VARA provides the main legal basis for the protection of moral rights.⁴⁶ The rights granted by VARA under Sections 106A(a)(1)-(2) include the right to attribution, meaning the right to claim authorship of the work, and the right to prevent the use of one's name as an author of a work of visual art

⁴⁰ MICHAEL TAPPIN ET AL., *LADDIE, PRESCOTT AND VITORIA: THE MODERN LAW OF COPYRIGHT* (5th ed. 2018) at 427.

⁴¹ *Merch. Corp. of Am. v. Harpbond* [1989] R.P.C. 697 (Ch).

⁴² *Id.*

⁴³ *Creation Records Ltd. v. News Grp. Newspapers Ltd.* [1997] E.M.L.R. 444 (Ch).

⁴⁴ Bonadio, *supra* note 22, at 161.

⁴⁵ *Cityzenkane at the Dubl Trubl Street Art Festival in Berlin*, YOUTUBE (2020), <https://www.youtube.com/watch?v=4-yVP0-2D8A>.

⁴⁶ The Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 106A.

he or she did not create. Section 106A(a)(2) grants the right to prevent the use of an artist's name in the event of distortion, mutilation, or other modification of the work which would be prejudicial to honor or reputation.⁴⁷ Sections 106A(a)(3)(A) and 106A(a)(3)(B) cover the right to integrity (for example, the right to prevent intentional distortion, mutilation, or other modification of the work which would be prejudicial to honor or reputation,) and the right of destruction (the right to prevent destruction of a work of recognized stature).⁴⁸ VARA expressly excludes works made for hire from its scope.⁴⁹ This exclusion is particularly significant in the context of street art, as commissioned murals may qualify as works made for hire, thereby depriving artists of VARA's moral rights protections altogether rather than transferring those rights to the copyright owner.⁵⁰

Cohen v. G&M Realty L.P., commonly known as the 5Pointz case, was later described as affirming street art as "a major category of contemporary art."⁵¹ Real estate developer Gerald Wolkoff allowed street artist Jonathan Cohen, also known as Meres One, to turn his nearly 18,581-square-meter warehouse into a residency and exhibition space for graffiti artists starting in 2002.⁵² Cohen proceeded to rename the site as 5Pointz and gave access to artists from around the world to create art on the surfaces of the warehouse. Thanks to Cohen as well as Marie-Cécile Flagueul and other volunteers, 5Pointz became known as a "graffiti mecca."⁵³ In 2013, Wolkoff shared his intentions to have the building destroyed to enact a luxury complex, which caused artists to take legal steps in opposition for the protection of the artworks, widely seen as the representation of the street art community.⁵⁴ The U.S. Court of Appeals for the Second Circuit ended its seven-year dispute in *Castillo v. G&M Realty L.P.* by affirming the District Court's award of the maximum in statutory damages of \$6,750,000 dollars to 21 artists for the destruction of their work without prior notice by Wolkoff.⁵⁵ This case concerned the willful destruction of artwork of recognized stature, using VARA's mechanisms for enforcing the protection rights against destruction. Under VARA, unremovable

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ VARA § 106A(c)(3).

⁵⁰ Gaetano Dimita, Reader in Interactive Entertainment and Intellectual Property law, Queen Mary University of London, lecture at Queen Mary University of London: Moral Rights (2022).

⁵¹ Lauren Carron, *Case Review of the 5Pointz Appeal: Castillo v. G & M Realty L.P.*, CTR. FOR ART L. (Mar. 2, 2020), <https://itsartlaw.org/2020/03/02/case-review-castillo-et-al-v-gm-realty-l-p>.

⁵² *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff'd sub nom Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

⁵³ *Id.* at 427.

⁵⁴ *Id.*

⁵⁵ *Castillo*, 950 F.3d at 173.

artworks incorporated into buildings may not be removed without the artist's consent unless the artist has expressly waived their rights in writing. By contrast, when a work is removable, the artist is entitled to prior written notice, allowing time to retrieve the work before its removal or destruction.⁵⁶ However, the question of achieving recognized stature in the U.S. as a work eligible for copyright protection is a complex one, given the temporary nature of street art. According to the Copyright Act of 1976, a work is "fixed" in a tangible medium of expression when its "embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."⁵⁷ In *Castillo*, the Second Circuit further clarified how street art is treated under VARA, holding that street art's transient character does not exempt it from "recognized stature," affirming the District Court's finding that that street art may be protected by moral rights despite its ephemerality.⁵⁸

Despite the plaintiffs' success in *Castillo*, other street art cases have reached different outcomes, including *English v. BFC&R East 11th Street LLC*. In *English*, artists attempted to make a claim pursuant to VARA to prevent the destruction of unsanctioned sculptures and murals created in a community garden.⁵⁹ The key difference between *English* and *Castillo* is that in the former, the murals and sculptures were unsanctioned by the owner and thus illegally placed.⁶⁰ The Southern District of New York granted summary judgment to the defendants on the basis that VARA does not apply to illegally placed artwork; however, it also stated that it expressed "no view on VARA's application to the individual sculptures, also illegally placed but not permanently affixed to the site"⁶¹ Similarly, *Pollara v. Seymour* arose from the unauthorized installation of a mural. Artist Joanne Pollara displayed the work without the property owner's permission, and when the mural was removed and damaged in the process, she brought an action under VARA against the owners and manager of the plaza where it had been installed. The United States District Court for the Northern District of New York denied the defendants' motion for summary judgment, holding that there was "no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner," thereby leaving open the possibility of VARA protection notwithstanding the unauthorized placement of the work.⁶² Collectively, these

⁵⁶ VARA § 106A.

⁵⁷ 17 U.S.C. § 101.

⁵⁸ *Castillo*, 950 F.3d at 170.

⁵⁹ *English v. BFC&R East 11th St. LLC*, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), aff'd sub nom *English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Pollara v. Seymour*, 150 F. Supp. 2d 393 n. 4 (N.D.N.Y. 2001).

cases illustrate how the interpretation of the right of integrity under U.S. law emerges at the intersection of the competing interests of moral rights protection and property ownership.

IV. COMPARATIVE ANALYSIS OF PROTECTIONS AFFORDED TO STREET ARTISTS AND ILLEGAL STREET ART, AND FREEDOM OF PANORAMA FOR STREET ART

This section examines how moral rights protections for street art differ in the United Kingdom and the United States, with particular attention to how copyright law, property law, and the legality of the artwork's creation intersect in determining whether, and to what extent, illegal street art and graffiti may be protected. The CDPA clarifies that copyright protection does not turn on the moral or social acceptability of a work, a position that contrasts with other cases in which courts denied protection to works considered offensive or contrary to public morals, such as *Attorney-General v Guardian Newspapers Ltd.*⁶³ The CDPA does not provide that copyright protection cannot be available for "controversial subject matter" on grounds of public policy.⁶⁴ In fact, Section 171(3) provides that any rule of law preventing or restricting copyright enforcement on grounds of public interest can be subject to an exception.⁶⁵ *Hyde Park Residence Ltd v. Yelland* (2003) highlighted that the purpose of Section 171(3) was to enable courts not to enforce copyright when the work in question was deemed "immoral or scandalous" or "injurious to public life or the administration of justice."⁶⁶ The first U.K. case to recognize the grant of copyright protection for illegal graffiti and street art was *Creative Foundation v Dreamland Leisure Ltd.*⁶⁷ Creative Foundation brought an action against Dreamland Leisure Ltd, the tenant of an amusement arcade building in Folkestone, following the removal of a Banksy graffiti from the premises in 2014.⁶⁸ The graffiti, entitled *Art Buff* and estimated to be worth 300,000 pounds, was removed by Dreamland, which claimed that its intent was to carry out lease obligations by repairing the wall. *Art Buff* was taken to New York to be sold to a third party.⁶⁹ Following the removal of the graffiti, the landlord of the building, Stonefield Estates Ltd, assigned its interest in the work to the Creative Foundation, after which the Creative Foundation brought a claim for summary judgment. Creative Foundation argued that because the graffiti had been sprayed onto the

⁶³ Att'y Gen. v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109 (HL).

⁶⁴ TAPPIN, *supra* note 41, at 426.

⁶⁵ CPDA Section 171.

⁶⁶ *Id.*

⁶⁷ Creative Found. v. Dreamland Leisure Ltd. [2015] EWHC 2556 (Ch).

⁶⁸ *Id.*

⁶⁹ *Id.*

landlord's land, it had become part of the property and therefore fell within the landlord's proprietary rights.⁷⁰ The court held that the mural formed part of the landlord's property and that the tenant had no right to remove it, ordering that the work be returned to the claimant. The judge observed that the copyright of the graffiti belonged to the artist despite recognition that the graffiti had been placed on the wall without the landlord's or tenant's consent. This case demonstrates that the illegality of the work's creation did not factor into the court's reasoning or affect the outcome of the judgment.⁷¹ The decision turned on the mural's physical attachment to the building and its substantial value, rather than on any assessment of the legality of its creation.

