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Banksy: Artist, Prankster, or Both?

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ANNA TICHY

Banksy: Artist, Prankster, or Both?

65 N.Y.L. SCH. L. REV. [*] (2020–2021)

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*"It appears we just got Banksy-ed."*¹
-Alex Branczik²

I. INTRODUCTION

The notion of pranks, or committing mischievous acts, has been around for centuries—Leonardo da Vinci, Abraham Lincoln, and Thomas Edison were all pranksters.³ Committing or falling victim to a mischievous act is something that nearly everyone can relate to. The artist Banksy, who started his career with street graffiti and is now a world-renowned artist, owes the magnitude of his career to his ability to prank the public.⁴ He has formed his own definition of what it means to be an artist—a definition that encompasses not only the work he creates, but also the way in which he presents it.

Or perhaps Banksy is not an artist, but—rather—a prankster. One of his more recent pranks, and likely the most publicized, was at the October 5, 2018 Sotheby's auction in London, England.⁵ There, auctioneer Oliver Barker slammed down the hammer signaling the sale of Banksy's *Girl with Balloon* for £1 million.⁶ However, within minutes of the sale, an alarm went off.⁷ The artwork, mounted on a wall at the auction, slid through the bottom of its frame, leaving a partially shredded portion of the picture exposed.⁸ Banksy acknowledged this intentional incident on his Instagram account, writing: "The urge to destroy is also a creative urge."⁹ Banksy's

1. *Sotheby's Gets Banksy'ed at Contemporary Art Auction in London*, SOTHEBY'S (Oct. 5, 2018), <https://www.sothebys.com/en/articles/sothebys-gets-banksyed-at-contemporary-art-auction-in-london>.
2. Alex Branczik is the Senior Director and Head of Contemporary Art, Europe for Sotheby's in London. Biography of Alex Branczik, SOTHEBY'S, <https://www.sothebys.com/en/about/team/alex-branczik> (last visited Jan. 26, 2021).
3. Stacy Conradt, *11 of History's Biggest Pranksters*, MENTAL FLOSS (Jan. 12, 2015), <https://www.mentalfloss.com/article/61016/11-historys-biggest-pranksters>. Renaissance artist and engineer Leonardo da Vinci would place wings on a small lizard to make it look like a dragon and then tell his friends that he had tamed it himself. *Id.* Before becoming our nation's sixteenth president, Abraham Lincoln, while staying at a hotel, told children playing with a pig bladder (the precursor to the balloon) that "they would get more enjoyment out of their [balloon] if they heated it in the hotel's fireplace." Following Lincoln's advice, the kids heated their balloon, which subsequently exploded and "[sent] hot coals flying across the room." *Id.* Inventor Thomas Edison "wir[ed] a water bucket to a battery so it would shock anyone who took a sip." *Id.*
4. See *Banksy*, ARTNET, <http://www.artnet.com/artists/banksy/biography> (last visited Jan. 26, 2021) ("The unveiling of a [sic] new Banksy works often incorporates pranks or performance.").
5. Scott Reyburn, *Banksy Painting Self-Destructs After Fetching \$1.4 Million at Sotheby's*, N.Y. TIMES (Oct. 6, 2018) [hereinafter *Banksy Painting Self-Destructs*], <https://www.nytimes.com/2018/10/06/arts/design/uk-banksy-painting-sothebys.html>.
6. *Id.* At the time of sale, £1 million equated to approx. \$1.4 million. *Id.*
7. *Id.*
8. *Id.*
9. 'Urge to destroy is also a creative urge': Banksy shares details of auction shredding prank (VIDEO), RT.COM (Oct. 6, 2018, 23:48), <https://www.rt.com/news/440516-urge-to-destroy-banksy-sothebys/>. Banksy

“urge to destroy,” however, poses numerous legal questions about *Girl with Balloon*. This Note explores the tort and copyright implications of Banksy’s latest prank under U.S. law.

Part II of this Note discusses Banksy’s background, works of art, and the details behind the sale and shredding of *Girl with Balloon*. Part III outlines the elements of trespass to chattels and asserts that the purchaser of *Girl with Balloon* may have difficulty prevailing in such a claim against Banksy. Part IV surveys Banksy’s protections under The Visual Artist Rights Act of 1990 (VARA) and explores whether Banksy has the right to prevent the purchaser from removing or disabling the shredder in the frame. Part V concludes this Note.

II. FROM SCHOOLBOY TO PRANKSTER

A. Banksy’s Early Years

Only the few people who are part of the exclusive “Club Banksy” know his true identity—for everyone else, it remains a mystery.¹⁰ What we do know: he grew up in a suburb of Bristol, England, attended Bristol Cathedral School, and started creating art at around fourteen, when—along with his classmates—he did “[g]raffiti . . . on the bus on the way home from school.”¹¹ Although he created art while he attended school, he did not get along with the art department there.¹²

Banksy’s time in school was unpleasant and he dropped out when he was sixteen.¹³ He claims to have spent much of his time apprenticing at a pork butcher in the years between dropping out of school and 1993—the period when his graffiti began to appear on walls and trains in Bristol.¹⁴ Despite his lack of formal artistic training, Banksy managed to captivate millions of people with his artwork, for “it was only when he had an aerosol spray can in his hand that he discovered his voice.”¹⁵

attributed the quote to the artist Pablo Picasso, but it was first coined by a prominent nineteenth-century anarchist Mikhail Bakunin. *Id.* Banksy’s post originally appeared on his Instagram account, but as of fall 2020, that post is no longer available for viewing in the United States. Banksy (@banksy), INSTAGRAM (Oct. 6, 2018) [hereinafter INSTAGRAM VIDEO], <https://www.instagram.com/p/BomXijhArX/>.

10. See WILL ELLSWORTH-JONES, *BANKSY: THE MAN BEHIND THE WALL* 31 (2013) “Club Banksy” is the “I know who he is and I have met him, but I am not going to tell you club.” *Id.* at 109 (internal quotations omitted). In conducting research for his book, Ellsworth-Jones collected information about Banksy from Banksy’s friends, whom he did not ask to reveal the artist’s identity, and the information Banksy has himself revealed to the public through forms of media such as Instagram and newspapers. *Id.*

11. *Id.* at 32–33.

12. *Id.* at 34.

13. *Id.*

14. *Id.* (discussing Banksy’s apprenticeship); Lauren Collins, *Banksy Was Here: The Invisible Man of Graffiti Art*, NEW YORKER (May 7, 2007), <https://www.newyorker.com/magazine/2007/05/14/banksy-was-here> (noting when Banksy’s graffiti first appeared in Bristol).

15. ELLSWORTH-JONES, *supra* note 10, at 34.

BANKSY: ARTIST, PRANKSTER, OR BOTH?

In the early 1990s, Banksy joined the graffiti scene in Bristol and associated himself with the gang of underground street artists known as DryBreadZ Crew.¹⁶ His work with this gang consisted of freehand graffiti in public spaces.¹⁷ Why did Banksy choose graffiti as his medium? Perhaps the best answer comes from the artist himself, who described graffiti as “one of the more honest art forms available” with “no elitism or hype.”¹⁸ He views graffiti as a rebellion:

The people who truly deface our neighbourhoods are the companies that scrawl their giant slogans across buildings and buses trying to make us feel inadequate unless we buy their stuff. They expect to be able to shout their message in your face from every available surface but you're never allowed to answer back. Well, they started this fight and the wall is the weapon of choice to hit them back.¹⁹

His time as an exclusively freehand graffiti artist came to an end when he turned eighteen and switched to stencils.²⁰ In his book *Wall and Piece*, Banksy recounted the story of the switch:

When I was eighteen I spent one night trying to paint 'LATE AGAIN' in big silver bubble letters on the side of a passenger train. British transport police showed up and I got ripped to shreds running away through a thorny bush. The rest of my mates made it to the car and disappeared so I spent over an hour hidden under a dumper truck with engine oil leaking all over me. As I lay there listening to the cops on the tracks I realised I had to cut my painting time in half or give up altogether. I was staring straight up at the stencilled plate on the bottom of a fuel tank when I realised I could just copy that style and make each letter three feet high. I got home at last and crawled into my bed next to my girlfriend. I told her I'd had an epiphany that night . . .²¹

In a later interview, Banksy also claimed that he had switched to stencils because “[he] was 21 and crap” and because stencils were “quick, clean, crisp and efficient. And that's quite sexy.”²² Regardless of the reason, Banksy's switch to stencils helped him refine his artistic style.²³

16. *The Bristol Graffiti Artist with the International Reputation*, BBC BRISTOL, http://www.bbc.co.uk/bristol/content/articles/2008/04/04/banksy_feature.shtml (last updated May 28, 2008).

