



# JIPEL

NYU Journal of Intellectual Property  
& Entertainment Law

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VOLUME 10

NUMBER 1

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NEW YORK UNIVERSITY  
JOURNAL OF INTELLECTUAL PROPERTY  
AND ENTERTAINMENT LAW

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VOLUME 10

FALL 2020

NUMBER 1

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*CHARGING BULL, FEARLESS GIRL,*  
ARTISTIC COMPOSITION, AND COPYRIGHT

RICHARD CHUSED\*

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\* Professor of Law, New York Law School. I extend loving thanks to my artist wife, Elizabeth Langer, who has served as my editor and muse for decades, and to New York Law School for its continuing support of my work. I’d also like to extend my gratitude to the article editors of the Journal of Intellectual Property and Entertainment Law for the very helpful suggestions they made during the editing process.

## INTRODUCTION

In the middle of the night on December 17, 1989, Arthur di Modica arranged for the sudden deposit of an eleven- by-sixteen-foot, 7,100-pound bronze sculpture—*Charging Bull*—in front of the New York Stock Exchange. Di Modica neither notified nor sought permission from the N.Y. Stock Exchange or City of New York before doing so.<sup>1</sup> The nocturnal<sup>2</sup> event created a major hubbub. Di Modica claimed that the bull was a Christmas present to the city, celebrating “the strength and power of the American people” in recovering from the economic pain of the financial and stock market crashes of 1987.<sup>3</sup>

Just over twenty-seven years later, another sculpture unexpectedly appeared in downtown New York City. On March 7, 2017—the eve of International Women’s Day—a diminutive, four-foot-tall bronze figure—*Fearless Girl*—was placed staring down the bull from a short distance away. This also caused consternation and amazement.<sup>4</sup> It too was deposited late at night, without permission from either public authorities or private property owners. In the ensuing months, disagreements among artists, local groups, and city authorities led to both works being moved, contests over property and copyright interests, arguments over the propriety of one work “commenting” on another, and threats of litigation. The tale has the makings of a great novel.

Most relevant to this essay, the out-of-the-blue arrival of *Fearless Girl* led di Modica, creator of *Charging Bull*, to claim that he enjoyed a right to control the setting in which his work was displayed and the character and quality of artworks that could be placed nearby.<sup>5</sup> This essay briefly tracks the history of *Charging Bull* and *Fearless Girl*, before investigating the nature of di Modica’s claims and the role

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<sup>1</sup> Robert D. McFadden, *SoHo Gift to Wall St.: A 3 1/2 -Ton Bronze Bull*, N.Y. TIMES (Dec. 16, 1989), <https://www.nytimes.com/1989/12/16/nyregion/soho-gift-to-wall-st-a-3-1-2-ton-bronze-bull.html>.

<sup>2</sup> Christy Kuesel, *How “Charging Bull” Became a Symbol for New York and a Site for Activism*, ARTSY (Nov. 20, 2019), <https://www.artsy.net/article/artsy-editorial-charging-bull-symbol-new-york-site-activism>.

<sup>3</sup> Philip H. DeVoe, *Wall Street’s Charging Bull Does Not Represent Oppression*, NAT’L REV. (Apr. 26, 2018), <https://www.nationalreview.com/2018/04/fearless-girl-charging-bull-position-misunderstands-history/>.

<sup>4</sup> Bethany McLean, *The Backstory Behind That ‘Fearless Girl’ Statue on Wall Street*, ATLANTIC (Mar. 13, 2017), <https://www.theatlantic.com/business/archive/2017/03/fearless-girl-wall-street/519393/>.

<sup>5</sup> See *infra* Section I.A.

of copyright law in resolving the disputes.<sup>6</sup> What, if anything, does copyright law have to say about the importance of compositional choices made during the creation and display of a particular work, the compositional relationships between a work and other works placed nearby, and the compositional significance of the physical setting in which a work is displayed?

## I

### A TALE OF COMPOSITIONAL CONFLICT

#### A. *A Brief History of Charging Bull*

The story of *Charging Bull* and *Fearless Girl* has been told elsewhere in some detail.<sup>7</sup> Only a brief retelling is warranted here. Shortly after the devastating financial crash of October 19, 1987, di Modica began contemplating the *Charging Bull* project.<sup>8</sup> In di Modica's view, the bull's obvious reference to the rising stock prices of a bull market symbolized the vibrant and resilient fabric of American culture.

Almost immediately after *Charging Bull* was deposited in front of the N.Y. Stock Exchange, the trading mart complained to the city and the bull was moved to storage in Queens. The city agreed with the exchange's complaints that automobile and foot traffic around the work were causing disruptions.<sup>9</sup> Cries of public dismay followed. The now renowned front page of the *New York Post*, pictured below,<sup>10</sup> excoriated the N.Y. Stock Exchange for the sculpture's removal. Public calls for the work's return to public view led to discussions between di Modica, his spokesperson

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<sup>6</sup> Others have tackled some of these issues, but with different takes than here. One set is related to the interplay between intertextuality as a literary theory and its utility in intellectual property law. See Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 U.C. IRVINE L. REV. 293 (2019). A commentary on the article can be found at E.S. Burt, *Translatable and Untranslatable: Discourse Theory and Copyright Law*, 9 U.C. IRVINE L. REV. 335 (2019). For a review of the array of ways that copyright law privileges the male gaze in a number of settings, including the *Charging Bull/Fearless Girl* controversy, see John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 343, 382-391 (2018). There also is a student comment on the dispute. See Tzu-I Lee, Comment, *A Battle Between Moral Rights and Freedom of Expression: How Would Moral Rights Empower the "Charging Bull" Against the "Fearless Girl"?*, 17 J. MARSHALL REV. INTELL. PROP. L. 672 (2018). My analysis here focuses mostly on the nature of art and artistic composition.

<sup>7</sup> McLean, *supra* note 4.

<sup>8</sup> Kuesel, *supra* note 2.

<sup>9</sup> Kuesel, *supra* note 2; McFadden, *supra* note 1.

<sup>10</sup> The image may be found on Arturo di Modica's website. *History*, CHARGING BULL, <http://www.chargingbull.com/history/> (last visited May 19, 2020). It is attributed to J.B. Nicholas / Splash News.

