WELCOME TO THE MUSEUM OF LAWSUITS: AN IMAGINED TOUR OF ART CAUGHT IN LEGAL BATTLES

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This paper is a journey through a fictional museum covered in art with various legal backstories and even some stories that have yet to be completed. The first part of this paper discusses art restitution cases and includes a discussion about a case that just recently made its second appearance in front of the United States Supreme Court. The second part discusses ownership and destruction of art, and the third part similarly discusses both ownership and destruction but in the context of aerosol art. The fourth and final part of the paper focuses on art caught in copyright cases and concludes on the most recent appellate court case dealing with AI

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INTRODUCTION

Hello! Come in! Welcome to the Museum of Lawsuits. I hope you're ready to take a glance at some of the most famous artwork caught up in legal battles. It's funny how when I started the museum, I never imagined that my collection would become so expansive. Prior to the 1970s, my museum was practically barren.[1] No art, but this is because before the 1970s, art law was practically nonexistent.[2] As art law became more of a well-known practice, my collection also grew. As more lawsuits came up in the field of art law, more paintings began to fill up the walls in my museum. What started out as a barren museum covered in empty walls became one of the most expansive art museums in the world. Every time that a piece of art becomes the subject of a lawsuit, it magically appears on the walls of my museum. While we will not have time to see every piece, I'll make sure you get to see some of my personal favorites. Two timely cases have added new works to the museum, and we will be taking you through the collection to place these in context: one involves a painting stolen by Nazis in 1939 and the other, an artist claiming that AI created artwork that should be protectable by copyright. Both were subjects of the U.S. courts in March 2025.

But before I tell you about the tour, let me tell you a little bit more about the museum. To understand how a museum works, we need to know what a museum is. "A museum is a not-for-profit, permanent institution in the service of society that researches, collects, conserves, interprets and exhibits tangible and intangible heritage. Open to the public, accessible and inclusive, museums foster diversity and sustainability."[3] Furthermore, museums "operate and communicate ethically, professionally and with the participation of communities, offering varied experiences for education, enjoyment, reflection and knowledge sharing."[4] For a museum to function as a museum, it must adhere to that definition. If I were to take away public access to my museum, it would no longer be a museum or receive the benefits that a museum is legally allowed to receive. This is why I leave my museum open to the public all day, every day.

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[1] *See* Lawrence M. Kaye & Howard N. Spiegler, *Preface, in* THE ART LAW REVIEW (Lawrence M. Kaye & Howard N. Spiegler eds., 2021) [hereinafter *Preface*].
[2] *See* John Henry Merryman, Albert E. Elsen, and Stephen K. Urice, *Introduction in* LAW, ETHICS AND THE VISUAL ARTS. (5th ed. 2007)
[3] *Museum Definition*, INTERNATIONAL COUNCIL OF MUSEUMS: STANDARDS AND GUIDELINES, https://icom.museum/en/resources/standards-guidelines/museum-definition/ (last visited Mar. 26, 2025).
[4] *Id.*

Part I looks at a number of art restitution cases, including the most recent decision in *David Cassier, et al. v. Thyssen-Bornemisza Collection Foundation*. The first room on Part I of the tour is the Lewenstein Family Room. This room will tell the stories of the lawsuits filed by the heirs of the Lewenstein family to get back two of their Kandinsky paintings, *Colorful Life* (1907) and *Painting with Houses* (1909). We will also briefly look at the Room with the Woman in Gold where we will learn a little about the legal stories surrounding the famous Gustav Klimt painting, *Portrait of Adele Block-Bauer I* (1907). Next, in The Room that Goes on Forever, the District Court's and Appellate Court's decisions will create a legal landscape to explain the legal dispute over a Monet impressionist landscape painting. Then we will have a chance to see a work that is on loan from the National Gallery. This room will discuss the history and lawsuit surrounding the *Portrait of Greta Moll* (1908), created by Henri Matisse. Unfortunately, this room is not a permanent fixture in the museum because the court decided that it belonged at the National Gallery, and not with the original owners. We then conclude this section with the most recent addition to the museum, the Camille Pissarro painting, *Rue St Honoré, Apres-midi, Effet de Pluie* (1897) and its 20+ year legal battle over ownership, with its most recent development occurring at the U.S. Supreme Court in March 2025.

All of these works discussed so far have been embroiled in fights over ownership and destruction. Part II will also touch on ownership disputes but not disputes from World War II. The first room in Part II of the tour is the Room of Many Rothkos. It is an extremely expansive room that covers the legal dispute of Rothko's estate and tells the story of how his children fought to get his life's work back. In this room you will see 789 different works that created the estate of Rothko, and you will hear the result of the legal dispute between the executors and his family. It is important to juxtapose this family with the others, all fighting to get back art that was inappropriately taken from them. The Room with the Tattered Masterpiece is next. In this room you will learn about Ilya Repin and his painting *Ivan the Terrible and His Son Ivan 1581* (1883-1885). Specifically, you will learn about the impact he and his work had on Russian culture.

I assume you all will want a break for lunch or a break to step outside and get fresh air. At this point you are welcome to take a Quick Step into the Courtyard. In the courtyard, which is also Part III of the tour, you will be able to see and learn about a bankruptcy case that deals with legal issues behind a Banksy painting created on leased property and how the case was decided, and a second case that involves artwork also on a building and the dispute surrounding its destruction.

After a Quick Step into the Courtyard, I'd be delighted to have you join me in the newest addition to the Museum of Lawsuits: The Copyright Wing! The magic of owning this museum is that, as you'll find out, things just appear. Some might say it's kind of a circus, but here we see the act of creation in progress. Where the earlier rooms focused on the ownership of the object, Part IV looks to the act of creation itself. We revisit key copyright cases about photographs, circus posters, and rock stars, along with movie stars, monkeys, and the latest, AI. So, to

avoid spoiling any of the lovely things you'll see in the Copyright Wing, I'll just wait for you to join me there.

This is just a small sampling of the Museum of Lawsuits. There are many more topics and beautiful artwork that are included, but unfortunately, after the Copyright Wing the tour will come to an end. As I walk you to the door, we will discuss everything we covered during the tour, and I will send you on your way. So, now that you know where we're going, let's begin!

I. TAKEN: SOME ART RESTITUTION CASES

Beautiful paintings now worth millions of dollars have been the subject of ownership disputes, and no more so than the art restitution cases coming out of World War II. This Part will look briefly at the history, and then dive into some of the cases, a sample of what the Museum of Lawsuits includes. It is, after all, where I began the collection that grew into the museum.

A. I Bet You Thought I'd Skip a History Lesson

As we walk down the hall to the first room, I think it would be beneficial for you to hear a little bit about why we have art law, and why there wasn't much of a need for art law until the 1970s.[5] You will notice as we walk through the Museum of Lawsuits that a lot of the stories started as a consequence of World War II. While the paintings may have been painted prior to the start of the war, their stories of being admired on walls are their backstories, not the reason why they're hanging here in the Museum of Lawsuits.

Our lesson begins back in 1933 when the Nazis rose to power and began to terrorize Jewish citizens in Germany.[6] Throughout the 1930's, the Nazis began to "coerce Jews to transfer business holdings to non-Jews at prices far below market value."[7] This was true with regard to Jewish art businesses and private art collections as well, where Jewish families with art collections were often coerced to sell or abandon their artwork[8]

Nazi looting was prevalent and is well documented.[9] Some of the documentation includes records of the "theft, storage, and cataloging of thousands of paintings, some of which ended up in the private collections of Adolf Hitler,

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[5] For a history of the development of art law, *see* the introduction TO JOHN HENRY MERRYMAN, ALBERT EDWARD ELSERI, ET. AL, LAW, ETHICS AND THE VISUAL ARTS (2d 2008).

[6] Scott M. Caravello, *The Role of the Doctrine of Laches in Undermining the Holocaust Expropriated Art Recovery Act*, 106 VA. L. REV. 1769, 1776 (2020).

[7] *Id.*

[8] *Id.*

[9] *See generally* LYNN H. NICHOLAS, THE RAPE OF EUROPA (1994) (exploring and documenting how the Nazi regime systematically and pervasively plundered cultural objects).

Hermann Goering, and other lesser-known Nazi functionaries."[10] While the art was being looted, the Nazis separated the art into two groups: art that was considered acceptable by Hitler's standards, and art that was considered to be degenerate art.[11] The degenerate art was normally made by Jewish artists and/or contained depictions of Jewish subjects, as well as modern art like Cubism, Dadaism and Futurism.[12] Degenerate art was also removed from museums, while the acceptable art, often propaganda, remained in museums or was placed in the personal collections of Hitler and other high ranking Nazi officials.[13]

Artifacts, like the art looted by the Nazis, have been referred to as "the last 'prisoners of war.'"[14] After the war ended, "Allies concluded that there were 249,683 looted works of art at the Central Collecting Point in Munich." Countries like Vienna and Germany and other occupied countries have since begun implementing sporadic restitution programs to help return the art to its former owners.[15] While this has been helpful, and some of the art has been returned, a lot of the art has remained lost more than seventy years after the end of World War II.[16] Many works were never found or recovered, not to mention the all of the works destroyed as degenerate. Between the Nazi looting and destroying and then the Allies collecting and moving the art, the upheaval and unsettledness continues to this day.

There are still international efforts working to recover and return the missing art.[17] Even today, legal cases concerning Nazi looting are still being brought to court by heirs seeking restitution.[18] Don't believe me? On March 10, 2025, the U.S. Supreme Court granted certiorari and remanded a case back to the Ninth Circuit having to do with a Pissarro painting looted by the Nazis in 1939. We'll get back to that, don't you worry.

