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Can a work of art be destroyed under copyright law?

Art is not, as the metaphysicians say, the manifestation of some mysterious idea of beauty or God; it is not, as the aesthetical physiologists say, a game in which man lets off his excess of stored-up energy; it is not the expression of man's emotions by external signs; it is not the production of pleasing objects; and, above all, it is not pleasure; but it is a means of union among men, joining them together in the same feelings, and indispensable for the life and progress toward well-being of individuals and of humanity.

Leo Tolstoy, *What is Art?*¹

1. Introduction

It would generally strike anyone as strange that while the law is likely to protect fibreglass geese from having to wear ribbons,² it may be powerless to protect the same fibreglass geese, or indeed any work of art, from total destruction at the whim of its owner.³ This is, however, the likely position in most jurisdictions, including the United Kingdom. The area of law in question is that of copyright generally, but more specifically, the moral rights doctrine, which is codified in Article 6*bis* of the Berne Convention. The UK version of the doctrine, based loosely on Article 6*bis*, is enshrined in sections 77 to 89 of the UK Copyright Designs and Patents Act 1988 (CDPA). Generally, moral rights embody a bundle of rights which govern the relationship between a creator and his creation. The actual scope of this bundle of rights varies from jurisdiction to jurisdiction. The UK version recognises only four rights,⁴ one of which is the integrity right, which is the right of a creator to object to a mistreatment of his creation, providing such mistreatment is derogatory and prejudicial to his honour and reputation.⁵ The conventional view is that, in the UK, while the integrity right may *possibly* allow an artist to object to ribbons adorning his sculpted geese, it would not recognise total destruction of the same.

There are certain established reasons why destruction is not recognised as a breach of the integrity right in the UK. Firstly, a strict reading of section 80 and Article 6*bis* would appear to dismiss the act of destruction altogether.⁶ Section 80 defines 'treatment' of a work as one of a closed category of specified acts: addition to, deletion from, alteration to or adaptation of the work in

question. ‘Destruction’ does not fall neatly within any of these definitions. Furthermore, not only has there to be derogatory treatment of the work, sections 80(3), (4) and (6) require a further act in order to establish infringement. Prima facie, these subsections require that the *result* of the derogatory treatment is communicated or shown to the public in some way. As nothing would remain post destruction, there is nothing that may be communicated or shown to the public where destruction is concerned.⁷

Secondly, as destruction leaves nothing of the original work behind, there can be nothing left that can affect the author’s reputation, unlike a work which has been maltreated or deformed in some way, which does leave behind a misrepresentation of the author’s work.⁸

The third reason lies in the definition of ‘work’ for copyright purposes. The CDPA specifies eight categories of works which may be subject to copyright protection.⁹ These works are subdivided generally into authorial works, i.e. literary, dramatic, musical and artistic works, and entrepreneurial works, i.e. sound recordings, films, broadcasts and typographical arrangements. For the purposes of copyright law and moral rights, the protectable essence of authorial works like novels, poems, symphonies etc lies in their *content*, not their physical embodiment. Copyright arises and attaches to a work the instant it is created and fixed in a material form. It has been argued that for the purposes of copyright, the work then remains in existence even if its physical embodiment is destroyed.¹⁰ This principle apparently applies in relation to all types of works, textual works such as literary and musical works, and also artistic works. It is clearly the creative content, i.e. words, plots, descriptions, characters etc of a novel which constitute the protectable core, not the printed paper or electronic-ink. In furtherance of this principle, it is argued that likewise the picture is the protectable aspect of an artwork, not its physical support, e.g. the canvas and pigments of a painting. It follows that the destruction of the first edition of a book or the original painting or any of their copies would still leave the *content* intact. Furthermore, through their copies, their protectable content would remain accessible indefinitely, and the relevant work cannot be destroyed.¹¹ It is with this third argument i.e. that a ‘work’ cannot be destroyed, including artistic works, that this paper is solely concerned.

The UK is not alone in being ambiguous about the right to object to destruction of copyright works,¹² however it may draw inspiration from fellow common law jurisdictions such as Australia,¹³ US,¹⁴ and the India,¹⁵ who each has found its own way in granting authors such rights. In turn, it is hoped that this paper will serve not only to foster an argument that the UK should consider such rights and rethink its approach to artistic works under its copyright law, but that it would also serve to endorse the rights which are already available in the abovementioned and other jurisdictions.

2. Framework of paper

This paper will propose that artistic works are fundamentally different in nature to textual works, and it is unsound to treat them in exactly the same way under copyright law where destruction is concerned. This is reflected in the way we ordinarily treat works like music and literature as contrasted with the way in which we treat works like paintings and sculptures. We identify the latter with their original physical embodiment and feel an incalculable loss when the original physical work is destroyed. To all concerned, it is simply lost forever and no one would believe that it is not destroyed. However, there is no such depth of profound loss if the original handwritten manuscript for say, Mozart's 40th symphony, is lost. There is of course a great sense of dismay but that is only because of the provenance accorded to the manuscript. Otherwise, Mozart's 40th symphony is still performed and enjoyed in numerous concert halls throughout the world, and is recorded in the numerous copies of its music score. One may argue that we should treat all works of art alike, and could likewise consider that Mozart's 40th symphony may be completely destroyed in the event the very last copy of its manuscript or recording of the last performance of the symphony is destroyed, and when all memories of the symphony have completely faded. It must be appreciated however, in the present digital age in which reproduction techniques are superlative, such a consequence is highly improbable.

It is intended to take issue with the concept of work as applied to artistic works, primarily on the premise that the *physical matter* i.e. the paint and canvas and other materials, takes on a fundamental and *necessary* role in the creation of an artistic work. It is argued that the purely

immaterial element cannot function, on its own, as the entire artistic work, and that contrary to the view that a copyright work cannot be destroyed, destruction of the material will simultaneously destroy its immaterial content. It will also be argued that although an artistic work can be destroyed, copyright *protection* is not necessarily extinguished upon its destruction.

Therefore, essentially two questions are posed in dealing with the definition of ‘work’ where artistic works are concerned, firstly the question as to whether the material aspect i.e. the medium, of a work of art is a fundamental and essential element of the same, and secondly, whether art can be destroyed, both of which are issues which have been subject to considerable scrutiny by art philosophers. A discussion of the ontology of art is therefore an important contribution to the present debate, where issues regarding the law and those regarding art intersect as they do here. The ensuing discussion in this paper is not purely a discussion of metaphysics for its sake, but a matter of how the purposes of copyright protection and the moral rights doctrine in relation to art may be best served through a more helpful perception of what an artwork is.

Finally, the point must be made that, even if the *legal* concept of an artistic work is that it is an *immaterial* concept, the reality is that an original artwork is a *wholly unique entity*, consisting of *both* the immaterial subject-matter and the material support which encapsulates the subject-matter, which once destroyed, is utterly irreplaceable. Due to the unique nature of artworks such as paintings and sculptures, their very destruction constitute an irretrievable loss of a unique piece, a fate that rarely befalls the other forms, such as literary and musical works, of which multiple copies are invariably made, especially in the age of digital technology. It is obvious that the effect of destruction of even the first edition of a literary work is therefore nowhere near as devastating and irrevocable as that of an original artistic work, hence the reason for focusing on artworks, as their requirement for a solution is far more pressing.