Arthur Piccolo, who was also chairman of the Bowling Green Association, and Henry Stern, the New York City Parks Commissioner. The parties reached an agreement to retrieve the sculpture from storage and place it at Bowling Green, a small, cobblestone park located just a few blocks from the N.Y. Stock Exchange—but not within its view. Di Modica reportedly felt “fantastic” about the bull’s new location.<sup>11</sup> During the bull’s subsequent solo stay at Bowling Green, *Charging Bull* became a major tourist destination and was viewed by millions.<sup>12</sup>



The *New York Post*’s cover from December 16, 1989, showing *Charging Bull* and its initial removal from the N.Y. Stock Exchange.

<sup>11</sup> *Wall St. ’s Bronze Bull Moves 2 Blocks South*, N.Y. TIMES, Dec. 20, 1989, at B3.

<sup>12</sup> See, e.g., *Charging Bull, Fearless Girl & Cultural Tourism in Lower Manhattan*, N.Y. Almanack (May 31, 2020), <https://www.newyorkalmanack.com/2020/05/charging-bull-fearless-girl-cultural-tourism-in-lower-manhattan/>.

After *Fearless Girl* appeared years later, staring down the bull at Bowling Green,<sup>13</sup> police and others once again voiced concerns over automobile congestion and tourists crowding around the two pieces. Fears of accidents, as well as concerns raised by di Modica, who was strongly opposed to the presence of the new work, led to the diminutive child's removal from Bowling Green. On December 10, 2018, about nine months after *Fearless Girl*'s first appearance, she was removed and taken a few blocks away to her current location: the front of the N.Y. Stock Exchange.<sup>14</sup> The story came full circle. The two pieces swapped locations.



*Fearless Girl* in her original location staring down *Charging Bull* at Bowling Green.

At the time *Fearless Girl* was relocated, New York City Mayor Bill de Blasio claimed that *Charging Bull* would also be moved back near the N.Y. Stock Exchange, and that it was important to keep the two works together.<sup>15</sup> Brian Boucher,

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<sup>13</sup> The *Fearless Girl* image below is from Sarah Cascone, *From 'Charging Bull' to the Bull Market: 'Fearless Girl' Heads to the New York Stock Exchange*, ARTNET (Apr. 19, 2018), <https://news.artnet.com/art-world/fearless-girl-new-york-stock-exchange-1269851>. It is credited to Volkan Furuncu/Anadolu Agency/Getty Images.

<sup>14</sup> Sandra E. Garcia, 'Fearless Girl' Statue Finds a New Home: At the New York Stock Exchange, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange.html>.

<sup>15</sup> At that point, the city's plans to move the bull to a spot near the girl were supposedly firm. *NYC Finalizing Plans to Move Wall Street Bull Statue*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/aponline/2019/11/08/us/ap-us-wall-street-bull.html>.



on behalf of *ArtNet News*, reported that di Modica was “steaming mad” at the prospect of the city reuniting the two sculptures.<sup>16</sup>

[T]he sculpture, by artist Kristen Visbal, was soon unmasked as the brainchild of ad agency McCann New York and investment firm State Street Global Advisors as part of a campaign to land more women on corporate boards. (Spoiler alert: State Street turned out to be not so great when it came to gender or racial equity.)

The arrival of *Fearless Girl* irked Di Modica, who maintains that the bronze lass turned his own sculpture into part of an ad campaign. He took legal action, retaining none other than civil rights crusader Normal Siegel to represent him. That led in turn to a tweeted criticism by Mayor Bill de Blasio, accusing Di Modica of not liking “women taking up space.” Ultimately, to better accommodate the crowds headed there just to see her, the *Girl* moved to a spot across from the NYSE. (That means *Charging Bull*’s relocation would put the beast close, again, to his nemesis.)<sup>17</sup>

After di Modica objected to his sculpture being relocated back to the N.Y. Stock Exchange in the presence of *Fearless Girl*, Mayor de Blasio apparently backed down, at least temporarily. De Blasio claimed that the city was still considering moving *Charging Bull* but that no definite plans had been made.<sup>18</sup> In the fall of 2019, the city withdrew its application from the Public Design Commission to move di Modica’s work back to the N.Y. Stock Exchange, allegedly because it could not decide exactly where to place it. In June 2020, the Commission finally entertained a proposal from the Mayor’s office to move *Charging Bull*, only to turn it down.<sup>19</sup> The local community planning board had previously declined to approve a similar

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<sup>16</sup> Brian Boucher, *The Artist Behind Wall Street’s ‘Charging Bull’ Is Seeing Red Over a Plan to Remove the Sculpture From the Financial Hub*, ARTNET (Nov. 19, 2019), <https://news.artnet.com/art-world/wall-street-bull-relocation-1708023>.

<sup>17</sup> *Id.*

<sup>18</sup> Elizabeth Kim, *City Delays Moving Charging Bull*, GOTHAMIST (Nov. 13, 2019), <https://gothamist.com/news/charging-bull-may-stay-put-after-all>; Julia Marsh, *De Blasio Backs Down, ‘Charging Bull’ Statue to Stay Put for Now*, N.Y. POST (Nov. 13, 2019), <https://nypost.com/2019/11/13/de-blasio-backs-down-charging-bull-statue-to-stay-put-for-now/>.