Despite knowing the history, some private gallery owners and even museums are not always willing to give a painting back to the family seeking restitution.[19] World War II's chaotic disturbance of art provided new opportunities for forgeries, other art was destroyed or lost, and those are just two topics that make up art law. As we move through the Museum of Lawsuits, you will see examples of these struggles, among other different legal battles, that have become prevalent in the field of art law. Now, I ask that you keep our history lesson in mind as we finally

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1776-77.
[14] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 Eur. J. Int'l L. 49, 50 (2011).
[15] Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 Vand. J. Transnat'l L. 1041, 1043 (2005).
[16] Lior Zemer & Anat Lior, *Inhuman Copyright Scene: The Forgotten Law of Art in the Holocaust*, 2022 Utah L. Rev. 353, 367 (2022).
[17] *Id.*
[18] *Id.*
[19] *Id.*

cross the threshold of the Lewenstein Family Room, the first of a number of Rooms focused on Nazi looted art cases.

B. Lewenstein Family Room

Welcome to the first room on the tour! If you look around, you'll see two paintings, the one on the right is *Colorful Life* painted in 1907 by Wassily Kandinsky.[20] It's a beautiful painting done in the divisionism style, meaning small daps of paint were placed adjacently along the canvas to create the effect of light.[21]

Figure 1: Wassily Kandinsky, Colorful Life (1907)

Now, if you look to the right you'll see another Kandinsky, this one is an oil painting titled *Painting with Houses*, which was completed in 1909.[22] Before I get ahead of myself and get lost in the incredible Kandinskys, let me tell you why both of these paintings ended up on the walls of the Museum of Lawsuits.

[20] *Colorful Life*, KANDINSKY, https://www.wassilykandinsky.net/work-1.php (last visited Apr. 9, 2024).
[21] *Divisionism*, TATE, https://www.tate.org.uk/art/art-terms/d/divisionism (last visited Apr. 9, 2024).
[22] *Painting with Houses*, KANDINSKY, https://www.wassilykandinsky.net/work-1.php (last visited Apr. 9, 2024).

Figure 2: Wassily Kandinsky, Painting with Houses (1909)

Emanuel Albert Lewenstein, a passionate art collector, grew up in the Netherlands.[23] His father, Adolph Lewenstein, owned and operated an extremely successful sewing company in the Netherlands that came to be known as N.V. Amsterdamsche Naaimachinenhandel.[24] Emmanuel used this fortune to begin his own personal, and extremely extensive art collection, and even inherited some of the masterpieces in his collection from his father.[25] While some of the masterpieces were acquired from his father, the two on the walls today came from his uncle Paul Citroen and his photographer friend Erwin Blumenfeld.[26] When Emmanuel passed in 1930, his wife, Hedwig, managed the art before it was passed on to his two children Robert and Wilhelmine.[27]

After the start of World War II, when the Nazi's invaded the Netherlands, the Lewenstein children were forced to flee and find safety.[28] When the Lewensteins fled, their art remained in the Netherlands, and eventually the art was brought to the Fredrik Muller auction house in October of 1940 by an unknown individual.[29] *Colorful Life* was sold for "a fraction of the market value," and *Painting with*

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[23] *The Emanuel Lewenstein Collection*, MONDEX CORPORATION, https://www.mondexcorp.com/the-emanuel-lewenstein-collection/ (last visited Apr. 9, 2024) [hereinafter *Lewenstein Collection*].

[24] *Id.*

[25] *Id.*

[26] *Id.*; For more information on his uncle, *see Paul Citron*, MUSEUM OF MODERN ART, https://www.moma.org/artists/1129-paul-citroen (last visited Mar. 26, 2025); For more information on his close personal friend, *see Homepage*, ERWIN BLUMENFELD, https://erwinblumenfeld.com/ (last visited Mar. 26, 2025*).*

[27] *Lewenstein Collection, supra* note 25.

[28] *Id.*

[29] *Id.*

Houses was "obtained under dubious circumstances," and then sold at an extremely low price.[30] Now, the journey doesn't end here, so let me tell you why the art is here today, starting with *Colorful Life*.

Colorful Life was hung in the Städtische Galerie im Lenbachhaus in Munich, Germany on loan from a state-owned bank before the Lewenstein heirs filed suit in 2017 in the Federal District Court in Manhattan demanding its return.[31] The heirs claimed that the painting was left in the Netherlands at a museum for safekeeping before being stolen and sold at auction, but the bank said the art was acquired legally.[32] While the suit started at the Federal District Court in Manhattan, it did not remain there, and arguments were instead heard by the German government's advisory panel on Nazi-looted art in 2023.[33]

The Assembly determined that since the art was taken while the Lewensteins were being persecuted by the Nazis and that leaving the art was involuntary, the Lewensteins were eligible for restitution.[34] The Advisory Commission stated that "'[t]here are numerous indications that this was a case of a seizure as a result of Nazi persecution,'" because of "'[t]he systematic exclusion, disenfranchisement and dispossession of the Jewish population of the Netherlands began immediately after the invasion of the German Wehrmacht on May 10, 1940."[35] Additionally, the bank's inability to show that the painting was voluntarily consigned by the Lewenstein family further solidified the assembly's decision.[36] While it took five years of legal disputes, both in the United States and in Germany, I am happy to announce that the painting is now back in possession of the Lewenstein heirs.

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[30] *Id.*

[31] Colin Moynihan & Alison Smale, *Heirs Sue for Return of a Kandinsky, Saying It Was Looted by Nazis*, The New York Times (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/arts/design/heirs-sue-for-return-of-a-kandinsky-saying-it-was-looted-by-nazis.html; Catherine Hickley, *German Panel Says Kandinsky Painting Should Go Back to Jewish Heirs*, The New York Times (Jun. 13, 2023), https://www.nytimes.com/2023/06/13/arts/kandinsky-painting-german-bank-jewish-heirs.html.

[32] Moynihan & Smale, *supra* note 33 (The initial Complaint asserted that "[t]he painting was taken from its legitimate owners in 1940 in violation of international law.") (internal citations omitted).

[33] Hickley, *supra* note 33.

[34] *Id.*

[35] Recommendation of the Advisory Commission in the case of the Heirs of Hedwig Lewenstein Weyermann and Irma Lewenstein Klein v. Bayerische Landesbank, Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz. [hereinafter Recommendation of the Advisory Committee].

[36] *Id.*

Painting with Houses was also returned to the Lewenstein heirs, but this time by the decision made by the Dutch Restitution Committee on November 1, 2018.[37] In a similar situation to that of the German assembly, the Dutch Restitution Committee determined that the sale could neither be separated from the Nazi regime, nor could the sale be considered voluntary.[38] There was a large discussion on the art as the City Council had previously ruled that the purchase was not done in bad faith, and allowed the museum to keep the Kandinsky.[39] This required the Committee to balance interests of the claimant versus the City Council.[40] The Committee in a binding opinion determined that the interests of the heirs did not outweigh those of the City Council in keeping the painting.[41] Keep reading because the story does not stop here!

In February 2022, the City of Amsterdam returned the painting back to the heirs of the Lewenstein family.[42] That was also the day that *Painting with Houses* appeared on the walls of my museum-when the issue was finally settled. This was done after a committee created by the Dutch culture minister faulted the decision made by the Committee and their balancing test.[43] The faulting caused members of the commission, and the chairman himself, to resign from their positions on the Restitution Committee.[44] The City of Amsterdam understood the financial hardships of the original Lewenstein owners, which was brought onto them by the Nazi invasion, and agreed with the heirs that restitution was appropriate.[45] Now, thankfully, *Painting with Houses* and *Colorful Life* are both back in possession of the Lewenstein family.

A. Woman in Gold Room

We all know this painting, and its story, thanks in part to a movie with the same name.[46] This case has many of the same elements we see in these cases. A family is fleeing for their life. They leave behind art. Those that obtain the art don't want to give it back to the owners. A lawsuit ensues that is riddled with procedure.

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[37] *Dutch Restitution Decision re Kandinsky 'Painting with Houses: 'Interest of the claimant in restitution does not outweigh the interest of the [Museum] in retaining the work,'* LootedArt: Restitutions and Case News (Nov. 1, 2018), https://www.lootedart.com/U1VEU5151251.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Recommendation of the Advisory Committee, *supra* note 37, at 13.
[42] Colin Moyniham, *Kandinsky Painting Returned to Jewish Heirs by Amsterdam Museum*, The New York Times (Feb. 28, 2022), https://www.nytimes.com/2022/02/28/arts/design/kandinsky-painting-returned.html.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Woman in Gold (BBC Films Origin Pictures 2015).

Maria Altman sued to reclaim her family's Gustav Klimt 1907 painting of her aunt, Adele Block-Bauer.[47] The case would make it all the way to the U.S. Supreme Court, in an effort to force the Austrian government to return the painting. In the end, Altman would win her case in 2004.[48] The case came down to whether her aunt had donated the painting in her will. It turned out she had not, and that in fact, her husband Ferdinand had the power to decide the painting's fate. Upon his death, he willed the painting and all of his possessions to his nephews and nieces, and Maria was the only surviving one in 1998. The win at the U.S. Supreme Court was the right to sue the Austrian government. Austria agreed to arbitration, and in the end the Klimt painting was returned to Maria.