3. The ontology of art – can a work of art be destroyed?

The question of whether a work of art can be destroyed is a question which features in any query investigating the *nature* of art works. The query is not so much a question as to what conditions a

work must fulfil in order to be classified as an artistic work (for e.g. it meets some standard of Beauty, or standard of craftsmanship), than a focus on asking *what type of entity* is a work of art. In other words, we ask if a work of art is perhaps a purely physical object, a feat of imagination, or a sensory experience for both artist and spectator? Destruction enters into the equation in that if a work of art is a purely physical object, then clearly it can be destroyed, but not if it is an abstract entity. These questions have been debated by numerous aesthetic philosophers, including Wollheim, Collingwood, Margolis and Thomasson, and it is from the works of these philosophers that inspiration is sought in order to address the issue in copyright law.

These same questions do also crop up in copyright law, but they have not been debated to the same depth in legal circles. While judges and academics have certainly debated in much depth and detail, the criteria which must be met by a work before it can be considered as an artistic work for copyright purposes, they have not considered the issue of destruction to the same extent, which is unfortunate as the issue is important particularly in considering whether an artist has a right to object to the destruction of his work. The following section will deal with the legal perspective on artistic works, before proceeding to a consideration of the key texts on the ontology of art by aesthetic philosophers.

4. Legal Perspective

The law and the arts have crossed paths in countless instances, ranging from issues relating to copyright, obscenity, customs and duties, and taxes.¹⁶ Problems in aesthetics have therefore necessarily been the subject of considerable judicial deliberation, although unfortunately without the assistance of or reference to any of the established aesthetic theories or expert opinion.¹⁷ The courts' reluctance to enlist the help of experts in the field is explained by Lord Simon in *Hensher*,¹⁸

...the court will endeavour not to be tied to a particular metaphysics of art, partly because courts are not naturally fitted to such matters and partly because Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics...

A few law academics on the other hand have increasingly taken up with art theorists in their discussions on art. Karlen refers briefly to the work of Collingwood, Margolis and Goodman in his general discussion on aesthetic theory in relation to legal problems involving art,¹⁹ while Pila, in writing on the categorisation of copyright works,²⁰ relies on the work of Kendall Walton,²¹ while also making brief references to art philosophers such as Thomasson, Dickie and Levinson.

The engagement of law academics with the question of destruction have however generally been incidental, arising primarily from discussions of the following two perspectives. Firstly, the issue crops up when law academics (Derclaye, Pila, Garnett and Davies) consider the broader question of the requirement for fixation or permanence of copyright protected works, in the discussion of which, the same academics have questioned the *nature* of these same works. It will be seen that legal academic debate has readily accepted that destruction of the material form of a work does not destroy the “copyright work” itself. However, the conclusion is unaccompanied by any satisfactory reason, and certainly with little recourse to the extensive debates which have already taken place in art philosophy on the very same question.

Secondly, and closely related to the above legal query, other law academics (Liu, Waisman) have focused more pointedly on the material or physical aspects of artistic works, generally concluding that the physical material is a separate and distinct feature, which when destroyed, does not destroy the work of art. In arriving at the above conclusions, law academics in general appear to accept rather too eagerly that destroying the physical work, even if it is a “singular” work i.e. works of which there is only one instance, like a painting or sculpture, does not destroy the work of art itself, notwithstanding that this is a stance which has been debated at length by art philosophers and which has not been as readily accepted by them.

The above legal debates will be covered in the following sections, in which the point will be made that their conclusions on destruction arrived at thus far have been premature and unsatisfactory.

A. The Requirement for Fixation or Permanence?

The question of whether an artistic work may be destroyed is linked to numerous debates which have centred on the requirement of fixation, i.e. that the work is recorded in a material form, which is a long established principle of copyright law.²² In copyright cases pre-dating the CDPA, where the fixation requirement appears in section 3(2), the fixation principle has been expressed generally in terms of the necessity for certainty, firstly of existence of the work itself, and secondly, for ascertaining the boundaries of the work claimed.²³ Section 3(2) CDPA, which refers only in relation to literary, dramatic and musical works, simply states that copyright does not subsist in these works unless and until it is “recorded in writing or otherwise”, and is also deemed to be the time the work is *made*. The act merely goes on to define “writing”,²⁴ but does not give any further guidance beyond this. Artistic works are presumably not subject to the same requirement as they exist ordinarily in a physical material form, and not in an ephemeral state.²⁵

The issue of destruction arises where debates on the fixation requirement have centred on the question of whether the fixation itself must also be in a permanent form. *Copinger & Skone James* categorically confirms that permanence is *not* a requirement, and indeed nowhere does it say in the CDPA that fixation ought to be permanent.²⁶ It appears however that the courts have not been so certain themselves, of either the necessity for artistic works to be also fixed or that the fixation should be permanent.²⁷ Derclaye, on having studied relevant cases and legal commentary on this issue, has concluded that permanence is not a requirement,²⁸ but that, despite the absence of any reference to artistic works in Section 3(2), fixation may well be a requirement for artistic works to the extent that the work for copyright purpose at least has to be *static* or *accessible* to some extent.²⁹ Stokes, who has similarly referred to and analysed several of the same cases referred to by Derclaye, concludes that the current position is unclear.³⁰

While it appears at least from case-law and the opinions of the above academics that permanence is not a requirement and that fixation *may* be a requirement for artistic works, underlying the debates surrounding the fixation of works and the issue of permanence lies the question of the fundamental *nature* of the works which are protectable under copyright law. In other words, what is the nature of artistic works? More specifically, is its physical or material form an integral part of an

artistic work? Where literary and musical works are concerned, it may be somewhat trite to state that it is clearly the novel or symphony that is protected not its printed material. But it is unclear if the same proposition extends equally to the visual arts. However, while the creative content of a novel can clearly be distinguished from its material fixation, i.e. the physical printed material, it does not also follow that a painting does not constitute the paint and canvas materials. It is proposed that a painting or a sculpture does constitute its physical material, and therefore if the physical painting or sculpture was destroyed, the painting or sculpture is clearly and certainly destroyed, a view which is discussed in more depth in the next section.

This is in contrast to the position taken by Davies and Garnett, who state (in relation to all types of copyright works, including artistic works), ‘First, it should be borne in mind that the integrity right is related to a copyright work, and a copyright work cannot itself be destroyed: it remains in existence even if the original embodiment or fixation of it is destroyed.’³¹ The underlying reason for this bold statement appears in *Copinger & Skone James on Copyright*,³² in which the authors emphasise that copyright law’s requirement for a material form should not be confused with a requirement that such form be permanent as the relevant work which is protected by copyright is an entirely separate entity from its physical material embodiment.³³ The authors in *Copinger & Skone James* then conclude that ‘Destruction of the material form in which the work was fixed does not destroy the work itself, nor the copyright which came into existence upon its being fixed’.³⁴ Hence it would follow that destruction cannot breach the integrity right as the work cannot be destroyed.