Copyright protection for illegal street art lacks a clear doctrinal framework or bright-line rule, with courts instead assessing claims on a case-by-case basis. Although the clean hands doctrine has been invoked in cases involving illegal street art, courts have declined to apply it where the alleged misconduct is not directly related to the dispute between the parties, indicating that illegality alone does not preclude protection.⁷² According to Dr. Paula Westenberger, this indicates that the illegality effect in copyright-protection would be "better suited in cases where both parties are directly affected by the illegal conduct."⁷³ The doctrine is more likely to apply where the artist's illegal conduct directly affects the property owner's rights, rather than where illegality is incidental to the creation of expressive content.⁷⁴ The central issue uniting these statutory provisions and cases is not the illegality of street art, but whether and when illegality should displace otherwise applicable copyright or moral rights protections. Courts increasingly resist bright-line exclusions, instead adopting a functional approach that evaluates the relationship between the artist's unlawful conduct and the competing claims of property ownership and artistic integrity.⁷⁵

In the U.K., the freedom of panorama exception arises in Section 62(1)(B) of the CDPA, which provides that the copyright of buildings, sculptures, and works of artistic craftsmanship permanently located in public spaces is not infringed through the creation of a graphic work, photograph, film, or broadcast of a visual image representing them.⁷⁶ Furthermore, Section 62(1)(B) also states that it is not an infringement to distribute or communicate to the public photos, films, broadcasts

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A. 257, 268 (2008).

⁷³ Westenberger, *supra* note 38, at 11-12.

⁷⁴ *Id.* at 12.

⁷⁵ *Id.*

⁷⁶ CDPA Section 62.

or any of the above-mentioned works.⁷⁷ This exception to the general rule that a copyright owner has the exclusive authorization right to creation and distribution provides a limitation to the copyright owner's right to take an infringement action against creators and distributors of images of sculptures, buildings, and works of artistic craftsmanship.⁷⁸ The freedom of panorama exception is especially relevant in street art and graffiti cases, as these works are generally open to the public, such that anyone can photograph them and share such reproductions. Such photography, communication or reproduction, therefore, would not qualify as copyright infringement. However, Section 62(1)(B) does not cover paintings and drawings, so the public distribution or communication of photos, films, and broadcasts of murals, posters, and stickers located in public spaces would be considered copyright infringement, except if authorization has been granted by the copyright-owner.⁷⁹ However, the CDPA provides an exception under Section 31, which provides that the incidental inclusion of a copyrighted work in another work does not constitute copyright infringement. While not limited to street art, this provision is particularly relevant to works located in public spaces, including murals and graffiti, which may appear incidentally in photographs, films, or broadcasts.⁸⁰ Section 31 has been interpreted narrowly by the courts, with the incidental inclusion exception applying only where the copyrighted work is neither deliberately selected nor given independent significance. In *Fraser-Woodward Ltd v. BBC*, for example, the High Court held that inclusion is not incidental where the work forms a meaningful or intentional part of the broadcast.⁸¹ Applied to street art, this suggests that while a mural or graffiti may lawfully appear in the background of a news report or public event footage, such as a coverage of a marathon, Section 31 would not shield uses where the artwork is deliberately framed, highlighted, or exploited for its expressive or commercial value.

The U.S. and the U.K. exhibit notable similarities as well as important divergences in the protections afforded to street artists. It may be argued that the U.S. offers more extensive protection in certain respects, particularly through the operation of VARA, which provides enforceable moral rights of integrity and protection against destruction for works of recognized stature. By contrast, U.K. moral rights protections are more limited in scope and are more readily displaced by property law considerations. This distinction is especially salient in the context of street art, where disputes frequently arise over removal and destruction rather than reproduction. In the U.K., although the CPDA provides no basis for denying

⁷⁷ *Id.*

⁷⁸ Bonadio, *supra* note 32, at 28.

⁷⁹ CDPA Section 62.

⁸⁰ *Id.* Section 31.

⁸¹ *Fraser-Woodward Ltd v. BBC* [2005] EWHC 472 (Ch)

copyright protection on public policy grounds or because of the work's controversial subject matter under the CDPA, copyright protection can be denied on public policy or public interest grounds.⁸² Holdings related to the CDPA, whether or not they address street art or graffiti, are still applicable to street art. However, there is a lack of street art-specific rules, exceptions, and public policy restrictions or exclusions in the U.K., recognizing the specific content type of street art. On the other hand, U.S. case law provides that public interest grounds are insufficient reasons for invoking the clean hands doctrine, and as such the doctrine is not applied when a plaintiff's misconduct "is not directly related to the merits of the controversy between the parties, but only where the wrongful acts in some measure affect the equitable relations between the parties."⁸³ As regards moral rights, the CDPA was the first legal instrument to introduce this integral part of copyright protection in the U.K. Although British case law had acknowledged some moral interests, its codification arrived significantly later than other jurisdictions.⁸⁴ The U.S., in turn, provides a range of legal mechanisms relevant to copyright and moral rights protection, including federal copyright law, VARA, state-level moral rights statutes, and common law doctrines developed through judicial interpretation.⁸⁵ It is nonetheless important to acknowledge that illegal or unsanctioned street art is often treated differently in practice when copyright protection is asserted, even if U.S. copyright law does not formally exclude such works. As scholars have noted, while street artists may invoke copyright doctrines to advance infringement or moral rights claims, these protections may be limited in effectiveness given the "low-IP" ethos of street art and the practical and normative tensions surrounding enforcement.⁸⁶ Nevertheless, Section 113 of VARA provides that a property owner is required to make a good faith attempt to notify the artist before proceeding with the destruction of their work, and only if the artist fails to remove or pay for the removal of their work within 90 days can the work be destroyed.⁸⁷ Nonetheless, if the artwork is placed illegally and without consent on the property of others and cannot be removed, as is often the case with street art, VARA will not apply.⁸⁸ Additionally, the 90-day removal period varies by state: under the 1979 California Art Preservation Act, the notice for the removal period is solely 30 days.⁸⁹ *Botello v. Shell Oil Co.*, which concerned the destruction of a

⁸² Westenberger, 8note 38, at 10-12; *see, e.g.*, *Hyde Park Residence Ltd v. Yelland* [2000] EWHC 37 (Ch), [2001] (Ch), *aff'd* [2001] (Ch).

⁸³ *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933).

⁸⁴ Schwender, *supra* note 74, at 268.

⁸⁵ Smith, *supra* note 9, at 259.

⁸⁶ *Id.* at 260.

⁸⁷ VARA § 113(d)(2).

⁸⁸ *English*, 1997 WL 746444 at 3.

⁸⁹ California Art Preservation Act, Cal. Civ. Code §§ 987–989 (West 1979).

mural created by street artists that had been sanctioned and commissioned by the property owner, highlighted the tension of these legal questions associated with street art. The court provided in *dicta* that moral rights did not apply to unsanctioned art but solely to works “affixed or attached by arrangement with the owner” and such protection “obviously does not apply to graffiti, which lacks these characteristics”⁹⁰ Moral rights protection remains an issue for street artists, given such holdings fail to uphold VARA’s right of integrity.⁹¹ Graffiti art is performed on walls and other surfaces and, as such, is often considered unremovable, which makes it exempt from protection from destruction under current U.S. legal provisions.

V. CONCLUSION

In conclusion, the extent of application of moral rights on copyright-protected street art in the U.K. and the U.S. fluctuates from case to case despite the existence of certain general rule specific cases. Although street art and graffiti and their commercial, social, and artistic value give rise to many cases concerning moral rights and copyright protection, there are insufficient specific legal tools to deal with disputes that arise over the preservation of street art.⁹² The application of moral rights to street art in the U.K. is still left unanswered given that as of 2019 no courts have explicitly provided that street art and graffiti are art forms entitled to copyright and moral rights protection, or explained the extent of such protection.⁹³ In both the U.S. and the U.K., graffiti and street art lack legal mechanisms for the protection of moral rights and copyright. In the U.K., street art and graffiti are susceptible to derogatory treatment and are precluded from the right of paternity, right to privacy, right of integrity, and the right not to be identified as the author of another’s work. Furthermore, the lack of a general provision in the CDPA concerning moral rights apart from economic rights, in contrast to the Berne Convention, makes the requirements for moral rights protection incredibly restrictive. Domestic moral rights regimes in the U.K. and the U.S. operate within narrower and more qualified frameworks than the international standards from which they are derived. While international instruments adopt a broad conception of moral rights, national implementations have introduced limitations that significantly affect the protection available to street artists, particularly in cases involving unauthorized placement and competing property interests. Lawyer David Vaver has described the CDPA as having a “grudging attitude toward moral rights, at least if the expression given

⁹⁰ *Botello v. Shell Oil Co.*, 280 Cal.Rptr. 535 (Cal. Ct. App. 1991).

⁹¹ VARA § 106A(a)(3).

⁹² See Bonadio, *supra* note 38, at 71.

⁹³ *Id.*

these rights in the Act is any testament.”⁹⁴ Indeed, Vaver’s statement correctly acknowledges the insufficient protection in the U.K. legal sphere concerning moral rights for artists. Similarly, the U.S. regime requires changes in legislation to ensure the protection of moral rights for artists, which unfortunately remain threatened under the current legal tools available.⁹⁵ In both countries, commentators have given recommendations or proposals regarding street art protection and preservation.⁹⁶ However, such proposals constitute only temporary protective measures and do not replace the need for effective moral rights protection, which can be achieved on a permanent basis only through legislative reform.⁹⁷

⁹⁴ David Vaver, *Moral Rights Yesterday, Today and Tomorrow*, 7 INT’L J.L. & INFO. TECH. 1 (1999).

⁹⁵ Schwender, *supra* note 74, at 268-269.

⁹⁶ PAUL GOUGH, *BANKSY: THE BRISTOL LEGACY* (2012).

⁹⁷ *Moral Rights*, U.S. COPYRIGHT OFFICE (April 23, 2019), <https://www.copyright.gov/policy/moralrights/>.