The U.S. Supreme Court case centered on the concept of the "anti-retroactivity doctrine" that statutes, unless stated otherwise, do not apply retroactively. In this case, the statute at issue was the Foreign Sovereign Immunities Act, which was enacted in 1976. The question was did Maria have the right to sue the Austrian government in U.S. courts? The U.S. Supreme Court said yes. Justice Stevens wrote the opinion. He begins, "In 1998 an Austrian journalist, granted access to the Austrian Gallery's archives, discovered evidence that certain valuable works in the Gallery's collection had not been donated by their rightful owners but had been seized by the Nazis or expropriated by the Austrian Republic after World War II."[49] Among those were six Klimt paintings from the home of Ferdinand Blo-Bauer. Stevens explains, "In response to these revelations, Austria enacted a new restitution law under which individuals who had been coerced into donating artworks to state museums in exchange for expert permits could claim their property…" but in this case the Klimt paintings had been "freely donated" before the war, claimed Austria. Maria first filed in Austria, but because of expense, voluntarily dismissed the case, and refiled in California. The Austrian government claimed sovereign immunity based on retroactively applying the FSIA. The District Court, the Appeals court and the U.S. Supreme Court rejected that idea, all on slightly different reasoning.

[47] Nina Totenberg, *After Nazi Plunder, A Quest to Bring home the "Woman in Gold*, NPR, (Apr. 2, 2025), https://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home.
[48] Republic of Austria v. Altmann, 541 U.S. 677 (2004).
[49] *Id.*

Figure 3: Gustav Klimt, Portrait of Adele Block-Bauer I, otherwise known as the Woman in Gold (1908).

B. The Room That Goes on Forever

This is one of my favorite rooms, and I'm guessing it will be some of yours too, if you're a Monet fan. Look around and look deeply into the landscape that you see ahead of you. It seems to go on forever, doesn't it? Unfortunately, that's also how the legal battle felt, too.

Figure 4: Claude Monet, Wheat Fields (1908)

The story of this landscape, one depicting wheat fields, a village, and trees outside of Paris, France, begins when Karl von der Heydt purchased the painting in 1908.50 The painting remained in Karl von der Heydt's home in West Germany until his death in 1922, when it was inherited by Gerda Dorothea DeWeerth.51 The Painting remained with DeWeerth except from 1927 through 1929 when she kept it at her mother's home.52 At no point in DeWeerth's ownership did she sell nor dispose of the Monet, nor did she entrust anyone to do so.53 In 1943 during WWII, DeWeerth sent the landscape, among other valuables, to her sister in Oberbalzheim, and never saw the painting again.[54] DeWeerth was informed that the painting was removed from her sister's house, but there was no evidence that would explain how the painting disappeared.[55] District Judge Vincent L. Broderick surmised that either one of the American soldiers quartered in DeWeerth's sister's home, or a different unknown individual had stolen the painting.[56]

As soon as DeWeerth was put on notice that the painting was stolen, she attempted to locate the painting, and in 1946 she began reporting the painting as stolen and sought legal help.[57] In 1956 the painting was discovered at an art gallery in New York City, and was reported to have come from an art dealer in Switzerland.[58] The painting was sent to Mrs. Baldinger, who purchased the painting in good faith, who subsequently displayed the painting two times before exclusively maintaining the Monet in her Park Avenue residence.[59] In 1981, DeWeerth's nephew informed her that the missing Monet was placed on exhibit in 1970, and in 1982 DeWeerth retained legal counsel.[60] Later that year DeWeerth brough action to discover who owned the painting, and the New York State

[50] DeWeerth v. Baldinger, 658 F. Supp. 688, 690 (S.D.N.Y. 1987).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *DeWeerth*, 658 F. Supp. at 690 (The Court was even bold enough to "infer that either one of those [American] soldiers [quartered in her residence], or someone else, *stole* the painting.").
[56] *Id.*
[57] *DeWeerth*, 658 F. Supp. at 691 (Mrs. DeWeerth made extensive efforts to reunite with this Monet, including reporting the loss to the military government in the Bonn-Cologne area, soliciting legal advice, getting in touch with a leading art expert in an attempt to find and recover the piece, and reporting it as missing to the *Bundeskriminalamt* (the German FBI).).
[58] *Id.*
[59] *Id.* (Mrs. Balinger purchased it from an art gallery in New York, who ostensibly purchased it from a reputable art dealer in Geneva, Switzerland. From whom this art dealer purchased the Monet from is unknown.).
[60] *Id.*

Supreme Court sided with DeWeerth, which is when she discovered that the painting was owned by Baldinger.[61]

On December 27, 1982, DeWeerth sent a letter to Baldinger demanding the return of the Monet, and when the request was denied, DeWeerth filed suit in the United States District Court in the Southern District of New York.[62] The District Court determined that DeWeerth owned the painting by inheriting it from her father and that she neither entrusted anyone to sell it, nor did she ever sell the painting.[63] Additionally the Court stated that Baldinger could only prevail if title could be traced back to DeWeerth, but that was impossible for her to accomplish.[64]

Defendant tried to seek "damages for her 'considerable personal distress and anguish'" due to DeWeerth's claim that it was her painting, and for the diminution of value the suit caused for the Monet.[65] The Court determined that the claim was without merit before moving on to Baldinger's remaining affirmative defenses: adverse possession and gratuitous bailment.[66] The adverse possession claim failed because the possession needed to be open and notorious.[67] Since the landscape remained primarily in her Park Avenue residence, the District Court determined that the two exhibitions that Baldinger sent the Monet to were not enough to prove adverse possession.[68] In regard to the gratuitous bailment defense, this also failed because sending the painting for safekeeping did not constitute gratuitous bailment, especially during wartime.[69] The District Court's determined that the judgment was to be rendered in favor of DeWeerth, and that Baldinger needed to return the painting directly to its original owner.[70]

Baldinger appealed, and the United States Second Circuit Court of Appeals analyzed whether or not the District Court had jurisdiction, and if they abused their discretion when they granted relief to DeWeerth.[71] The Second Circuit determined that the District court erred when they excused DeWeert's failure to search for the Monet after 1957. The Court argued that since she was a sophisticated and wealthy art collector, she could have kept looking for the painting, or at least hired someone to search for her. Additionally, the quick discovery of the painting by her nephew makes it clear that the exhibition information was accessible to anyone who tried to look for the painting. Also, key documents and information relevant to the case were missing, and memories from when DeWeerth initially claimed to have reported the missing painting could have

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[61] *Id.* at 692.
[62] *DeWeerth*, 658 F. Supp. at 692.
[63] *Id.* at 695.
[64] *Id.* at 696.
[65] *Id.* at 696.
[66] *DeWeerth*, 658 F. Supp. at 697.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 698.
[71] DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987).

faded over time. The Second Circuit determined that it would be unjust to require "a good faith purchaser who has owned a painting for 30 years to defend under these circumstances."[72] Additionally, the Second Circuit determined that this injustice is avoided by requiring a "property owner to use reasonable diligence in locating [their] property."[73] For those reasons, the Second Circuit determined that DeWeerth failed to meet her burden, and that the painting was to remain with Baldinger.[74]

While this is not the happy ending for DeWeerth, this painting has found its home in the Museum of Lawsuits. This legal battle shows the importance of having all the facts, and the importance of never giving up when you're trying to protect your art, or you risk losing it forever. It also teaches us that sometimes behind the most beautiful landscapes, we find less beautiful stories.

C. On Loan from the National Gallery

Welcome to the most temporary room on the tour. The room On Loan from the National Gallery (the one in England). This is one of my least favorite decisions, and soon you'll see why.

Figure 5: Henri Matisse, Portrait of Greta Moll (1908)

[72] *Id.* at 112.
[73] *Id.*
[74] *Id.*

The *Portrait of Greta Moll* was created in 1908 by Henri Matisse.[75] Moll was a sculptor who had previously had her portrait painted by Lovis Corinth.[76] Matisse disliked the portrait, and offered to paint her a different portrait, one that he didn't dislike.[77] Moll's husband purchased the portrait from Matisse after its completion, and owned the painting until he died in 1947, when ownership transferred to Moll.[78] Moll feared the impending division of Berlin, and gave one of her husband's former students the portrait for safe keeping while she moved to Wales to stay with her daughter.[79] Instead of keeping the portrait safe, the student sold the painting in Switzerland, without Moll's authorization, and kept the money for themself.[80] After multiple different transfers of ownership, in 1979 the portrait ended up at the National Gallery.[81] No one at the National Gallery acted on the red flags of the first transfer of ownership of the portrait following WWII, and neglected to tell public authorities who would have been able to look for the original owner.[82]

The individuals, who sought to have the painting returned by the National Gallery "were prevented from pursuing their claims to the Painting by the British Museums Act of 1963 and the Museums and Galleries Act of 1992." The acts serve to protect British Museums, like the National Gallery from the disposal of what they consider to be their property.[83] Those seeking the return of the portrait then gave notice to the National Gallery about the painting's theft, and after the National Gallery refused to return the painting they involved the Spoilation Advisory Panel.[84] The Spoilation Advisory Panel was unable to help as the theft occurred in 1947 and they only dealt with the Nazi-era which ended two years prior in 1945.[85] The individuals then demanded the return of the portrait in April 2015, and after the National Gallery's refusal to return the portrait, the Plaintiffs filed suit in district court and then appealed. [86]

The Plaintiff's tried to argue that there was an expropriation exception under FISA which would apply to the portrait.[87] "Under 28 U.S.C. § 1605(a)(3) a foreign state is not immune from jurisdiction in a case where" the plaintiff proves four things.[88] First, that "rights in property are in issue; [second] that the property was

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[75] *Portrait of Greta Moll*, ART UK, https://artuk.org/discover/artworks/portrait-of-greta-moll-115021 (last visited May 15, 2024).
[76] *Id.*
[77] *Id.*
[78] Williams v. Nat'l Gallery, London, 749 F. App'x 13, 15 (2d Cir. 2018).
[79] *Id.* at 15.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Williams*, 749 F. App'x at 15.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 16.
[87] *Williams*, 749 F. App'x at 16.
[88] *Id.*

'taken'; [third] that the taking was in violation of international law; and [fourth] that one of the two nexus requirements is satisfied."[89] The Second Circuit also explained that in the test, the object must be taken by a public actor, not a private actor.[90] Since the act of taking the portrait was done by a private actor, Moll's husband's student, FISA is not applicable.[91] Since the appellants could not prove the expropriation exception was applicable, the Court of Appeals affirmed the District Court's decision.[92]

The affirmation of the District Court's decision is what allowed the *Portrait of Greta Moll* to remain at the National Gallery. Unfortunately, this piece is on loan, as the National Gallery won't approve of me keeping it here forever but stay and look at the portrait for as long as you'd like. Please don't take too long though because we have a few more rooms to go.