In order to address the position articulated in *Copinger and Skone James*, it is firstly suggested that there is a difference between the *protectable work* for copyright purposes and the *copyright protection* afforded to works. In other words, it is argued that artistic works which can be protected under copyright law can be destroyed and further, just because a copyright protectable work is destroyed, it does not also necessarily mean that the *protection* that is afforded to the work by copyright is also destroyed. It would appear that academic debate on the issues of fixation, permanence, nature of copyright works and their destruction conflate the work which is protected under copyright with the protection itself. It is further argued that, as mentioned above, there is a

difference between literary and musical works on the one hand and artistic works on the other. Generally, it is argued that literary and musical works are works which cannot be destroyed because of their abstract nature; the notation on printed paper merely *represents* them, and destroying the printed notation does not harm the work itself. However, it is further argued that this is not true of artistic works.

The question as to what happens to the copyright of a work when it is destroyed has been raised by legal academics,³⁵ but it has not received much in-depth attention, despite the fact that it is not a question which has yet been afforded a definitive answer, hence we have very little literature on this issue. When this issue is raised however, it does appear that two different but related creatures are discussed: the “copyright work” or simply the “copyright” in the work. It is not always clear as to what exactly is at the heart of the issue, as academics have either asked if a copyright work may be destroyed, or as to what happens to copyright if a work is destroyed, and on occasion, as mentioned above, the two are conflated in discussions.

The issue is important where the integrity rights is concerned as legal academics have argued that because a “copyright work” cannot be destroyed, an artist cannot object to the destruction of his painting or sculpture, because the “copyright work” in his painting or sculpture survives the act of violence and continues to exist. However, it appears that the same academics have simply made the assumption that the work cannot be destroyed *simply because* copyright protects the creative content or core of a work. It is not at all certain that this is the logical conclusion, simply based on what *copyright* protects or chooses to protect. In other words, copyright law, according to these academics, appears to dictate its own ontology of art works, not on any logic or reason but by *simply* and *only* stating that *because* it protects the creative content of a work, be it literary, musical, dramatic or artistic, then even if the very last and only manifestation of the work is destroyed, the *work* in question is not. There must be more to this, indeed judging from the vast amount of literature generated by our art philosopher colleagues on this very question.

While the legal assumption *may* ring true for works like novels or symphonies where the printed paper or CD recording are obviously simply *receptacles*, there are ample valid arguments which stress that the paint strokes on a canvas or the carved marble are not simply receptacles, but are *actually* the art works themselves or at least are significant parts of the art works. The legal assumption cannot hold true for *all* works. Copyright law appears to have simply assumed and accepted that *all* works under its purview are *abstract* entities, without quite explaining why. It is the contention of this paper that copyright law should not regard *all* works in the same manner, and that literary, dramatic and musical works are fundamentally different from artistic works and should be treated differently in this respect. In any case, it is also arguable that the canvas and its pigments or the marble that has been carved to form the sculpture are part of the creative content that copyright protects, a view which is discussed in the next section.

Pila, in discussing the requirement for the material fixation of copyright works, raised the issue of destruction, saying that ‘strictly speaking, if a work is constituted by its material form, destruction of that form will destroy the work, and consequently destroy its copyright as well’,³⁶ and hesitantly adds, ‘this, however, *seems* not to be so’, relying on *Lucas v Williams*,³⁷ which clarified that the existence of the material form of the work was a question of evidence, and that its absence would not necessarily defeat a claim of infringement. In a subsequent article,³⁸ Pila points out that section 153(3) of the CDPA 1988 resolves this conundrum neatly as it provides that if all of the qualification requirements of the act are satisfied, then ‘copyright does not cease to subsist by reason of any subsequent event’. Two issues may be raised in relation to Pila’s brief discussion of *Lucas* and Section 153(3).

Firstly, it is not certain that the destruction of a work will necessarily or consequently destroy copyright in any case, with or without relying on section 153(3). Section 153(3) simply confirms the nature of copyright, and all its fundamental principles i.e. when all the conditions are met, *copyright protection* arises and there is no reason why it should not continue to exist until its expiry, notwithstanding the destruction of a singularly unique painting or the one and only manuscript of a piano concerto. If a work has been created according to the accepted principles of copyright law i.e. it

is a literary, musical, dramatic or artistic work, and it has been fixed in some material form, and it meets all the formal qualification requirements (e.g. nationality of author or place of creation etc), then copyright protection arises. Why should *copyright protection* necessarily cease if the work has been destroyed or no longer exist in a physical form?

Secondly, Pila is right of course to say that the main practical role fixation plays is that of evidence, and that is the main import of *Lucas v Williams*. However, Pila relies on *Lucas* for the proposition that “artistic works are distinct from their material fixation, in which case paint ought not to be essential for the *existence* of a painting.”³⁹ It is submitted that it is not clear that *Lucas* goes so far as to make this proposition or that such a proposition may necessarily be implied. It merely proposed that just because a physical copy of a painting was not available, it did not mean that *infringement* could not be proved. In *Lucas*, as long as there was some other available evidence, in that case oral evidence by a witness who claimed to have seen the original painting, then that was sufficient evidence for an infringement claim. *Lucas* makes an important point for the law of evidence,⁴⁰ but it is submitted, no more than that. It is quite another thing to say that paint and canvas are not essential for a painting, which is the point under discussion in this paper. Indeed, Karlen asks a similar question to that posed by Pila but couches it clearly in terms of evidence solely: “..what happens when the original is lost or destroyed? Does the artist lose all protection, or is something like the Best Evidence rule imposed...?”⁴¹

The question that Pila asked is related but essentially different to that raised by Garnett and Davies, who, without making reference to section 153(3), contend in a more authoritative tone that a copyright *work* cannot itself be destroyed and ‘it remains in existence even if the original embodiment or fixation of it is destroyed’, on the basis that ‘a copyright work and the first physical embodiment of it are not the same things.’⁴² To an extent, as already pointed out above, this point can be appreciated, particularly of literary and musical works where the destruction of the first manuscript of a novel or a symphony would not destroy the novel or symphony itself. The protectable core of the novel or symphony lies arguably in their content, not in the printed strokes of their manuscripts or copies thereof. However, and this is a point which Garnett and Davies admit as much, it is difficult to say the

same of artistic works which exist as unique singular works because of their aesthetic value, although they still maintain that the point nevertheless applies to artistic works without explaining why.⁴³

The language of Garnett and Davies refers to “work”, while both Pila and section 153(3) refer more specifically to simply “copyright”. Indeed, as already pointed out above, the judges in *Lucas v Williams* were making a point about *infringement*, i.e. copyright protection of the work, saying that copyright can still be infringed even in the absence of the work itself. *Lucas* did not refer to the *work*, but to *copyright protection*. What appears to be asserted according to section 153(3) and *Lucas* is that *copyright protection* remains whatever happens to the work itself. It does not necessarily mean that the “copyright work” remains in existence, whatever “copyright work” means.

The next question that arises is whether artistic works are truly distinct from their physical form, which is considered next.