17. *Id.*

18. BANKSY, *WALL AND PIECE* 8 (2005).

19. *Id.*

20. *Id.* at 57. Stencil graffiti art consists of the artist reproducing an image by spraying paint over holes in cardboard or metal onto the desired surface. *Creating Stencil Art: A Background and Brief Tutorial*, SPRAYPLANET (Dec. 4, 2018), <https://www.sprayplanet.com/blogs/news/creating-stencil-art-a-background-and-brief-tutorial>.

21. BANKSY, *supra* note 18, at 13.

22. ELLSWORTH-JONES, *supra* note 10, at 57.

23. *See id.* at 57–71 (discussing Banksy's transition from freehand graffiti to stencils as creating “a style which did not need to be decoded and was instantly understood and enjoyed”).

One of Banksy's earliest stencil influences was Blek le Rat²⁴—a Parisian street artist who had been stenciling life-sized rats across walls in Paris since 1981.²⁵ Blek remained anonymous in his early days of street art in an attempt to avoid the police, but has since gone public with his identity—unlike Banksy, who continues to remain anonymous.²⁶ Although it is uncertain when Banksy first learned of Blek, it may have been through a mutual friend who claims to have shown Blek's work to Banksy in the late 1990s.²⁷ According to Will Ellsworth-Jones,²⁸ “[o]nce you have seen Blek's work it is impossible to see a Banksy piece, especially his early work, without thinking of Blek.”²⁹

B. Street Artist, Prankster, or Both?

The term “street art” originated with graffiti artists, whose works were initially on city streets and walls.³⁰ However, street artists like Banksy, Jaune, Mademoiselle Maurice, Bordalo II, and Michael Pederson have challenged and re-imagined the idea of street art.³¹ That art is not just graffiti sprayed on a wall; it may also be sculptures, paintings, and stencils, carefully placed on any sort of surface accessible to the public view. Some street artists take advantage of the public display to “develop artistic credibility, publicity, designer contracts, and sales-potential for works made on more traditional surfaces.”³² Although Banksy's mediums were initially those that

24. Blek le Rat's real name is Xavier Prou. *Blek Le Rat*, ARTSPER, <https://www.artsper.com/en/contemporary-artists/france/2861/blek-le-rat> (last visited Jan. 26, 2021). He is known as “one of the first graffiti artists in Paris” and his alias Blek le Rat “originates from the comic book Blek le Roc, using ‘rat’ as an anagram for ‘art.’” *Id.*

25. ELLSWORTH-JONES, *supra* note 10, at 63.

26. *Id.* at 64 (“[N]ow [Blek le Rat] is as open as Banksy is closed.”).

27. *Id.*

28. Will Ellsworth-Jones, the author of *Banksy: The Man Behind the Wall*, served as the “chief reporter and New York correspondent for *The Sunday Times*.” ELLSWORTH-JONES, *supra* note 10.

29. *Id.* at 65. Even Banksy has acknowledged Blek's importance, stating: “Every time I think I've painted something slightly original, I find out that Blek le Rat has done it, too . . . only Blek did it twenty years earlier.” *Id.*

30. *Graffiti and Street Art*, ARTSY, <https://www.artsy.net/gene/graffiti-and-street-art> (last visited Jan. 26, 2021).

31. Ilana Herzig, *These 10 Artists Are Challenging Our Idea of What Street Art Can Be*, ARTSY (Sept. 27, 2017, 6:53 PM), <https://www.artsy.net/article/artsy-editorial-10-artists-challenging-idea-street-art>. Jaune's street art style, which has been seen across Europe and even in Indonesia, involves adding in little trashmen who interact with existing architecture, graffiti, and scribbled tags in a playful way. *Id.* Mademoiselle Maurice makes colorful origami installations that can be found across the world, from the subway stations in London to the Saint-Maurice Cathedral, with some works using over thirty thousand pieces of origami. *Id.* Bordalo II, a name meant to honor his grandfather who also painted on the streets of Lisbon, uses train tracks and colorful palettes to create his artistic pieces. *Id.* Michael Pederson, a Sydney native and street artist, creates humorous, interactive displays using traditional signage, such as installing a height restriction sign in front of an old sewage pipeline. *Id.*

32. Richard H. Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 584 (2018) [hereinafter *Anti-Rebellion Graffiti*].

BANKSY: ARTIST, PRANKSTER, OR BOTH?

might be considered more “traditional” for street artists, such as walls and bridges,³³ his mediums now run the gamut—from traditional canvases,³⁴ to theme parks,³⁵ sculptures,³⁶ cars,³⁷ food,³⁸ and even live animals.³⁹

Banksy creates art that is simple, politically charged, playful, and powerful at the same time. The saying “imitation is the sincerest form of flattery” rings all too true for Banksy, as many of his works have been duplicated and advertised as authentic.⁴⁰ To counteract this, Banksy created Pest Control, a handling service that acts on his behalf and determines whether the artist was responsible for creating a work.⁴¹ If so, Pest Control issues the proper paperwork, authenticating the work as a true Banksy piece.⁴²

33. ELLSWORTH-JONES, *supra* note 10, at 73–74.

34. See Scott Reyburn, *Banksy Painting ‘Devolved Parliament’ Sells for \$12 Million*, N.Y. TIMES (Oct. 3, 2019) [hereinafter *Devolved Parliament*], <https://www.nytimes.com/2019/10/03/arts/design/banksy-devolved-parliament-auction.html> (stating that Banksy “joined the ranks of the world’s most expensive artists” when his “Victorian-style oil on canvas” sold for approximately \$12.1 million in 2009).

35. See ELLSWORTH-JONES, *supra* note 10, at 136–37 (describing Banksy’s display of a blow-up doll resembling a Guantanamo Bay detainee that could be seen inside Disneyland’s Big Thunder Mountain Railroad ride).

36. See Claire Selvin, *Artist Claims that Banksy Sculpture that Could Sell for \$1.3 M. at Sotheby’s Was Stolen From Him*, ART NEWS (Nov. 18, 2019, 12:30 PM), <https://www.artnews.com/art-news/market/banksy-sothebys-the-drinker-sculpture-1202667871/> (reporting that a British artist claimed that he had kidnapped Banksy’s six-foot-tall *The Drinker* sculpture when it was in central London in 2004).

37. See *Banksy at Bristol City Museum*, THE GUARDIAN (June 12, 2009, 11:12 EDT), <https://www.theguardian.com/artanddesign/gallery/2009/jun/12/banksy-bristol-art-exhibition> (noting that Banksy’s “burned-out ice cream van” was a new work unveiled in his secretive exhibition in the Bristol City Museum). Banksy’s painted ice cream truck had a large ice cream cone tipped over on its roof, with melted ice cream coming down the front windshield. *Id.*

38. See ELLSWORTH-JONES, *supra* note 10, at 139–40 (describing Banksy’s 2008 exhibition *The Village Pet Store and Charcoal Grill*, which featured two chicken nuggets depicted as chickens by attaching each to two mini chicken feet).

39. *Id.* at 126. In 2006, Banksy painted a thirty-eight-year-old elephant with non-toxic paint for his exhibition *Barely Legal* in Los Angeles, California. *Id.* at 134–35; *Banksy Barely Legal*, BANKSY UNOFFICIAL, <https://banksyunofficial.com/tag/banksy-barely-legal/> (last visited Jan. 26, 2021).

40. See ELLSWORTH-JONES, *supra* note 10, at 205–21 (recounting several instances when fake Banksy art was created and sold as his real work, such as when two men with several eBay accounts and email addresses were caught with at least 120 fake Banksy prints, worth an estimated £200,000).

41. See QUESTIONS, PEST CONTROL, <https://pestcontroloffice.com/faq.asp> (last visited Jan. 26, 2021) (outlining Pest Control’s responsibilities). In 2008, Banksy created Pest Control “to authenticate works and prevent fakes and site-specific street pieces from appearing on the market.” Scott Reyburn, *Banksy is a Control Freak. But He Can’t Control His Legacy*, N.Y. TIMES (Feb. 5, 2020), <https://nytimes.com/2020/02/05/arts/design/banksy-legacy.html>.

42. See QUESTIONS, *supra* note 41 (“The certificate of authenticity (COA) means you can buy, sell or insure a piece of art knowing it’s legitimate . . . Pest Control is the only source of COA’s for Banksy. We issue them for paintings, prints, sculptures and other attempts at creativity.”).

Banksy has been described as a “creative outlaw” who “speaks for a generation.”⁴³ His status as a creative outlaw is illustrated through the content of works such as *Napalm* (2004), *Dismaland* (2015), and *Devolved Parliament* (2019), each described below.