TOWARD A TRANSPARENT ART MARKET? REMARKS ON EU IMPORT REGULATION 2019

*Paula Mroczkowska-Król**

I. INTRODUCTION

The art market in the European Union seems to suffer from a lack of transparency. This was the conclusion drawn from a study by the European Commission in 2019.¹ The same year, the Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods (“Regulation 2019”),² came into force (although not all provisions were ratified simultaneously).³ Regulation 2019 was enacted to “ensure the effective protection against illicit trade in cultural goods.”⁴ Importantly, Regulation 2019 emphasizes the importance of “transparency” in its Preamble when discussing the value of the electronic system for tracking cultural goods in ensuring

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¹ Neil Brodie, Donna Yates, *Illicit trade in cultural goods in Europe. Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade. Final report*, 139-140, 205-206 (2019).

² Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods L 151/1.

³ These are: Article 3(1), which should be applied from 28 December 2020 and Article 3(2) to Article 3(5), Article 3(7) and Article 3(8), Article 4(1) to Article 4(10), Article 5(1), Article 5(2) and Article 8(1), which should be applied which the electronic system referred to in Article 8(1) becomes operational or at the latest from 28 June 2025.

⁴ Recital 1 of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019.

communication between Member States (Recital 24). Provisions of Regulation 2019 on the implementation and regulation of this electronic record-keeping system came into force on June 28, 2025, and have since caused controversies in the art market. Hence, it is worth asking whether Regulation 2019 is a suitable tool to increase the transparency in this market, or perhaps, it only establishes new restrictions and impedes transactions in the art market, as many art market professionals believe.

II. REGULATION 2019 ON THE PROTECTION OF CULTURAL GOODS

The Regulation 2019 makes several references, specifically in its Recitals 7 through 9, to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO 1970 Convention”),⁵ the treaty which established an international system to combat the illicit trafficking of cultural property. Additionally, the Annex to the Regulation 2019 contains a definition of cultural goods which mirrors the definition of cultural property expressed in UNESCO 1970 Convention and in its complementary treaty, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT 1995 Convention”).⁶ Thus, Regulation 2019 can be understood as a regional supplementation to UNESCO 1970 Convention that provides more precise methods of cultural heritage protection for nations in the EU.⁷

The European Union views the illicit trade of cultural goods as a source of financing and money laundering for terrorist groups. Accordingly, the aim of Regulation 2019 is not only to protect cultural goods, but also as part of an ongoing effort to prevent terrorism. In order to ensure effective means to achieve these goals, the Annex to Regulation 2019 contains a comprehensive classification system for different types of cultural goods and defines the provisions that apply to each category.

Article 3(1) of Regulation 2019 establishes a general prohibition on the import of a specific category of cultural goods, stating in part: “[t]he introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited.” Alternative provisions govern the import of cultural goods listed in Part B of the Annex. The cultural goods in

⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970.

⁶ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

⁷ Hanna Schreiber, Regulation (EU) 2019/880 and the 1970 UNESCO Convention – A Note on the Interplay between the EU and UNESCO Import Regimes, 7 *Santander Art & Culture Law Rev.* 173 (2021).

Part B include archaeological objects discovered through excavations (including regular and clandestine), archaeological discoveries on land or underwater, and dismembered elements of artistic or historical monuments and archaeological sites that are at least 250 years old.

The cultural goods described in Part B of the Annex require an import licence, yet there are situations when this document cannot be presented. In cases where the cultural goods' country of origin or discovery cannot be reliably determined, or in cases where the cultural goods were taken out of their country of origin or discovery before April 24, 1972 [Article 4 (4) of the Regulation 2019], an application for importation into the EU may be accompanied instead by supporting documents or evidence of the following: 1) that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and 2) that the cultural goods were exported for purposes other than temporary use, transit, re-export or transshipment.

For cultural goods listed in Part C of the Annex, import can be done through an importer statement in accordance with Article 5. Part C includes pictures, paintings, and drawings produced entirely by hand on any support and in any material, which are more than 200 years old, and their value is 18,000 EUR or more per item.

It is also important to note that neither the import licence nor the importer statement is required when cultural goods are imported for the exclusive purpose of ensuring their safekeeping by a public authority (e.g., in cases of armed conflict or natural disaster). Further, provisions that refer to an import licence or importer statement do not apply to the temporary admission of cultural goods for the purpose of education, science, conservation, restoration, exhibition, digitization, performing arts, academic research or cooperation between museums or similar institutions [Article 3(4) of the Regulation 2019].

The provisions of Regulation 2019 could be seen in the light of classic John Henry Merryman's conception expressed in his renowned article, *Two Ways of Thinking About Cultural Property*.⁸ Merryman refers to cultural nationalism and internationalism as two conceptions that organize thinking about cultural heritage. Nationalism aims to retain cultural objects in their source state, and internationalism allows the flow of cultural goods across different countries; that is, not necessarily only to and from states that are culturally connected to these objects. Merryman criticized nationalism, arguing that this view is not motivated by a desire to protect the cultural heritage, but rather a will to keep the object in the source state at any cost (even in the warehouse of a museum, for example). On the other hand, Merryman endorsed internationalism, believing that the mobility of

⁸ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l Law 831, 847-851 (1986).

cultural objects is fruitful not only for the art market but also for increasing accessibility to culture and spreading knowledge to people throughout the world.

Although there are more modern conceptions of cultural heritage, Merryman's initial theory provides helpful context in describing regulation regarding cultural goods. There is literature that suggests Regulation 2019 is an endorsement of Merryman's view of internationalism⁹ because Regulation 2019 focuses on the protection of third states' cultural heritage, instead of caring exclusively for European countries' heritage, and it does not embody the idea of cultural nationalism. This reasoning is convincing, but incomplete. It must be emphasized that Regulation 2019 refers not only to restrictions on the introduction of cultural objects into the territory of the Member States, but it also notes that cultural goods can be imported due to the need for their safekeeping, restoration, exhibition, or educational purposes. Therefore, these provisions can be interpreted as promoting and sharing the knowledge of different cultures. In that sense, Regulation 2019 is the embodiment of cultural internationalism and actual protection in Merryman's view.

III. REGULATION 2019 IN THE CONTEXT OF THE ART TRADE: AN OPPORTUNITY FOR MARKET TRANSPARENCY?

The general aim of Regulation 2019 is the protection of the cultural heritage and the prevention of terrorism. Nevertheless, the EU identifies an impact that this legal act can have on the global art market. European lawmakers express these concerns in Recital 10 of the Preamble to the Regulation 2019: "In order not to disproportionately impede trade in cultural goods across the Union's external border, this Regulation should only apply to cultural goods above a certain age limit, which is established by this Regulation. It also seems appropriate to set a financial threshold in order to exclude cultural goods of lower value from the application of the conditions and procedures for import into the customs territory of the Union." Moreover, Article 3(5) of the Regulation 2019 indicates that an import licence shall not be required for cultural goods that have been placed under the temporary admission procedure, where such goods are to be presented at commercial art fairs. In such cases, an importer statement shall be provided in accordance with the procedure in Article 5 of Regulation 2019.

Despite the efforts of European lawmakers to present the Regulation 2019 as an opportunity for the art market, art market professionals have widely criticized

⁹ Tamás Szabados, *The EU Regulation on the Import of Cultural Goods: A Paradigm Shift in EU Cultural Property Legislation?*, 18 *Croat. Y.B. Eur. Law & Pol'y* 22 (2022).

this legal act,¹⁰ perceiving it as an unnecessary bureaucracy, an additional and considerable burden imposed on art dealers, or even closure of the European art market for art dealers who operate globally. It is true that proof of legal export from a third state can be difficult to find and present. It is also true that the establishment of importer liability creates risk for art dealers. But before one calls the Regulation 2019 “draconian,” one should think about the wider legal environment and tendencies in the courts’ judgments.

It must be emphasized that the provenance of the cultural good (including the work of art) is an extremely important issue in the art market. The failure to examine the provenance of a given object may result in a restitution claim from its legitimate owner. Article 4(1) of the UNIDROIT 1995 Convention states that the possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. Therefore, due diligence when acquiring the object should not be neglected. This view is present in articles regarding restitution proceedings and the good faith when purchasing the cultural object, despite the fact that in some countries, e.g., France, good faith of an acquirer is presumed,¹¹ such good faith can be recognized only in the situation when the purchaser was acting extremely carefully. Oftentimes, the court examining the restitution claim will not treat reckless behaviours (e.g., buying an artwork without checking any registers of the lost art) as acting in good faith. As a result of that, it could cause the return order regarding the cultural object in question.¹²

Taking these examples into consideration, mandatory collection of documents due to cultural property import requirements could, at least partially, eliminate problems caused by the lack of due diligence in the art trade. Additionally, countries outside the European Union, like the US and Switzerland, have also adopted specific import regulations concerning cultural property. Import

¹⁰ See for example: Margaret Carrigan, *New EU Import Regulations Are Causing ‘Procedural Paranoia’ for the Art Trade*, <https://news.artnet.com/market/eu-import-regulations-2653480> [access: 3 November 2025]; Melanie Gerlis, *Why art dealers are up in arms at the EU’s new anti-terror legislation*, *Financial Times*, 25 June 2025; Tom Seymour, *The EU law that’s threatening to up-end the antiquities market*, *Financial Times*, 5 March 2025.

¹¹ See more: Sophie Vigneron, *The Return of Illicitly Exported Cultural Objects: The Implementation of the 2014/60/EU Directive in France*, 2 *Santander Art & Culture Law Rev.* 35, 46, 50-51 (2016).

¹² Marc-André Renold, *Stolen Art: The Ubiquitous Question of Good Faith* 262-263 International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of cultural property disputes: Papers emanating from the Seventh PCH International Law Seminar, May 23, 2003*, (2004).

restrictions introduced in these countries are conditional upon an international agreement with the source country.¹³ It is apparent, then, that some import restrictions are necessary in the global art market.

