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## **“Stealing” Abandoned Works of Art and Moral Right**

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On April 25, 2019, it was reported in ArtNews that a man was convicted of theft and fined \$3,500 for taking sketches rejected by the well-known artist Gerhard Richter and thrown in the trash outside his home in Cologne in 2016.[1] The definition of theft is basically the same in Germany as in the United States—a taking and carrying away of the personal property that belongs to another with the intent to permanently deprive the person of that property.[2] If property is abandoned, it isn't the property of another and it can't be stolen. If that status is not clear the finder may have an obligation to try to find the owner. In the German case it was pretty clear Richter put the work in the trash because he wanted it destroyed. So what in the world was stolen if the physical sketches themselves were no longer the property of anyone?

In my view, the most interesting possibility has little to do with theft of a tangible object but the obliteration of the artistic intention of Richter. Under German moral right law, artists have the rights to determine if their name may be used as the creator of a work and to prohibit the distortion of their work if it prejudices their legitimate intellectual or personal interests in the work.[3] In this setting Richter's desire was to discard and trash, not just discard, works he had rejected as artistically worthy. It would be unseemly at a minimum and illegal at the maximum to allow a trash picker to determine that work Richter wished to destroy could either be attributed to him as the painter. Similarly, it distorts his interests in the works to allow them to become publicly available when he preferred to never have them see the light of day. The defendant in the German case actually took his "found" objects to the Gerhard Richter Archive at the Dresden State Art Collections to have them authenticated. The archive informed Richter of what was happening. The intention of the defendant to treat them as Richter works if they were authenticated is pretty clear. Though unusual this case augments the need to undertake a careful review of the meaning of theft in the modern intellectual property era.

It is worth comparing this event to the famous Robert Rauschenberg, Erased De Kooning Drawing now in the collection of the San Francisco Museum of Modern Art.[4] De Kooning agreed to provide Rauschenberg with one of his drawings knowing that Rauschenberg intended to erase as much of it as he could. De Kooning, in a sense, agreed to the "trash" his work and allow a fellow artist to create a new one from the remains. Surely it would grossly inappropriate to allow anyone to restore the work to its original De Kooning appearance. That move would both attribute to a work De Kooning no longer identifies as his and to distort the intent of both De Kooning and Rauschenberg to create a "new" work. Artists often destroy work they do not want so publicly display; they should be allowed to do so without interference.

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[1] Javier Pes, *The Man Who Scavenged Gerhard Richter's Cast-Off Sketches From the Trash Is Found Guilty of Theft*, ArtNet News (April 25 2019), <https://news.artnet.com/art-world/gerhard-richter-1526698> (last visited Apr. 26, 2019).

[2] German Criminal Code, Ch. 19, §242 provides:

Whosoever takes chattels belonging to another away from another with the intention of unlawfully appropriating them for himself or a third person shall be liable to imprisonment not exceeding five years or a fine.

The translation is by Prof. Dr. Michael Bohlander, is up to date as of 2013 and may be found at [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p2031](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2031) (last visited Apr. 29).

[3] The Copyright Act of 9 September 1965 (Federal Law Gazette I p. 1273), as last amended by Article 1 of the Act of 1 September 2017 (Federal Law Gazette I p. 3346) provides as follows:

Section 13: Recognition of authorship. The author has the right to be identified as the author of the work. He may determine whether the work shall bear a designation of authorship and which designation is to be used.

Section 14: Distortion of the work. The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.

[4] <https://www.sfmoma.org/artwork/98.298/> (last visited Apr. 26, 2019).