Created by Banksy in 2004, *Napalm* is a play on the internationally known photograph from the Vietnam war—*The Terror of War*.⁴⁴ Banksy reinvented this image by positioning Kim Phuc, seen running naked and screaming after being hit by napalm in the original photograph, in the center of the frame, and placing the characters of Ronald McDonald and Mickey Mouse to her left and right, respectively; they appear to be holding her forearms. Ronald and Mickey, who are smiling from ear-to-ear, are the faces of two of the world’s most litigious corporations—McDonald’s and Disney.⁴⁵ This work has been described as the artist’s attack on American consumer culture, its lack of humanism, and the dangers of capitalism.⁴⁶

Banksy launched *Dismaland* in 2015 and described it as a “family theme park unsuitable for small children.”⁴⁷ Located in Weston-super-Mare, England for a little over five weeks, the art installation was modeled after, and intended to mock, Disneyland.⁴⁸ Like many of his other works, *Dismaland* targeted capitalistic culture. The installation featured ten of Banksy’s own works as well as the works of fifty-eight other artists whom Banksy invited to contribute.⁴⁹ One of Banksy’s most notable works within the installation was a Cinderella scene that featured a crashed pumpkin carriage, Cinderella and her horses lying dead, and a swarm of paparazzi

43. Scott Indrisek, *The 6 Most Iconic Works by Banksy*, ARTSY (Sept. 6, 2019, 2:43 PM), <https://www.artsy.net/article/artsy-editorial-6-iconic-works-banksy> (internal quotations omitted).

44. *See id.* (stating that *Napalm*, created in 2004, is “Banksy at his most unforgiving and in-your-face” because this work juxtaposes “the subject of a 1972 photograph from the Vietnam War” with Mickey Mouse and Ronald McDonald). *The Terror of War* was named one of the “Most Influential Images of All Time” by TIME. *The Terror of War*, TIME: 100 PHOTOGRAPHS, <http://100photos.time.com/photos/nick-ut-terror-war> (last visited Jan. 26, 2021). *The Terror of War* was taken on June 8, 1972 by Nick Ut outside of Trang Bang, about twenty-five miles away from Saigon, Vietnam. The photo depicts naked Kim Phuc, a nine-year-old girl, running away from her village after “a load of napalm” was mistakenly dropped onto the village by the South Vietnamese air force. According to Ut, who took the girl to the hospital, she was screaming “Too hot! Too hot!” in reaction to the third-degree burns caused by napalm and covering 30 percent of her body. *Id.*

45. *Napalm*, MY ARTBROKER, <https://www.myartbroker.com/artist/banksy/napalm/> (last visited Jan. 26, 2021).

46. *Id.*

47. Mark Brown, *Banksy’s Dismaland: ‘Amusements and Anarchism’ in Artist’s Biggest Project Yet*, THE GUARDIAN (Aug. 20, 2015, 9:09 EDT), <https://www.theguardian.com/artanddesign/2015/aug/20/banksy-dismaland-amusements-anarchism-weston-super-mare>.

48. *See* Indrisek, *supra* note 43 (“[I]n 2015, *Dismaland* was a faux-family-friendly destination on the British seaside. Modeled, of course, on Disneyland . . .”); *see also* Brown, *supra* note 47 (describing some of the features of *Dismaland*).

49. Brown, *supra* note 47.

BANKSY: ARTIST, PRANKSTER, OR BOTH?

taking photos.⁵⁰ Although not confirmed by the artist himself, the scene seemed to depict the 1997 death of Princess Diana, when her car was chased by paparazzi and crashed in a Paris tunnel.⁵¹ In Banksy's rendition of the scene, Cinderella's long blonde hair hangs out of the window of her pumpkin carriage, just as Princess Diana's blonde hair was visible to onlookers after the crash.⁵² Banksy's Cinderella installation is seen as a commentary on the modern-day life of public figures and their relationship with the media.⁵³

*Devolved Parliament*⁵⁴ sold for £9.9 million in October, 2019.⁵⁵ The painting, a Victorian-style oil on canvas, depicts Britain's House of Commons populated by chimpanzees, posed sitting, chewing, and scratching themselves.⁵⁶ Although originally created in 2009, *Devolved Parliament* is especially relevant in the context of Britain's exit from the European Union and the political turmoil that it created.⁵⁷

Napalm, *Dismaland*, and *Devolved Parliament* are three of the many works Banksy has created that prompt us to question society's firm hold on our thoughts and beliefs. Banksy is able to take objects, people, ideologies, and institutions well-known to society—such as Disney, McDonald's, Cinderella, and the U.K. Parliament—and portray them in contexts that are highly charged, and even dark. Banksy is a “creative outlaw” precisely because of his ability to juxtapose such contrasting elements in a simple work of art; that is what makes his oeuvre so fascinating, thought-provoking, and moving.

50. See Melia Robinson, *Many are Finding this Shocking Piece Hidden Inside Banksy's 'Dismaland' Gut-Wrenching*, BUSINESS INSIDER (Aug. 21, 2015, 4:38 PM), <https://www.businessinsider.com/banksy-dismaland-cinderella-princess-diana-2015-8> (discussing the similarities between the pumpkin carriage crash in Banksy's *Dismaland* and the famous scene of Princess Diana's fatal car crash in 1997); see also Brown, *supra* note 47 (stating that the Cinderella crash scene was one of ten Banksy works in *Dismaland*).

51. Robinson, *supra* note 50.

52. *Id.*

53. *Id.* The official park map read: “Step inside the fairytale and see how it feels to be a real princess.” *Id.*

54. *Devolved Parliament*, *supra* note 34.

55. Colin Gleadell, *Banksy's Chimp Parliament Painting Sells for a Startling \$12 Million at Sotheby's, Prompting Both Cheers and Jeers*, ARTNET NEWS (Oct. 3, 2019), <https://news.artnet.com/market/banksy-devolved-parliament-sale-1669825>.

[S]harp-eyed Banksy enthusiasts notified The New York Times about significant differences between the image seen in Bristol in 2009 and that exhibited in 2019. Most crucially—and perhaps symbolically—the overhead lamps in the House of Commons had been turned off in the later version, and a banana held by a chimp in the foreground was turned downward, rather than up.

Devolved Parliament, *supra* note 34.

56. Gleadell, *supra* note 55; *Devolved Parliament*, *supra* note 34.

57. *Devolved Parliament*, *supra* note 34. In fact, *Devolved Parliament*—originally titled *Question Time*—“returned on loan to the Bristol Museum in March [2019] to coincide with Britain's then-scheduled exit from the European Union.” *Id.* See generally Benjamin Mueller, *What is Brexit? And What Happens Next?*, N.Y. TIMES <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> (last updated Jan. 31, 2020), (discussing Brexit).

Banksy's status as a creative outlaw is due not only to the content of his work, but also to the way in which he presents it. He often debuts his work through pranks, invoking another layer of shock factor in viewers. Pranks are defined as "mildly mischievous act[s],"⁵⁸ and Banksy has employed them to showcase his work for years. In 2004, he went to the Louvre Museum in Paris, France, which houses Leonardo da Vinci's *Mona Lisa*.⁵⁹ There, he hung his own version of the classic painting—*Mona Lisa Smile*.⁶⁰ Banksy's version depicted da Vinci's original work, except Banksy replaced Mona Lisa's head with an acid-yellow smiley face.⁶¹ He managed to sneak this work inside the Louvre and hang it up without being stopped.⁶²

The following year, Banksy's twelve-day London exhibition, *Crude Oils*, featured his reworked copies of works by well-known art icons such as Monet, Andy Warhol, and van Gogh.⁶³ At first, the exhibition appeared to have the feel of a traditional