The issue of art market transparency is presented as a new paradigm. This shift relates to the democratization of the art market, diminishing asymmetrical information (clients and new intermediaries, such as emerging art dealers and experts, gain more power due to easier access to information about art prices, provenance, condition of a work of art, etc.). Transparency of the art market is also related to the development of technology, for example, platforms such as Artprice and Artnet¹⁴. They, i.a., collect information about past transactions in the global art market, prepare analyses, indicate the most popular artists and track present and upcoming auctions. Why would the legislator (European or national) not notice the trend regarding transparency? The pursuit of the European lawmakers towards transparent art market via Regulation 2019 is confirmed in the Commission Implementing Regulation (EU) 2021/2079 of 24 June 2021, as the document has detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods (“Implementing Regulation 2021”).¹⁵ The Article 8 point (b) to the Implementing Regulation 2021 states that the applicant for import licence shall upload to the electronic system the relevant export certificates or export licences issued by the competent public authority of the source country, but, according to point (d) of this Article, there are other types of documents that can be submitted in support of an import licence application, such as sale invoices, insurance documents, transport documents, expert appraisals, auction catalogues, advertisements and other promotional sales material.

Collecting these documents by an applicant is a visible sign of his or her due diligence and acts in favor of art market transparency. Moreover, the fact that the flow of information takes place via an electronic system indicates that the passing of data between competent authorities of the Member States should be quick and efficient, which can also increase the art market transparency. Even though not all information from the electronic system will be publicly available, this solution can be perceived as a proof of the general shift toward the art market transparency, because the sole fact of collecting and meticulous processing the data about the

¹³ Tamás Szabados, op. cit. pp. 13-14.

¹⁴ Marios Samdanis, *Platformisation and transparency in the global art market* 219-231 Iain Robertson, Derrick Chong & Luís U. Afonso (eds.) *Global Art Markets: History and Current Trends* (2024).

¹⁵ Commission Implementing Regulation (EU) 2021/1079 of 24 June 2021 laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods L 234/67

cultural object can expand public knowledge about the object in question, e.g. by presenting this information in an auction catalogue during later sale.

The Regulation 2019 is not impeccable. There is a view that the matter of penalties and other measures for the infringement of provisions of the Regulation 2019, which is left to the decision of Member States, can lead to a legal patchwork. It can even encourage dishonest importers to seek the import of cultural goods illegally coming from a third country via the Member State with the least burdensome measures and penalties for the violation of the relevant regulation¹⁶. As mentioned before, art market professionals have raised multiple doubts regarding the possible freezing effect of Regulation 2019 in the art market. However, it is important to note that the strictest restrictions laid down by Regulation 2019 do not encompass lots of valuable works of art, for example, Impressionists' and Post-impressionists' paintings, not to mention, for example, Picasso's, Pollock's or Basquiat's works. Moreover, Regulation 2019 can turn out to be an actual advantage for art dealers—solid provenance (based on relevant documents) can significantly increase the value of an artwork. Last but not least, in the explanatory notes contained in Annex I to Implementing Regulation 2021, one can read:

“In checking the provenance of a cultural good the aspect of duly diligent behaviour of the applicant shall be taken into account, namely, whether the applicant has exercised due care and attention in acquiring the objects. In addition to the availability of appropriate certification or documentation, other aspects that shall be taken into account are the nature of the parties in a transaction, the price paid or declared, the risk associated with the country of export or the particular category of goods and whether the applicant consulted any accessible register of stolen cultural objects and any relevant information which could reasonably have been obtained, or has taken any other step that a reasonable person would have taken in the circumstances of the case.”

These statements show that the EU's attitude towards the art market is not as detached from reality as some art market professionals would say, and the Regulation 2019 is actually far from being “draconian.”

¹⁶ Sabina Urbinati, *Lights and Shadows of the EU Regulation 2019/880 on the Introduction and the Import of Cultural Goods* Maurizio Arcari, Irini Papanicolopulu, Laura Pineschi (eds.) *Trends and Challenges in International Law. Selected Issues in Human Rights, Cultural Heritage, Environment and Sea*. Kindle (2022).

IV. CONCLUSION

The main aim of Regulation 2019 is to protect the cultural heritage of third countries and fight against terrorism. Nevertheless, it also has an impact on the global art market. Some provisions of the Regulation 2019 may seem to be too strict and bureaucratic, but—if one perceives them as a sign of a shift towards the art market transparency—they may become more consistent and reasonable. Moreover, the pursuit of art market transparency via legislation can be an advantage for art dealers and other art market professionals, as well-prepared documentation presenting the provenance of an artwork can increase its value and attract potential clients. Finally, the way of the application of aforementioned provisions should be, as it is explained in Annex I to the Implementing Regulation 2021, quite flexible and based on reasonable grounds.

THE ART OF AUTHORSHIP: HYBRID CREATION AND THE BOUNDARIES OF COPYRIGHT PROTECTION IN THE AGE OF AI AFTER THALER V. PERLMUTTER

Carlo Matarazzo & Matilde Romagnoli***

I. INTRODUCTION

The evolution of US copyright law reveals a tension between technological innovation and the human-centered foundation of authorship in art. The U.S. courts have consistently established that originality remains the essential foundation of copyright protection, rooted in the idea that the latter shall protect human ideas only. Yet, the era of AI challenges this assumption, since now machines can autonomously generate expressive work. The D.C. Circuit's holding in *Thaler v. Perlmutter* stresses these tensions: while reaffirming that copyright protection extends only to human creators, it also reveals a gray area of hybrid-AI works. The U.S. Copyright Office's "sufficient control" test attempts to address this gap but instead creates inconsistencies between administrative practice and established doctrine. This paper analyzes copyright jurisprudence in the context of *Thaler v. Perlmutter* to question whether its traditional authorship model can survive in the age of generative AI.

II. THE ANTHROPOCENTRIC MANDATE: TEXTUALISM AND THE HUMAN AUTHORSHIP REQUIREMENT

A. *Procedural History: The Thaler v. Perlmutter Litigation*

Thaler v. Perlmutter addresses the question of copyright protection for works generated entirely by artificial intelligence like no other case before in U.S. copyright jurisprudence.¹ Plaintiff Dr. Stephen Thaler, a computer scientist and artificial intelligence ("AI") developer, tried to register an artwork created by his

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¹ *Thaler v. Perlmutter*, 687 F.Supp.3d 140 (D.D.C. 2023), aff'd *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025)

AI system Creativity Machine with the U.S Copyright Office, arguing that the AI software should be listed as the work’s author.² The US Copyright Office rejected the application on the grounds that copyright protection under U.S. law extends only to works of human authorship.³ Thaler appealed the decision before the United States District Court for the District of Columbia, asserting that the Copyright Act does not explicitly require human authorship.⁴ In 2023, the District Court upheld the Copyright Office’s decision, affirming that human creativity is a necessary element of copyrightable authorship.⁵

The D.C. Circuit’s opinion in *Thaler v. Perlmutter* is best understood as a legal self-defeat. Dr. Stephen Thaler presented a profound, innovative question: “Can a non-human machine be an author under the Copyright Act of 1976?”⁶ However, by framing the case in such terms, Thaler inadvertently created the ideal conditions for a narrow judicial response, which avoided the more complex questions regarding human-AI collaborations that define the current artistic landscape. The court’s decision followed logically because the plaintiff’s claim stripped itself of the core of the question. The resulting analysis is a simple bureaucratic question of whether AI creations and hybrid artworks should be granted copyright protection: can AI creations be protected by copyright?⁷

B. *Statutory Architecture: Why Machines Lack Legal Capacity*

The D.C. Circuit, in a unanimous opinion, affirmed the district court’s decision, holding that “the Copyright Act of 1976 requires all eligible work to be authored in the first instance by a human being.”⁸ Despite the lack of definition for the term “author”, the court concluded that a holistic reading of the statute clarified that Congress intended the term to refer exclusively to humans.⁹ The court looked at a series of textual proofs that showcased how the provisions would be

² *Id.* at 142.

³ *Id.* at 142.

⁴ Copyright Act of 1976, 17 U.S.C. §§ 101–801.

⁵ *Thaler*, 687 F.Supp.3d. at 150.

⁶ *Id.*

⁷ Shelby Jorgensen, *Case Review Update: Thaler v. Perlmutter (2025)*, CENTER FOR ART LAW: CASE REVIEW (June 20, 2025), <https://itsartlaw.org/case-review/case-review-update-thaler-v-perlmutter-2025/>.

⁸ *Thaler*, 130 F.4th at 1041.

⁹ *Id.* at 1045-1047; Anna B. Chauvet & Taryn T. Willett, *DC Circuit Holds That Human Authorship is Required As “a Matter of Statutory Law” for Copyright Protection*, FINNEGAN (Mar. 20, 2025), <https://www.finnegan.com/en/insights/ip-updates/dc-circuit-court-holds-that-human-authorship-is-required-as-a-matter-of-statutory-law-for-copyright-protection.html>.

nonsensical if “author” was used to also include non-human entities.¹⁰ The provisions include:

- Legal and economic capacity: The Act’s ownership provision, § 201(a), attributes copyright to the author “upon the work’s *creation*,” presupposing the author’s capacity to hold property, which machines lack.¹¹
- Mortality: The standard term for copyright is measured by looking at the author’s *life plus 70 years*, as shown in 17 U.S.C. § 302(a).¹²
- Familial relations: The Act’s provisions on termination and inheritance refer to an author’s family.¹³ As the courts observed, machines “have no surviving spouse or heirs.”¹⁴
- Personal identity: The Act contains provisions that require signatures for copyright transfers and that protect unpublished works regardless of the author’s “nationality or domicile,”¹⁵ which are meaningless when applied to AI.