B. Is the physical embodiment of an artistic work material to its existence?

Other law academics have focused more on the apparent distinction between the artistic work and its physical existence. Waisman, in discussing the integrity right, reiterates and extends the view held by Garnett and Davies, that the work protected by copyright and its physical embodiment are not the same thing,⁴⁴ and that an artistic work, once created, remains in existence at least conceptually and in the public’s perception, despite the destruction of its physical state.⁴⁵ Liu argues that even where it is difficult to distinguish between a work and its physical embodiment, especially in the case of sculptures, it is nevertheless still possible to draw a distinction,⁴⁶ and hence destruction of the physical embodiment does not destroy the work itself.

The arguments by Liu and Waisman, while persuasive, fail to take into account the idea that the physical structure of an artwork is an integral part, and that both its physical and conceptual aspects are inseparable,⁴⁷ which is *prima facie* almost certainly the case for sculptures at least,⁴⁸ and arguably the case for paintings. They also fail to appreciate that the original creation will be lost to future generations who would benefit from encountering the work in its original entirety not only on the basis firstly, that the original has incalculable social or historical value, but also secondly, as will

be explained below, that the experience of encountering the original work cannot be replicated in encounters with mere copies.

It is intended to take issue with the above arguments primarily on the premise that the *physical matter* i.e. the paint and canvas and other materials, takes on a fundamental and *necessary* role in the creation of an artistic work, and forms the copyright protectable creative content. The purely immaterial element cannot function, on its own, as the entire artistic work. Prints and postcards merely depict the *subject matter* of an oil painting but are ineffective in representing the nuances conveyed by the roughness and texture of the individual brushstrokes. Ultimately, it is maintained that the *conceptual* and *physical* aspects of an artistic work should not be treated separately, and that destruction of the original physical support does destroy the artistic work for the purposes of moral rights.

In support of his argument that the material and immaterial of art are completely separate, Liu quotes from Iris Murdoch and Bindman, an art historian . In the selected quote,⁴⁹ Murdoch opines that a work of art is not a material object, although in the same quoted passage, she does accept that, at least to some extent, the relation between material object and the art object seems close, especially so for sculptures. The statement does not *conclude* that the material and art are incontrovertibly distinct and separate. It could therefore be argued that the relationship between material and art is close or at least remains debatable.

It should however be noted that shortly after the quoted passage, Murdoch does go on to say that,

The accessible existence of art, its ability to hang luminously in human minds at certain times, depends traditionally upon an external being, a fairly precise and fixed sensory notation or ‘body’, an authority to which the client intermittently submits himself. If this notation is or becomes unavailable the work of art is lost: the picture is burnt, no reproduction does it justice....⁵⁰

In the quote relied upon by Liu, Bindman observed that there was a tendency among Neoclassical artists to “disdain material as being of lesser importance than the idea”. His statement essentially described the neoclassical sculptors who regarded material as secondary to the idea behind a sculpture. It is noted that the statement is made in relation *specifically* to neoclassical sculptors. At first glance therefore, it can be said that this chosen statement of Bindman’s, is not necessarily of universal application.

Liu poses the example of creating the same sculpture in different materials: wood, bronze and marble. In other words, the posture of the figure and all other details are exactly the same in all three products. They differ only in relation to the material used. Liu says that the *same statue may be made in any of these materials*. The destruction of the wooden sculpture, he argues, will not destroy the *work of sculpture, only the physical wooden embodiment of the sculpture is destroyed*. The same goes for the sculpture in bronze or marble. Read together with the quoted statement of Bindman’s, it is clear that Liu’s argument, supported by the selected quotes by Murdoch and Bindman, implies that the material is not important. It is submitted that there are two closely related arguments which may be levied against Liu’s conclusion. Firstly, it is clear that *there are* fundamental differences between the natural properties or make up of wood, bronze and marble, and hence it is arguable that these differences would result in different characteristics in the sculptures, making each sculpture a unique work of art, even if the composition is exactly the same for all three. In other words, the sculptures in wood, bronze and marble are all *different* works of art. John Rood, a specialist in wood sculptures, illustrated the difference by way of an example.

“... what would you do if you wished to make a figure of Daniel Boone? Would you choose bronze or stone as your material? Do you think either would be as suitable as wood? Obviously not.”⁵¹

Further, according to Rood, the difference does not stop there. There is even a difference between the different types of wood and sculptors would choose from the different varieties of oak, walnut, cherry, apple, cedar etc.

Secondly, it is contended that the physical medium is important in terms of the artistic choice made by the artist, and it plays a fundamental part in the artwork. The artist's choice of wood, bronze or marble is not random, but purposive. This view is endorsed by Alec Miller, a master sculptor active during the Arts and Crafts movement at the turn of the 20th century, who explained, "...wood as a medium for portraiture has many conspicuous qualities. It has a warmth and richness of surface beside which marble and stone seem cold and unsympathetic."⁵² The natural characteristics of each material contribute meaningfully to the resulting artwork.

The importance of the medium cannot be dismissed so lightly. For instance, John Dilworth, in his article 'Medium, Subject-Matter and Representation', discusses the relationship between an art medium and ideas, and generally theorises that the medium plays a functional role in the artwork, as an expression of the artist's *commentary* on the subject-matter.⁵³ It may be distinct from the subject-matter of a painting, but it is no less important, and it is an integral part of the work of art as a whole.

The importance of medium can also be discerned from the language employed in Professor James Elkins' book *What Painting Is*,⁵⁴ in which he discusses the act of painting, and the 'kinds of thought that are taken to be embedded in paint itself.'⁵⁵ He exhorts that every painting captures '...a certain resistance of paint, a prodding gesture of the brush...'⁵⁶ and that paint 'records the most delicate gesture and the most tense.'⁵⁷ Elkins explains that

Paint is a cast made of the painter's movements, a portrait of the painter's body and thoughts.... Painting is an unspoken and largely uncognized dialogue, where paint speaks silently in masses and colors and the artist responds in moods. All those meanings are intact in the paintings that hang in museums: they preserve the memory of the tired bodies that made them, the quick jabs, the exhausted truces, the careful nourishing gestures.⁵⁸

The medium thus is not necessarily devoid of meaning, or a role in an artwork, whether it serves as commentary on the subject-matter or as a reflection of the painter's moods and thoughts. A

painter's choice of watercolour or oil or acrylic for a painting is not made randomly. The thick and slick surface of an oil painting differs considerably from the thin and washed out appearance of a watercolour. The choice of medium is made to evoke a certain aesthetic experience on the part of the beholder. According to John Dewey, '...each art has its own medium and that medium is especially fitted for one kind communication. Each medium says something that cannot be uttered as well or as completely in any other tongue.'⁵⁹ The physical manifestations of these different mediums thus play an integral part of the work as a whole.

Furthermore, the *impact* on the viewer of simply the sheer size of some great artworks, Monet's large scale Water Lilies series, for instance, cannot be reproduced in art books, prints or catalogues – nothing can reproduce the experience of being in the *actual presence* of the originals. If they are destroyed, this unique artistic experience is also lost forever. In relation to art that is destroyed, as quoted above and to reiterate it here, Murdoch has said that "no reproduction does it justice".