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58. *Prank*, MERRIAM-WEBSTER, <https://merriam-webster.com/dictionary/prank> (last visited Jan. 26, 2021).
59. *Banksy Pranks*, BANKSY UNOFFICIAL, <https://banksyunofficial.com/category/banksy-pranks/> (last visited Jan. 26, 2021); Ashleigh Kane & Hermione Sylvester, *Five of Banksy's Most Infamous Pranks*, DAZED (Oct. 9, 2018), <https://www.dazeddigital.com/art-photography/article/41743/1/banksy-girl-with-balloon-painting-pranks-sotherbys-london>.
60. *Banksy Pranks*, *supra* note 59; Kane & Sylvester, *supra* note 59.
61. Kane & Sylvester, *supra* note 59. The acid-yellow smiley face symbolizes the acid house culture in the late-1980s. Jon Savage, *A Design for Life*, THE GUARDIAN (Feb. 20, 2009, 19:01 EST), <https://www.theguardian.com/artanddesign/2009/feb/21/smiley-face-design-history>. In the early 1960s and into the 1970s, the "Smiley" symbol was regarded as a positive, dream symbol of freedom post-Vietnam War. But by the late 1980s—in "the early days of acid"—the symbol became "associated with headlines like 'Evil of Ecstasy' and 'Shoot These Drug Barons.'" This association continued into the 1990s, though mutations of the symbol persisted and were used by bands like Nirvana. By the early 2000s, the Smiley was an "acknowledged part of pop culture history" and a "shorthand for the high 1970s" in the United States. *Id.*
62. Alex Altman, *Banksy: An Artist Unmasked*, TIME (July 21, 2008), <http://content.time.com/time/arts/article/0,8599,1825271,00.html>. After two attempts, Banksy was able to hang his *Mona Lisa Smile* in the Italian Grand Masters Room in the Louvre. *Banksy: A Guerilla in Our Midst*, THE INDEPENDENT (Aug. 6, 2005), <https://www.independent.co.uk/news/uk/this-britain/banksy-a-guerilla-in-our-midst-501660.html>.
63. *Banksy Crude Oils Exhibition, London 2005*, ART OF THE STATE, <https://www.artofthestate.co.uk/london-street-art-2/banksy-street-art/banksy-shows/banksy-crude-oils-exhibition-london-2005/> (last visited Jan. 26, 2021); ELLSWORTH-JONES *supra* note 10, at 130. Claude Monet (1840–1926), who was also known as Oscar-Claude Monet or Claude Oscar Monet, was one of the founders of French impressionist painting. *Biography of Claude Oscar Monet*, CLAUDE OSCAR MONET, <https://www.claudemonetgallery.org/biography.html> (last visited Jan. 26, 2021). The term "Impressionism" comes from Monet's 1872 (or 1873) painting *Impression, Sunrise*, which can be found in the Musée Marmottan-Monet, Paris. *Id.* Andy Warhol (1928–1987), born Andrew Warhola, was an American artist, filmmaker, and "leading exponent of the Pop art movement of the 1960s . . ." *Andy Warhol*, BRITANNICA, <https://www.britannica.com/biography/Andy-Warhol> (last visited Jan. 26, 2021). Warhol's painting career began in the late 1950s and "received sudden notoriety in 1962, when he exhibited paintings of Campbell's soup cans, Coca-Cola bottles, and wooden replicas of Brillo soap pad boxes." These works were later turned to mass-produced photographic silkscreens—a technique in which the repeated image was "reduced to an insipid and dehumanized cultural icon that reflected [] the supposed emptiness of American material culture." *Id.* Vincent van Gogh (1853–1890), one of the world's greatest post-impressionist artists, is known for pieces such as *Starry Night*, *Sunflowers*, and his *Self-Portrait*. *Vincent van Gogh*, BIOGRAPHY, <https://www.biography.com/artist/vincent-van-gogh> (last updated Mar. 4,

BANKSY: ARTIST, PRANKSTER, OR BOTH?

gallery show.⁶⁴ But at its opening, Banksy unleashed into the room 164 live rats, which ran around the gallery for the duration of the exhibition.⁶⁵ Patrons who did not have special tickets were only allowed in the gallery for three minutes—not nearly enough time to observe all of Banksy’s works while weaving through the rats.⁶⁶ Surely Banksy knew this, and so perhaps the true purpose of the exhibition was not to showcase his artwork, but to have his patrons scamper through a room filled with rats, as some sort of commentary on art and society. Or, perhaps, it was just a prank?

In 2006, Banksy visited California’s Disneyland.⁶⁷ There, he snuck inside the Big Thunder Mountain Railroad⁶⁸ ride and installed a life-sized inflatable doll.⁶⁹ It wore a black hood over its face, an orange jumpsuit, and had its hands bound, a clear representation of a Guantanamo Bay detainee.⁷⁰ The doll was removed after ninety minutes.⁷¹

In these instances, Banksy used pranks to unveil his work in a shocking and unique way—installing his own version of the *Mona Lisa* in the Louvre, displaying his works in a rat-infested gallery, and placing a dark and politically charged figure in a family-themed amusement park. The prank was part of the art itself. When we view Banksy’s canon of work in its entirety, it is evident that he weaves together art and pranks. Perhaps Banksy has always been a prankster; the medium he started with—spray painting the streets with graffiti—is inherently mischievous and it laid the foundation for his oeuvre.

C. Banksy’s Shredding Prank

One of Banksy’s most recent pranks, and surely the most notorious, is his shredding of *Girl with Balloon* at Sotheby’s contemporary art auction during the 2018

2020). During his career, “van Gogh completed more than 2,100 works, consisting of 860 oil paintings and more than 1,300 watercolors, drawings and sketches.” While he remained mostly unknown during his lifetime, his fame grew after his death. Today he is considered one of the greatest artists in history with some of his paintings “rank[ing] among the most expensive in the world.” *Id.*

64. ELLSWORTH-JONES, *supra* note 10, at 130.

65. *Id.*

66. *Id.*

67. *Artist Banksy Targets Disneyland*, BBC NEWS, <http://news.bbc.co.uk/2/hi/entertainment/5335400.stm> (last updated Sept. 11, 2006).

68. Big Thunder Mountain Railroad is an “[a]ttraction located in Frontierland at Disneyland Park” where riders take a speeding train ride through a haunted gold mine. *Big Thunder Mountain Railroad*, DISNEYLAND, <https://disneyland.disney.go.com/attractions/disneyland/big-thunder-mountain-railroad/> (last visited Jan. 26, 2021).

69. *Artist Banksy Targets Disneyland*, *supra* note 67; *Banksy Pranks*, *supra* note 59.

70. See *Artist Banksy Targets Disneyland*, *supra* note 67 (“[The] life-size replica of a Guantanamo Bay detainee . . . [w]as intended to highlight the plight of terror suspects at the controversial detention centre in Cuba.”).

71. *Id.*

Frieze Week in London.⁷² The 2006 spray paint and acrylic on canvas depicts a small child in black-and-white, reaching towards the string of a red heart-shaped balloon.⁷³ Interpretations of *Girl with Balloon* include contrasting visions—some see a child “reaching out to catch [a] balloon,” signifying “a vibrant emblem of childhood delight,” while others see a child reaching as a balloon “slip[s] from her fingers,” signifying “the inevitable loss of childhood and innocence.”⁷⁴

On the evening of October 5, 2018, “[a]fter competition between two telephone bidders” for the piece, auctioneer Oliver Barker slammed the hammer down, signaling the sale of *Girl with Balloon* for £1 million.⁷⁵ Attendees report that seconds after the sale was gavelled to a close, an alarm went off and *Girl with Balloon* slipped through the bottom of its frame, leaving a partially shredded portion exposed.⁷⁶ Everyone in the crowd was bewildered—how was a painting that had just sold for £1 million destroyed, seemingly on its own? It should come as no surprise that the artist was behind it.

Shortly afterwards, Banksy posted a picture of the partially-shredded *Girl with Balloon* on his Instagram account, captioning it “Going, going, gone...”⁷⁷ The next day, he uploaded a video to the same account.⁷⁸ The captioned video shows someone (presumably Banksy)⁷⁹ building and installing the shredder into the frame of *Girl with Balloon* when he created the work in 2006. In the video captions, Banksy wrote: “A few years ago I secretly built a shredder into a painting...in case it was ever put up for auction...”⁸⁰ The video contains scenes from the actual auction, depicting

72. *Sotheby's Gets Banksy'ed at Contemporary Art Auction in London*, *supra* note 1. Frieze Week is a “week in the cultural calendar when the [Frieze Art Fairs] take place in London, New York and Los Angeles.” *FAQs | Frieze Week*, FRIEZE, <https://www.frieze.com/faqs-frieze-week> (last visited Jan. 26, 2021). Frieze Week, hosted by media and events company Frieze, “encompasses gallery, museum, and institution show openings as well as myriad collateral events taking place directly related to the fair . . .” *Id.*; *About*, FRIEZE, <https://www.frieze.com/about> (last visited Jan. 26, 2021). Sotheby’s contemporary art auction is among the many events that take place during Frieze Week. *Contemporary Art Evening Auction*, SOTHEBY’S, (Oct. 5, 2018), <https://www.sothebys.com/en/auctions/2018/contemporary-art-evening-auction-118024.html>.

73. *Banksy Girl with Balloon*, SOTHEBY’S, <https://www.sothebys.com/en/auctions/ecatalogue/2018/contemporary-art-evening-auction-118024/lot.67.html> (last visited Jan. 26, 2021).

74. *Id.*

75. *Banksy Painting Self-Destructs*, *supra* note 5.

76. *Id.*

77. Banksy (@banksy), INSTAGRAM (Oct. 5, 2018) [hereinafter *GIRL WITH BALLOON SHREDDED*], <https://www.instagram.com/p/Bokt2sEhlsu/>.

