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# Bruised Soul of the Artist: A Tribute to Sheldon W. Halpern

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TABLE OF CONTENTS



## I. FRIENDSHIP

The late Professor Sheldon W. Halpern was a well-known doctrinal scholar of copyright law and the law of defamation, privacy, and publicity. He was a 1959 graduate of the Cornell Law School. Professor Halpern practiced law for twenty-five years before entering the legal academy. He spent most of his career in legal education on the tenured faculty of the Moritz College of Law at The Ohio State University. I first met Professor Halpern in the early 1990s when he was tasked with writing an introduction to a symposium on privacy law to which I contributed an article that helped launch my career.[1] He was supportive and open-minded about my effort to introduce feminism into the discussions of the common law privacy torts by showing that cultural values relating to the place of women in society deeply shaped the early development of state privacy law. We subsequently saw one another from time to time at meetings of the Association of American Law Schools, whose section on privacy and defamation law I once chaired.

In retirement from The Ohio State University, he moved to Philadelphia and took on a full-time position as a Distinguished Professor at Albany Law School, commuting between upstate New York and Philadelphia. Professor Halpern and I became closer colleagues when his family moved east. I grew to think of him and his wife as generous, cosmopolitan intellectuals with big personalities and warm hearts. When advanced cancer was discovered in 2015, he had already moved on from Albany Law School and was living principally in Philadelphia. Moreover, though close to eighty years old, Professor Halpern was planning a series of lectures in the United Kingdom, updating his books,

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[1] Sheldon W. Halpern, *The "Inviolate Personality"—Warren and Brandeis After One Hundred Years: Introduction to a Symposium on the Right of Privacy*, 10 N. ILL. U. L. REV. 387 (1990). My contribution to the symposium, with a student research assistant, was the article Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990).

and continuing to welcome teaching opportunities for his unflagging professional enthusiasms. He faced the bad news about his health philosophically, proud of his accomplishments, and comforted by the love of his daughter, Michaela Halpern, and wife, Dr. Dorit Samuels. The Halperns had returned to Ohio to be near old friends when Sheldon died there in early 2016.

## II. CONTRIBUTION

Professor Halpern authored or co-authored several comprehensive treatises and textbooks,[2] along with a great many law review articles and essays.[3] He

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[2] *See, e.g.*, SHELDON W. HALPERN ET AL., COPYRIGHT: CASES AND MATERIALS (1992); SHELDON W. HALPERN, COPYRIGHT LAW: PROTECTION OF ORIGINAL EXPRESSION (2d ed. 2010); SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY, AND MORAL RIGHT (4th ed. 2000); Sheldon W. Halpern, *Publicity Rights, Trademark Rights, and Property Rights*, *in* OVERLAPPING INTELLECTUAL PROPERTY RIGHTS 321 (Neil Wilkof & Shamnad Basheer eds., 2012).

[3] *See, e.g.*, Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123 (1987); Sheldon W. Halpern, *The Art of Compromise and Compromising Art: Copyright, Technology, and the Arts*, 50 J. COPYRIGHT SOC'Y U.S.A. 273 (2003); Sheldon W. Halpern, *Copyright Law and the Challenge of Digital Technology*, *in* IMAGE ETHICS IN THE DIGITAL AGE 143 (Larry Gross et al. eds., 2003); Sheldon W. Halpern, *Copyright Law in the Digital Age:* Malum in Se *and* Malum Prohibitum, 4 MARQ. INTELL. PROP. L. REV. 1 (2000); Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L.J. 569 (2001); Sheldon W. Halpern, *A High Likelihood of Confusion:* Wal-Mart*,* TrafFix*,* Moseley*, and* Dastar*—The Supreme Court's New Trademark Jurisprudence*, 61 N.Y.U. ANN. SURV. AM. L. 237 (2005); Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273 (1990); Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539 (1991) [hereinafter Halpern, *Rethinking the Right of Privacy*]; Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995); Sheldon W. Halpern, *Selections from the 2007 Albany Law School Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property*, 70 ALB. L. REV. 1151 (2007); Sheldon W. Halpern, *Selections from the Second Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property*, 49 J. COPYRIGHT SOC'Y U.S.A. 127 (2001); Sheldon Halpern, *The Supreme Court's Trademark Jurisprudence: Categorical Divergence in the Interest of Information Convergence*, 25 J. MARSHALL J. COMPUTER & INFO. L. 635 (2008); Sheldon W. Halpern, *The Traffic in Souls: Privacy Interests and the Intelligent Vehicle-Highway Systems*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 45 (1995); Sheldon W. Halpern, *Trafficking in Trademarks: Setting Boundaries for the Uneasy Relationship Between "Property Rights" and Trademark and Publicity Rights*, 58 DEPAUL L. REV. 1013 (2009); Sheldon W. Halpern, *Values and Value: An Essay on Libel Reform*, 47 WASH. & LEE L. REV. 227 (1990); Phillip Johnson & Sheldon W. Halpern, *When Is a Performance Not a Performance (But a Copyright Work)?*, 4 QUEEN MARY J. INTELL. PROP. 236 (2014);