Turning to Waisman's arguments as outlined above, they are based on the simple proposition that if we accept that the destruction of a reproduction clearly does not destroy the artistic work, likewise we should accept that destruction of the original canvas which houses the work should not destroy the work itself. He uses the example of mass produced postcard reproductions of paintings, saying that there should be no difference between the destruction of a postcard copy of Picasso's *Guernica* and the actual original canvas, because 'the work as original expression exists independently from the material support that embodies it; that is precisely why works protected by copyright are a form of intellectual property.'⁶⁰ He observes that destroying the postcard would not destroy *Guernica* but however goes on to argue that if the destruction of the postcard does not destroy *Guernica*, why should the destruction of the original canvas do so? He develops this point by also citing the example of a U2 fan who breaks her CD of U2's songs, and points out that obviously breaking the CD does not destroy U2's works.⁶¹

There are several problems with Waisman's argument and the examples he has used in support. The first is that he has not actually explained why there is no difference between the destruction of a postcard and that of the original canvas. Indeed, he simply says "...there are no reasons why the conclusion should be different if the destroyed support is not a postcard but the canvas painted by the author's hand."⁶² While Waisman has not only ignored the vast body of literature which question the aesthetic value of copies and debate the ontology of art, he has also ignored the *reality* of such a scenario. While we would be rather indifferent to the thought of someone ripping up his postcard copy of *Guernica*, we would be rather horrified at the thought of the original *Guernica* meeting the same fate. It is a reality that cannot be ignored and must be confronted in any discussion of the law which affects creators and their works of art. In response to Waisman's statement, obviously there are reasons why the conclusion should be different, which reasons he has not explored in any depth.

Indeed, it appears that Waisman's only reasoning is that "The work as original expression exists independently from the material support that embodies it; that is precisely why works protect by copyright are a form of intellectual property." Waisman does not explain how he rationalises that a work exists independently from its material support except to say that this is why such works are a form of intellectual property. Again, as we have seen above in discussing the approach of other law academics on this issue, there is a propensity to draw such conclusions merely on the basis of what intellectual property law, or more particularly, copyright law protects or seeks to protect, rather than a more exhaustive and objective enquiry into the issue. The issue of whether the destruction of the original canvas destroys the work of art itself is a query which is not unique to the law, and is one which has to be comprehended not only at a metaphysical level but also as an appreciation of how we ordinarily regard works of art in reality.

Further, there are a myriad of reasons as to why the U2 CD example does not lend support to Waisman's point that destroying an original canvas does not destroy the work itself. A CD is a recording, which is the result of a technological process operated by a sound engineer. The production of a CD is not even a step in the process of creating any of U2's songs. It is not an *essential* step in the

creation at all. In this regard, the CD is purely and clearly a mere receptacle or device for the performance of U2 songs. In contrast, the canvas on which Picasso worked was *necessary* in expressing *Guernica*. There is at least a case for arguing that the canvas is an integral part of the work and that destroying the canvas would destroy the work, whereas none discernibly exists for the CD. This example in fact serves to highlight the fundamental difference between the nature of works such as music and literature, which are presented in mere receptacles such as CDs, and that of works like paintings and sculptures, whose physical embodiments are an integral part of their being.

The question as to whether copies have the same aesthetic value as the original has vexed art philosophers. In essence, the question is dependent on how aesthetic value is assessed, and whether the aesthetic value of an artwork survives its destruction in the form of mass-produced copies. This will be considered further below when discussing the views of art philosophers. It is contended that there is a difference between destroying a postcard and destroying the original. At the very least, considering the sheer importance, value and *indispensability* of the original physical embodiment to the artwork, it is arguable that to destroy the original physical embodiment of a work of art would destroy the work itself.

Waisman goes on to explain that ‘the previous example [i.e. the hypothetical destruction of *Guernica*] shows that at least one of the ways of altering the physical support, destruction, does not fully extend to a work and thereby cannot be considered an alteration of a work.’⁶³ Turning to this point that destruction does not amount to alteration of the work, Waisman’s statement was made in the context of his main contention, which is that the infringement of the integrity right lies not so much in the altering or modifying act in question itself than in the *effect* of the act carried out.⁶⁴ His article endeavours to point out that if the purpose of the integrity right is to be correctly realised, not all modifications can be considered an infringement. In fulfilment of this endeavour, he proposes a set of criteria by which all modifications may be assessed. The key criterion appears to be the instant a particular modification of a work has *also* created a modified perception in the beholder’s mind. In other words, just because a work has been tinkered with is not good enough to constitute

infringement. The point is whether it has also created a different perception in the public's mind.⁶⁵ This criterion fulfils the additional requirement that an infringing modification to the creation harms the *reputation* of the creator.⁶⁶ As the creator's reputation is dependent on how the public perceives his work, then Waisman's proposal that we have to ascertain if the perception of the beholder is also necessarily altered by the act in question would certainly serve this additional requirement. Therefore, to Waisman, since destruction of the physical support or embodiment of a work of art would not alter the perception that the public *already possesses* of the work, it may not harm the reputation of the creator, and hence does not amount to infringement of the integrity right.

Waisman's point regarding destruction firstly presupposes that the perception of the original work has been widely held in the public's eye at large, and secondly, ignores the points already made above i.e. that we ordinarily accept the physical embodiment as part and parcel of the work of art. It also places much emphasis on the additional requirement of reputation. It is contended that first of all, reputation *can* be harmed by destruction. One reason is that, according to art historian, Albert Elsen, '...even a lost work's survival by the best reproduction diminishes the artist's reputation because the serious judgment of quality depends on confrontation with the work itself.'⁶⁷ Secondly, even if it is thought that reputation may not be harmed by destruction, there still remains the additional requirement of *honour*, which may be harmed by destruction.⁶⁸

5. The perspective from art philosophy

As already identified above, the questions concerning the ontology of art which have vexed philosophers are highly relevant at least to the questions concerning art's status in the realm of copyright law. Amie Thomasson has identified the very real and practical reasons for caring about such issues. She has correctly observed that such theories of art have implications in practical problems experienced in various activities such as the curation or restoration of art, or in trading or collecting art.⁶⁹ Thomasson has identified certain practical problems which may be served by asking the sort of questions which metaphysicians ask. It is contended that the problems she has identified

also involve issues of law. For instance, she has identified the problem of the extent to which a painting is considered altered or destroyed, if at all, by restoration, which not only involves ontological issues but also moral rights doctrine. Another is the problem of establishing the conditions which determine if a new song is the same as an old one, which involves not only ontological issues but also it is contended here, copyright infringement issues.⁷⁰

The present legal problem identified in this paper itself clearly entails issues of copyright protection, moral rights and ontology. Out of necessity, such questions are regularly resolved in some fashion in the law courts, but usually without reference to art theory.⁷¹ As such, this paper advocates that copyright law may benefit from considering art theory in depth, and in this particular instance, theories concerning the ontological status of art. However, this paper similarly cautions that the question is an extraordinarily difficult one, one which has attracted an astonishing variety of different theories. Bearing this in mind, this paper attempts to very briefly survey the major competing theories, before extracting the theory or theories which will serve the purposes of copyright law best.