<sup>19</sup> Julia Marsh, *NYC Panel Tells Mayor de Blasio He Can’t Move Wall Street’s ‘Charging Bull’*, N.Y. POST (June 22, 2020), <https://nypost.com/2020/06/22/nyc-panel-tells-de-blasio-he-cant-move-wall-streets-charging-bull/>.

proposal.<sup>20</sup>

As of this essay's writing, the city's plan to move *Charging Bull* somewhere near the N.Y. Stock Exchange and *Fearless Girl* remains embroiled in controversy.<sup>21</sup> The city continues to profess concern about automobile and pedestrian traffic if the two works are placed next to each other at the Exchange.<sup>22</sup> Yet, while di Modica claims that there is an agreement to leave the bull in Bowling Green permanently, the existence of such a deal is disputed. There is no written evidence to support it.<sup>23</sup>

*Fearless Girl* is not the only work to challenge di Modica's claim for control over the environment in which his sculpture is displayed. Both before and after *Fearless Girl*, various "commentators" have made their own guerilla statements about the bull, asserting positions quite different from di Modica's view of his work as an optimistic declaration of American resilience. On Christmas Eve in 2010, for example, artist Agata Oleksiak (typically called, "Olek") wrapped *Charging Bull* in crocheted pink, purple, and green yarn as an artistic statement, creating a rather less fearsome and softer creature.<sup>24</sup> The following year, Occupy Wall Street began its demonstrations by gathering around the bull.<sup>25</sup> A poster, displayed below, used the bull's image to promote the event.<sup>26</sup> In 2017, a woman splattered the bull with blue paint as a protest against President Donald J. Trump's withdrawal of the United

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<sup>20</sup> See Zachary Small, *New York's Iconic 'Charging Bull' Sculpture Becomes Subject of Fierce Debate Among Politicians*, ARTNEWS (May 22, 2020, 11:04 AM), <https://www.artnews.com/art-news/news/new-yorks-charging-bull-move-controversy-1202688237/>. At a meeting of Community Board 1 covering the financial district, a proposal to move the bull to a site near the New York Stock Exchange was voted down in what was taken as a setback for Mayor de Blasio and the city. The city still claims the right to move the piece and di Modica persists in his claim that his consent is required. *Id.*

<sup>21</sup> Tom Shea, *NYC Planning on Moving Iconic Charging Bull Statue From Bowling Green*, NBC N.Y. (Nov. 14, 2019, 10:38 AM), <https://www.nbcnewyork.com/news/local/nyc-planning-on-moving-iconic-charging-bull-statue-from-bowling-green/2181021/>; see also Small, *supra* note 20.

<sup>22</sup> Shea, *supra* note 21.

<sup>23</sup> Small, *supra* note 20.

<sup>24</sup> See Malia Wollan, *Graffiti's Cozy, Feminine Side*, N.Y. TIMES (May 18, 2011), <https://www.nytimes.com/2011/05/19/fashion/creating-graffiti-with-yarn.html>.

<sup>25</sup> Julianne Pepitone, *Hundreds of Protesters Descend to 'Occupy Wall Street'*, CNN MONEY (Sept. 17, 2011, 7:07 PM), [https://money.cnn.com/2011/09/17/technology/occupy\\_wall\\_street/index.htm](https://money.cnn.com/2011/09/17/technology/occupy_wall_street/index.htm).

<sup>26</sup> The image of the Occupy Wall Street poster in the text below is available at Michael Bierut, *The Poster that Launched a Movement (Or Not)*, DESIGN OBSERVER, <https://designobserver.com/feature/the-poster-that-launched-a-movement-or-not/32588>. The image of the poster is credited to Adbusters.

States from the Paris Accords, an international agreement on climate change.<sup>27</sup> Two years later, another paint splatter incident protesting climate change occurred, this time covering the bull in red to signify “blood on the hands” of the financial community.<sup>28</sup>

As with many other artworks on public display, *Charging Bull*’s observers imposed their own points of view on the work. Di Modica could not prevent such reactions. But they typically lasted only a short while before being removed or cleaned up. The single exception occurred in 2019, when a Texas trucker wielding a metal banjo and cursing President Trump whacked the instrument against the bull, inflicting a significant gash on one horn.<sup>29</sup> The damage took some time and \$15,000 to repair.<sup>30</sup>

### *B. Origins of Fearless Girl and Subsequent Controversy*

The most famous of all the commentators on the bull remains the diminutive, four-foot tall *Fearless Girl* standing akimbo with hands on her hips and staring directly down at the oversized bull charging toward her. Overnight, the *Charging Bull* and *Fearless Girl* pieces combined to evoke an array of vigorous statements about the relationships between women and finance, women and men, and the gendered structure of modern society. *Fearless Girl* appeared to make a forceful case for women to play a more significant role in American society. Or did it?

The sculptor of *Fearless Girl* was Kristen Visbal, but the project was actually the brainchild of State Street Global Advisors, an international financial management company, and their large, national advertising representative, McCann New York.<sup>31</sup> State Street intended to use the sculpture to draw attention to the lack of women in leadership roles across Wall Street and to market its new Gender Diversity Fund. The fund sought investments in firms scoring better than their

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<sup>27</sup> Jackie Wattles, *Woman Arrested for Vandalizing Wall Street’s Famed Bull Statue*, CNN MONEY (Sept. 16, 2017, 5:55 PM), <https://money.cnn.com/2017/09/16/news/charging-bull-statue-vandalism/index.html>.

<sup>28</sup> See Kuesel, *supra* note 3.

<sup>29</sup> Katie Van Syckle & Ashley Southall, *Attack Leaves Wall Street’s Iconic Bull With a Gash on Its Horn*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/nyregion/wall-street-bull-vandalism.html>.

<sup>30</sup> See Ella Torres, *Wall Street ‘Charging Bull’ Repairs to Cost an Estimated \$15,000 After Banjo Attack Leaves Hole in Its Horn*, ABC NEWS (Sept. 10, 2019, 12:45 PM), <https://abcnews.go.com/US/charging-bull-repairs-cost-estimated-15000-banjo-attack/story?id=65508538>.

<sup>31</sup> *Fearless Girl*, MCCANN WORLD GROUP, <https://www.mccannworldgroup.com/work/fearless-girl> (last visited Oct. 17, 2020).

industry peers on gender diversity.<sup>32</sup> *Fearless Girl*, like *Charging Bull*, was intended to be a short-term display.<sup>33</sup> But again, public clamor led to both works being left in place, staring each other down.

There was a major irony to this part of the story: State Street was known to have a spotty record on gender inclusion.<sup>34</sup> As one commentator snarkily noted, “[W]hen de Blasio’s office says he feels it’s important for *Fearless Girl* to stand up to the bull and ‘what it stands for,’ he’s referring to a fake meaning imposed on the bull by the new statue, and not the artist’s original intent.”<sup>35</sup> In short, the notion that Kirsten Visbal placed *Fearless Girl* at Bowling Green as a guerilla commentary on the bull is misleading at best and fictional at worst. More accurately, it was a brilliant publicity move by a major Wall Street firm with a sketchy gender record.