was an elegant writer. In his work, he displayed concerns about the operation of law but also about the moral values that live within and beside the law. Indeed, one of the recurrent themes in his scholarship was the relationship between the legal and the moral. His tribute to the late legal scholar Edward Bloustein reflected Professor Halpern's interest in normative moral fundamentals.[4] As philosophers of privacy know, Bloustein rejected William Prosser's influential analysis of common law privacy torts as a set of four distinct torts.[5] Bloustein's view was that "the tort cases involving privacy are of one piece and involve a single tort" protecting the "interest in preserving human dignity and individuality."[6] Praising his friend Bloustein's philosophical contribution, Professor Halpern was moved to ask the question of whether the law is always up to the task of protecting human dignity. What is the dignity of which Professor Halpern wrote? He was referring to the familiar conception of dignity as the defining feature of rational beings with free will.

As creatures capable of reason and equipped with the freedom necessary for responsibility, human beings generally ought to be let alone to pursue their own ends. They should be treated as subjects and not as mere utilitarian objects for the purposes of others. Democratic societies are spirited by a commitment to respect human dignity by safeguarding and nurturing freedom. It is imperative, Professor Halpern exhorted in response to Bloustein, "to confront the moral issues surrounding the problem of protecting human dignity."[7] Invasions of privacy can leave behind a "bruised soul," he said, but "the legal balm the bruise requires" defies configuration, particularly in our "media saturated world."[8] Recognizing moral values implicated by privacy rights, publicity rights, defamation, and copyright, Professor Halpern often reluctantly concluded that not everything important and of great value is amenable to legal protection.[9] Some of the protections we ought to enjoy must derive from civility and culture, not law.

## III. DIGNITY AND RIGHTS OF ARTISTS

Invasions of privacy can result in bruised souls, and so can false attributions of artwork. A recent legal contest underscores the importance of Professor Halpern's insights and displays why a scholar of privacy, publicity, defamation, and copyright could be led to ponder the relationship between

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Sheldon W. Halpern, Comment, *"Civil Insanity": The New York Treatment of the Issue of Mental Incapacity in Non-Criminal Cases*, 44 CORNELL L.Q. 76 (1958).

[4] *See generally* Halpern, *Rethinking the Right of Privacy*, *supra* note 3.

[5] *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[6] Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000–05 (1964).

[7] Halpern, *Rethinking the Right of Privacy*, *supra* note 3, at 544.

[8] *Id.* at 549.

[9] *See, e.g.*, *id.* at 562–63.

moral values and legal praxis. In the unusual dispute in question, Scottish-born painter Peter Doig was accused of wrongfully denying the authenticity of a painting he insisted he did not paint, to the financial detriment of the work's unsophisticated owner.[10] Doig won the case against him, which commenced in 2013 and continued for three years. United States District Judge Gary Feinerman ultimately ruled that the evidence presented in a week-long trial proved "conclusively" that Doig did not paint the plaintiff owner's painting.[11] The case raised concerns about whether a living artist should ever be required by law to authenticate a work of art ascribed to him or her and face civil liability for denying authenticity. While victorious, Peter Doig complained that justice was "long overdue" and that the issue that "a living artist has to defend the authorship of his own work should never have come to pass."[12] There is a moral argument from the importance of dignity and inviolate personality that Doig is correct. Yet, other arguments press in another direction.