78. INSTAGRAM VIDEO, *supra* note 9.

79. *Id.* (showing someone in a black hooded jacket installing the shredder into the frame). The video began with the caption: “I secretly built a shredder into a painting,” suggesting that Banksy was referring to himself as the one placing the shredder into the frame. *Id.*; *Banksy Video Shows Plan to Shred Entire Girl with Balloon Artwork*, THE GUARDIAN (Oct. 17, 2018, 20:12 EDT), <https://www.theguardian.com/artanddesign/2018/oct/18/banksy-video-girl-with-balloon-shred-entire-artwork>.

80. INSTAGRAM VIDEO, *supra* note 9.

BANKSY: ARTIST, PRANKSTER, OR BOTH?

attendees staring at the partially-shredded *Girl with Balloon* in disbelief.⁸¹ Evidently, the shredding was initiated through a remote device that someone controlled from within the auction room.⁸²

Some speculate that Sotheby's had to have been in on the stunt.⁸³ Both Banksy and the auction house deny it.⁸⁴ But it is worth noting that putting *Girl with Balloon* up for sale came with extraordinary stipulations.⁸⁵ Kenny Schachter, a prominent writer for *artnet News* who has been in the art industry for decades, got the inside scoop from his "trustworthy inside source" we know only as "Deep Pockets."⁸⁶ Schachter disclosed that an individual from "Banksy's publicity team contacted Sotheby's to sell the painting," under the following conditions: "the painting had to be hung in the salesroom during the sale," the painting had to be scheduled for auction "in the latter half" of the evening's sales; and the painting could not be examined out of its frame prior to sale.⁸⁷ Initially, Sotheby's refused.⁸⁸ The consignor then "countered by offering to pay a seller's fee of around 5 percent," which the auction house declined,

81. *Id.*

82. *See Banksy Painting Self-Destructs*, *supra* note 5 ("A photo posted on the private Instagram account of Caroline Lang, the chairman of Sotheby's Switzerland, showed a man in the salesroom operating an electronic device . . .").

83. *See* Mattha Busby, *Shredded Banksy: Was Sotheby's in on the Act?*, *THE GUARDIAN* (Oct. 13, 2018, 14:24 EDT), <https://www.theguardian.com/artanddesign/2018/oct/13/shredded-banksy-was-sothebys-in-on-the-act> (noting that "[a]rt lovers . . . were sharply divided about whether the auction house was aware the stunt would take place").

84. *See* Banksy (@banksy), *INSTAGRAM* (Oct. 17, 2018) [hereinafter *GIRL WITH BALLOON BEFORE SHREDDING*], https://www.instagram.com/p/BpDMo26h3Cu/?utm_source=ig_web_copy_link ("Some people think the auction house were [sic] in on it, they weren't."); *see also* *Banksy Painting Self-Destructs*, *supra* note 5 (stating that Sotheby's head of contemporary art in Europe, Alex Branczik, asserted that Sotheby's was "not in on the ruse.").

85. Kenny Schachter, *Here's What Really Happened With Banksy's Art-Shredding Stunt at Sotheby's*, *According to Kenny Schachter's Source*, *ARTNET NEWS* (Oct. 17, 2018), <https://news.artnet.com/opinion/kenny-schachter-on-banksy-at-sothebys-stunt-1372921>.

86. *Id.*

87. *Id.*

88. *Id.* Sotheby's explained that it is not typical "to hang a relatively inconsequentially valued painting in the room (the pre-sale estimate was £200,000 to £300,000) during an evening auction . . ." *Id.* Besides, auction houses usually inspect artworks prior to their sales and set any conditions of sale. *See How Auction Houses Work*, *GRAY'S AUCTIONEERS*, <https://www.graysauctioneers.com/blog-posts/2019/3/5/how-auction-houses-work#:~:text=Always%20try%20and%20examine%20the,few%20days%20before%20the%20auction> (last visited Jan. 26, 2021) (explaining that prior to selling anything at an auction, the item must be valued by conducting "a thorough examination and analysis" of, among other things, "the artwork quality, size, subject matter, complexity, rarity, if it has sold previously, for how much, comparable works that have sold recently, consultations with art historians/curators or specialists, or even technical analyses . . . to examine condition or authorship").

and then raised the offer to around 10 percent, which Sotheby's accepted.⁸⁹ The auction house denied the story in its entirety.⁹⁰

Regardless of whether Sotheby's was in on the stunt or not, Banksy's shredding of *Girl with Balloon* is "a part of art history."⁹¹ At the time of the stunt, art dealers speculated that it would actually raise the prices of his works.⁹² One year later, this proved true, when *Devolved Parliament* sold for a record-breaking £9.9 million—almost ten times the sale price of *Girl with Balloon*.⁹³

Ironically, the destruction of *Girl with Balloon* created an entirely new piece of art. Banksy renamed the partially shredded painting *Love is in the Bin*, which Pest Control subsequently authenticated as a genuine Banksy creation.⁹⁴

Banksy's prank created shock waves throughout the art world and also poses intriguing legal questions.⁹⁵ Does the purchaser have a tort claim against the artist? What if Banksy activates the shredder again? Does the purchaser have a right to protect her work from further alteration? Does Banksy have a right to prevent the purchaser from removing or defusing the shredder? The following sections of this Note grapple with these questions.

III. TORT: TRESPASS TO CHATTELS

A. *The Elements of Trespass to Chattels*

Trespass to chattels, a common law tort, "is committed by intentionally interfering with [another's] possession in a way that causes legally cognizable harm."⁹⁶ The Restatement (Second) of Torts describes trespass to chattels as "intentionally dispossessing another of the chattel" or "using or intermeddling with a chattel in the

89. Schacter, *supra* note 85.

90. *Id.* Sotheby's representative stated that "how the work was handled and presented in the sale . . . never featured in [the] discussions regarding commission rates, and there were no stipulations [regarding] the frame connected to [the] consignment agreement." *Id.*

91. Scott Reyburn, *How Banksy's Prank Might Boost His Prices: 'It's a Part of Art History'*, N.Y. TIMES (Oct. 7, 2018) [hereinafter *Boost Prices*], <https://www.nytimes.com/2018/10/07/arts/design/banksy-artwork-painting.html>.

92. *Id.*

93. *Devolved Parliament*, *supra* note 34.

94. *Latest Banksy Artwork 'Love is in the Bin' Created Live at Auction*, SOTHEBY'S (Oct. 11, 2018), <https://www.sothebys.com/en/articles/latest-banksy-artwork-love-is-in-the-bin-created-live-at-auction#:~:text=A%20s%20the%20final%20hammer,had%20been%20sold%20at%20auction>. The purchaser, who has remained anonymous, proceeded with the purchase at the auction price bid and stated: "When the hammer came down . . . and the work was shredded, I was at first shocked, but gradually I began to realise that I would end up with my own piece of art history." *Id.*

95. See Richard Chused, "Temporary" *Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1, 40 (2019) [hereinafter *Temporary Conceptual Art*] ("The recent and now (in)famous half-shredding of a 2006 version of *Girl with Balloon* immediately after its auction at Sotheby's was gavelled down as sold certainly left many both amazed and befuddled.").

96. DAN B. DOBBS ET AL., HORNBOOK ON TORTS 105 (2d ed. 2016).

BANKSY: ARTIST, PRANKSTER, OR BOTH?

possession of another.”⁹⁷ *Black’s Law Dictionary* defines chattel as “[m]ovable or transferable property; personal property; [especially], a physical object capable of manual delivery and not the subject matter of real property.”⁹⁸

Although the exact elements of trespass to chattels vary among jurisdictions, there are three general elements that a plaintiff must satisfy to succeed in a cause of action. First, the plaintiff must be the owner, though not necessarily in possession, of the tangible property.⁹⁹ For instance, if A loans his chattel to B, B has possession of the chattel, but A is still its rightful owner. If B then intentionally harms the chattel, A has a cause of action against B, because A is the rightful owner of the chattel. Possession, in this case, is secondary to ownership.

Another important factor in the analysis of this first element is that the concept of tangible property has changed over time. Some courts have expanded it to embrace the digital age.¹⁰⁰ *Thrifty-Tel, Inc. v. Bezenek*,¹⁰¹ decided in 1996, “laid the groundwork for future applications” of trespass to chattels to electronic devices and the internet.¹⁰² Thrifty-Tel, a telephone operator, sued the families of two minors who used computers to hack Thrifty-Tel’s access and authorization codes in order to make long distance phone calls for free.¹⁰³ The California Appellate Court found that “the electronic signals generated by the [minors’] activities were sufficiently tangible to support a trespass cause of action.”¹⁰⁴ In 1997, the U.S. District Court for the Southern District of Ohio relied on *Thrifty-Tel* when deciding *CompuServe, Inc. v. Cyber Promotions, Inc.*¹⁰⁵ In that case, CompuServe, an internet service provider, sued Cyber Promotions for sending unsolicited emails to CompuServe’s subscribers.¹⁰⁶ In holding Cyber Promotions liable for trespass to chattels, the court noted that “[e]lectronic signals generated and sent by computer have been held to be sufficiently

97. RESTATEMENT (SECOND) OF TORTS: INTENTIONAL HARMS TO PERS., LAND, AND CHATTELS § 217 (AM. L. INST. 1965).

98. *Chattel*, BLACK’S LAW DICTIONARY (11th ed. 2019). Trespass to chattels differs from trespass to land in that the latter is a cause of action for trespass to real property. *See* DOBBS ET AL., *supra* note 96, at 85.