Furthermore, the court also rejected Thaler’s argument concerning the work-for-hire doctrine, which already allows for copyright registration of works by non-human authors.¹⁶ The starting point for the work-for-hire doctrine was 17 U.S.C. § 201(b), which states that “[i]n the case of a *work made for hire*, the *employer* or other person for whom the work was prepared is *considered the author for purposes of this title*, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, *owns all of the rights comprised in the copyright*.”¹⁷ Thaler argued that he can be seen as the *employer* of the Creativity Machine.¹⁸ However, the court rejected this analogy: the doctrine requires that the initial work be born from human authorship, since it must be eligible for copyright protection before the work’s ownership and the legal status as “author” are transferred to the employer.¹⁹ The statute’s use of the word “considered,” as explained by the court, is a legal fiction that acknowledges how the hiring party is not the actual creator.²⁰ In short, since the Creativity Machine’s work was never eligible for copyright in the first place, the work-for-hire doctrine could not apply.

¹⁰ *Thaler*, 130 F.4th at 1045-1047,

¹¹ *Id.* at 1045 (quotation omitted) (emphasis added).

¹² Copyright Act § 302(a).

¹³ *Id.* § 203(a).

¹⁴ *Thaler*, 130 F.4th at 1045.

¹⁵ Copyright Act § 104(a).

¹⁶ *Thaler*, 130 F.4th at 1050.; see *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

¹⁷ Copyright Act § 201(b) (emphasis added).

¹⁸ *Thaler*, 130 F.4th at 1050.

¹⁹ *Id.*

²⁰ *Id.* at 1048-1049.

III. PERSONALITY AS THE THRESHOLD FOR CREATIVE CONTROL

A. *The Expression of Personality*

U.S. courts have tried to define “creative control” in cornerstone copyright cases. In *Bleistein v. Donaldson Lithographing Co.* (1903), the court supported a broad and inclusive interpretation of creativity, establishing that even a minimal personal contribution suffices and that copyright protection does not depend on the artistic merit of the work.²¹ Instead, any work that reflects personal expression and individual creative effort qualifies, regardless of its perceived aesthetic value. In other words, a piece need not have any artificial cultural or financial value or uphold any technical standard of beauty or craft in art, taste, skills, or market value in order to be subject to copyright protection. Rather, it must show human input, establishing that the most fundamental trait to establish originality is the expression of personality: “[p]ersonality always contains something unique. . . . [a] very modest grade of art has in it something irreducible, which is one man's alone.”²² Hence, even modest contributions or work not traditionally regarded as art can demonstrate originality if they express the author’s individuality, despite minimal effort or technical sophistication. Under this concept, a work’s uniqueness arises from the human mind and not from an external evaluation of quality. Therefore, to determine whether a work is original, one should not focus on the aesthetic or techniques employed, but rather on the presence of human influence.

In the context of works made with the assistance of tools, processes, or machines, this means that courts consider whether the human artist has left an identifiable personal imprint. What is unclear is whether this personal imprint can be identified in the process of creation of the work or whether it must be identified in the final product: in other words, whether simply looking at a painting, one needs to be able to identify and localize human contribution. As *Bleistein* suggests, courts should not impose stringent quantitative thresholds to determine human input: a minimal but identifiable contribution can suffice.²³ This opens the door for the treatment of partial human involvement in AI-generated works as copyrightable. The crafting of detailed prompts and the selection of stylistic guidance can reflect the user’s individual choices and personality. This may constitute the spark of creativity mentioned in *Thaler*, as it is later discussed in this article. In addition, selecting, editing, or combining ingredients of AI-generated outputs may be perceived as reflecting individual choices made with the intention to express

²¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)

²² *Id.* at 250.

²³ *Id.*

personality. If *Bleistein* is applied literally, even if a generative AI software produces most of the work, the human guiding hand may be sufficient to infuse personality in the final product and constitute originality.

In *Aalmuhammed v. Lee* (2000), the Ninth Circuit's analysis indicated that a joint work requires the intent of all parties to create such a work.²⁴ In the case, the plaintiff sought co-ownership of the copyright in a film about Malcolm X, arguing that his contributions, such as reviewing the script, suggesting revisions, and rewriting particular areas, entitled him to a share of the copyright.²⁵ The court emphasized that authorship depends not only on creative input but also on decision-making authority and control over the final product.²⁶ If taken literally, a problem arises from this definition for co-authorship of works that include AI-generated content: a machine does not have the consciousness or the intention to express the willingness to create a joint work. In that sense, it would be impossible for a piece of art to be attributed to both a human and a machine. Nonetheless, the definition also requires sufficient decision-making authority and control, implying that human creative input alone is not sufficient: there must be intentional and meaningful control over the work's expressive outcome. If applied to AI-generated content, this definition would raise the question of whether activities such as prompt engineering or the selection and editing of AI output satisfy this concept of intention, and furthermore, whether this type of human contribution may satisfy the originality requirement.

B. An Unresolved Issue: Reconciling § 102(a) with the Incentive Structure of Copyright

Despite these judicial doctrines being mirrored and codified in statutory provisions, 17 U.S.C. § 102(a) provides protection to “original works of authorship fixed in any tangible medium of expression,” emphasizing human authorship and fixation as the core thresholds.²⁷ Section 102(a) makes no mention of any requirement of skill, aesthetic value, or effort, just as the precedents of *Bleistein* and *Meshwerks* hold that originality arises from human intellectual contribution rather than technical skill in execution.²⁸ Nonetheless, these cases and statutory provisions fail to address the extent of meaningful control required. In this sense, these precedents are applied literally; most AI-generated products that include human creative input could be subject to co-authorship copyright protection. This

²⁴ *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

²⁵ *Id.* at 1237-1231.

²⁶ *Id.* at 1234.

²⁷ Copyright Act § 102(a).

²⁸ *Bleistein*, 188 U.S. at 239; *Meshwerks*, 528 F.3d at 1258.

literal application of the case law would contradict the spirit of U.S. copyright law, which is meant to incentivize innovation. Allowing copyright protection for any work with minimal human involvement, without assessing the quality or significance of the creative input, could dilute the concept of originality, undermining the incentive structure that copyright is meant to protect. The law faces a delicate balance: it must recognize meaningful human creative control in hybrid AI-human works while maintaining the normative standard that originality reflects genuine intellectual contribution.

IV. THE ADMINISTRATIVE FRONTIER AND THE “SUFFICIENT CONTROL” TEST

A. The U.S. Copyright Office Guidance and the Doctrine of Predictability

Due to the lack of binding judicial precedent on hybrid works, the USCO issued its “Copyright Registration Guidance for Works Containing AI-Generated Materials” in March 2023,²⁹ followed by a more detailed report in January 2025.³⁰ This guide established the *de facto* legal standard for AI-assisted works, with the core principle being that a work containing AI-generated material is copyrightable only to the extent that a human author exercised “sufficient control” over the expressive elements of the final output.³¹

The USCO’s application of this test led to the conclusion that, based on current technology, “prompts alone do not provide sufficient human control to make users of an AI system the authors of the output,” with the explanation that such prompts convey instructions that “constitute unprotectible ideas.”³² This position was illustrated in the Office’s rejection of Jason Allen’s artwork “Théâtre D’opéra Spatial,” which was created using the AI image generator Midjourney in 2022.³³ In this case, the USCO’s Review Board denied copyright protection for the

²⁹ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (to be codified at 37 C.F.R. pt. 202) (Mar. 16, 2023).

³⁰ U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 2: COPYRIGHTABILITY (2025),

³¹ *Id.* at iii.

³² *Id.* at 18, 9.

³³ Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren’t Happy*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html> (discussing the controversy after the GAI-generated artwork won the 2022 Colorado State Fair’s fine art competition in the “Digital Arts/Digitally-Manipulated Photography” category for emerging artists, becoming one of the first such images to win a prize of this nature).

image itself, concluding that Allen had “no control over how the artificial intelligence tool analyzed, interpreted, or responded to these prompts.”³⁴

Under the current guidance, copyright protection for hybrid works is limited to the human’s creative “selection, coordination, or arrangement” of AI-generated materials or to significant, creative modifications made to the AI’s output after it has been generated.³⁵ In all such cases, the applicant must explicitly disclaim the underlying AI-generated content in their registration application.³⁶

B. The Paradox of Progress: How Advanced Tools Diminish Authorship Claims

The USCO’s “sufficient control” test creates significant tension with foundational copyright doctrines. This clash between standards has led to an unstable and paradoxical framework where judicial precedent recognizes human authorship for simple tools, while administrative bodies establish high but uncertain barriers for new and more complex ones. The statutory basis for protection, found in 17 U.S.C. § 102, is for “original works of authorship,”³⁷ which was defined by the Supreme Court’s landmark decision in *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991). The Court established that the standard for deciding whether a work can gain copyright protection is its originality rather than its creator’s effort; the only additional requirement is a “modicum of creativity.”³⁸ The Court in *Feist* rejected the “sweat of the brow” doctrine, holding that the mere effort of labor, without creativity, is not enough to warrant copyright protection.³⁹

USCO’s focus on a user’s lack of fine-tuning control over an AI model’s output in their guidance documents imposes significantly higher standards of originality rather than the minimal standard described in *Feist*. In fact, the creative labor involved in prompt engineering (e.g., conceiving of a scene, the style, etc.) could easily be seen as a level of standard higher than the “modicum of creativity” described in *Feist*, even if the final execution is left to the AI model.

The shortcoming of the USCO’s “sufficient control” test is its focus on mechanical predictability, which results in a situation where the more powerful the tool becomes, the less likely its human user is to be recognized as an author. However, this comes as a contradiction to copyright law itself. As the court notably said in *Thaler*, “[c]opyright law incentivizes the creation of original works so they

³⁴ Plaintiff’s Complaint, Request for Declaratory Relief, and Demand for Jury Trial at 12, Allen v. Perlmutter, No. 1:24-cv-02665 (D. Colo. Sept. 26, 2024).