Western societies attribute a special status to artists. In French and other European law, this is reflected in the concept of "moral right."[13] The juridical concept of moral right, Professor Halpern explained, functions by "vesting in the creator rights to control . . . the creation that are independent of . . . ownership of that creation."[14] "Grounded on the premise that the 'artist' is different from the rest of us, the moral right can function comfortably only in a cultural milieu that accepts and nurtures that difference," according to Professor Halpern.[15] In the United States, by virtue of their creativity and originality, professional fine artists are indeed widely viewed as different, the epitome of persons of moral dignity, with "individual personality."[16] Indeed, some of the best and most successful professional artists have these human

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[10] Fletcher v. Doig, 125 F. Supp. 3d 697, 701, 703, 705 (N.D. Ill. 2014) (alleging tortious interference with plaintiffs' prospective economic advantage by interfering with the auction of a painting owned by Fletcher, and seeking declaration that Doig painted the painting); *see also* Fletcher v. Doig, No. 13 C 3270, 2016 WL 3940082, at *2, *5, *8 (N.D. Ill. July 21, 2016) (denying defendant artist's motion to exclude plaintiffs' expert witnesses, one whose report concluded that the work in dispute was clearly painted by Doig, and another whose report concluded that if authentic, the work would be valued at $6 to $8 million dollars, but no less than about $50,000); Patrick M. O'Connell, *Judge Rules Famous Artist Did Not Paint Landscape at Center of Lawsuit*, CHI. TRIB. (Aug. 23, 2016), http://www.chicagotribune.com/news/local/breaking/ct-peter-doig-painting-ruling-met-20160823-story.html [https://perma.cc/N8CF-G9Y7].

[11] O'Connell, *supra* note 10 (quoting Feinerman, J.); *see also* Fketcher [sic] v. Doig, No. 13 C 3270, 2016 WL 4708999 (N.D. Ill. Aug. 23, 2016).

[12] O'Connell, *supra* note 10 (quoting Peter Doig).

[13] *See generally* Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65 (1997) (discussing whether U.S. law should fully embrace the continental moral right doctrine alone or through copyright law).

[14] *Id.* at 65.

[15] *Id.*

[16] *Id.* at 82.

traits in spades.[17] Although the American courts have not tended to embrace the idea of moral right as such,[18] de jure American law broadly rewards and protects artistic creativity in a number of ways short of letting artists "impose a servitude on their work preventing alteration or abuse."[19]

The First Amendment helps to protect artistic creativity by shielding from prosecution artists who express themselves in content, ideas, and opinions that may be controversial, offensive, or intrusive.[20] Sometimes, the creativity claims of artists are allowed to trump privacy and religious freedom claims asserted by others.[21] The law of copyright protects artists who make certain types of work from having others reproduce that work.[22] The law of defamation, often in combination with the law of intellectual property, helps artists fight false attribution.[23] Patent law can protect novel and nonobvious designs, and the invention of new techniques and technologies.[24] The law of privacy and publicity can protect against misappropriation of the attributes of personal identity—e.g., faces and voices—of performing artists and

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[17] For example, Marina Abramović is a provocative artist with a highly unique and captivating personality. *See Home*, MARINA FILM PROJECT, http://marinafilm.com/ [https://perma.cc/DZH9-8XBY] (describing a film about the artist and characterizing her as "one of the most compelling artists of our time"); *see also* Elizabeth Greenwood, *Wait, Why Did That Woman Sit in the MoMA for 750 Hours?*, ATLANTIC (July 2, 2012), http://www.theatlantic.com/entertainment/archive/2012/07/wait-why-did-that-woman-sit-in-the-moma-for-750-hours/259069/ [https://perma.cc/S6T3-4TR5] (characterizing Marina Abramović as "the most famous living performance artist").

[18] Halpern, *supra* note 13, at 65, 67, 78 (explaining how the moral right never unambiguously caught on in the United States).

[19] *Id.* at 80 (quoting Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103 (1997)). Halpern was skeptical of importing the moral right concept from European law into U.S. law given cultural differences and inexactitude in what the concept covers in the various countries that employ it. *See id.* at 68–80 ("Personally, I tend to lean toward the artist; my heart is with moral right. . . . I want to say 'amen' [to greater moral rights protection]. But I can't.").

[20] *See, e.g.*, Winter v. DC Comics, 69 P.3d 473, 479–80 (Cal. 2003) (holding that a comic book depiction of the plaintiffs that was "distorted for purposes of lampoon, parody, or caricature" was protected by the First Amendment).