*Fearless Girl*, like *Charging Bull*, has also attracted “commentaries” since its arrival in 2017. Perhaps the most creative was by Alex Gardega. Displeased that the statue staring down *Charging Bull* was merely an advertising stunt by a large investment firm with few women in leadership positions, Gardega placed *Pissing Pug*, next to the left leg of the girl urinating on her foot.<sup>36</sup> Manuel Oliver, whose son Joaquin Oliver was killed in the Marjory Stoneman Douglas High School mass shooting in Parkland, Florida, made another clever and powerful commentary.<sup>37</sup> In protest of gun violence and mass shootings in schools, Oliver placed a bulletproof

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<sup>32</sup> Jena McGregor, *Why This Giant Money Manager Put a Statue of a Defiant Girl in Front of Wall Street’s Famous ‘Charging Bull,’* WASH. POST: ON LEADERSHIP (Mar. 7, 2017, 10:15 PM), <https://www.washingtonpost.com/news/on-leadership/wp/2017/03/07/a-wall-street-advertising-stunt-spotlights-a-push-to-get-more-women-on-boards/>.

<sup>33</sup> See *id.* (State Street originally only applied for a one-week zoning permit).

<sup>34</sup> See DeVoe, *supra* note 3.

<sup>35</sup> See DeVoe, *supra* note 3.

<sup>36</sup> Nick Fugallo & Max Jaeger, *Pissed-off Artist Adds Statue of Urinating Dog Next to ‘Fearless Girl,’* N.Y. POST (May 29, 2017, 11:12 PM), <http://nypost.com/2017/05/29/pissed-off-artist-adds-statue-of-urinating-dog-next-to-fearless-girl/>. The image in the text is in this article and is credited to Gabriella Bass.

<sup>37</sup> He has been quite active in the gun control movement since the killing. See, e.g., Johnny Diaz, *Father of Parkland School Shooting Victim Joaquin Oliver Launches One-Man Show*, S. FLA. SUN-SENTINEL (Sep. 20, 2019), <https://www.sun-sentinel.com/local/broward/parkland/fl-fea-parkland-father-manuel-oliver-one-man-show-20190812-2kk2kjlknvcszdg2csogyk3hki-story.html>.

vest on *Fearless Girl*, turning her into what others have called *Fearful Girl*.<sup>38</sup> Finally, on the weekend after Justice Ruth Bader Ginsburg died, State Street arranged for a “Ginsburg Collar” to be placed on *Fearless Girl*, and displayed the result in a full-page advertisement in the New York Times to commemorate the justice’s death.<sup>39</sup>



Left: Alex Gardega next to *Fearless Girl* and his own *Pissing Pug* statue.

Right: Manuel Oliver’s statement against school shootings, for which he placed a bulletproof vest on *Fearless Girl*.

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<sup>38</sup> Meghan DeMaria, *Parkland Father Puts Bulletproof Vest on 'Fearless Girl' Statue to Protest Mass Shootings*, YAHOO! LIFE (Nov. 3, 2018), <https://www.yahoo.com/lifestyle/fearless-girl-statue-wore-bulletproof-vest-part-parkland-fathers-protest-mass-shootings-152806367.html>; Changing the Ref (@ChangeTheRef), TWITTER (Nov. 2, 2018, 11:02 AM), [https://twitter.com/ChangeTheRef/status/1058373694207221760?ref\\_src=twsrc%7Ctwcamp%5Eetweetembed%5E1058373694207221760%7Ctwgr%5Eshare\\_3&ref\\_url=https%3A%2F%2Fwww.yahoo.com%2Flifestyle%2Ffearless-girl-statue-wore-bulletproof-vest-part-parkland-fathers-protest-mass-shootings-152806367.html](https://twitter.com/ChangeTheRef/status/1058373694207221760?ref_src=twsrc%7Ctwcamp%5Eetweetembed%5E1058373694207221760%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.yahoo.com%2Flifestyle%2Ffearless-girl-statue-wore-bulletproof-vest-part-parkland-fathers-protest-mass-shootings-152806367.html).

<sup>39</sup> An image of the ad is shown below. Advertisement, N.Y. TIMES, Sep. 20, 2020, at A7.



*Left:* An Occupy Wall Street poster featuring *Charging Bull*.

*Right:* State Street's advertisement marking Justice Ginsburg's death, which included the tagline, "Here's to the original."

From this very brief telling of the tale, it is clear that the presence of *Fearless Girl*, whether facing *Charging Bull* or not, has produced a variety of observations about both itself and the bull. All of these events confirm that even if the creators of public sculptural works retain legal authority over the surrounding environments, they may be sharply limited in their ability to control public commentary about their endeavors.

### *C. The Legal Issues*

From the moment *Fearless Girl* arrived at Bowling Green, Arturo di Modica expressed deep antagonism about his work being a focus of criticism and social commentary.<sup>40</sup> A letter from Norman Siegel and Steven Hyman, di Modica's attorneys, to Mayor de Blasio just over a month after *Fearless Girl* appeared made

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<sup>40</sup> Di Modica had a similar reaction in 2019 when the city talked about moving *Charging Bull* back to the Stock Exchange. See Boucher, *supra* note 16.

this quite clear.<sup>41</sup> Di Modica's attorneys raised a series of objections to *Fearless Girl*'s presence near *Charging Bull*.<sup>42</sup> They claimed that leaving *Fearless Girl* near to *Charging Bull* violated di Modica's rights to control reproductions of the bull, to prepare derivative works, and to distribute copies of *Charging Bull*.<sup>43</sup> They also contended that di Modica's moral right to limit modification of his work was violated.<sup>44</sup>

For purposes of this essay, two of these claims are notable—the derivative work and moral rights issues. Neither reproductive nor distribution rights were threatened.<sup>45</sup> The derivative work question is about the right of an artist to license works that rely on her or his original creation to make a new work.<sup>46</sup> The moral rights claim would have to rely on the Visual Artists Rights Act of 1990 (“VARA”). VARA, however, applies only to works created after its effective date.<sup>47</sup> *Charging Bull* was completed and placed at the Stock Exchange the year before the Act went into effect. But the modification terms of VARA are still worth exploring. They, like the provisions on derivative works, raise fascinating questions about the degree to which copyright law allows artists to control the environmental composition in which their works are publicly displayed.