Theorists fall into roughly two camps when concerned with the ontology of art. While some contend that *all* works of art are purely abstract entities or activities, others make a distinction between works like music, literature and drama on the one hand, and singular pieces like paintings and non-cast sculptures. This paper aligns itself primarily with the latter view, and ultimately will depend on Thomasson's observation that the problem with current theories is that they conflict with common sense views of art.⁷²

Chief among the proponents that works of art are purely abstract entities is RG Collingwood, who argued that works of art are not physical entities at all, but are purely the imaginative experience of the artist.⁷³ To him, the canvas with its pigments and sounds which emit from the orchestra are merely the means by which artists reconstruct their imaginary experience. As such, since essentially the work of art exists only in the mind of its artist, it cannot be destroyed. Likewise, presumably if it is purely abstract, the work cannot be bought or sold, performed or read either, which are the sort of activities that we ordinarily indulge in.

Similarly, Gregory Currie claims that all works are abstract entities, each capable of multiple instances.⁷⁴ The canvas or the musical score are not works of art, but instead the work is the *action* taken in producing the canvas or the musical score. His account directly counters that of Wollheim who theorises that paintings and non-cast sculptures are physical entities while works of literature and music are types, of which their copies or performances are tokens.⁷⁵ Currie rejects the view that “singular” works of art such as paintings and non-cast sculptures are aesthetically privileged by arguing that their reproductions, if molecule for molecule *exactly* the same as that of the original, are just as aesthetically valuable.⁷⁶ As such, according to Currie, paintings and sculptures are not “singular” works as is commonly perceived, and that although we treat them as such, it is possible that we are mistaken about this.

Levinson, in his review of Currie’s work,⁷⁷ argues firstly against the contention that works of art are mere *action types*, saying that appreciators of artworks, appreciate the end result, not just the work or activity that has gone into the production of the work. We appreciate or experience art as the physical object or sensory experience that they clearly are. “...in art we primarily appreciate the *product* [author’s emphasis], viewed in its context of production; we don’t primarily appreciate the activity of production, as readable from the product.”⁷⁸ Levinson isn’t saying that we do not appreciate the activity that has gone into a work, but rather he is saying that Currie has got it back to front. We appreciate the product first and foremost.

That Levinson is conscious that appreciators also appreciate the activity behind a work is borne out in his argument against Currie’s view that true copies are just as aesthetically valuable as the original, saying that mechanical copies are not substitutes for the original as they do not convey the artist’s unique achievement. The actual manner of production of a work of art plays a vital and important role in how we appreciate that work of art. “The original canvas is a unique repository of the painter’s achievement; indiscernible canvases produced otherwise are not. An original painting puts one in more intimate contact with the artist’s manual action than a copy produced from it even by a counterfactually reliable method can do.”⁷⁹ Dutton echoes a similar view, saying that we celebrate *original* works because we celebrate what the artist can do, his achievements, skill and creativity.⁸⁰

Armed with the extra knowledge that the work in front of us is a copy or forgery changes our perception and appraisal of the work, not because of snobbery or elitism,⁸¹ but because we admire extraordinary displays of skill, which give us an elevated sense of pleasure.⁸² According to Wight, Adam Smith observed that “a great work of art commands a high price, but its exact duplicate commands only our disdain.”⁸³ Thus the original painting or work of art cannot be substituted by its copy, no matter how technologically perfect a copy, which in turn suggests the *singularity* in the nature of such works.

Instead of attempting to put forward a unified theory on the ontology of art, accounting for all of the different arts, Wollheim and Wolterstorff have sought to distinguish between paintings and non-cast sculptures on the one hand and the other arts, such as music and literature, on the other.⁸⁴ Essentially paintings and sculptures are physical entities while literature and music are not, and therefore can outlast the destruction of any of their copies or performance.

Thomasson takes issue with all of these theories, reminding us of how we ordinarily conceive the arts. She observes that where paintings and sculptures are concerned in particular, people ordinarily treat them as individual entities and *identify them with the originals*, not their copies.⁸⁵ These original entities are bought, sold, and moved physically, and are also capable of being destroyed.⁸⁶ In contrast, works of music and literature⁸⁶ are conceived differently, that they survive the destruction of their original manuscript, but subject to Thomasson’s caveat that it survives only as long as a copy of it remains.⁸⁷ The main point is that Thomasson has correctly observed a divergence in how different types of works of art are treated and that therefore there is a possibility that they may not all be of the same ontological type at all.⁸⁸ Further, she observes that all the major theories on the ontology of art have serious conflicts with our commonsense and ordinary beliefs and practice of the arts.⁸⁹ Her conclusion is that “consistency with such beliefs and practices is the main criterion of success for a theory of the ontology of works of art.”⁹⁰ According to Thomasson, any theory which purports to describe the arts, but also violates or conflicts drastically with our everyday beliefs and practices, may not actually be describing our works of art at all.

Where paintings and sculptures are concerned, Thomasson, *taking into account our everyday practices and beliefs*, argue that they are essentially physical objects but ones which come into existence through human intention. They are not purely “imaginary objects or abstracta, they are perceptible, are materially constituted by certain physical objects, and *may be destroyed if their constituting base is* [author’s emphasis].”⁹¹

The fact that Thomasson, in making the above meaningful observation, had taken into account our *everyday practices and beliefs*, suggests that her approach, more so than those of the other major philosophers, is eminently apposite for the purposes of copyright law. It has to be remembered that it is also Thomasson who understands that the ontology of art has a profound bearing and application in our everyday engagement with the arts, not least, the engagement too of the law with the arts.⁹²

6. Summary and Conclusion

The initial question posed in this paper was whether the integrity right encompasses a right to object to destruction. In seeking answers to this question, it has been necessary to ascertain the question as to whether an artistic work is destroyed when its physical embodiment is destroyed. Current conventional copyright scholarship suggests that the artistic work, at least for copyright protection purposes, is not so destroyed even though its physical embodiment is. Hence, according to Garnett and Davies in *Moral Rights*,⁹³ this *prima facie* undermines any basis for having a right to object to destruction. This approach however goes against the grain of our ordinary and conventional beliefs and practices: if the painting which is exhibited in the Louvre and known to the world as the Mona Lisa is burned to ashes, then the world would surely mourn the irreplaceable loss of one of its greatest masterpieces; we are unlikely to accept that the work still exists. Further, copyright scholars appear to have conflated *copyright protection* with that of the *work that is protected by copyright*. The UK CDPA simply states that an eligible work qualifies for copyright protection upon meeting certain requirements and that copyright shall not cease to subsist by reason of any subsequent event. What is certain is that according to the CDPA, copyright protection does not cease to subsist but that is all it is saying. Copyright law is otherwise silent on the *existence* of works which are protected by copyright.

The fact that an original work is destroyed brings nothing to bear on whether its copyright can be *enforced*. Further, other copyright scholars have argued that the physical embodiment of an artistic work is immaterial, and that therefore its destruction does not affect the existence of the artistic work. This paper has argued, in reliance on the views of artists and art scholars alike, that the physical medium of a work is a vitally important and integral part of its whole.

More fundamentally, copyright scholars appear to have very readily accepted, without more, the continued existence of artistic works in the event of their destruction, a query of metaphysics which requires much more in-depth debate. Their stance reflects the stance of some of the major philosophers in the arena, Collingwood and Currie for instance, who have theorised that all works of art, including singular ones like paintings and sculptures, are essentially abstract entities. However, in contrast, Wolterstorff and Wollheim have established elementary differences between music and literature on the one hand, and paintings and sculptures on the other, essentially viewing the latter as *physical* entities, which can be destroyed. The point is that the major philosophers engaged in this ontological debate on the arts have themselves struggled with question of the nature of art, and it behoves copyright scholars to similarly engage in such debate or at least take cognizance of these theories.