D. Refusal, Spanish Style?

The cases discussed so far are merely a sampling of the Nazi Looting cases. The latest is *David Cassirer, et. al. v. Thyssen-Bornemisza Collection Foundation*, and on March 10, 2025, the U.S. Supreme Court granted certiorari. The tale will sound familiar – families fleeing, a museum unwilling to give back the art, and a fight over jurisdiction to decide ownership.

The painting was owned by David Cassier's grandmother, when it was stolen by Nazis, and is now owned by a state Spanish museum. The question is which law applies, which is where our conversation begins. In Spain, the museum would acquire title after seven years, even if it was stolen. Under a new California law, "thieves cannot pass good title."[93] Let's dive in.

When this case made it to the lower courts, a very important question was presented: which rule of law would be chosen?[94] The Plaintiffs wanted California, and the Defendants wanted the court to follow federal common law. The lower courts, "relying on a minimally reasoned Ninth Circuit precedent, picked the federal option."[95] This resulted in the Foundation being considered the rightful owner since they did not know the painting was stolen, and they had it in their possession for enough time.[96]

In 2022, the Supreme Court took this case to resolve a circuit split in which the Ninth Circuit was the only Circuit to follow federal law, as the Ninth Circuit

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Cassier's Case Continues*, Transnational Litigation Blog (Mar. 14, 2025), https://tlblog.org/cassirers-case-continues/ (last visited March 22, 2025).
[94] Cassirer v. Thyssen-Bornemisza Collection Found., 596 U.S. 107, 112, 142 S. Ct. 1502, 1507 (2022).
[95] *Id.*
[96] *Id.*

had initially decided this case using Spanish law.[97] The Supreme Court decided that the Ninth Circuit should apply state, rather than federal choice-of-law rules as it was the more common approach to resolving this issue.[98] The reason the Supreme Court was insistent on using state versus federal law was because if this were "comparable private litigation" under 28 USCS §1606 dictates the right choice of law would be state and not federal law.[99] The Supreme Court went further to say that even if 28 USCS §1606 did not state what it did, then the court should have reached that very same result.[100] Since there was no need for there to be federal law, since this was a "suit raising non-federal claims," the Court vacated and remanded the case back to the Ninth Circuit.[101]

Once this case returned to the Ninth Circuit not much had changed from the last visit. The Court went through a three part analysis to determine if there were different applicable laws, if there were jurisdictional interests in applying those laws, and then a comparison to see whose interests would be the most impaired by the selection of the other jurisdictions laws.[102] Unfortunately, after this analysis, the Court determined that since Spain had the painting in its possession for a period of time long enough to gain ownership, their interests would suffer more if California law was applied.[103] The Court also noted that the Spanish law is accommodating to the California interests because it would only partially impair the interest rather than fully impairing the interests which would happen if California law was chosen.[104]

[97] *Cassirer*, 596 U.S. at 113.
[98] *Id.*
[99] *Cassirer*, 596 U.S. at 107-08.
[100] *Id.*
[101] *Id.*
[102] *Ninth Circuit Decides Cassier in Favor of Spain*, Transnational Litigation Blog, (Jan. 10, 2025), https://tlblog.org/ninth-circuit-decides-cassirer-in-favor-of-spain/.
[103] *Id.*
[104] *Id.*

Figure 6: Camille Pissarro, Rue St. Honore, Apres-Midi, Effect de Pluie (1897)

This is not where the story ends, in response to this case, the California legislature got involved and passed a new law: California had to apply California laws to claims brought by California residents "involving the theft of art or other personal property during the Holocaust or other political persecutions."[105] Once this new law was passed, Cassirer filed a petition with the Supreme Court to vacate and remand the case back to the Ninth Circuit, and the petition was granted.[106] Now at this point, this is as much about the case as I can tell you… but what I can say is that we might want to keep our eyes on any Supreme Court or Ninth Circuit decisions coming out soon. You just might have to return to the Museum of Lawsuits to see if there have been any big changes to the story!

While I would love to stay in this room for hours, I think it's time we move onto the Room of Many Rothkos. This is also where we move from WWII restitution cases to questions of and the obligations of an executor of an estate.

II. OWNERSHIP AND DESTRUCTION

A. Room of Many Rothkos

Take a moment and breathe this room in. Look around . . . I'll wait. In this room you're surrounded by an artist's life work. The collection of every masterpiece he has ever created. Not just any man's life work though, right now

[105] *Cassier's Case Continues*, *supra* note 93.
[106] *Id.*

you're some of the only people who will ever see all of Mark Rothko's art in one singular, but massive, room. Seven hundred eighty-nine paintings, all under one roof, and all caught up in the same lawsuit.[107]

Mark Rothko is one of the best artists of his generation most famous for his creations of a "new and impassioned form of abstract painting."[108] His story started on September 25th, 1903 in Russia before his family immigrated to the United States when he was ten.[109] After he moved to New York in 1923, he began taking art classes at the Art Students League.[110] While at the Art Students League in the mid 1920's, Rothko was taught by the teaching of Max Weber, a modernist painter, who was heavily influenced by Cubists, Fauvists, and Cezanne.[111] As we know, the Great Depression favored few, and artists were not one of them, so Rothko began to pick up work wherever he could find it.[112] Some of the jobs were toiling, bookkeeping, and even a part time teaching job.[113] During the 1930s and the beginning of the 1940s things began to take a turn for Rothko because he never quit believing that he would be a great painter.[114] This was also when his paintings were considered to be the "middle ground between abstraction and surrealism."[115] While he was beginning to have more successes, he was also beginning to have a shift in his medium.[116] At the end of the 1940s Rothko dabbled in watercolors of more muted greys and earth tones pushing him more towards Surrealism.[117] By the 1950's, Rothko's once bright and colorful work began to get darker as his depression became less and less manageable, and on February 25, 1970, the world renowned artist committed suicide.[118] Rothko's death then sparked a bitter legal dispute between the executors of his estate and his children over his estate of 798 paintings.[119]

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[107] Matter of Rothko's Est., 372 N.E.2d 291 (N.Y. 1977).
[108] *Mark Rothko*, National Gallery of Art, https://www.nga.gov/features/mark-rothko.html (last visited Apr. 10, 2024).
[109] *Id.*
[110] *Mark Rothko: Early Career (1903-1948)*, National Gallery of Art, https://www.nga.gov/features/mark-rothko/mark-rothko-early-years.html (last visited Apr. 10, 2024).
[111] *Biography*, Mark Rothko, https://www.markrothko.org/biography/ (last visited March 26, 2025).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Mark Rothko: Classic Paintings (1949-1970)*, National Gallery of Arts, https://www.nga.gov/features/mark-rothko/mark-rothko-classic-paintings.html (last visited Apr. 10, 2024).
[119] *See* Matter of Rothko's Est., 372 N.E.2d 291 (N.Y. 1977); *see* Rachel Cooke, *The art cheats who betrayed my father*, The Guardian (Sept. 19, 2008), https://www.theguardian.com/artanddesign/2008/sep/14/art1.

Kate and Christopher, Mark Rothko's two children sued the executors of his estate, Barnard Reis, Theodoros Stamos, Morton Levine, and Levine's gallery the Marlborough.[120] The Rothko children claimed that the executors had conspired with the gallery to "'waste the assets' of Rothko's estate and defraud them of their proper share."[121] They claimed that the executors were selling the paintings to the gallery for way less than the true market value in order to benefit themselves. One example the heirs provided was that the Marlborough once sold 100 paintings for less than $2 million.[122] They even set up a twelve year repayment schedule that excluded interest and only required a $200,000 down payment.[123] This was the start of the case that lasted over four years, and it was the reason why we have 798 paintings hanging on the walls in this room.[124]

In *Matter of Rothko's Est.,* the executors were seeking to have the order of the Appellate Division overruled.[125] The Appellate division in *Will of Rothko*, ruled that the executors owed damages to the heirs for their conflict of interest, and that the damages were the "appreciated value of the paintings at the time of trial," and the executors were held in accordance to their role they played in the sales.[126] Additionally, the court determined that the heirs could not reject any painting that was returned because of the decree.[127] In the attempt to obtain a reversal, the Court of Appeals of New York determined that the executors were urging "that an improper legal standard was applied in voiding the estate contracts of May, 1970, that the "no further inquiry" rule applies only to self-dealing and that in case of a conflict of interest, absent self-dealing, a challenged transaction must be shown to be unfair."[128]

In order to review this, the court had to analyze whether or not Reis and Stamos were guilty of conflicts of interest.[129] The court found that the conflicts are deeply intertwined in the sales that occurred between the executors.[130] Further, they said that in order to find that Reis and Stamos did not have conflicts of interests that they would have to stretch the law instead of follow the law to obtain their desired result.[131] Levine also tried to establish that there was a complete defense for their actions because they advised counsel in their transactions, but his alleged good faith was not a good enough reason for the Court to agree with