³⁵ U.S. COPYRIGHT OFFICE, *supra* note 39, at iii.

³⁶ Copyright Registration Guidance, 88 Fed. Reg. at 16192.

³⁷ Copyright Act § 102.

³⁸ *Feist Publ’ns*, 499 U.S. at 346.

³⁹ *Id.* at 359-360.

can be used and enjoyed by the public [T]his protection is not extended as a special reward to the author, but rather to encourage the production of works that others might reproduce more cheaply.”⁴⁰ The USCO’s guidance effectively contrasts the idea presented in *Thaler*, since it denies intellectual property protection to many hybrid works despite their human contribution, posing a substantial threat to the economic viability of the emerging field of generative AI.

V. THE ECONOMIC PRECARITY OF HYBRID CREATION: LIABILITY WITHOUT OWNERSHIP

A. *The Infringement Dichotomy: Direct Liability in the Absence of IP Protection*

This doctrinal ambiguity creates profound challenges in the new economic landscape created by AI. The absence of a clear—and most importantly, predictable—standard for copyrightability in AI-assisted works creates significant legal and economic challenges not only for businesses, but also for individual creators. The current framework in the United States creates a paradoxical situation: artists and small businesses are incentivized to innovate their practice with the use of new and powerful technologies, but at the same time, they are denied the traditional rewards of ownership while being held to the full spectrum of legal liability for copyright infringement.

In fact, creators face significant copyright infringement risk. Generative AI models are trained using massive datasets that include vast amounts of copyrighted material scraped from the internet without license.⁴¹ On the input side, high-profile lawsuits against major AI companies are challenging the legality of such training, while the output side directly threatens individual creators.

When a creator publishes an output that infringes copyright, they become the direct infringer, and they cannot use ignorance as a defense; they can therefore be held liable for statutory damages up to \$150,000 per infringed work, in addition to court-ordered injunctions.⁴² This creates a scenario of liability without ownership, where, in the absence of “sufficient human control,” the output cannot be copyrighted. This focus on predictability has created what can be described as a “platonic” standard of copyright eligibility, which requires the author to have a fully-formed mental conception of the work and total control over its execution.⁴³

⁴⁰ *Thaler*, 130 F.4th at 1042 (quotations omitted).

⁴¹ Katherine Lee, A. Feder Cooper & James Grimmelmann, *Talkin’ ’Bout AI Generation: Copyright and the Generative-AI Supply Chain*, 72 J. COPYRIGHT SOC’Y U.S.A. 251, 277 (2025).

⁴² *Id.* at 385.

⁴³ Danny Friedmann, *Creation and Generation Copyright Standards*, 14 N.Y.U. J. INTELL. PROP. & ENT. L. 51, 66 (2024) (using the term “platonic” to describe a towering, idealistic standard

Furthermore, generative AI presents a complex dichotomy for corporations: on one hand, it offers unprecedented opportunities for efficiency and economies of scale in the content creation field. On the other hand, critical corporate strategies involve not only creating but also protecting a portfolio of IP assets.⁴⁴ These strategies are challenged by current legal interpretations. Under USCO's guidance, content generated by AI with only minimal human input is not eligible for copyright protection.⁴⁵ This guidance has the potential to directly affect companies' ability to license and protect this type of content, undermining the feasibility of such strategies.

B. Market Implications: The Risk of Technological Oligopolies

The consequences of the current state of hybrid authorship are significant. It may severely harm the adoption of AI tools, while also exposing companies and creators who mistakenly believe AI-generated or assisted content is risk-free to extensive litigation. A more probable and dangerous risk is the formation of a technological oligopoly, where "AI Giants" may absorb litigation risk while simultaneously controlling access to the newest technologies.⁴⁶

Arguably, a clear framework is a necessity for the bottom of the hierarchy, including small artists and creators. While large corporations might leverage AI for cheaper labor, AI technology offers a distinct and clear advantage to smaller entities, such as startups, capable of using these tools to create, for example, powerful marketing campaigns.

VI. CONCLUSION

The legal and moral dilemma of hybrid authorship remains unsolved after *Thaler*, giving us only a glimpse of what the future holds in terms of challenges for copyright law. Furthermore, in October 2025, the filing of a petition for certiorari before the Supreme Court elevated this conflict to the national stage.⁴⁷

of copyright eligibility, including a fully formed mental conception and total authorial control over the work, that he argues is being applied inconsistently to AI-generated images).

⁴⁴ Timothy Shields, *When AI Content Creation Becomes a Legal Nightmare: The Hidden Risks Every Business Owner Must Know*, KELLEY KRONENBERG (June 26, 2025), <https://www.kelleykronenberg.com/blog/when-ai-content-creation-becomes-a-legal-nightmare-the-hidden-risks-every-business-owner-must-know/>

⁴⁵ See U.S. COPYRIGHT OFFICE, *supra* note 39, at 18.

⁴⁶ Micaela Mantegna, *ARTificial: Why Copyright Is Not the Right Policy Tool to Deal with Generative AI*, 133 YALE L.J. 1126, at 1167 (2024).

⁴⁷ Petition for Writ of Certiorari, *Thaler v. Perlmutter*, 2025 WL 1373093 (No. 25-449).

The legal framework of hybrid authorship of AI-generated content is currently unclear and even paradoxical, resulting in a landscape where new tools are being created without guidance to artists and creators on the legality of their use. Should the law distinguish between “human” art and hybrid art, or should current frameworks adapt to accommodate these new tools, allowing them to be eligible for copyright protection and making it possible for hybrid art to be eligible for copyright protection? AI hybrid authorship is the next step in this technological and legal evolution. USCO’s future decisions regarding hybrid authorship will shape the trajectory of copyright law in the future.

CASE COMMENT:

Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007 (N.D. Cal. 2025)

Annabel Tresise *

The rapid development of large language models (LLMs) since late 2022 has created unprecedented legal uncertainty at the intersection of copyright law and artificial intelligence.¹ LLMs trained on the copyrighted works of artists, authors, and musicians are capable of producing results that mimic and imitate those creators' styles and expressions. As a result, creators have turned to copyright law for relief, arguing that artificial machines may not, without rights holders' consent, be trained on or regurgitate artists' works.²

In *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025) Judge Alsup issued a landmark decision resolving, for the first time, whether the use of copyrighted books to train large language models (LLMs) is fair use. Particularly significant in the four-factor fair use analysis was the conclusion that training LLMs on copyrighted content was “quintessentially transformative.”³ Many argue that this was the correct legal decision,⁴ while others criticize it for failing to weigh

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¹ See, e.g., Claudia Bazter, *AI Art: The End of Creativity or the Start of a New Movement?*, BBC (Oct. 18, 2024), <https://www.bbc.com/future/article/20241018-ai-art-the-end-of-creativity-or-a-new-movement> (last visited Nov. 6, 2025); Pearl Lam, *The Impact Of Artificial Intelligence On The Art World*, Forbes (Feb. 2, 2024), <https://www.forbes.com/councils/forbesbusinesscouncil/2024/02/02/the-impact-of-artificial-intelligence-on-the-art-world/> (last visited Nov. 6, 2025); Sachin Waiker, *When AI-Generated Art Enters the Market, Consumers Win—and Artists Lose*, Stan. Graduate Sch. of Bus. (2024), <https://www.gsb.stanford.edu/insights/when-ai-generated-art-enters-market-consumers-win-artists-lose> (Nov. 6, 2025).

² See, e.g., *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201-WHO (N.D. Cal. Jan. 13, 2023); *Concord Music Grp., Inc. v. Anthropic PBC*, No. 5:24-cv-03811-EKL (N.D. Cal. June 26, 2024); *In re OpenAI, Inc. Copyright Infringement Litig.*, MDL No. 3143 (S.D.N.Y. Apr. 3, 2025).

³ *Bartz*, 787 F. Supp. 3d at 1022.

⁴ See, e.g., Edward Lee, *Copyright Dilution Under Constitutional Scrutiny*, in AFTER FAIR USE: AI & COPYRIGHT (Found. for Am. Innovation Symposium, Sept. 12, 2025); Michael D. Murray, *Generative AI, Copyright Infringement, and Fair Use*, in AFTER FAIR USE: AI & COPYRIGHT (Found. for Am. Innovation Symposium, Sept. 12, 2025).

Anthropic’s commerciality and the potential market harm to authors.⁵ The decision, however, should be interpreted as supportive of future plaintiffs’ copyright claims for three reasons. First, although *Bartz* held training general-purpose LLMs on copyrighted materials was transformative, the court made no finding relating to specific-purpose models. Second, *Bartz* held that training LLMs on pirated materials was unequivocally not fair use. Thirdly, and critically, the court was not asked to consider whether Claude’s outputs infringed plaintiffs’ copyrighted works, creating a distinct pathway for future litigation.⁶

I

Anthropic is one of the world’s premier artificial intelligence software companies, responsible for creating the LLM “Claude.” Claude is touted as one of—if not the most—ethical LLM on the market.⁷ For example, it is “governed” by Constitutional AI and based in part on the Universal Declaration of Human Rights.⁸ To train Claude, Anthropic downloaded over seven million books from pirated sites⁹ and stored them in a digital repository. Anthropic then purchased hundreds of thousands of print copies of books, all of which it destroyed and scanned into a digital repository.¹⁰ Anthropic intended to keep both the pirated books and the scanned books in this digital repository “forever,”¹¹ with the purpose of creating ease of searchability.¹² From this digital repository of scanned books, Anthropic continued to train Claude.¹³ At some point, it did, however, cease to train Claude on the pirated books.¹⁴

⁵ *Analysis in Bartz v. Anthropic AI Case Marred by Fatal Flaws*, Copyright Alliance (Aug. 2025), <https://copyrightalliance.org/bartz-anthropic-ai-case-flaws/> (last visited Nov. 6, 2025).