These derivative work and moral rights issues are the primary focus of this essay.<sup>48</sup> Usually we think about derivative works as creations adding new original

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<sup>41</sup> Letter from Norman Siegel et al., Attorneys for Arturo di Modica, to Honorable Bill de Blasio (Apr. 11, 2017), (on file with New York University Journal of Intellectual Property and Entertainment Law).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* This is not to say that images of the two works together were not frequently taken and that many small replicas of the *Charging Bull* have not been made. But those sorts of copying issues have arisen without regard to *Fearless Girl* and still do now that the girl has been moved away from Bowling Green.

<sup>46</sup> 17 U.S.C. § 101 (2018).

<sup>47</sup> 17 U.S.C. § 106A(d)(2) (2018).

<sup>48</sup> Arthur Piccolo, di Modica's spokesperson, has also claimed that the sculptor owns physical property rights in the bull. See Small, *supra* note 20. This is up for grabs. A good argument can be made that di Modica abandoned his sculpture and no longer owns it. He also declared that it was a gift to New York City. Originally, di Modica viewed his actions as a temporary gift. But what is it now that its presence seems to be permanent? Assuming that the actions of the city may be construed as acceptance of the gift, then the city may own it. But note that the city has never undertaken the customary administrative process to formally accept permanent ownership of the property. So far, these issues have not directly surfaced between the parties. But if the city moves the bull back to the Stock Exchange and di Modica sues, ownership of tangible property interests probably would be contested.

material to a prior work that recasts, transforms, or adapts the original—like a movie made from a novel with the permission of the copyright owner.<sup>49</sup> But in this case, *Fearless Girl* is a far different “creature” than *Charging Bull*. Its physical and compositional features make no direct use of the bull. It is not wholly analogous to a derivative movie’s use of content in a novel. Nonetheless, its installation nearby clearly commented upon and changed the atmospherics surrounding di Modica’s work. Does that make it a derivative work? Does di Modica have any control over the creation of *Fearless Girl* or its location?

The moral rights provisions of the copyright code raise closely related issues. The placement of the girl facing the bull created a dramatically new two-sculpture composition. Does only State Street have control over the coupled imagery it created? The modification provisions of the copyright code bar modification of a work of fine art by a party other than the artist that is an “intentional distortion, mutilation, or other modification of that work which would be prejudicial to . . . [the artist’s] honor or reputation.”<sup>50</sup> As with the derivative work issue, *Fearless Girl* did not directly make any physical modifications to *Charging Bull*. If a change was made by the presence of the girl, it was in the alteration of the bull’s compositional impact. Does such a compositional change constitute a “modification” or “mutilation” within the meaning of VARA? If so, did it endanger di Modica’s honor or reputation?

Before directly approaching these copyright questions, it is important to have at least a basic understanding of various forms of artistic composition. That is taken up in the next section. Following that, I will explore more directly the ways some forms of composition were altered by *Fearless Girl* and consider the intellectual property consequences of those changes.

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<sup>49</sup> See the definition of “derivative work” in 17 U.S.C. §101:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

<sup>50</sup> 17 U.S.C. §106A(a)(3)(A) (2018).



## II

## CHARGING BULL AND COMPOSITION

*A. A Brief Journey into the Aesthetics of Composition*

Sensitivity about both the composition of a work and its relationship to the environment in which it is displayed have been persistent themes in the history of Western art. Attentiveness to these issues touches the heart of artistic creativity. Theorizing a bit about the composition of two-dimensional works provides a baseline for thinking about the ways location and environment may have significant impacts on viewer reactions to any work of art. Models about composition of two-dimensional works have evolved in at least two directions. The first attempts to find scientific and rational notions to explain why many people react more favorably to the appearance of one work than to another. The second views composition as an ineffable, aesthetic, and instinctual judgment.

Some artists use well-known rational or mathematical concepts like the “golden triangle,” the “golden ratio,” or the “rule of three” to construct basic features of their work.<sup>51</sup> The first divides a surface into four triangles, with the four edges of the canvas or other material forming the bases of each. The golden ratio is based on the Fibonacci Ratio, a set of points on a surface that creates an elaborate spiral form. The rule of three is the simplest. Simply draw a “tic-tac-toe” grid on the working surface. This standard suggests placing important parts of an image at the points where the tic-tac-toe lines intersect. Some cameras are actually made with a tic-tac-toe grid that can assist a photographer in using the “rule of three.”<sup>52</sup> Other conceptual and minimalist artists, such as Sol LeWitt, clearly use mathematical norms to guide their work.<sup>53</sup>

Not surprisingly, these and other logic systems have been subject to criticism, especially when applied to non-geometric compositions. The dissenters suggest that formulas may work in some cases, but that their fit with human artistic preferences

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<sup>51</sup> Greek and Roman public buildings were certainly designed using mathematical systems. See, e.g., Rocco Leonardis, *The Use of Geometry by Ancient Greek Architecture*, in *A COMPANION TO GREEK ARCHITECTURE* 191, 192–206 (Margaret Miles ed., 2016).

<sup>52</sup> For a good explanation of this idea, along with another more complex system using the curving points of a Fibonacci mathematical formula called the Fibonacci Spiral or golden ratio, see Jon Sparkman, *Why the Golden Ratio is Better than the Rule of Thirds*, PETAPIXEL (Oct. 24, 2016), <https://petapixel.com/2016/10/24/golden-ratio-better-rule-thirds/>.

<sup>53</sup> For discussion of the copyright issues involved in such work, see Richard Chused, “Temporary” *Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUTER & TECH. L.J. 1 (2019) [hereinafter Chused, *Conceptual Art*].

in other settings is loose at best.<sup>54</sup> Regardless of the validity of the various “golden” claims, many modern artists find it very difficult to express why or how they decide on the overall composition of works they create. For them, composition is a notion beyond the capacity of logical thinking to describe or define. This view is more appropriate for discussion of the relationships between *Charging Bull* and *Fearless Girl*. It is hard to imagine that State Street thought about the girl’s compositional relationship to the bull with mathematical precision. They certainly planned the positioning of the girl so that it stared directly at the bull. But the rest of their spatial interaction—the main subject of this essay—is very difficult to analyze precisely. Such ambiguity in compositional theory signals that grappling with the legal relationships between *Charging Bull* and *Fearless Girl* is likely to be as open-ended and conflictual as art itself.