99. *See* DOBBS ET AL., *supra* note 96, at 106 (“[I]f the defendant intentionally harms a chattel that the owner has loaned or leased to someone else, the owner is not in possession, but [the owner] has an action [in trespass to chattels] if his interests in the chattel are adversely affected.”).

100. *See id.* (“Some . . . cases have extended the tort [of trespass to chattels] to protect computer systems from electronic invasions by way of unsolicited bulk email or the like, or hacking into a computer.”).

101. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

102. R. Clifton Merrell, Note, *Trespass to Chattels in the Age of the Internet*, 80 WASH. U.L.Q. 675, 679 (2002); *see generally* *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 (extending the concept of tangible property to electronic signals from a computer).

103. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 471.

104. *Id.* at 473 n.6.

105. *See* 962 F. Supp. 1015, 1027 (S.D. Ohio 1997) (“Defendants’ intentional use of plaintiff’s proprietary computer equipment exceeds plaintiff’s consent, and, indeed, continued after repeated demands that defendants cease. Such use is actionable trespass to plaintiff’s chattel.”).

106. *Id.* at 1015.

physically tangible to support a trespass cause of action.”¹⁰⁷ These courts expanded trespass to chattels to include the notion of cyberspace as tangible property.

The second element of trespass to chattels is that the defendant must trespass intentionally.¹⁰⁸ A defendant can trespass in two ways—by causing physical harm to the chattel or by physically interfering with the owner’s rights to possess the chattel.¹⁰⁹ The Restatement (Second) of Torts characterizes this as intermeddling and dispossession, respectively.¹¹⁰

Dispossession may be committed by intentionally:

- (a) taking a chattel from the possession of another without the other’s consent, or
- (b) obtaining possession of a chattel from another by fraud or duress, or
- (c) barring the possessor’s access to a chattel, or
- (d) destroying a chattel while it is in another’s possession, or
- (e) taking the chattel into the custody of the law.¹¹¹

Dispossession occurs when the defendant assumes physical control over the plaintiff’s chattel whereas intermeddling with a chattel involves “intentionally bringing about physical contact with the chattel.”¹¹² Not only must a defendant trespass—through either dispossession or intermeddling—but the defendant must do so intentionally.¹¹³ However, intent does not always require wrongful motive.¹¹⁴ As long as the defendant acted voluntarily in the dispossession of, or intermeddling with, the chattel, the intent element is satisfied.¹¹⁵

107. *Id.* at 1021 (first citing *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472–73; and then citing *State v. McGraw*, 480 N.E.2d 552, 554 (Ind. 1985)).

108. See RESTATEMENT (SECOND) OF TORTS: INTENTIONAL HARMS TO PERS., LAND, AND CHATTELS § 217 cmt. b (AM. L. INST. 1965) (“[T]he word ‘trespass,’ so far as it applie[s] to interference with chattels, has come to be limited to intentional interferences.”).

109. DOBBS ET AL., *supra* note 96, at 106.

110. RESTATEMENT (SECOND) OF TORTS § 217; *see id.* § 217 cmt. e (“‘Intermeddling’ means intentionally bringing about a physical contact with the chattel.”); *see also id.* § 217 cmt. d (explaining that the cause of action for trespass to chattels is appropriate so long as the intermeddling “was the legal cause of the harm”). *See generally id.* § 221 (defining dispossession).

111. *Id.* § 221.

112. *Compare id.* at § 221 cmt. b, *with id.* § 217 cmt. e. “The actor may commit trespass by an act which brings him into an intended physical contact with a chattel in the possession of another, as when he beats another’s horse or dog, or by intentionally directing an object or missile against it . . .” *Id.* § 217 cmt. e.

113. *See* Michael R. Siebecker, *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?*, 76 S. CAL. L. REV. 893, 912–17 (2003) (“[T]he intent to dispossess or intermeddle with the property of another represents an essential element of a modern trespass to chattels claim.”).

114. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 86 (5th ed. 1984).

115. *See id.* (“It is no defense that the defendant believed the goods to be his own.”). Moreover, “[w]holly accidental interference or dispossession . . . will not satisfy the intent element.” *See* Siebecker, *supra* note 113, at 916 (“Even if the interference [or dispossession] occurred by mistake, sufficient intent exists . . . as long as the mistaken act itself was voluntary.”).

BANKSY: ARTIST, PRANKSTER, OR BOTH?

Finally, a plaintiff must sustain actual damages to prevail on a trespass to chattels claim.¹¹⁶ Specifically, the Restatement (Second) of Torts outlines that a defendant is liable to the chattel's possessor only if:

- (a) he dispossesses the other of the chattel, or
- (b) the chattel is impaired as to its condition, quality, or value, or
- (c) the possessor is deprived of the use of the chattel for a substantial time, or
- (d) bodily harm is caused to the possessor, or harm is caused to some person or thing which the possessor has a legally protected interest.¹¹⁷

In summary, a plaintiff must demonstrate that the defendant intentionally trespassed onto the plaintiff's tangible property and such trespass caused the plaintiff actual damages.

B. Banksy and Trespass to Chattels

Girl with Balloon was a physical and tangible piece of artwork—a chattel—and the purchaser was its owner when it was shredded. It was, therefore, their property. This notion is supported by § 2-328(2) of the Uniform Commercial Code, which states: “A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner.”¹¹⁸ When the hammer fell, the sale was complete, ownership was transferred, and the purchaser was the new owner of the artwork. Because the owner of a chattel does not need to be in possession of it in order to assert a claim for trespass to chattels, ownership of the painting had vested in the purchaser at the time of its destruction, even though the painting was still in Sotheby's possession. The purchaser would therefore be able to satisfy the first element of trespass to chattels.

The purchaser could likely also satisfy the second element. Banksy dispossessed the purchaser by intentionally assuming physical control over the chattel without their consent. While Banksy did not physically touch *Girl with Balloon* in order to initiate the shredding, he or his agent was able to assume physical control over it due to the remotely controlled shredder.¹¹⁹ Although Banksy could argue that he never physically touched the artwork and is thus not liable, a court would likely disagree. Like the electronic signals in the computer and phone systems in *Thrifty-Tel* and the email accounts in *CompuServe*, which courts found satisfied the second element of trespass, electronic signals operated via remote control to initiate the shredding

116. KEETON ET AL., *supra* note 114, at 87.

117. RESTATEMENT (SECOND) OF TORTS § 218.

118. U.C.C. § 2-328(2) (AM. L. INST. & UNIF. L. COMM'N 2019).

119. See *Banksy Painting Self-Destructs*, *supra* note 5 (“The painting, mounted on a wall close to a row of Sotheby's staff members, had been shredded, or at least partially shredded, by a remote-control mechanism on the back of the frame.”); see also *Banksy Video Shows Plan to Shred Entire Girl with Balloon Artwork*, *supra* note 79 (“Banksy has posted a video to his website in which he implies the shredding of his million-pound artwork *Girl with Balloon* . . . was supposed to have been complete Banksy shows himself constructing the shredding mechanism inside a frame.”).

would likewise satisfy this element.¹²⁰ Although it is clear that, in intentionally shredding the work, Banksy intended to assume physical control over the piece, it is unclear whether he intended to shred it. Banksy himself acknowledged in his Instagram video and the accompanying post that he installed the shredder and initiated the shredding.¹²¹ He intentionally trespassed and, thus, the second element of trespass to chattels is satisfied.

However, the third and last element of a trespass to chattels claim would be difficult for the plaintiff to prove because they would have to demonstrate that Banksy's shredding caused actual damages—specifically, that *Girl with Balloon* was “impaired as to its condition, quality, or value.”¹²² Under a plain reading of this requirement, the plaintiff would prevail because the condition of the piece was impaired—after the shredding, one portion was left dangling from the bottom part of the frame. Practically speaking, however, the plaintiff would have trouble convincing a court that they were entitled to damages; due to all the publicity, the artwork's value likely rose after the partial shredding. Although the piece was impaired as to its condition, the purchaser would not be able to prove they suffered damages due to the presumed increase in value of the work.