⁶ *Id.* at 2021 (Judge Alsup noted that: “Here, if the outputs seen by users had been infringing, Authors would have a different case. And, if the outputs were ever to become infringing, Authors could bring such a case. But that is not this case.”)

⁷ See, e.g., Ivan Belcic & Cole Stryker, *What Is Claude AI?*, IBM Think (May 2024), <https://www.ibm.com/think/topics/claude-ai> (last visited Nov. 6, 2025).

⁸ *Claude’s Constitution*, Anthropic (May 9, 2023), <https://www.anthropic.com/news/claude-constitution> (“Constitutional AI” provides answer to questions such as Why does an LLM encourage some actions but not others? What “values” might a language model have? Claude’s Constitution gives LLMs “explicit values determined by a constitution, rather than values determined implicitly via large-scale human feedback”).

⁹ *Bartz*, 787 F. Supp. 3d at 1014.

¹⁰ *Id.* at 1016.

¹¹ *Id.* at 1016.

¹² *Id.* at 1016.

¹³ *Id.* at 1016–17.

¹⁴ *Id.* at 1025.

The plaintiffs in *Bartz* were fiction and non-fiction authors.¹⁵ At least two works from each author were illegally downloaded to train Claude,¹⁶ and more of the plaintiffs' books were then later purchased by Anthropic for scanning and storage.¹⁷ The plaintiffs' works were specifically chosen by Anthropic as training materials due to the "creative expressions they contained."¹⁸

On August 19, 2024, the plaintiffs filed suit in the Northern District of California, alleging that the training and retention of the pirated and purchased books by Anthropic infringed their copyright.¹⁹ By March 27, 2025, Anthropic responded with a motion for summary judgment, asking the simple question: is Anthropic's use of the plaintiffs' books to train its LLMs, as well as its continued storage of the books in a digital repository, protected as fair use under section 107 of the *Copyright Act*?²⁰

II

The judgment largely favored Anthropic, with the court finding that the training of Claude using copyrighted content was transformative—"exceedingly transformative"²¹—under factor one, "purpose and use," of the fair-use doctrine.²² The court rejected all three of the plaintiffs' arguments, which were that: (i) using their works to train Claude was like teaching a person to read and write;²³ (ii) Claude's training was intended to memorize their works' creative elements, which are protectable under copyright law;²⁴ and (iii) AI should not be able to do what people do.²⁵

First, the court likened the plaintiffs' arguments to those of a child learning to read and write using the plaintiffs' books, concluding that preventing someone from learning from copyrighted works is not a protectable cause of action under copyright law.²⁶ Second, the court made clear that none of Anthropic's LLMs

¹⁵ *Id.* at 1015; the plaintiffs also represented a certified class of authors, whose works totalled approximately 482,460 infringed works (*Bartz v. Anthropic PBC*, No. 3:24-cv-05417-WHA (N.D. Cal. Oct. 17, 2025) (order granting preliminary approval of class action settlement).

¹⁶ *Id.* at 1015.

¹⁷ *Id.* at 1023.

¹⁸ *Id.* at 1017.

¹⁹ *Bartz v. Anthropic PBC*, No. 3:24-cv-05417-WHA (N.D. Cal. Aug. 19, 2024) (complaint).

²⁰ Def.'s Mot. For Summ. J. at 1, *Bartz v. Anthropic PBC*, No. 3:24-cv-05417-WHA, Dkt. No. 122 (N.D. Cal. filed Apr. 25, 2025).

²¹ *Bartz*, 787 F. Supp. 3d at 1019.

²² *Id.* at 1020–23.

²³ *Id.* at 1019.

²⁴ *Id.* at 1021–22.

²⁵ *Id.* at 1022.

²⁶ *Id.* at 1021–22.

reproduced any outputs to the public that included “one author’s identifiable expressive style.”²⁷ The court instead summarized that copyright does not extend to methods of operation, concepts, or principles, which are illustrated or embodied in a work.²⁸

As to the plaintiffs’ third argument, which was simply that computers should not be allowed to do what humans do, the court again found in Anthropic’s favor. The court likened Claude to *White v. W. Pub. Corp.*, 29 F. Supp. 3d 396, 400 (S.D.N.Y. 2014), a case concerning whether an AI legal tool that was trained on legal materials, and whether producing new legal writing qualified as fair use. In *White*, the training was found to be fair use.²⁹

The development of a digital repository comprising scanned copies of the plaintiffs’ books was also considered transformative.³⁰ The court reasoned that Anthropic had validly purchased the books and scanned them for the *purposes* of storage and searchability.³¹ Key to the court’s reasoning was, first, that storage and searchability are not creative properties of the original works that receive copyright protection,³² and second, that Anthropic did not *copy* the physical books but rather *replaced* them.³³

The analysis of the three other fair use factors for the training of the LLMs and the digital repository closely mirrored each other.³⁴ As to factor two, both the court and Anthropic agreed that the plaintiffs’ books possessed a high degree of creativity and expression, thereby endowing them with the highest protection under copyright.³⁵

However, factor three—being the extent of the use—favored Anthropic, as the court held that both the training and storage of the books in their entirety were reasonably necessary for the transformative use.³⁶ Although the plaintiffs argued that Anthropic could have trained Claude on other books or no books at all, the

²⁷ *Id.* at 1021.

²⁸ *Id.* at 1021–22 (citing 17 U.S.C. § 102(b)). See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120–22 (2d Cir. 1930) (Learned Hand, J.) (stage properties and storytelling elements); *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1445 (9th Cir. 1994) (“user-friendly” design principles and elements); *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004) (music theory principles and chord progressions).

²⁹ *White v. W. Pub. Corp.*, 29 F. Supp. 3d 396, 400 (S.D.N.Y. 2014) (Rakoff, J.)

³⁰ *Bartz*, 787 F. Supp. 3d at 1023–25.

³¹ *Id.* at 1025.

³² *Id.*

³³ *Id.* (finding that such entitlement to “dispose” of validly purchased works was Anthropic’s right under the *Copyright Act*, 17 U.S.C. § 109(a)).

³⁴ *Bartz*, 787 F. Supp. 3d at 1029–32.

³⁵ *Id.* at 1029.

³⁶ *Id.* at 1029–30.

court disagreed, noting that this argument raised the threshold from reasonably necessary to strictly necessary.³⁷

The court found that factor four—the effect of the use upon the market for or value of the copyrighted work—favored neither party.³⁸ The plaintiffs’ arguments against the training of Claude on their books were twofold: first, Claude could create an explosion of works that could compete with the authors’ works.³⁹ However, the court declined to provide copyright protection to the plaintiffs based on a theoretical market, comparing the plaintiffs’ arguments to the notion that teaching children to write would also “result in an explosion of competing works.”⁴⁰ Providing protection to the authors under this logic would be protecting them against competition, which is not what the Copyright Act requires.⁴¹

Second, the plaintiffs argued that training LLMs on their copyrighted works would displace an emerging market wherein the plaintiffs can license their works for the very purpose of training LLMs.⁴² The court dismissed this argument, concluding that a potential licensing market “is not one the Copyright Act entitles Authors to exploit.”⁴³

As to the effect on the market for the digital repository, the plaintiffs raised two other arguments. First, they argued that the existence of the digital repository prevented Anthropic from purchasing new digital copies directly from the authors. This argument was rejected by the court because the digital repository was merely a “format change” that provided no remedies to the plaintiffs under the *Copyright Act*. The plaintiffs also failed to provide evidence in support of their second argument, which was that Anthropic might be able to transmit unauthorized digital copies of their works to third parties, thus hindering the plaintiffs’ ability to sell their own books. The court ultimately held that this factor of fair use was neutral.⁴⁴

III

Although the analysis of fair use favored Anthropic’s use of copyrighted materials to train Claude and the development of a digital repository of the validly acquired books, *Bartz* overwhelmingly favored the plaintiffs on the question of whether the use and storage of pirated books was fair use.⁴⁵ The court doubted “that

³⁷ *Id.* at 1030.

³⁸ *Id.* at 1031; *see also* 17 U.S.C. § 107(4).

³⁹ *Id.* at 1031–32.

⁴⁰ *Id.* at 1032.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1033.

any accused infringer could ever meet its burden of explaining why downloading source copies from pirate sites *that it could have purchased or otherwise accessed lawfully* was itself reasonably necessary to any subsequent fair use.”⁴⁶ This summary of bad faith did not, however, equate with a finding against fair use. Rather, the court embarked on an objective analysis of Anthropic’s behavior in holding the books to create a central, general-purpose library, concluding that this constituted not fair use.⁴⁷

IV

Bartz was the first judgment to resolve the question of whether training AI on copyrighted materials can be transformative and fair use. The affirmative answer offered a win for Anthropic and many AI companies alike. However, the judgment should not be taken to unequivocally stand for the proposition that *all* LLM training is transformative and fair use. Rather, an analysis of the judgment, taken in conjunction with the judgment in *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025), provides a more nuanced interpretation whereby future plaintiffs may argue that *specific* training of a *specific* LLM may *not* be transformative.