[21] *See* Foster v. Svenson, 7 N.Y.S.3d 96, 103–05 (App. Div. 2015) (holding that a defendant's photographs of the inside of a neighbor's home did not violate privacy laws, but instead were deemed to be "a work of art").

[22] U.S. COPYRIGHT OFFICE, CIRCULAR 40: COPYRIGHT REGISTRATION FOR PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS 1 (Sept. 2015), http://www.copyright.gov/circs/circ40.pdf [https://perma.cc/228W-S6U6]; *Copyright Basics*, ARTISTS RTS. SOC'Y, http://www.arsny.com/copyright-basics/ [https://perma.cc/W66P-L2SV].

[23] Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, *in* THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 143, 172 (Ronald D. Spencer ed., 2004).

[24] *See General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/patents-getting-started/general-information-concerning-patents# [https://perma.cc/72EJ-ZGB9] (last modified Oct. 20, 2016).

celebrities.[25] Although American law protects the cultural specified special status and dignity of artists, it does not and cannot do so completely.[26] The law may not always provide succor to what Professor Halpern termed the "bruised soul"[27] of the artist and indeed can be a weapon of considerable moral injury.

To this point, the facts of the Peter Doig civil lawsuit decided in August 2016 are instructive.[28] Robert Fletcher, a retired corrections officer residing in Ontario, and Bartlow Gallery of Chicago, Illinois sought to establish in federal court that Peter Doig painted an acrylic work Fletcher said was given to him by a teenager who spent time in Thunder Bay Correctional Centre on LSD drug charges.[29] Fletcher claims to have mentored and assisted the teen artist, whom he asserted in the lawsuit is the now well-known Scottish-Canadian artist Peter Doig.[30] Doig's work commands multimillion dollar sales prices, a fact pointed out to Fletcher by a visitor to his home who noticed the painting hanging on a wall and said it was the work of a famous artist.[31] The painting depicts a nonrealistic desert scene with cacti and a pond.[32] It appears to typical observers to be signed "Pete Doige," a different name than that of the artist Peter Doig.[33]

Mr. Doig vehemently disclaimed the painting and any past association with Fletcher.[34] Fletcher's lawsuit sought compensatory damages, alleging that Doig and co-defendants were liable for tortious interference with Fletcher's lawful efforts to sell the painting in an auction as a Peter Doig work, and a declaration that Doig painted Fletcher's painting despite Doig's denials.[35] The suit originally named Peter Doig's attorney and his gallery along with Doig,

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[25] *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity has developed to protect the commercial interest of celebrities in their identities.").

[26] *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1189 (9th Cir. 2001) (holding that an actor did not prevail in an action against a magazine that used an image from one of his popular film roles in advertising without his consent).

[27] Halpern, *Rethinking the Right of Privacy*, *supra* note 3, at 549.

[28] The trial took place in early August 2016, and the verdict was handed down on August 23, 2016. *See* Fketcher [sic] v. Doig, No. 13 C 3270, 2016 WL 4708999 (N.D. Ill. Aug. 23, 2016).

[29] Colin Perkel, *Peter Doig Denies He Created 1976 Painting Owned by Canadian*, CBCNEWS (July 12, 2016), http://www.cbc.ca/news/arts/peter-doig-court-battle-1.3675429 [https://perma.cc/ED6U-GYEW].

[30] *Id.*

[31] *See id.*

[32] *See* Carey Dunne, *Peter Doig Wins Bizzare Court Battle, Proving He Didn't Make a Painting*, HYPERALLERGIC (Aug. 24, 2016), http://hyperallergic.com/318847/peter-doig-wins-bizarre-court-battle-proving-he-didnt-make-a-painting/ [https://perma.cc/7ZMN-LEES].

[33] Graham Bowley, *Peter Doig Says He Didn't Paint This. Now He Has to Prove It.*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/10/arts/design/peter-doig-painting-lawsuit.html?_r=0 [https://perma.cc/MD25-JY49].