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[120] Rachel Cooke, *The art cheats who betrayed my father*, THE GUARDIAN (Sept. 19, 2008), https://www.theguardian.com/artanddesign/2008/sep/14/art1.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *See id.*
[125] 372 N.E.2d 291 (1977).
[126] 56 A.D.2d 499 (N.Y. App. Div. 1977).
[127] *Id.*
[128] *Matter of Rothko's Est*., 372 N.E.2d at 295.
[129] *Id.* at 296.
[130] *Id.*
[131] *Id.* at 296.

him.[132] After looking through all of the arguments brought by the executors in their attempt to overrule the decision of the Appellate Division, the Court determined that the arguments were without merit and affirmed the prior decision.[133]

This decision in favor of Rothko's children was instrumental in protecting Rothko's legacy. Kate, Rothko's oldest child, wanted the paintings not for the money, but instead she wanted the estate back because she "wanted to make sure that her father's wishes became a reality."[134] While the specifics of his wishes were not left in Rothko's will, they were made very apparent by the sales he made, and even more apparent by the ones he didn't make.[135] Rothko wanted to make sure the paintings went to the right people, not just anyone who could write a check.[136] Even though the heirs did not get back the paintings that the executors and Marlborough had already sold, the court gave Kate the opportunity to carry out the wishes of her father with the art that remained.[137]

I'm going to give you a few more moments to take in the art and think about the meaning behind the paintings and how special it is that Rothko's children were able to gain control of his estate. So many paintings, and a very lucky verdict. Before we move on, I want to leave you with a question. What do you think Rothko looked for when he was selling his paintings that caused him to turn away countless buyers? You might want to think past the shapes and colors to find out what the paintings mean to you before trying to tackle that question.

B. Room with the Tattered Masterpiece

Adjacent to the destruction and/or removal is one more example. This painting might be hard to look at. Not just because of the sad scene depicted in the painting, but because of the condition that the painting is in.

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[132] *Id.* at 296-97.
[133] *Matter of Rothko's Est*., 372 N.E.2d at 299-300.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*

Figure 7: Ilya Repin, Ivan the Terrible and His Son Ivan 1(1885)

Ivan the Terrible and His Son Ivan was painted in 1885 by the famous Russian painter Ilya Repin.[138] It depicts the scene of Ivan the Terrible holding his dying son Ivan in his arms. The reason there is so much emotion in this picture is because the scene portrayed in the painting is what followed immediately after Ivan the terrible struck his son in the head with his cane. This painting has been criticized and met with mixed reviews since its completion.[139] Based on the dark history of Ivan the Terrible, it is easy to infer that Repin intended the painting to be thought provoking and controversial.[140] While the intent upon the creation of the painting might have been to create a controversial piece of art, I doubt that Repin could have ever expected the demise of the masterpiece to have the same effect.

On May 25, 2018, *Ivan the Terrible and His Son Ivan* was destroyed by Igor Podporin. Podporin grabbed a metal post used to keep visitors away from the paintings and used it to smash through the glass and tear the canvas.[141] Upon arrest, Podporin told authorities that his destruction of the painting was justified because he claimed the Tsar did not actually murder his son.[142] Podporin plead

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[138] *Ivan the Terrible and His Son Ivan By Ilya Repin*, ACADEMIA AESTHETICS, https://academiaaesthetics.com/gallery/ivan-the-terrible-and-his-son-ivan/ (last visited May 16, 2024).
[139] *Supra* note 140.
[140] *See id.*
[141] *Russian Sentenced For Vandalizing Iconic Painting Of Ivan The Terrible,* RADIOFREEEUROPE | RADIOLIBERTY (Apr. 30, 2019), https://www.rferl.org/a/russian-sentenced-to-2-1-2-years-for-vandalizing-iconic-painting-of-ivan-the-terrible/29912342.html.
[142] *Id.*

partially guilty to the charges but was sentenced to two and a half years in prison by a Moscow court.[143] Fortunately, a state-owned bank, Sberbank, has offered to fund the restoration of the uninsured painting, which will cost an estimated $160,000.[144]

I'm not sure if the *Ivan the Terrible and His Son Ivan* that we have hanging on the walls in the Museum of Lawsuits will ever be repaired. Hopefully, when the restoration of the original is completed, I'll walk into this room and see the painting in its former glory. I don't think it's too big of a wish, as you have seen today some pretty magical things can happen with art law, and I am fortunate enough to work with it daily. So, while this is a sad room, I hope the restoration of the painting (and the potential for a restored copy in the Museum of Lawsuits) sends you into the Courtyard on a positive note.

III. A QUICK STEP INTO THE COURTYARD

A. Bank-sy On That

One morning when I was walking around the museum making sure everything was in order, I too needed a break, so I stepped into the courtyard. At first, I was surprised as I noticed that there was a new piece of art on the museum. To my delight it was a Banksy. I never imagined I would be fortunate enough to have a Banksy grace my museum, but here we are. In typical Banksy fashion, nothing is out of the picture, which is why it is the first and only piece of art we have painted on the outside of the museum, not hung on the walls inside. So, if you haven't had enough of the tour yet, please join me in the courtyard so I can tell you more about the case which got the museum our Banksy.

[143] *Id.*
[144] *Id.*

Figure 8: Banksy, Painting of a Girl on a Swing[145]

This Banksy appeared on my museum after the Ace Museum was determined to be the owner of the Banksy original which was spray painted on their museum while Ace was leasing the building.[146] In this case, the art was created, the portion of the wall on which the art was painted was removed, the art was placed in storage, and the portion of the wall which was removed was subsequently replaced.[147] The United States Bankruptcy Court in the Central District of California determined that the art belonged to the Ace Museum because it was a gift from Banksy himself. A gift, under California law, is "a transfer of personal property, made voluntarily and without consideration."[148] When Banksy went to the museum and painted the art onto the walls of the museum it was a display of his intent to make a gift to the Ace Museum.[149] Even though at the time the art was created Ace Museum was leasing the building, there is nothing that would indicate that Banksy intended to gift the art to the lessor.[150] This is why the bankruptcy court ultimately determined that the art, while done on someone else's building, was rightfully owned by the Ace Museum.[151]

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[145] Matt Stromberg, *The Real Story Behind Banksy's "Parking" Mural in LA*, HYPERALLERGIC (Sept. 13, 2022), https://hyperallergic.com/760222/the-real-story-behind-banksys-parking-mural-in-la/.
[146] In re: Art & Architecture Books of the 21st Century, No. 2:13-BK-14135-RK, 2023 WL 2048518 (Bankr. C.D. Cal. Feb. 15, 2023).
[147] *Id.* at *23.
[148] *Id.* (internal citations omitted).
[149] *Id.*
[150] *Id.*
[151] In re: Art & Architecture Books of the 21st Century, No. 2:13-BK-14135-RK, 2023 WL 2048518 at *41.

This decision makes me thankful that I am not leasing the Museum of Lawsuits! I hope this case sticks with you in case you ever pass by something that looks suspiciously like a Banksy piece whenever you walk down the street.

B. White-Washing Famous Graffiti Art

Now I know you saw more than just the Banksy graffiti on the walls, in fact if you look around you can see other graffiti practically covering the entire courtyard. If you thought there was a lot of art in the Rothko room, if you tried to count all of the graffiti art that came to us from 5Pointz, you would count around 10,650 works of art.[152]

This story starts back in 2002 when Gerald "Jerry" Wolkoff created spaces on dilapidated buildings that he owned in Long Island, New York for art installations.[153] Jonathan Cohen, a well-known aerosol artist, became Wolkoff's curator to help rent out spaces on the building to artists who were interested in filling the walls with their aerosol art.[154] With Cohen's help, 5Pointz became a cultural phenomenon with thousands of visitors coming to take in the art daily.[155] The movement of putting the aerosol art on the walls of 5Pointz was considered "creative destruction," and to help truly bring this idea to life, the aerosol art was done in two ways: the art would either remain on the walls for a long period of time, or it would be changed every couple days or weeks.[156]

Eleven years later, in 2013, Wolkoff was seeking approval to demolish 5Pointz so that he could turn the space into luxury apartments.[157] Cohen, after hearing this news, sought to get the site designated as a spot of cultural significance from the New York City Landmark Preservation Commission.[158] Not only was Cohen unable to get the site designated as a site of cultural significance, but he was also unable to raise enough money to buy the site.[159] This is when Cohen, among a group of other artists who had art at 5Pointz, sued under the Visual Artists Rights Act of 1990 (VARA).[160] The statute also affords artists the right to prevent destruction of their work if that work has achieved 'recognized stature' and carries over this protection even after the work is sold."[161] The question was whether the works had achieved the necessary stature.

Upon filing, the artists received a temporary restraining order against the destruction of the art, but when that expired, the court denied the application for

[152] Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir. 2020).
[153] *Castillo*, 950 F.3d at 162.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Castillo*, 950 F.3d at 162.
[158] *Id.*
[159] *Id.*
[160] *Castillo*, 950 F.3d at 163.
[161] *Id.*

a preliminary injunction on November 12, 2013.[162] Hours later the artists were banned from the site. And then the night before the court handed down its decision, Wolkoff hired men to whitewash the art.[163] This galvanized a lawsuit from nine other artists not included in the original suit.[164] Both of the suits were consolidated, and there was a three week trial to determine the outcome.[165] The Court determined that the VARA was in fact violated because 45 of the works that were whitewashed had achieved the required recognized stature.[166] This resulted in the court awarding the maximum amount of statutory damages for VARA which was $150,000 for each of the 45 works, for a total of $6.75 million."[167]

G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue LLC, ACD Citiview Buildings, LLC, and Gerald Wolkoff appealed this decision arguing that the works they whitewashed are not of "recognized stature."[168] The Second Circuit Court of Appeals determined that when art is " of high quality, status, or caliber that has been acknowledged by a relevant community" then it is considered of recognized stature.[169] The Court further noted that aerosol art, like the art covering 5Pointz, has grown and is even becoming "high art," going even further to note that Banksy has been influential in aerosol art's success.[170] Additionally the Court noted that the behavior of Wolkoff after the denial of the preliminary injunction is another reason why the maximum statutory damages were appropriate.[171] While the beautiful exhibitions are now gone, at least some of the artists who were hurt the most were fairly compensated. Also, how cool is it that Banksy's art helped the Second Circuit determine the District Court's decision was appropriate, and now all of this aerosol art has found a home here!