The first step of the analysis is to acknowledge that *Bartz* was doctrinally correct in light of the arguments and materials before the Court.⁴⁸ Transformativeness in copyright begs the question of “whether the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with the new expression, meaning or message...”⁴⁹ In *Bartz*, the court was asked to analyze whether a general-purpose LLM (i.e., Claude) was itself transformative of the training data and inputs it received. The court came to a reasonable conclusion based on the technology put before it, summarizing that “Anthropic’s LLMs trained upon works not to race ahead and replicate or supplant them—but to turn a hard corner and create something different.”⁵⁰ Applying the level of transformativeness as required by the court in *Andy Warhol Found. for the Visual Arts, Inc. v.*

⁴⁶ *Id.* at 1025.

⁴⁷ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544–45, 143 S. Ct. 1258 (2023).

⁴⁸ There is, however, commentary that the discovery process was rushed and incomplete at the time of Anthropic’s motion for summary judgment. See, e.g., *Mixed Decision in Anthropic AI Case: Authors Guild Responds to Summary Judgment in Bartz v. Anthropic*, Authors Guild (June 25, 2025), <https://authorsguild.org/news/mixed-decision-in-anthropic-ai-case/> (last visited Nov. 6, 2025).

⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁵⁰ *Bartz*, 787 F. Supp. 3d at 1022.

Goldsmith, 598 U.S. 508 (2023), Claude, in its most basic function, has a “further purpose or different character” which alters the plaintiffs’ creative works with “new expression, meaning or message.”⁵¹ Therefore, the legal conclusion that a general-purpose model of an LLM like Claude is *fundamentally transformative* of its input training data is doctrinally sound.⁵²

It must be acknowledged, however, that *Bartz* largely failed to acknowledge the market harm (or potential of market harm) that the plaintiffs alleged.⁵³ In *Warhol*, the Court emphasized that commercial use “tends to weigh against a finding of fair use,”⁵⁴ as copying “is less justified than non-commercial copying.”⁵⁵ In *Bartz*, the court seemingly brushed aside the commercial analysis, making little reference to Anthropic’s status as a commercial entity that makes millions of dollars.⁵⁶ Rather, the court acknowledged that commercialism “tends to be less important when the secondary use is highly transformative.”⁵⁷ Thus, in *Bartz*, the weight of Anthropic’s commercial success became less relevant in light of the exceedingly transformative use of training Claude.

This seemingly broad-brush conclusion was also supported by Judge Chhabria in *Kadrey v Meta Platforms, Inc.*,⁵⁸ delivered two days after *Bartz*, also in the Northern District of California. The plaintiffs in *Kadrey* were similarly a group of authors who alleged that Meta had breached their copyright by training its LLM, “LlaMa,” on their copyrighted works.⁵⁹ The court considered the same question that the court in *Bartz* considered, also on summary judgment.⁶⁰ In arriving at the same conclusion of transformativeness as *Bartz*, the *Kadrey* court held that “[t]here is no serious question” that Meta’s use of the authors’ books to train

⁵¹ *Warhol*, 598 U.S. at 528.

⁵² This conclusion was also supported by the immediately succeeding judgment of Judge Chhabria in *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025) (Chhabria, J.); see generally U.S. Copyright Office, *Copyright and Artificial Intelligence, Part 3: Generative AI Training*, 45–48 (May 2025) (concluding that general purpose LLMs are transformative).

⁵³ See, e.g., *Mixed Decision in Anthropic AI Case: Authors Guild Responds to Summary Judgment in Bartz v. Anthropic*, Authors Guild (June 25, 2025), <https://authorsguild.org/news/mixed-decision-in-anthropic-ai-case/> (last visited Nov. 6, 2025).

⁵⁴ *Warhol*, 598 U.S. at 537 & n.13 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

⁵⁵ *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1046 (N.D. Cal. 2025).

⁵⁶ *Cf. Kadrey*, 788 F. Supp. 3d at 1035 (stating that “Judge Alsup focused heavily on the transformative nature of generative AI while brushing aside concerns about the harm it can inflict on the market for the works it gets trained on.”).

⁵⁷ *Id.* at 1046; see also *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 32 (2021).

⁵⁸ *Kadrey*, 788 F. Supp. 3d 1026.

⁵⁹ *Id.* at 1036.

⁶⁰ *Id.* at 1036–37.

LlaMa was a “further purpose” with a “different character.”⁶¹ However, *Kadrey*⁶² acknowledged that “Meta stands to gain from its development of a product trained on the plaintiffs’ works.”⁶³ Despite this, *Kadrey* followed *Bartz*, concluding that the commercial use “does not tilt the first factor in the plaintiffs’ favor.”⁶⁴

V

Despite prevailing commentary that *Bartz* delivered a heavy blow to the plaintiffs and artists alike, this is not the reality for several reasons. First, the conclusion that training LLMs on pirated materials and then storing those pirated works in a digital repository is not fair use is a significant win for artists. In *Bartz*, the parties agreed to—and the court preliminarily approved—a settlement sum of \$1.5 billion to compensate authors for Anthropic’s piracy.⁶⁵ This is notably the largest amount ever awarded in a copyright infringement case.⁶⁶

Second, *Bartz* should be interpreted to stand for the proposition that a general-purpose LLM like Claude trained on copyrighted works is transformative. It should not be taken to stand for the proposition that *all* LLMs trained on copyrighted works are transformative. Claude is a general-purpose LLM that has *many* uses other than creating literary or written works that can mimic or displace authors. These uses include providing cooking recipes, helping users with language translation, or assisting with creating cover letters. Claude was trained on the plaintiffs’ works so that it can understand language and can ultimately respond to prompts covering a wide variety of uses. While it is true that what Claude can *also* do is create works which mimic the plaintiffs’ works (if prompted to do so), this argument was not alleged by the plaintiffs in *Bartz*.⁶⁷ Therefore, an LLM or image generator that is trained on copyrighted materials *for the purpose of regurgitating mimics of those*

⁶¹ *Id.* at 1044.

⁶² *Id.* at 1035. The analysis in *Kadrey* heavily weighed the market effects of the fair use, noting that “[u]nder the fair use doctrine, harm to the market for the copyrighted work is more important than the purpose for which the copies are made.” *Id.*

⁶³ *Id.* at 1046.

⁶⁴ *Id.*

⁶⁵ Copyright Alliance, *What to Know About the \$1.5 Billion Bartz v. Anthropic Settlement* (Oct. 28, 2025), <https://copyrightalliance.org/participating-bartz-v-anthropic-settlement/> (last visited Nov. 6, 2025).

⁶⁶ *Id.*

⁶⁷ *Id.* at 2021 (Alsup, J.) (“Here, if the outputs seen by users had been infringing, Authors would have a different case. And, if the outputs were ever to become infringing, Authors could bring such a case. But that is not this case.”).

copyrighted materials is, arguably, not bound by this “transformative” judgment.⁶⁸ For example, in *Disney Enters. Inc. v. Midjourney Inc.*, No. 2:25-cv-05275 (C.D. Cal. filed June 11, 2025),⁶⁹ the plaintiffs specifically allege that the training of defendant Midjourney’s image generator on characters like Homer Simpson and Yoda had the *specific purpose* of producing images that are near-exact copies of those characters.⁷⁰ From this view, the transformative argument is still left open if future plaintiffs can point to an LLM that has a more defined purpose than Claude.

Third, and importantly, *Bartz* does leave open the opportunity for the *Bartz* plaintiffs and others to bring a claim for copyright based on Anthropic’s *outputs*.⁷¹ Indeed, the court expressly stated that Plaintiffs may do so: “... if the outputs were ever to become infringing, Authors could bring such a case.”⁷² Importantly, this analysis is bolstered by *Kadrey*. In *Kadrey*, Judge Chhabria expressed much greater sympathy for the plaintiffs and considered that the answer to the question of whether training materials on copyrighted material is illegal is likely yes.⁷³ *Kadrey* makes clear that: “by training generative AI models with copyrighted works, companies are creating something that often will dramatically undermine the market for those works, and thus dramatically undermine the incentive for human beings to create things the old-fashioned way.”⁷⁴ Thus, *Kadrey* left the door open for plaintiffs in the future, and indeed told them their argument: a “plaintiff might argue that, even if the model can’t regurgitate their own works or generate substantially similar ones, it can generate works that are similar enough (in subject matter or genre) that they will compete with the originals and thereby indirectly substitute for them.”⁷⁵ Future plaintiffs may therefore have more success bringing copyright claims against AI companies based on infringing outputs.

VI

Bartz represents a pivotal moment in copyright law’s confrontation with AI. The court’s recognition that training general-purpose models like Claude on

⁶⁸ *Id.* at 2021 (Alsup, J.) (“Here, if the outputs seen by users had been infringing, Authors would have a different case. And, if the outputs were ever to become infringing, Authors could bring such a case. But that is not this case.”).

⁶⁹ Complaint at 1–6, 55–58, 67, *Disney Enters. Inc. v. Midjourney Inc.*, No. 2:25-cv-05275 (C.D. Cal. filed June 11, 2025).

⁷⁰ *Id.* at 24, 30–32.

⁷¹ *Bartz*, 787 F. Supp. 3d at 1021.

⁷² *Id.*

⁷³ *Kadrey*, 788 F. Supp. 3d at 1034.

⁷⁴ *Id.* at 1035.

⁷⁵ *Id.* at 1051. The *Kadrey* plaintiffs did not emphasize this argument, nor did they develop an evidentiary record that supports their claim.

copyrighted works can be transformative establishes a clear doctrinal baseline while also affirming that the use of pirated materials remains categorically outside the bounds of fair use. Although the decision favors AI developers when the training data was allegedly lawfully acquired, what remains to be litigated—and what *Bartz* and *Kadrey* left open—is whether AI outputs themselves can constitute infringement. As LLMs continue to develop capabilities of replacing specific authors’ voices and styles on demand, that question may prove the most consequential in future copyright disputes.