[34] *See id.*

[35] Fletcher v. Doig, 125 F. Supp. 3d 697, 701 (N.D. Ill. 2014).

but the court dismissed the attorney and dealer co-defendants for lack of jurisdiction.[36] The court denied Doig's forum non conveniens motion to move the case to Canada.[37] The court also denied a motion to disqualify Fletcher's two main expert witnesses.[38]

It can be demeaning for a living artist to be dragged into a legal battle where the claims at issue strike one as preposterous and the people making them and providing evidence are not, in one's view, truly expert or objective. Why then, in a society that clearly respects artists, would a court not grant a motion to dismiss such an action at the earliest opportunity? One explanation could be that the court recognizes that disputes over authentication like this one raise the conflict Professor Halpern discussed in his work between "the 'personality' of the creator of a work" and the "preservation of a society's cultural heritage."[39] An artist's self-esteem and preferences may point to closeting the fact of authorship, while uncloseting serves the interest in a full and complete understanding of a major and influential cultural phenomenon. A "lighter" explanation may simply be that a good deal of money is at stake.[40] Since Doig benefits financially from the art market, he is arguably reciprocally obligated to submit to legal regimes of tort, property, and contract that sustain it. An artist, like any other person, could have self-interested or even unlawful financial motives for not wanting the truth of authenticity to be probed. Courts may view major financial disputes relating to fine art that fail to settle and that can only be resolved by art experts as requiring full adjudication. As a consequence, what may prove to be weak claims, as well as strong ones, will potentially have a day in court, to the detriment of successful artists who must pay to defend themselves and face humiliation and inconvenience.

Fletcher and his gallery contended that Doig was not being truthful.[41] (But could an artist forget a teenage work in good faith? I believe one could.) Fletcher originally raised the possibility that Doig might be ashamed of his putative juvenile delinquency,[42] and might have even gone so far as to falsify documents to conceal it. Fletcher raised the further possibility that Doig might want to manipulate how the art world views his development as a painter.[43] He raised the additional possibility that Doig might just want to control the market for his art work.[44] To be sure, at stake was the multimillion dollar value of the

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[36] *Id.* at 701, 719. The court concluded that the fiduciary shield doctrine prevented its exercise of personal jurisdiction over the artist's art dealer and his attorney. *Id.* at 719.

[37] *Id.* at 711.

[38] Fletcher v. Doig, No. 13 C 3270, 2016 WL 3940082, at *1 (N.D. Ill. July 21, 2016).

[39] Halpern, *supra* note 13, at 81.

[40] *Cf.* Sheldon W. Halpern, *The Commercial Appropriation of Personality*, 13 DUKE J. COMP. & INT'L L. 381, 388 (2003) (book review) (offering, "Lighten up, it's only about money!" as an explanation in contrast to "difficult compromises between society's interest in free expression and the individual's interest in decency and dignity").

[41] Bowley, *supra* note 33.

[42] *See id.*

[43] *See id.*

[44] *See id.*

painting, if authentic, and the reputation and historical understanding of Peter Doig.[45] (In the past decades, dreamy Edvard Munch-esque paintings by Doig have sold for up to $12 million.[46]) While Fletcher's lines of contention are plausible in the abstract, they were not well supported by the facts presented in the August 2016 trial, whose verdict was announced a few weeks later.[47]

One important set of facts counting against Fletcher related to the existence of a Canadian man named Pete Doige (now deceased) whom witnesses said did paint as a youth and could have associated with Fletcher during a stint at Thunder Bay.[48] Doig's defense was to show that the provenance claimed by the painting's owner proves it could not be his work.[49] Doig and his witnesses denied that Doig ever served time in a detention facility, to start.[50] The artist and witnesses gave evidence that Peter Doig could not have spent time during the era in question at Thunder Bay since he was a younger boy in school at the time the painting was allegedly made.[51] They pointed out that the painting is not signed in Doig's name and that a photo on an identification card Fletcher used to try to prove Doig's whereabouts did not resemble Peter Doig.[52] Letters between Doig and his mother from the 1970s remove doubt that he was not an inmate at Thunder Bay.[53] Doig's evidence supported a contention that Doig did not begin painting on canvas until at least 1979, years after the date of the painting attributed to him, and that he never met Mr. Fletcher.[54] In announcing his verdict, Judge Gary Feinerman said "massive evidence" proved it was "impossible" for Doig to have painted Fletcher's painting, that any similarities to Doig's work were coincidental, and, critically, that a deceased carpenter and amateur painter named Peter Edward Doige created the work.[55] By implication, it seems the court agreed with Doig that Fletcher's experts were not believable and disinterested, even if they were minimally qualified.