Now that we've had a Quick Step Into the Courtyard, let's go back inside and get the rest of the group. It's time to visit the Copyright Wing, and I have a feeling that you won't want to miss any part of this wing.

IV. THE COPYRIGHT WING

I didn't know much about copyright prior to this wing appearing, so for those of you who don't know too much, let me tell you everything you need to know for the purposes of the tour. Museums for most of their history didn't need to know anything about copyright, unless they wanted to reproduce a work for the gift shop. Now we are all putting things online, and moreover, creating databases

[162] *Castillo*, 950 F.3d at 163.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Castillo*, 950 F.3d at 164.
[167] *Id.*
[168] *Castillo*, 950 F.3d at 164.
[169] *Id.*
[170] *Id.* at 167-68.
[171] *Id.* at 173.

where we tag things as Open Access and in the public domain. I do recommend doing your own research when you leave the Museum of Lawsuits because it is a very interesting field of law, but for now a brief rundown will have to suffice.

We turn to the U.S. Copyright Office for the basic definition: "Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression."[172] Original works are independently created by humans, and trust me, the human part will be important later.[173] Some of the types of art that you will see today that falls under the protections of copyright law are photos, posters, and screenprints, but the list goes on. Also, there are less conventional pieces of art in this section, so you might see pieces like magazines or even random pictures that just showed up on the wall. We will still talk about all the art, and don't worry I will still leave you with questions and the desire to return to see if any new piece appeared on the walls of the Copyright Wing overnight!

In this wing, we see the question of what qualifies for copyright popping up over and over, even as recently as March 2025. But we also see questions of who controls copyrighted works (and do other laws impact on that control like right of publicity) and when does fair use apply to the use of one artistic work as a reference or underlying photograph in another artistic work. Yes, I am talking about *Warhol*. But let's go back a century first.

A. Wilde for Sepia

Let's start with the famous photograph on your right. This sepia-colored photograph taken in January 1882 is titled "Oscar Wilde, No. 18," and was taken by Napoleon Sarony.[174]

[172] *What is Copyright?*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/what-is-copyright/ (last visited Jul. 14, 2024).
[173] *Id.*
[174] *Oscar Wilde*, THE MET, https://www.metmuseum.org/art/collection/search/283247 (last visited Nov. 22, 2024).

Figure 9: Napoleon Sarony, Oscar Wilde, No. 18 (1882)

For his time, Nicholas Sarony, had been deemed a master of celebrity photographs, and became one of, if not the most well-known celebrity photographer in New York.[175] This photograph was taken by Sarony prior to Wilde's release of "the Picture of Dorian Grey," which came out nine years later in 1891.[176] The only work credited to Wilde at this time was the unpublished melodrama "Vera," and another book of verse which is considered to be slightly controversial.[177]

When Wilde entered Sarony's studio to take the picture he was wearing the same clothing that he wore when teaching his famed lectures.[178] As you can see by the image above, this attire included "a jacket and vest of velvet, silk knee breeches and stockings, and slippers adorned with grosgrain bows--the costume he wore as a member of the Apollo Lodge, a Freemason society at Oxford."[179] Also, as you can tell by the name of the photograph, "Oscar Wilde, No. 18," this was not the only photo taken of him that day. Many other images were captured, all showing Wilde in various poses.[180] A deeper analysis of the photograph shows Wilde leaning in to draw onlookers in, "his features not yet bloated by self-

[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Oscar Wilde*, The Met, https://www.metmuseum.org/art/collection/search/283247 (last visited Nov. 22, 2024).
[179] *Id.*
[180] *Id.*

indulgence and high living."[181] Wow do I love that description, and I think it is the perfect transition to tell you more about the intriguing legal battle that unfolded in the wake of this photography session.

In January 1882, Sarony and Oscar Wilde entered into an agreement wherein Sarony would capture Wilde's photographs.[182] By entering into the agreement, Sarony became the "author, inventor, designer, and proprietor of the photograph in suit."[183] Sarony arranged the scene, placed Wilde in the shot, and edited the lighting, among other creative liberties he took all from his own "original mental conception."[184] In the original case, Sarony filed suit stating that Burrow-Giles Lithographic Company who used his photographs in "allegedly unauthorized lithographic reproductions."[185]

On appeal, after the lower court ruled in favor of Sarony, and Burrow-Giles claimed that the court was wrong in its decision.[186] Going so far as to say that the court did not have the constitutional right to protect photographs through copyright.[187] The court started out by determining that "Copyright, 1882, by N. Sarony" was a sufficient notice of copyright.[188] By placing the notice on each copy in a visible format, Sarony had given appropriate notice to the public that the art was his copyrighted property.[189] The Supreme Court also stated that even if he just put Sarony instead of N. Sarony on the photographs it would be "a sufficient designation of the author until it is shown that there is some other Sarony."[190] Additionally, even if there was another Sarony, just putting N. Sarony would still be sufficient notice in the eyes of the Supreme Court.[191]

The question of whether or not photographs were able to be protected under the Constitution was a matter of first impression for the Supreme Court.[192] The Supreme Court rationalized that while photographs were not previously covered by constitutional protections, it would not be irrational to include them under the protections of the Constitution.[193] Thus, the court stated, "[u]nless, therefore,

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[181] *Id.*
[182] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884).
[183] *Id.*
[184] *Id.* at 55.
[185] Pran N. Phelan, *The Curious Case of Burrow-Giles Lithographic (an 1884 U.S. Supreme Court decision involving "new" camera technology), and how it could help Shape Today's Thinking on Artificial Intelligence (AI) Inventorship*, PatenNext (Aug. 20, 2022), https://www.patentnext.com/2022/08/the-curious-case-of-burrow-giles-lithographic-an-1884-u-s-supreme-court-decision-involving-new-camera-technology-and-how-it-could-help-shape-todays-thinking-on-artificial/.
[186] *Id.*
[187] *Id.*
[188] *Burrow-Giles Lithographic Co.*, 111 U.S. at 55.
[189] *Id.*
[190] *Id.* at 55-56.
[191] *Id.* at 56.
[192] *Burrow-Giles Lithographic Co.*, 111 U.S. at 60.
[193] *Id.* at 58.

photographs can be distinguished in the classification of this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why congress cannot make them the subject of copyright as well as the others."[194] This, in connection with the "nature of authorship and of originality, intellectual creation, and right to protection" the Supreme Court determined that Sarony's photograph was protected, and entered a judgment against Burrow-Giles Lithography Company.[195] The implications of this case are vast and provide protections to photographers to date. Could you imagine the implications on photography if the court had said photographs were not subject to constitutional copyright protections? Me neither. Let's keep walking over to the next section of the Copyright Wing, I'm sure you'll enjoy the show.

B. Peanuts and Posters

Come one come all! Let's take a look over here! I bet the circus jokes I've been telling you throughout the tour are starting to make more sense now. If you look to your left, you will see a gorgeous poster picturing ballet dancers. It seems like a lost piece of history to me, something you hear about in stories passed down from generations, read about in books, or even hear about on some of your favorite television shows.

Figure 10: *Poster of Women Performing in a Ballet (1898)*

In the second poster, you find men and women in all white painted to look like statues. Looking at a poster like this makes me wonder what it would be like to see performers pretending to act as statues. Yes, during my time walking through cities I have seen performers pretend to be statues, and I must admit there are times when I have been genuinely surprised to find that the person under the

[194] *Burrow-Giles Lithographic Co.*, 111 U.S. at 57.
[195] *Id.* at 61.

paint was real, not made of metal. So please take another couple of minutes to look over this poster before we move on to the last one.

Figure 11: Poster of Individuals Posing as Statutes

Please tell me you're still here with me because we are now going to look to the left to see the final poster in the trio. Not to pat myself on the back, but I must say that I did save the best for last. Not only is it my favorite picture, but it is the poster that held up best to the test of time. At this time, I recommend you take one last look at this poster and then take a step back to admire all three together while I tell you their story.

Figure 12: Poster of Bicycle Performers (1898)

As you can see by the three posters, the one with the ballet, the one with the men and women representing statutes, and the one with the bicycle performers, each with Wallace, the owner in the top left corner of all three posters.[196] I do

[196] *Id.*

apologize for the damage to the posters, but alas, they are older than me, and as I have previously mentioned, I think it gives them some character. It also makes me wish I could go back in time and maybe see these posters fresh off the press. Okay, that's enough of my thoughts, let me tell you more about why these posters are in the Copyright Wing.

This case arises out of "alleged infringements consisted in the copying in reduced form of three chromolithographs prepared by employees of the plaintiffs for advertisements" that included images of the business owner.[197] If you've already guessed that the employer owned a circus, then you were right! After the lithography company copied the posters which were originally created by the circus employees, Wallace filed suit for copyright infringement.[198] The circuit court and the court of appeals both agreed that the chromolithographs were not under the protection of copyright law, and both returned a verdict for the defendants.[199] The U.S. Supreme Court would later reverse this decision.