However, the most crucial point of this paper is that ultimately there is a difference between the purpose of the law and that of philosophy. Although the premise of this paper is to urge a more exhaustive, less superficial approach on the part of copyright lawyers to the question of artistic works and its existence, and to be receptive to established theories in metaphysics, it must always be borne in mind that the law bears upon real life problems and issues. It has a real influence and effect on art, artists and other players in the art world. The task then for copyright lawyers is to seek out theoretical underpinnings which do not detract too far from our commonsense beliefs and practices. In this regard, the observation by Thomasson that theories which conflict too violently with our commonsense beliefs and practices must necessarily fail in their goal of describing the arts accurately and completely is instructive for copyright lawyers. Among the theories which she has identified as diverging too far from our ordinary beliefs are those which envisage the singular arts as purely

abstract entities which cannot be destroyed. Copyright law's apparent treatment of artistic works, especially those of a singular nature, as abstract works which cannot be destroyed is at variance with how we ordinarily treat such works.

There is a further and final point that this paper makes. This paper has made the point that it is not only instructive but also imperative that copyright lawyers look to beyond the law for inspiration and other viewpoints which are relevant to the difficult issues they face. The issue in the present paper is whether a work of art can be destroyed, which in turn will affect the issue as to whether or not artists should have the right to object to the destruction of their work. This in turn calls into question the underlying ethos of copyright law and moral rights doctrine. By merely accepting that the work of art is divorced from its canvas or marble block, and that it therefore cannot be destroyed, copyright law not only ignores the reality of our ordinary practices as argued above, but also, it fails to give proper consideration to what the singular nature of certain works of art ultimately represents. Wasiman has implied that there is no difference in the burning of a postcard and that of the original canvas. Currie argues that there is no difference in aesthetic value between that of an exact copy and that of the original, hence underlining his main contention that all arts, including paintings and sculptures, are abstract entities which cannot be destroyed. However, it was Dutton who has argued passionately that the reason we react differently to mere copies or forgeries is because we regard the original work as something quite special and unique, and that it has a human origin which a copy does not, and hence has an aesthetic value which no copy will ever have. Although Dutton's thesis was in relation to the problem of forgeries and copies, the point he makes about how we appreciate works of art is also relevant here: "Every work of art is an artefact, the product of human skills and techniques".⁹⁴ Further, in articulating exactly that which the original possesses but a forgery or copy lacks, Jenkins says,

There is another more cognitive meaning of originality involving creativity which involves an unique idea and the execution of that idea. This is a working out of a solution to a particular problem that belongs only to that person at that particular time in the sense that only they can do it, and is a creative act.⁹⁵

Dutton and Jenkins have each identified the goal of copyright law and its related doctrine of moral rights. The law serves to acknowledge and protect the product of human creativity, endeavours and achievement. The original canvas of *Guernica*, which is the unique product of Picasso's skills and techniques, is the work *Guernica* which we all admire today. We cannot divorce the canvas from *Guernica* nor the marble block from *David*. Destroying either canvas or marble will destroy precious works of art. Perhaps it is time that the law recognises and more importantly, protects against such losses.

¹ Leo Tolstoy, *What is Art?* (Aylmer Maude tr, Thomas Y Crowell & Co. 1899) 51.

² These are the facts in the Canadian case of *Snow v The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105.

³ As noted by Stina Teilmann, 'Framing the law: the right of integrity in Britain' (2005) 27 *European Intellectual Property Review* 19.

⁴ The four rights are the Paternity Right, Integrity Right, False Attribution Right and Privacy Right.

⁵ CDPA 1988, s. 80.

⁶ Destruction is not specifically provided for under Article 6bis of the Berne Convention. However, a Resolution was passed at the Brussels Revision Conference which encouraged countries to adopt moral rights which could protect against the destruction of works. For arguments *against* a right to object to destruction, see WR Cornish, D Llewelyn and TF Aplin, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (8th edn, Sweet & Maxwell, Limited 2013) 522; Gillian Davies and Kevin Garnett, *Moral Rights* (1st edn, Thomson Reuters (Legal) Limited 2010), para 8-023; Irini A Stamatoudi, 'Moral Rights of Authors in England: the Missing Emphasis on the Role of Creators' (1997) 4 *Intellectual Property Quarterly* 478, 482-483; P Anand, 'The Concept of Moral Rights Under Indian Copyright Law' (1993) 27 *Copyright World* 35; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 45; Edward Damich, 'The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors' (1988) 23 *Georgia Law Review* 1 at 18.

⁷ Davies and Garnett (n 6) para 8-023, 242

⁸ The author deals with this issue in an article, [Author and Citation details omitted] *Oxford Journal of Legal Studies*, forthcoming 2016.

⁹ CDPA, s.1(1).

¹⁰ Davies and Garnett (n 6) para 8-023, 241

¹¹ *Ibid.*

¹² Most jurisdictions, including the civil law countries like France and Germany, either clearly lack any explicit legislative or judicial recognition of the right to object to destruction or display ambiguity in the recognition of such a right.

¹³ Copyright Act 1968, s.195AK.

¹⁴ Visual Artists Rights Act of 1990, 17 U.S.C. §106A.

¹⁵ Judgement delivered by Judge Pradeep Nandrajog, *Amar Nath Seghal v Union of India* 117 (2005) DLT 717, 2005 (30) PTC 253 Del.

¹⁶ Peter Karlen, 'Legal Aesthetics' (1979) 19 *British Journal of Aesthetics* 195, 196

¹⁷ *Ibid.*, 209; Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998), chapter 2; Christine Haight Farley, 'Imagining the Law' in Austin Sarat, Matthew Anderson and Cathrine O. Frank (eds), *Law and the Humanities An Introduction* (Cambridge University Press 2014), 307-310; Costas Douzinas and Lynda Nead (eds), *Law and the Image: the Authority of Art and the Aesthetics of Law* (University of Chicago Press 1999) Introduction 1-18.

¹⁸ *Hensher v Restawhile* [1976] AC 64, 94-95.

¹⁹ Peter H Karlen, 'What is art -sketch for a legal definition' (1978) 94 *Law Quarterly Review* 383.

²⁰ Justine Pila, 'Copyright and Its Categories of Original Works' (2010) 30 *Oxford Journal of Legal Studies* 229.

²¹ Kendall L Walton, 'Categories of Art' (1970) 79 *The Philosophical Review* 334.

²² Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (16th edn, Sweet & Maxwell 2013), 3-107.

²³ *Tate v Fulbrook* [1908] 1 KB 821; *Tate v Thomas* [1921] 1 Ch 503; *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700

²⁴ CDPA, s.178.

²⁵ Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009), 92.

²⁶ Caddick, Davies and Harbottle (n 22) 3-110

²⁷ *Ibid.*, 3-110; Estelle Derclay, 'Debunking some of UK copyright law's longstanding myths and misunderstandings' (2013) *Intellectual Property Quarterly* 1; Simon Stokes, 'Categorising art in copyright law' (2001) 12 *Entertainment Law Review* 179.