## IV. SECRET ART

The Doig case attracted international attention as a first-of-its-kind litigation. It raised important issues about the value North Americans place on creative personality. Not all of the issues were explicitly addressed in the lawsuit, such as whether an artist should have a per se right to keep immature

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[45] *See* O'Connell, *supra* note 10.
[46] Fletcher v. Doig, 125 F. Supp. 3d 697, 702 (N.D. Ill. 2014).
[47] *See supra* note 11 and accompanying text.
[48] *See* Bowley, *supra* note 33.
[49] *Id.*
[50] *Id.*
[51] *See* O'Connell, *supra* note 10.
[52] *See id.*; *see also* Bowley, *supra* note 33.
[53] *See* Bowley, *supra* note 33; *see also* O'Connell, *supra* note 10.
[54] *See* Bowley, *supra* note 33.
[55] O'Connell, *supra* note 10 (quoting Feinerman, J.).

work a secret. Peter Doig's reaction to the suit placed before the public the larger issue of whether having one's word about authorship challenged in a lawsuit is a tolerable affront to moral personality. Doig won his suit, but lost the moral battle: artists do not have the final say concerning the authenticity of their work, courts do.

Losing the moral battle in the American context was inevitable. On one level, it seems an affront to moral personality to have one's word about authorship challenged at all. Such a challenge diminishes the capacity to curate identities, which is a recognized dimension of personal freedom. In some domains we are able to freely curate ourselves, editing out facts and deeds at will. On social media, for example, one can leave out vast realms of one's recent and distant past to craft a misleading persona and not be deemed dishonest. Other people have no right to know everything about us.

Traditionally and today, writers and other living artists may keep early works or records of such works under literal or virtual lock and key, incurring no disapprobation. Unless the artist is well known, if secret juvenilia or other secret art does somehow come to light, the artist may have little to fear: as a practical matter, few will care. Yet the incompetent drawings, racist musings, nude selfies, and the like of a celebrated artist will have significant monetary value and hold cultural interest. This is so true that in some contexts it could feel "wrong" for the artist to withhold the work from attribution, denying someone much-needed financial resources or social understanding. In the case of major artists whose works can be sold for large sums, secret art that escapes, so to speak, can wind out in the marketplace to the artist's chagrin.

The direction of the law runs against the notion that a living artist should have the final word about whether or not a particular work is his or her creation. A final say would protect the artist's interest in controlling his or her reputation and personality. Moral and policy opinion may vary, however, as to whether a living artist should be able to disclaim a creation, for example, because she believes it is a poor reflection of skill or character. An argument could be made against legal penalty for a living artist denying authorship, even falsely. I have argued elsewhere that a person, even a celebrity, can be justified in lying to protect their own privacy.[56] If I can lie to protect my own privacy, why can't I lie to protect my integrity as an artist? The question merits discussion beyond the scope of this writing.

Individuals legitimately claim a right to possession and sale of lawfully acquired art work—art sold or gifted to them. Not as clear is whether a right to possess and alienate artworks strictly entails a right to the artist's honest attestation of authenticity. As stressed in Fletcher's case against Peter Doig, however, an artist's refusal to authenticate can greatly affect the market value of artwork.[57] Denial of authorship can undercut the right to sell an artwork as well as the ability to sell the work.

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[56] Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 161–63 (1999).
[57] O'Connell, *supra* note 10.

When millions of dollars are at stake, it makes the artist's unwillingness to admit (or deny) ownership seem unfair. Consider, however, an analogy to the Fifth Amendment right against self-incrimination. Others can testify that I did such and such to my detriment, but I cannot be forced testify that I did such and such to my detriment even though it could mean that others may face serious criminal liability. If I cannot be forced to give evidence against myself in a criminal case though others may go to prison, perhaps I cannot be forced to give evidence of my conduct as an artist where only money is at issue. The analogy is not perfect, but nor is it completely inapposite.

The Doig case now stands as precedent. United States courts have the power to declare, based on a preponderance of evidence, whether a work is the creation of the artist who denies having created it. Money and the integrity of the art market may be the main and ultimate reason courts will exercise this power. Art is a major commodity. Many artists are celebrities. As Professor Halpern has written, "Whatever the social merit of commercialization of personality and/or the morality of commercializing one's identity, the economic reality is that, for good or ill, the phenomenon of celebrity generates value."[58] Of course, the simple assertion that something has value does not lead inexorably to the conclusion that the law must protect it, though economic value lends itself to the machinery of the common law of property, tort, and contract.