The reasoning that the Supreme Court used to give copyright protections to the poster was similar to the reasoning followed in *Bleistein v. Donaldson Lithographing Co.*.[200] The court determined that the chromolithographs were "pictorial illustrations," but made sure to clarify that this did not automatically mean that the illustrations had to be part of a book.[201] Additionally, the Court compared the protection of the posters to the ability to protect the integrity of a Rembrandt etching if someone attempted to recreate the masterpieces long after the artist had passed.[202] Similar to their decision in *Burrow-Giles Lithographic Co.,* the Supreme Court determined that just because posters weren't originally protected by copyright law did not mean that they should be excluded.[203]

The Supreme Court went further to say that the "works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use,—if use means to increase trade and to help to make money"[204] Further, just because the images were adapted to the advertisement does not mean the images should not be protected by copyright.[205] The commercial value of art does not take away the emotional or educational value of artwork, and the Supreme Court wanted to ensure that artists could not be taken advantage of just because their work wasn't the typical art we are used to seeing in museums.[206]

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[197] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903).
[198] *Id.*
[199] *Id.*
[200] *Bleistein*, 188 U.S. 239 at 251; *Burrow-Giles Lithographic Co.*, 111 U.S. at 57.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Bleistein*, 188 U.S. 239 at 251.
[205] *Id.* at 252.
[206] *Id.*

I'm not saying that posters aren't typical art in all museums, but in 1903 this was another revolutionary decision for the Supreme Court. By siding with Wallace and providing protections for the plaintiffs, posters became a protected form of art.[207] Now, I hope you enjoyed looking at the beautifully designed posters because I know I always do, but unfortunately it's time to say goodbye to Mr. Wallace and move on to the next work. The photograph we're about to see might look a little familiar. I remember the first time I saw it I couldn't help but smile.

C. Marilyn Monr-oh No!

Now, some of you in the audience who are familiar with estate planning might know where I'm heading with this story. For those of you who are not well versed in estate law, this is the story of how Marilyn Monroe lost her right of publicity following her death.[208] I will get into more exact explanations of what this means, but in short it basically means that if Marilyn Monroe did not own property rights at her death, then she did not have the testamentary capacity to grant those rights.[209]

Now I'm sure that left you with questions, so let me try and clear them up with a more thorough explanation of the background story and the court's decision in *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc*..[210] When Marilyn Monroe died with a will, on August 5, 1962, her will did not "expressly bequeath a right of publicity."[211] Instead, the will stated, "[a]ll the rest, residue and remainder of my estate, both real and personal of whatsoever nature and whatsoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows," and she proceeded to divide this between three individuals: May Reis, Dr. Marianne Kris, Lee Strasberg, and the executor of the will was Marilyn Monroe's attorney, Aaron Frosch.[212]

The legal story begins six years after the commencement of the Monroe Estate probate.[213] Unfortunately, Mr. Strasberg died in 1968, and the court appointed his wife, Anna Strasberg, as the Administratrix of the Monroe Estate.[214] On June 19, 2001, the Monroe Estate finally closed after Ms. Strasberg was able to transfer the residuary assets from the estate to MMLLC.[215] The intent of the

[207] *Bleistein*, 188 U.S. 239 at 252.
[208] 2007 WL 1480920, at *1.
[209] *Id.*
[210] 486 F. Supp. 2d 309 (S.D.N.Y. 2007).
[211] *Id.* at 312.
[212] *Id.*
[213] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 312.
[214] *Id.*
[215] *Id.*

Delaware company was to "hold and manage the intellectual property assets of the residuary beneficiaries of Marilyn Monroe's will."[216]

At this point, you're probably wondering when I'll begin discussing copyright, well, rest assured the wait is over! The opposing party in this suit is a New York limited liability company titled Shaw Family Archives Ltd. (SFA).[217] SFA owned many photographs, and their collection included a bunch of photographs of the one and only Marilyn Monroe.[218] In owning these pictures, the daughters of SFA's original owner, purportedly owned the copyrights to the photos included in the collection.[219]

The reason why the photograph of Marilyn Monroe ended up in this museum is because of a dispute between MMLLC and SFA.[220] The dispute arose because of two issues.[221] First, "the alleged sale of a T-shirt at a Target retail store in Indianapolis, Indiana on September 6, 2006, which bore a picture of Marilyn Monroe and the inscription of the "Shaw Family Archives" on the inside neck label and tag, and [second] the alleged maintenance of a website by SFA and Bradford through which customers could purchase licenses for the use of Ms. Monroe's picture, image and likeness on various commercial products."[222] MMLLC claims that they were granted a post mortem right of publicity through the residual clause of Marilyn Monroe's will, and that using the photographs without MMLLC's consent is a violation of MMLLC's rights under Indiana's 1994 Right of Publicity Act.[223]

Figure 13: Image of a t-shirt with the Shaw photograph of Marilyn Monroe

There are two important things to note with this statute. The first is that the statute passed over thirty years after Marilyn Monroe's death in a state where she

[216] *Id.*
[217] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 312-13.
[218] *Id.* at 313.
[219] *Id.*
[220] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 313.
[221] *Id.*
[222] *Id.*
[223] *Id.*

had no contact during her life.[224] The second is that the statute "purports to apply to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship."[225]

The United States District Court in the Southern District noted that California, New York, and Indiana, the three states where the issue was relevant, did not recognize descendible post mortem publicity rights at the time of Marilyn Monroe's death.[226] At the time of the court's decision in 2007, New York did not recognize "any common law right of publicity and limits its statutory publicity rights to living persons."[227] California passed their descendible publicity rights statute twenty-two years after Marilyn Monroe's death in 1984, and Indiana's first descendible post mortem right of publicity passed in 1994.[228] While there was a common law right of publicity in existence prior to Marilyn Monroe's death, it was not freely transferable or descendible.[229] Thus, the court ultimately determined that the residual clause in Marilyn Monroe's will "did not recognize descendible post mortem publicity rights and did not allow for distribution under a will of property not owned by the testator at the time of her death."[230]

The court then moved on to a discussion of Marilyn Monroe's intent to devise rights she may have acquired under California or Indiana through her will's residuary clause.[231] MMLLC argued that Marilyn Monroe intended to give the testamentary legatees of her will the post mortem right of publicity, but the court was not convinced by this argument.[232] The boiler plate language of Marilyn Monroe's will was what really led the court to determine that there was no intent to pass on this right to the legatees.[233] The court also determined that even if this was Marilynn Monroe's intent, the disposition is still invalid because there was no legal right to dispose of the property that was not in existence at the time of her death, even going as far as calling this claim absurd.[234] But what happened after the case was interesting. The t-shirts now include both the MMLLC estate (mis)information and the licensed information from the Shaw estate *as part of the label*.

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[224] *Id.*
[225] *Id.*
[226] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 314.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 317.
[231] *Id.*
[232] *Id.*
[233] *Id.* at 318.
[234] *Id.* at 318-19.

Figure 14: New t-shirt after the lawsuit with additional information on the tag

I know it might seem like a good stopping point, but the court went even further as to say that both the California and Indiana statutes do not cover testamentary disposition for celebrities who were deceased prior to their enactment.[235] This is because neither of the statutes allow individuals to pass on statutory property that was not in their possession when they died.[236] If the statutes did allow for the rights to be transferred, "neither of the statutes that arguably bestowed that right allows for it to be transferred through the will of a "personality" who, like Ms. Monroe, was already deceased at the time of the statute's enactment."[237] Thus, after a lengthy analysis the court determined that SFA was able to sell the photographs that they owned the copyright to because Marilyn Monroe's will did not transfer MMLLC's predecessors any post mortem right of publicity.[238]

Now, let's move on to another photograph. This photo is a little less conventional and might even be considered a selfie!

D. Say Cheese!

This might be one of the happiest photographs that we have been lucky enough to have grace the walls of the entire museum. Looking at this photograph makes me wonder, who do you think was happier the moment this photograph

[235] *Shaw Fam. Archives Ltd.*, 486 F. Supp. 2d at 319.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 320.

was taken? The macaques who discovered how to use technology? Or the photographer that knew he just got a once in a lifetime photograph? Could you imagine taking a photograph like this? I couldn't. I could stand here and think about and discuss the process that went into this photograph all day, but I don't want to keep you on the tour longer than I need to, so let's begin.

Figure 15: Selfie by a Macaques

I'm sure you've heard about this legal dispute that we're going to discuss, but just in case you don't remember the backstory, I'll tell you. In July of 2011, David Slater was searching far and wide to get pictures of local Indonesian wildlife.[239] He landed in North Sulawesi and began following a group of macaques.[240] Slater was trying to capture the perfect shot of a macaque's face, but much to his dismay, the monkeys were too scared to let him get close enough to capture the image.[241] In an attempt to find a different way to capture the shot, Slater set up his tripod to see if the curious macaques would take the picture on their own.[242] On his first attempt, the images didn't come out as he hoped, so he changed the settings in hopes of getting a better shot.[243] This time, one curious macaque went and took the perfect selfie, which is where our story begins.[244]

In 2015, PETA filed a copyright infringement claim against Slater on behalf of Naruto, the macaque who took the selfie.[245] The District Court ruled that "a suit

[239] Andres Guadamuz, *Can the monkey selfie case teach us anything about copyright law?*, WIPO MAGAZINE (Feb. 2018), https://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

in the name of an animal is not a 'case or controversy'" and ruled in favor of Slater.[246] Following the judgment for Slater, PETA appealed and represented Naruto as his "next friend."[247] The main issue in this case was determining whether or not Naruto had statutory standing under the Copyright Act. There is a simple rule in determining if an animal has statutory standing, it is "if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing."[248] "The Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute," thus Naruto did not have statutory standing.[249] This stands for the concept that no copyright attaches to works created by non-humans, including animals.[250]

Do you think that Naruto should have won? If it's any consolation, Slater did agree to donate twenty-five percent of his future profits from the photos taken of Naruto and his friends to protect crested macaques in their habitat in Indonesia.[251] On that note, let's move on to the collection of fabulous screen prints that you see to your left. I'm sure you'll recognize the face on the prints and the artist who created them.