IV. COPYRIGHT: MORAL RIGHTS

A. Visual Artist Rights Act & Moral Rights

If the primary goal of the purchaser was to preserve the work in its half-shredded state and ensure that the shredder could not be activated again, could they file a motion for a restraining order or injunction? Would a court's grant of such motion violate Banksy's rights as an artist under the Visual Artist Rights Act? What can the plaintiff do in order to prevent Banksy from remotely reactivating the shredder?

Moral rights “refer[] to certain non-economic rights that are considered personal to an author.”¹²³ They embody the notion that “[a]n artistic creation is not merely a product that can be bought or sold but rather it is a direct reflection on the author's personality, identity, and even his or her ‘creative soul.’”¹²⁴ The United States did not grant authors protections of their moral rights until it ratified the Berne Convention

120. See *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (finding that electronic signals are enough to support a trespass to chattel claim); see also *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996) (finding that electronic signals are enough to support a trespass to chattel claim).

121. INSTAGRAM VIDEO, *supra* note 9; GIRL WITH BALLOON BEFORE SHREDDING, *supra* note 84.

122. RESTATEMENT (SECOND) OF TORTS § 218(b).

123. *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S. COPYRIGHT OFF. 6 (2019) [hereinafter U.S. COPYRIGHT OFF.], <https://www.copyright.gov/policy/moralrights/full-report.pdf>. Moral rights include the “rights of attribution (the right to be credited as the author of one's work) and of integrity (the right to prevent prejudicial distortions of one's work) . . .” *Id.* at 3.

124. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 410 (2009).

for the Protection of Literary and Artistic Works in 1988.¹²⁵ Article *6bis* of the Berne Convention requires all member countries to protect artists' moral rights.¹²⁶ In order to comply with this article, Congress passed The Visual Artist Rights Act (VARA) of 1990, amending The Copyright Act of 1976.¹²⁷

VARA grants authors—artists—the rights of attribution and integrity, which run for the life of the artist and expire at the end of the calendar year in which the artist dies.¹²⁸ The right of attribution refers to the right of an artist to be credited as the author of their work.¹²⁹ This right is important because it ensures that artists can claim their work as their own, ensuring that they get the credit they deserve.¹³⁰ Such protection motivates artists, fosters the creative process, allows artists to create the “stepping stones for their career,” and ultimately, helps them achieve their goals.¹³¹ Banksy is not a rookie when it comes to his right of attribution—he takes full advantage of it through Pest Control.¹³²

The right of integrity refers to the right of an artist to prevent prejudicial distortions of their work.¹³³ Specifically, VARA grants artists the “right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and . . . to prevent any destruction of a work of recognized stature.”¹³⁴ Traditionally, the right of integrity

125. See U.S. COPYRIGHT OFF., *supra* note 123, at 3, 7. “The Berne Convention in general and its requirement for a moral right provision in particular arise from a sensibility that artistic endeavors should be protected because of the inherent value—a moral imperative—of creativity and the works it produces.” *Temporary Conceptual Art*, *supra* note 95, at 49.

126. Berne Convention for the Protection of Literary and Artistic Works, art. *6bis*, Sept. 9, 1886, revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

127. See U.S. COPYRIGHT OFF., *supra* note 123, at 7 (noting that Congress relied upon “an existing patchwork of laws” to protect artists’ moral rights and “add[ed] two additional elements to the patchwork,” including passing VARA in 1990); see also Lang Chen, Note, *My Art Versus Your Property: A Proposal for VARA Application to Site-Specific Art*, 46 AIPLA QJ. 341, 348 (2018) (explaining that “the only way [for the United States] to adhere to the Berne Convention was to enact specific moral rights legislation” and, therefore, “VARA was enacted as an amendment to the 1976 Copyright Act”). VARA is codified as § 106A in Title 17. U.S. COPYRIGHT OFF., *supra* note 123, at 5. Besides recognizing the rights of integrity and attribution, VARA also grants six exclusive rights to copyright holders. Chen, *supra*. Additionally, “in 1998 Congress added section 1202 to title 17, which prohibits both providing false copyright management information (“CMI”) and removing or altering CMI in certain circumstances.” U.S. COPYRIGHT OFF., *supra* note 123, at 7; 17 U.S.C. § 1202.

128. 17 U.S.C. § 106A(d)(1), (4).

129. U.S. COPYRIGHT OFF., *supra* note 123, at 3. This Note focuses on the right of integrity. The language of VARA outlines that authors of “work[s] of visual art” have the right “to claim authorship of that work,” and “to prevent the use of his or her name as the author of any work of visual art which he or she did not create.” 17 U.S.C. § 106A(a)(1)(A)–(B); see 17 U.S.C. § 101 (defining a “work of visual art”).

130. Chen, *supra* note 127, at 350.

131. *Id.*

132. Reyburn, *supra* note 41.

133. Chen, *supra* note 127, at 350–51.

134. 17 U.S.C. § 106A(a)(3)(A)–(B).

granted artists protections from mutilation but not from complete destruction of their artwork.¹³⁵ This exclusion made no logical sense, as individuals who modified works were liable, but individuals who destroyed works were not.¹³⁶ Today, VARA's right of integrity grants artists the right to prevent modifications to, as well as destruction of, their artwork.¹³⁷ This right encourages the creative process and ensures that an artist has a "final say over the version of her work" and "prevents [her] name from being attached to a defective version of [her] work."¹³⁸

An artist bringing a claim under VARA "to prevent intentional distortion, mutilation, or modification of [their] work" must assert that such action would be "prejudicial to his or her honor or reputation."¹³⁹ Although VARA does not provide any definition or guidance as to the definition of this element, the VARA House Report recommended that courts "focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected" and "examine the way in which a work has been modified and the professional reputation of the author of the work."¹⁴⁰ In the 2010 case *Massachusetts Museum of Contemporary Art Foundation Inc. v. Büchel*, the First Circuit Court of Appeals interpreted this standard as requiring that artists show prejudicial harm to their reputation in relation to the modification, distortion, or mutilation of the specific work at issue.¹⁴¹ The U.S. Copyright Office "agrees with the interpretation of this right by the [First Circuit], specifically that the harm to the artist's reputation should be assessed in the context of the particular work at issue and not the artist's reputation concerning his or her entire oeuvre."¹⁴²

If an author brings a claim under VARA to prevent the destruction of their work, that work must be one "of recognized stature."¹⁴³ Similar to the previously discussed prejudice requirement, "a work of recognized stature" is neither defined by

135. Chen, *supra* note 127, at 351 (first citing Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 51 (1998)); and then citing *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949)).

136. Chen, *supra* note 127, at 351 (citing Liemer, *supra* note 135, at 51).

137. 17 U.S.C. § 106A(a)(3)(A)–(B).

138. Chen, *supra* note 127, at 351 (citing Liemer, *supra* note 135, at 51). There are, however, three exceptions to the right of integrity. First, modifications of a work which result from the passage of time, or the inherent nature of the materials, are not considered distortions or mutilations. 17 U.S.C. § 106A(c)(1). Second, modifications of a work which are a result of conservation, or of the public presentation, such as lighting and placement, are not considered distortions, mutilations of the work unless caused by gross negligence. 17 U.S.C. § 106A(c)(2). Third, the right of integrity does not apply to reproductions, depictions, or portrayals of the work of art. 17 U.S.C. § 106A(c)(3). The third exception also applies to the right of attribution. *Id.*

139. 17 U.S.C. § 106A(a)(3)(A).

140. H.R. REP. NO. 101-514, at 6925–26 (1990), reprinted in U.S.C.C.A.N. 6915, 1990 WL 258818.

141. 593 F.3d 38, 52–54 (1st Cir. 2010).

142. U.S. COPYRIGHT OFF., *supra* note 123, at 77 (emphasis omitted).

143. 17 U.S.C. § 106A(a)(3)(B).

BANKSY: ARTIST, PRANKSTER, OR BOTH?

the statute nor “clearly elucidated by the courts.”¹⁴⁴ The most frequently cited case on this issue is *Carter v. Helmsley-Spear, Inc.*¹⁴⁵ The *Carter* court outlined in 1994 that for a work to be “of recognized stature,” the plaintiff “must make a two-tiered showing: (1) that the visual art in question has ‘stature,’ *i.e.* is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”¹⁴⁶ In 2018, the court in *Cohen v. G&M Realty L.P.* applied this test and held that aerosol artworks on long-standing walls qualified as works of recognized stature due to their “artistic merit and embrace by the artistic community.”¹⁴⁷

B. Banksy’s Claims under VARA

What if the purchaser of *Love is in the Bin* wants to take the shredder out of the frame? What if they worry that Banksy might activate the shredder to complete the shredding process? After all, the buyer is the rightful owner of the painting, so they should be able to protect it from a further trespass to chattels. Can a court grant an order ensuring that the shredder is not activated again without simultaneously violating Banksy’s rights under VARA?