- ²⁸ As indeed, the question of permanence itself is questionable as nothing can really ever be said to be truly permanent, a view expressed in Hector MacQueen and others, *Contemporary Intellectual Property Law and Policy* (2nd edn, OUP 2010), 78.
- ²⁹ Derclaye (n 27) 12-17.
- ³⁰ Stokes (n 27) 185.
- ³¹ Davies and Garnett (n 6) 8-023.
- ³² It is noted that Gillian Davies, author of *Moral Rights*, is also a co-author of *Copinger & Skone James on Copyright*.
- ³³ Caddick, Davies and Harbottle (n 22) 3-110.
- ³⁴ *Ibid.*, 3-111.
- ³⁵ Justine Pila, 'An Intentional View of the Copyright Work' (2008) 71 *Modern Law Review* 535, 542; Davies and Garnett (n 6) 8-023; Caddick, Davies and Harbottle (n22) 3-110.
- ³⁶ Pila, 'An Intentional View of the Copyright Work' (n 35) 542
- ³⁷ (1892) 2 QB 113 (CA).
- ³⁸ Pila, 'Copyright and Its Categories of Original Works' (n 20) fn 65, 237. In most jurisdictions, copyright statutes generally state that copyright subsists for the statutory period once an eligible work is fixed. To my knowledge, nowhere in any copyright statute is it suggested that copyright protection may expire prematurely.
- ³⁹ Pila, 'An Intentional View of the Copyright Work' (n 35) 542.
- ⁴⁰ It is cited in textbooks on evidence e.g. A. Keane and P. McKeown, *The Modern Law of Evidence* (Oxford University Press 2014), 575.
- ⁴¹ Karlen (n 19) 392.
- ⁴² Davies and Garnett (n 6) 8-023.
- ⁴³ *Ibid.*
- ⁴⁴ Agustin Waisman, 'Rethinking the moral right to integrity' (2008) 3 *Intellectual Property Quarterly* 268.
- ⁴⁵ *Ibid.*, 272-273.
- ⁴⁶ Deming Liu, 'English copyright law makes the poor "snowman" poorer' 35 *European Intellectual Property Review* 674, 680.
- ⁴⁷ Terry Barrett, *Criticizing Art: Understanding the Contemporary* (Second edn, Mayfield Publishing Company 2000), 63; Arnold Isenberg, 'Perception, Meaning and the Subject-Matter of Art' (1944) 41 *The Journal of Philosophy* 561; David F. Bowers, 'The Role of Subject-Matter in Art' (1939) 36 *The Journal of Philosophy* 617.
- ⁴⁸ Liu (n 46) 680
- ⁴⁹ Iris Murdoch, *Metaphysics as a Guide to Morals* (Chatto & Windus 1992), 2.
- ⁵⁰ *Ibid.*, 3.
- ⁵¹ John Rood, *Sculpture in Wood* (University of Minnesota Press 1950), 21.
- ⁵² Alec Miller, 'Sculpture in Wood' (1930) 21 *The American Magazine of Art* 329, 333.
- ⁵³ John Dilworth, 'Medium, Subject Matter, and Representation' (2003) 14 *The Southern Journal of Philosophy* 45.
- ⁵⁴ James Elkins, *What Painting Is* (Routledge 2004).
- ⁵⁵ *Ibid.*, 5.
- ⁵⁶ *Ibid.*, 2.
- ⁵⁷ *Ibid.*, 5.
- ⁵⁸ *Ibid.*, 5.
- ⁵⁹ John Dewey, *Art as Experience* (Putnam 1934).
- ⁶⁰ Waisman (n 44) 271.
- ⁶¹ *Ibid.*, 272.
- ⁶² *Ibid.*, 271
- ⁶³ *Ibid.*, 271.
- ⁶⁴ *Ibid.*, at 269.
- ⁶⁵ *Ibid.*, 272-273.
- ⁶⁶ *Ibid.*, 274.
- ⁶⁷ Albert Elsen, 'Why Do We Care About Art' (1976) 27 *Hastings Law Journal* 951, 955.
- ⁶⁸ This is a position I have argued elsewhere. [Author and Citation details omitted] *Oxford Journal of Legal Studies*, forthcoming 2016.
- ⁶⁹ Amie L. Thomasson, 'Debates about the Ontology of Art: What are We Doing Here?' (2006) *Philosophy Compass* 245.
- ⁷⁰ *Ibid.*
- ⁷¹ Karlen, *Legal Aesthetics* (n 16) 209.
- ⁷² Amie L. Thomasson, 'The Ontology of Art' in Peter Kivy (ed), *The Blackwell Guide to Aesthetics*, 78, 79
- ⁷³ R.G. Collingwood, *The Principles of Art* (Oxford University Press 1958)
- ⁷⁴ Gregory Currie, *An Ontology of Art* (Macmillan 1989)
- ⁷⁵ Andy Hamilton, 'Review of An Ontology of Art by Gregory Currie' (1990) 40 *The Philosophical Quarterly* 538
- ⁷⁶ Gregory Currie, 'The Authentic and the Aesthetic' (1985) 22 *American Philosophical Quarterly* 153. This view has also been expounded by others. See e.g. Arthur Koestler, *The Act of Creation* (Hutchinson 1964); Alfred Lessing, 'What is Wrong with a Forgery' (1965) 23 *Journal of Aesthetics and Art Criticism* 461.
- ⁷⁷ Jerrold Levinson, 'Review of Gregory Currie's An Ontology of Art' (1992) 52 *Philosophy and Phenomenological Research* 215.
- ⁷⁸ *Ibid.*, 217.
- ⁷⁹ *Ibid.*, 218.

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- ⁸⁰ Denis Dutton, 'Artistic Crimes' (1979) 19 *The British Journal of Aesthetics* 302.
- ⁸¹ As suggested by Lessing (n 76).
- ⁸² Denis Dutton, *The Art Instinct* (Oxford University Press 2009), 188-193.
- ⁸³ Jonathan B. Wight, 'Adam Smith's Ethics and the "Noble Arts"' (2006) 64 *Review of Social Economy* 155, 171-172
- ⁸⁴ Richard Wollheim, *Art and its Objects* (2nd edn, Cambridge University Press 1980); Nicholas Wolterstorff, *Works and Worlds of Art* (Clarendon Press 1980)
- ⁸⁵ Thomasson, 'The Ontology of Art', 78
- ⁸⁶ *Ibid.*, 79
- ⁸⁷ *Ibid.*, 79, 89
- ⁸⁸ *Ibid.*, 79.
- ⁸⁹ *Ibid.*, 79-80, 84-90.
- ⁹⁰ *Ibid.*, 88.
- ⁹¹ *Ibid.*, 89.
- ⁹² Thomasson, 'Debates about the Ontology of Art: What are We Doing Here?'
- ⁹³ Davies and Garnett (n 6) 8-023
- ⁹⁴ Dutton, 'Artistic Crimes'
- ⁹⁵ Jennifer Jenkins, 'Where Beauty Lies - Fakes and Forgeries' (1995) LXXXIII *The Philosopher* 6