[246] *Id.*
[247] *Id.* at 421.
[248] *Id.* at 426.
[249] *Naruto*, 888 F.3d at 426.
[250] *See generally* Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).
[251] Jason Slotkin, *'Monkey Selfie' Lawsuit Ends with Settlement Between PETA, Photographer*, NPR (Sept. 12, 2017), https://www.npr.org/sections/thetwo-way/2017/09/12/550417823/-animal-rights-advocates-photographer-compromise-over-ownership-of-monkey-selfie.

E. Orange Prince

Imagine walking through an airport, a grocery store, or even a news stand and seeing this on the shelves.

Figure 17: Andy Warhol, Orange Prince on the Cover

Prince! Andy Warhol! Who could name a better duo? I know I sure can't. This story starts in 1981 back when Lynn Goldsmith was commissioned by Vanity Fair to photograph the up-and-coming artist: Prince,.[252] Goldsmith allowed Vanity Fair to use one of her pictures in a one-time use deal.[253] Vanity Fair then hired Warhol to create the illustration, and Warhol used Goldsmith's photo to create a purple silkscreen portrait of Prince, which appeared with an article about Prince in Vanity Fair's November 1984 issue."[254] Goldsmith was paid $400 for the source photograph.[255] After Prince died, Vanity Fair contacted the Andy Warhol Foundation (the "Foundation") to use the photograph in a special edition magazine to commemorate Prince.[256] Once Vanity Fair's parent company discovered the Prince Series images (those pictured on the wall), they used "Orange Prince" on the cover.[257]

[252] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 508 (2023).
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*

When Goldsmith found out, she notified the Foundation who then sued her "for a declaratory judgment of noninfringement or, in the alternative, fair use," and Goldsmith filed a counterclaim for infringement.[258] The District Court granted summary judgment in favor of the Foundation, but the Court of Appeals reversed this decision and found that "all four fair use factors favored Goldsmith."[259] After granting cert, the sole issue the Supreme Court was tasked to determine was "whether the first fair use factor, 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,' § 107(1), weighs in favor of AWF's recent commercial licensing to Condé Nast."[260]

In analyzing fair use, the Supreme Court stated that, "the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use."[261] Meaning, if the original work and the secondary work "share the same use or highly similar purposes and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying."[262] The Supreme Court then looked at the usage of the photographs.[263] Goldsmith's was used as a reference for the Vanity Fair illustration, which was in a commercial nature.[264] The Foundations usage of the image for the commemoration magazine was similarly used in a commercial nature.[265]

The court determined that photographers and artists like Goldsmith deserve copyright protections even against famous artists like Warhol.[266] This includes protection from works that are derived from the originals, especially if the purpose and character are not sufficiently distinct.[267] The commercial nature of the two images was very similar and they were both used for the same purpose, and the Foundation "offered no other persuasive justification for its unauthorized use of the photograph."[268] Thus, the Supreme Court determined that the first factor of fair use weighed in favor of Goldsmith.[269]

This was an important case for smaller artists everywhere. Knowing that their art can be protected, even if it is utilized by some of the most well-known artists in the world, is a huge relief. Especially because we have had many cases before

[258] *Id*. at 508.
[259] *Id.* at 509.
[260] *Id.*
[261] *Id*. at 532.
[262] *Id.* at 532-33.
[263] *Id.* at 533.
[264] *Id.*
[265] *Id.* at 535.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*

that seem to be going in a different direction. The question now is how the case will impact artists *using reference photos* and artists that create *reference photos*.

Our next and final stop in the Museum of Lawsuits today is something that I'm sure will become its own museum at some point! Let's head over and look at the very first AI generated image in the Museum of Lawsuits.

F. A(I)rt

Come take a look at our most recent and final piece of art on the tour! Honestly, I am kind of sad that this is where our road ends, but I am happy that it's such a beautiful road to look down.

Figure 18: Creativity Machine, A Recent Entrance to Paradise (2018)

This piece of art is so beautiful it makes me want to take a walk right down the tracks through the tunnel. It feels like something I've seen before in my dreams, or even in other forms of art, but I just can't put my finger on it. Something I love about this piece, other than the fact that it's the first piece of AI art in the museum, is that I'm not sure if I could create it myself. Not only am I not the most AI oriented person, but I also think that my creativity flows through me in a written manner, not through pictures and designs. I think that it is for those reasons why I have such an appreciation for individuals who can create art, or even for individuals who can use a machine to do that work for them. With all the recent developments in AI, I don't know why I was so surprised to see art created through AI on the walls of the Copyright Wing. I guess you never really know when a piece of art you admire will find itself in the middle of a lawsuit…

AI is everywhere nowadays, especially in copyright law. This case started after Dr. Stephen Thaler, the owner of an AI system called "Creativity Machine,"

used AI to generate a piece of visual art "of its own accord."[270] Dr. Thaler tried to register his art, but he was denied by the Copyright Office "on the grounds that the work lacked human authorship, a prerequisite for valid copyright to issue, in the view of the Register of Copyright."[271] Following the denial from the Copyright Office, Dr. Thaler filed suit against the Copyright Office.The issue the court was faced with in this case was whether or not "human authorship is an essential part of a valid copyright claim."[272] We've been here before, right? Are you thinking what I'm thinking?

Dr. Thaler claimed that since he owned the AI program, and that what he inputted in the program created the image, that the AI art he generated should be acknowledged as authorship by the Copyright Office.[273] Remember what I said earlier about original works created by a human? This is why that piece of information was important. "A Recent Entrance to Paradise," Dr. Thalers' image, is not subject to copyright because it lacks the key requirement of copyrightability.[274] Human authorship.[275] The United States District Court of the District Columbia applied *Burrow-Giles Lithographic Co. v. Sarony,* because it brings up the necessity of human authorship in designing the photo before it's taken.[276] The reason why the court has previously provided copyright protections to new forms of art is because of human involvement in the creative process, but this was a whole new form of art with little to no human authorship.[277]

The District Court also discussed the future of AI art as something that artists can put "in their toolbox to be used in the generation of new visual and other artistic works."[278] As we progress toward a new form of art that involves AI, courts will be faced with challenging questions dealing with the issue of how much input is actually needed from a human in order to be granted copyright protections.[279] What we know now is that the mere imputing of instructions into a program like Dr. Thaler, despite owning the program, does not qualify the image that is created to be subject to those protections.[280] Given the lack of human authorship in the generation of "A Recent Entrance to Paradise," the court granted the Register of Copyrights and the Director of the United States Copyright Office cross-motion for summary judgment, but left the door open for the discussion about AI and art in the future.[281]

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[270] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 142 (D.D.C. 2023).
[271] *Id.*
[272] *Id.*
[273] *Thaler*, 687 F. Supp. 3d at 143.
[274] *Id.* at 146.
[275] *Id.*
[276] *Id.*; Burrow-Giles Lithographic Co., 111 U.S. at 59.
[277] *Thaler*, 687 F. Supp. 3d at 142.
[278] *Thaler*, 687 F. Supp. 3d at 149.
[279] *Id.*
[280] *Thaler*, 687 F. Supp. 3d at 149.
[281] *Id.* at 149-50.

On March 18, 2025, the US Court of Appeals for the District of Columbia Circuit affirmed the decision of the District Court.[282] Humans are a key requirement for registering a copyright in the United States, and an AI system does not qualify as an author. When Dr. Thaler registered Creativity Machine as the work's sole author, the Copyright Office was correct in its decision to deny the application.[283] The Court of Appeals reiterated the fact that humans are integral to the Copyright Act because humans are the only things that can be considered to be authors since machines are just tools to aid in the creative process.[284] Furthermore, the machine as an entity that cannot own property and the Copyright Act allows the authors to own their art.[285] Also, the art is only owned by the author for the duration of their life, or for an estimate of how long an human will live, but since machines do not have a life in the same way a human does, this unit of measurement does not work.[286] Additionally, the machine cannot pass on the rights to their heirs like a human can because a machine has no heirs.[287]

Ultimately, the US Court of Appeals for the District of Columbia Circuit determined that machines are not authors because machines "do not have property, traditional human lifespans, family members, domiciles, nationalities, *mentes reae*, or signatures."[288] While all of the conditions in the aforementioned list are not necessary conditions for authorship under the Copyright Act - humanity is.[289]

This Appeals decision came only a few weeks after the U.S. Copyright Office in its second AI report conveyed the same message. What does this mean for the future of AI art? What do you think will happen? Is it now well-established that we must have humans at the helm? And the bigger question, what does it mean to be human? Is that the next thing to be litigated? I guess if you want answers you'll just have to come back to the Museum of Lawsuits again soon to see if there are any new developments!

CONCLUSION

Unfortunately, this is when you leave me, but I hope you enjoyed yourself at the Museum of Lawsuits. Hopefully you are leaving with a newfound appreciation of some of the art you've seen today as well as the desire to learn more about other art housed in the museum that we did not have a chance to visit today. Please remember that the museum is always open, so you can come back and see the art

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[282] Thaler v. Perlmutter, March 1, 2025, https://media.cadc.uscourts.gov/opinions/docs/2025/03/23-5233.pdf

[283] *Thaler v. Perlmutter*, No. 23-5233, 2025 U.S. App. LEXIS 6294, at *10 (D.C. Cir. Mar. 18, 2025).

[284] *Id.* at *11.

[285] *Id.* at *12.

[286] *Id.* at *12-*13.

[287] *Id.*

[288] *Id.* at *14.

[289] *Id.* at 15.

whenever you please. Thank you so much for coming, I hope to see you back in the Museum of Lawsuits again very soon!