This open-endedness is confirmed by a lucid depiction of subjective sensibility about composition. It may be found in *Portraits*—a perceptive book written by Michael Kimmelman, a sensitive, sophisticated, and knowledgeable art and architecture critic for *The New York Times*.<sup>55</sup> Some years ago, Kimmelman invited a number of well-known artists to meet him at museums of their choosing and view works that they believed influenced their artistic development or that they simply liked. His experiences are described in *Portraits*. During his visit with Jacob Lawrence at the Metropolitan Museum of Art, Kimmelman asked Lawrence why he

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<sup>54</sup> A good fit is claimed in Lauren Palmer, *See How Artists Discover Simplicity as an Art Form in Works which Reflect the Golden Ratio*, ARTNET (Oct. 2, 2015), <https://news.artnet.com/art-world/golden-ratio-in-art-328435>. Ratio based lines are drawn over a number of famous paintings that fulfill the mathematics of the ratio. But doing so after the fact does not convince me that the artist actually used that method in the absence of written evidence of the claim. Essays expressing greater dubiety about the concept include Adam Mann, *Phi: The Golden Ratio*, LIVE SCIENCE (Nov. 25, 2019), <https://www.livescience.com/37704-phi-golden-ratio.html>; Cat Lewis, *Scientific Studies on the Golden Ratio*, MAD SYMMETRY (MAY 29, 2017), <http://madsymmetry.com/science-surrounding-golden-ratio/>; Samuel Obara, *Golden Ratio in Art and Architecture*, U. GA. DEP’T MATHEMATICS EDUC., <http://jwilson.coe.uga.edu/EMT668/EMAT6680.2000/Obara/Emat6690/Golden%20Ratio/golden.html> (last visited Mar. 12, 2020).

<sup>55</sup> Michael Kimmelman, *PORTRAITS: TALKING WITH ARTISTS AT THE MET, THE MODERN, THE LOUVRE, AND ELSEWHERE* ix–xiii (1998).

found Sassetta's<sup>56</sup> painting *The Journey of the Magi*, shown below,<sup>57</sup> magical. Lawrence responded:

It's simplified but very complex at the same time. We say "simplicity" and imply something's easy to accomplish but this isn't easy. It's a highly refined composition, and I could describe why formally: the way the shapes balance one another, the way the image moves from dark to light. But there's something that I can't describe formally, which is a certain feeling, an intuitiveness, maybe. An emotional authenticity. I'm just projecting here, but I think it seems authentic to me because maybe the artist wasn't tied up too much in rhetoric, you know, talk, school talk, pedantics [sic]. When I was young I hung around painters and people in the arts, music, theater. I was just beginning to grasp what a theater person or artist meant when he talked about space or rhythm or movement. I couldn't talk the way they did. At the time I had a more intuitive sense of why I like something, and I still think that's the most important thing to have.<sup>58</sup>

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<sup>56</sup> Formally his name was Stefano di Giovanni di Consolo, but he is commonly known as Sassetta. See *Sassetta Biography*, NAT'L GALLERY ART, <https://www.nga.gov/collection/artist-info.1860.html> (last visited Oct. 1, 2020).

<sup>57</sup> Sassetta, *The Journey of the Magi* (painting), MET MUSEUM, <https://www.metmuseum.org/art/collection/search/437611> (last visited Aug. 9, 2020). The image below of the painting is in the public domain.

<sup>58</sup> KIMMELMAN, *supra* note 54, at 209. Elizabeth Langer, my artist wife, expresses similar notions. If I ask her how she knows where some shape should be placed in a collage, or why one work should be located next to another when it is publicly displayed, or when a work is finished, a precise answer is rarely forthcoming. She is simply unable to verbalize in a precise way why one composition works for her and another does not. Knowing when a composition is complete routinely becomes an unanswerable quest:

Often I don't know when a piece is finished. Knowing when to stop is one of the most difficult judgment calls a creative person is called to make. Countless times I have ruined a work by failing to stop. Other times I have looked at a drawing or painting and said to myself, "This is good, but it's not special; it doesn't grab me." I can take a risk by adding a color, some dissonant lines or a bold mark. Sometimes I hit the jackpot and the work sings. Other times (more often), I destroy the piece and I am unable to bring it back. But I always remember the voice in my head: "It's far better to take a risk and fail than to settle for something that is only good."

Kate Feiffer, *How Do You Know When You're Finished?*, MARTHA'S VINEYARD ARTS & IDEAS (July 2016), <http://www.mvartsandideas.com/2016/06/know-youre-finished/>.



Sassetta, *Journey of the Magi* (c. 1433–35)

Despite the uncertainty about our “knowledge” of the ways artists conceive of compositional forms or the reasons why people react to them in various ways, the overall appearance of a work of art is central to the relationships between artist and viewer. This has been true for centuries. Artists creating early religious paintings and iconography cared deeply about composition. The creation of triptychs is a perfect example. Their three-panel structure had deep resonance with Christian theology and therefore with the compositional choices made by artists in the panels themselves. The “architecture” of the style led naturally to the need to create relationships between the three segments of such works. But triptychs also were frequently placed in particular locations in churches.<sup>59</sup> Their environmental placement often was an important part in the artistic design of the triptychs themselves.

Artists have also experimented with ways to supplement traditional forms of religious painting with certain more elaborate “additions” for quite some time. Often these were designed to draw a viewer’s eyes to a particular figure in the composition or a phrase in a book. Artists of sacred art, for example, began to use gold leaf and

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<sup>59</sup> See, e.g., PETER HUMFREY, *The Physical Environment*, in *THE ALTARPIECE IN RENAISSANCE VENICE* (2020) (ebook) (describing Byzantine and Gothic architectural and decorative elements in Venetian churches between the 1300s and 1500s, including interior decoration with triptychs).

other appliques to enhance their works. Similarly, an array of early book writers employed highly decorative calligraphy and images on some of their pages.<sup>60</sup> These flourishes also were critical aspects of composition. They accentuated reverence, authority, power, holy figures, or important religious concepts. Golden halos around the heads of important Christian figures, of course, were commonplace in medieval art.<sup>61</sup> The Western artists of these early works combined different artistic techniques, added new elements to their compositions, and crafted a variety of ways to contrast, compare, and emphasize emotional, religious, narrative, and compositional aspects of their work.