## V. BRUISERS AND BRUISED

Legal action against an artist is well-justified where greed or mischief inconsistent with a market economy and the commodity status of fine art prompts suit. Yet, an artist's desire to avoid emotional pain could prompt his or her denial of creative authorship. To see or hear a work of which one is not proud of over and over; to be asked for comment, interpretation over and over again—that is a real bruising. It is also a bruising to have to endure for three years, as Peter Doig did, denying authorship in a lawsuit where an abundance of readily available evidence proved that someone else was the artist.[59] To minimize bruising, the courts could flatly and categorically decline to hear authorship in living artist cases. Like Professor Halpern, I lean with the artist. But also like Halpern, I know the law cannot shield anyone from all injury and all of the emotional pains of the public accountability and the courtroom.

Art is a realm of commerce, and artists can be bad actors in that realm. They might unfairly refuse to settle wrongful interference cases, or unfairly seek to control the market in their work by selectively authenticating objects attributed to them, disadvantaging the unlucky holder of works without the artist's nod. While we might wish a person to have the right to distance himself from something he has created, to the extent of denying it the stamp of

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[58] Halpern, *supra* note 40, at 382 (footnotes omitted).

[59] *See supra* note 55 and accompanying text.

authenticity, such a right cannot be absolute in the context of the professional and commercial art world. Still, Doig's case leads one to hope future American courts will require plaintiffs to work harder to withstand summary judgment and motions to dismiss, not turning a blind eye to readily available evidence and pressing ahead against artists in senseless litigation.

Forgery cases teach courts something about how art can be authenticated without relying upon the artist's attestation. Science and technology can help uncover fakes, and other forms of evidence and witnesses can help establish whether or not a person could have created a work of art attributed to them.[60] Thus, the assault on dignity and personality can be lessened where prospective plaintiffs are expected to aggressively exploit the availability of objective authentication measures. If a scientific analysis of the paint or surfaces used in the Doige painting could have established that Peter Doig was not the artist, there would have been no need to sue (and bruise) Doig (at least not for three years). Arguably, nonintrusive measures should be exhausted first before an artist is sued, despite the happenstance that the artist is alive and a market player.

Artists like Peter Doig have power and many social advantages over defendants like Fletcher. But high-income artists can be easily taken advantage of by the knowing and the naive, as indeed they take advantage of others.[61] The legal system that defines artists as special and allows them to bruise others bruises artists, too.[62] The career of Professor Halpern transected five decades of changing mores and technologies related to his fields of intellectual property and the dignitarian torts. Yet, his insights remain relevant, and will continue to be relevant, to how we understand the tensions between artists and their societies for many years to come.

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[60] The authenticity of a painting can be assessed by examining, inter alia, the materials and paint pigments used to create it. In 2010, Wolfgang Beltracchi was arrested and jailed in Europe for forging works attributed to famous artists and earning millions of dollars in a career spanning twenty-five years. Sophie Hardach, *The Surprising Secrets of Busting Art Forgeries*, BBC (Oct. 19, 2015), http://www.bbc.com/culture/story/20151015-the-surprising-secrets-of-busting-art-forgeries [https://perma.cc/TJQ3-L6MY]. Beltracchi was detected in 2008 when it was discovered that one of his forgeries contained titanium dioxide white paint that did not exist in the early twentieth century, the supposed era of the painting he had faked. *Id.* Beltracchi went to great lengths to use materials appropriate to past eras, but slipped up and got caught. *See id.*

[61] Artists can also easily take advantage of others. In a recently decided case, a fine art photographer, Arne Svenson, prevailed in an invasion of privacy and right to publicity suit brought by individuals whom Svenson photographed with a telephoto lens as they went about their business in their homes in a Manhattan condominium building with large glass windows. *See* Foster v. Svenson, 7 N.Y.S.3d 96, 98 (App. Div. 2015).

[62] *See generally* Anita Allen, *The Home as Public and Private*, 4 J. HANNAH ARENDT CTR. FOR POL. & HUMAN. BARD C. 84 (2016).