To preserve his right of integrity, Banksy can pursue two claims under VARA. He could assert that removing or disengaging the shredder would be an intentional distortion, mutilation, or modification that “would be prejudicial to his . . . honor or reputation.”¹⁴⁸ He could also assert that removing or disengaging the shredder would constitute a “destruction of a work of recognized stature.”¹⁴⁹ Banksy has a right of action under both claims because he is the author of the painting and, pursuant to 17

144. *Anti-Rebellion Graffiti*, *supra* note 32, at 624.

145. *Id.* See generally *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994) *aff’d in part, vacated in part, reversed in part on other grounds*, 71 F.3d 77 (2d Cir. 1995) (applying VARA’s “recognized stature” provision to bar destruction or alteration of art installed in a building lobby during bankruptcy proceedings).

146. *Carter*, 861 F. Supp. at 324–25.

147. 320 F. Supp. 3d 421, 439 (E.D.N.Y. 2018). In *Cohen v. G&M Realty L.P.*, also known as the 5Pointz litigation, twenty-one aerosol artists sought a preliminary injunction under VARA against the owner of warehouse buildings in Long Island City, New York, to prevent the destruction of their graffiti art on the walls of the 5Pointz Aerosol Art Center, Inc. *Id.* at 427. The court denied the preliminary injunction and, only eight days later, the plaintiffs’ graffiti was destroyed by whitewashing. *Id.* The court stated that the defendants’ buildings “had become the repository of the largest collection of exterior aerosol art . . . in the United States” and that the litigation “marks the first occasion that a court has had to determine whether the work of an exterior aerosol artist . . . is worthy of any protection under the law.” *Cohen v. G&M Realty, L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013). On appeal, the court held that the “aerosol artwork on long-standing walls qualified as works of recognized stature subject to VARA protection” and the defendants “acted willfully in whitewashing the aerosol artwork.” *Cohen*, 320 F. Supp. 3d at 421. Thus, the court “award[ed] maximum statutory damages under VARA for each of the 45 works wrongfully and willfully destroyed in the combined sum of \$6,750,000.” *Id.* at 428.

148. 17 U.S.C. § 106A(a)(3)(A).

149. 17 U.S.C. § 106A(a)(3)(B).

U.S.C. § 101, *Love is in the Bin* fits the definition of a “work of visual art,” as it is a “painting . . . existing in a single copy, in a limited edition of 200 copies or fewer.”¹⁵⁰

In order to preserve *Love is in the Bin* and ensure that the shredder could not be turned on again, the purchaser has a few options. They could open the frame and completely remove the shredder, open the frame and disengage the shredder by cutting wires or removing its parts, or place something on the outside of the frame in order to block the electronic signal between the shredder and remote control. The first two options require opening the actual frame of the piece, whereas the last option involves placing something on the frame.

If the purchaser removed the frame, would that action constitute a modification, distortion, or mutilation of the painting? The answer depends on whether the shredder is part of the work itself. According to Alex Branczik, when “Sotheby’s approached Pest Control, asking if they could remove [the frame], . . . ‘Pest Control said very clearly: the frame is integral to the art work . . .’”¹⁵¹ Based on this statement, it seems as though the frame, with the shredder built into it, is essential to the painting. Thus, removing or disengaging it would constitute a modification, distortion, or mutilation of the work.

But what if, instead of removing or disengaging the shredder, the purchaser placed something on the outside of the frame that blocks the signal between the shredder and its remote control? Such modification would be discrete, not readily visible, and minimally invasive—the frame would not have to be opened. Banksy could argue that placing something on the frame, however, would constitute a modification, because the purchaser would need to place something on the work that was not part of the original; additionally, he could argue that such modification would be prejudicial to his reputation as a prankster.

Courts and the U.S. Copyright Office have narrowed the reputational analysis in which “the harm to the artist’s reputation should be assessed in the context of the particular work at issue and not the artist’s reputation concerning [his] entire oeuvre.”¹⁵² Despite this narrow interpretation, Banksy could still assert that his reputation would be harmed. His prank of partially shredding the artwork during a live auction relied on the shredder installed inside the frame. Arguably, removing or disengaging the shredder would damage his reputation.

Banksy could also assert that removing or disengaging the shredder would constitute a destruction of a work of recognized stature. Per the *Carter* court’s analysis, *Love is in the Bin* is “viewed as meritorious” and is recognized as such “by art experts [and] other members of the artistic community,” and, therefore, qualifies as a work of recognized stature.¹⁵³ Indeed, *Love is in the Bin* is the first painting ever to be

150. 17 U.S.C. § 101.

151. Anny Shaw, *Banksy Seller’s Stringent Instructions for Sotheby’s Revealed*, THE ART NEWSPAPER (Oct. 17, 2018, 16:42 PM), <https://www.theartnewspaper.com/news/banksy-sale-stipulations>.

152. U.S. COPYRIGHT OFF., *supra* note 123, at 77 (emphasis omitted).

153. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994) *aff’d in part, vacated in part, reversed in part on other grounds*, 71 F.3d 77 (2d Cir. 1995).

BANKSY: ARTIST, PRANKSTER, OR BOTH?

created during a live auction and has been recognized as “a part of art history.”¹⁵⁴ Would removing or disengaging the shredder constitute “destruction” of the piece? The work would still physically exist and aesthetically look the same. But an artist’s intent should be considered when evaluating whether a work is destroyed or not, as “[t]here is an important sense in which the intent of an [artist] controls the availability of copyright protection.”¹⁵⁵ Banksy’s intention—that the shredder be part of the work itself—should play a role in determining whether or not removing or disengaging it constitutes destruction. Intent plays a crucial role, as “the artists’ expectations, like their expressed intentions, about the ways in which their work will or may be destroyed should govern the longevity of their creations.”¹⁵⁶ Ironically, steps taken to protect *Love is in the Bin* from destruction can actually themselves constitute destruction of the work.

Are there any ways in which the purchaser can protect *Love is in the Bin* from further shredding without violating Banksy’s VARA right of integrity? Could the purchaser obtain a court order prohibiting the artist from activating the shredder? Or perhaps create a gadget that stands next to *Love is in the Bin*, blocking the signal between the shredder and its remote? A court order prohibiting Banksy from activating the shredder would not constitute a modification, mutilation, or distortion to the work because nothing is being done to the work itself. Rather, the artist would be prohibited from modifying, mutilating, or distorting the work. Would such a court order violate Banksy’s rights of attribution and integrity under VARA? Would his inability to turn the shredder on, either through court order or a gadget, constitute a destruction or modification? Perhaps it would constitute a destruction or modification of his intent, but not of the actual work. Does Banksy have any rights to protect his intentions?

V. CONCLUSION

Although this Note discusses trespass to chattels and VARA claims separately, what happens if these claims go head-to-head? What if a court deems the shredder and frame part of the work, protected by VARA, and the purchaser fears another trespass to chattels, this time in a way that may reduce, rather than increase, the value of the piece? Would the purchaser be able to prevail on a trespass to chattels claim? Or would a court rule in Banksy’s favor, reasoning that the shredder, and thus the shredding, are protected by VARA?

Each possibility carries broader policy implications. If a court ruled in favor of the trespass to chattels claim, the purchaser’s property rights would be protected at the expense of Banksy’s artistic rights, which could contribute to a chilling effect of artists’ rights. If a court ruled in favor of Banksy, and protected his rights under VARA, individual property rights would be compromised. Collectors would wonder

154. *Boost Prices*, *supra* note 91.

155. *Temporary Conceptual Art*, *supra* note 95, at 55.

156. *Id.* at 57.

what the point was in buying and owning art if artists maintained the right to destroy their creations.

Would an individual violate VARA if they purchased a painting and cut it in half? Most likely yes, as this would be considered a statutory mutilation. But what if the artist included a pair of scissors with the painting and titled it “The Nature of Demolition”—would the purchaser’s cutting of the painting still be considered a violation under VARA? Perhaps not, if the artist’s intent was for the purchaser to cut the work in half. What if the purchaser of *Love is in the Bin* found a way to re-activate the shredder and shredded the rest of the piece? Would Banksy have a claim under VARA? Or would the purchaser be permitted to shred the artwork, given the presence of a shredder placed there by Banksy?

The answers to these questions are ambiguous, and they must be contemplated carefully. Banksy’s latest prank—the partial shredding of *Girl with Balloon*—poses unique tort and copyright implications, which highlight the inherent tensions between artist and property rights. Through his pranks, Banksy has pushed the limits of both art and law.