Some of these early innovations were precursors to much twentieth century art. The use of figurative subject matter and landscapes gradually gave way to increasingly secular and abstract compositions. Painters were heavily influenced by the relationships of triptych panels and by the addition of “artificial” methods (such as the use of gold leaf) to emphasize characters or features in works of art. Later artists, like Doménikos Theotokópoulos (“El Greco”) in the sixteenth century, Diego Velázquez in the seventeenth century, and Francisco Goya around the turn of the nineteenth century, each enhanced Western art in distinct ways—abstraction in the case of El Greco, realism and visible emotion in the case of Velazquez, and pathos together with use of lighting effects in the case of Goya.

As depictions of non-religious figures, objects, and scenes blossomed, artists’ use of inanimate features as the central compositional feature of two-dimensional work—animals, home interiors, or still life arrangements—became plausible. By the turn of the twentieth century, everyday items such as newspaper clippings, photos, cloth, and other materials began to take on both compositional and, at times, narrative commentary. For such non-representational works, including collage, assemblage, and combinations of two- and three-dimensional elements, composition was of central importance. Lacking an easily “understood” narrative or central

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<sup>60</sup> For a brief summary of early use of gold in art see Kelly Richman-Abdou, *Why Artists Use Gold Leaf and How You Can Make Your Own Ethereal Paintings*, My Modern Met (March 1, 2018), <https://mymodernmet.com/gold-leaf-art/2/>. For some examples of beautifully illuminated historic manuscripts, see Joshua J. Mark, *Twelve Greatest Illuminated Manuscripts*, Ancient Hist. Encyclopedia (Feb. 1, 2016), <https://www.ancient.eu/article/1185/twelve-greatest-illuminated-manuscripts/>.

<sup>61</sup> JOHN BECKWITH, *Early Christian Art: The Synthesis of the Secular and the Religious Image*, in *EARLY CHRISTIAN AND BYZANTINE ART* (1986) (ebook) (describing origins of early Christian imagery and demonstrating early use of the halo even in sixth or seventh century Constantinople to signify divinity).

religious element, something else was needed to draw, excite, or hold viewers' attention.

Georges Braque and Pablo Picasso were central figures in the development of modern and contemporary art. Working together between 1907 and World War I, the two developed new compositional techniques in cubist painting and collage that still referenced more traditional artistic tropes.<sup>62</sup> Below are two fine examples of the novel projects they created, made in Paris in the spring of 1914. The Picasso is a painting on canvas of a collage-like composition, while the Braque is a work of painting and collage using sand on canvas.<sup>63</sup> Both represent everyday objects, though each was painted rather than displayed as collage. In both works, the compositions lack a traditional focus. Each contain items that run off the edge of the canvas, cover most of the surface of the works, and juxtapose cleverly, leading one's eyes to run riotously across the surface and tumble in all directions as a viewer ponders them for a time. They are, in short, untraditional, modern, eye-catching, animated, and political.<sup>64</sup> But their compositions nonetheless are riveting, in part because they, like their medieval predecessors, used applique technique as a central compositional theme. By a century ago, Western art had reached the point where composition was ready to leap off the page into assemblages and combinations of traditional paintings with objects or even architecture.

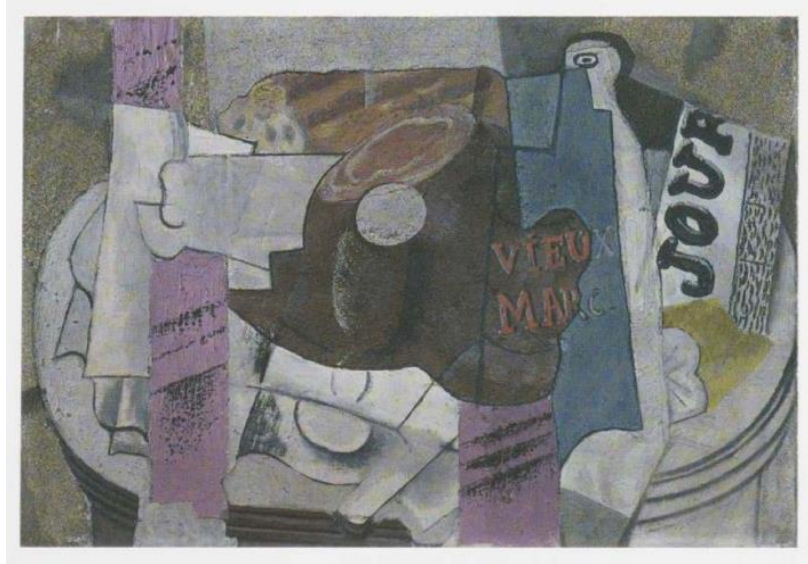
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<sup>62</sup> An important exhibition of their joint efforts was held by the Museum of Modern Art between September 24, 1989 and January 16, 1990. See *Picasso and Braque: Pioneering Cubism*, MOMA, <https://www.moma.org/calendar/exhibitions/1730> (last visited Apr. 7, 2020). The museum also published a book about the show. WILLIAM RUBIN, *PICASSO AND BRAQUE: PIONEERING CUBISM* (1989) (ebook), [https://www.moma.org/documents/moma\\_catalogue\\_1730\\_300062926.pdf](https://www.moma.org/documents/moma_catalogue_1730_300062926.pdf).

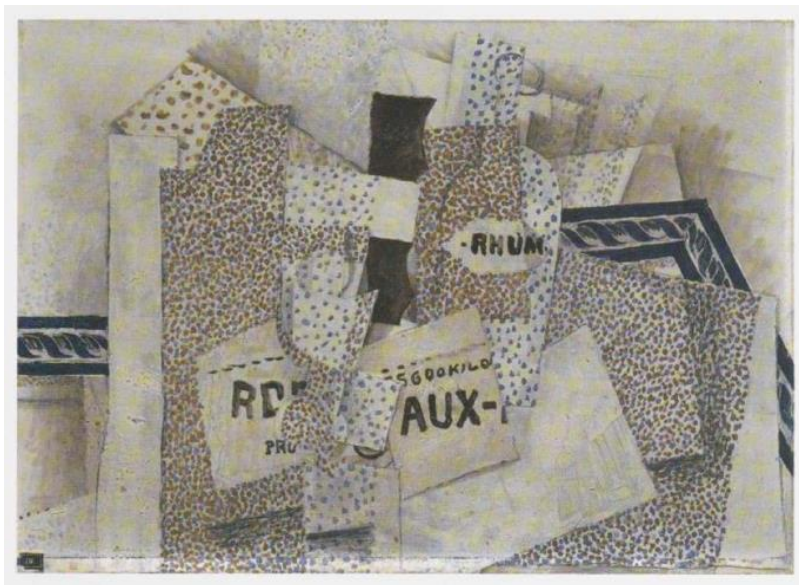
<sup>63</sup> RUBIN, *supra* note 62, at 324. The Braque was in a private collection at the time of the exhibition; the Picasso was at the Musée d'Art Moderne de la Ville de Paris. Both works shown below are reproduced in the book.

<sup>64</sup> These two works remind me of Michelangelo's *Last Judgment*, a fresco with a composition that wanders wildly over the huge surface of the apse around the altar in the Sistine Chapel. Complex, tumultuous composition is not only the property of the modern age. For more on the political motivation behind Picasso and Braque's anti-figuration movement, see Frances Pohl, Book Review, 29 *ARCHIVES OF AM. ART J.* 52, 52–56 (1989) (reviewing CÉCILE WHITING, *ANTIFASCISM IN AMERICAN ART* (1989)).





Pablo Picasso, *Ham, Wineglass, Bottle of Vieux Marc, Newspaper* (1914)



Georges Braque, *Bottle of Rum* (1914)

Three-dimensional art evolved through similar transitions, though the compositional issues were often more complex. The compositional instincts of ancient sculptors, such as those constructing Stonehenge, are sometimes complicated and obscure to contemporary viewers. Later sculpting of religious figures and objects, especially in altar settings, frequently took on triptych compositional configurations, sometimes in large and multifaceted ways. The altar

piece pictured below is one of many examples.<sup>65</sup> Whether occupying large spaces or a small niche, the environment in which a work was placed had an outsized impact on the way viewers perceived and comprehended the art itself. That compositional instinct, while surfacing at times with two-dimensional works produced for display in specific sites, is a more persistent factor in the creation and placement of three-dimensional works. From their use in religious settings, through their placement in particular secular locations, through recent tendencies to render sculpture using everyday objects, to their siting as abstract forms in open spaces, the intention is to grab and provoke our visual attention. Three-dimensional forms are often placed in unconventional settings—away from walls or in the middle of rooms—making the process of walking around them a critical part of the visual experience.



Michael Pacher, Sankt Wolfgang Altarpiece (c. 1479–81)

The work of contemporary artist John Chamberlin is a notable example of the use of everyday objects in three-dimensional art. Many of his pieces are composed of crushed and twisted parts of automobiles welded and bolted together in fascinating and joyous forms. Below is an image from a 2012 retrospective

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<sup>65</sup> See Photograph of St. Wolfgang Altarpiece, in Donna L. Sadler, *The Medieval and Renaissance Altarpiece*, SMARTHISTORY (Jan. 29, 2020), <https://smarthistory.org/altarpiece-medieval-renaissance/>. The altarpiece is made from polychrome pine, linden, gilding and oil, spanning over 40 feet high and more than 20 feet wide. Its location is the Parish Church, Sankt Wolfgang, Austria. The image below is from this article.



exhibition of Chamberlain's work at the Guggenheim Museum in New York City,<sup>66</sup> followed by another from a 2000 show of his work at the Pace Gallery, also in New York City.<sup>67</sup> The Dia Beacon museum in Beacon, New York also routinely displays his work.<sup>68</sup> In all three settings, it is not possible to fully comprehend many of the works without circumnavigating them. And their placement with other Chamberlain works is an integral part of the overall viewing experience.



John Chamberlain, *Hatband* (1960)

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<sup>66</sup> The exhibition was reviewed by Karen Rosenberg in *The New York Times*. The first image below of Chamberlain's work is included in that review. Karen Rosenberg, *Beyond the Junkyard*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/24/arts/design/john-chamberlain-choices-at-guggenheim-museum.html>. I visited this exhibition with my wife. We both were mesmerized by many of the works. The photo attribution is to Sara Krulwich/The New York Times.

<sup>67</sup> See Photograph of a John Chamberlain Sculpture, in *John Chamberlain Recent Sculpture*, PACE GALLERY, <https://www.pacegallery.com/exhibitions/john-chamberlain-8/> (last visited June 19, 2020). The second image of Chamberlain's work below is included on that website. The works were exhibited at the Pace Gallery from May 12 to June 10, 2000 in an exhibition of Chamberlain's then-recent works.

<sup>68</sup> The Dia museum web site contains information about Chamberlain and images of a number of his works. See *John Chamberlain*, DIA, <https://www.diaart.org/exhibition/exhibitions-projects/john-chamberlain-exhibition/> (last visited July 17, 2020).



John Chamberlain (2000)

For many stand-alone, two- or three-dimensional works, their setting is not necessarily critical to the way in which a viewer perceives them. Though their placement in certain rooms or near compatible works may enhance or diminish their artistic power, especially with three-dimensional works, many are largely capable of carrying their own creative authority without much environmental assistance. A single Picasso collage or Chamberlain sculpture can be placed in an array of spots and retain remarkable attraction to the human eye. But compositional sensibilities change dramatically when site-specific works come into view.

### *B. “Site-Specific” Works*

For purposes of this essay, the most important compositional features present in many artistic endeavors arise in “site-specific” works. Intentional location in a particular place is central to their aesthetic power. Site-specific works create unified compositions combining surfaces—canvases, walls, or horizontal planes—with three dimensional forms—sculpture, architectural spaces, or landscape designs. The most extreme examples involve sculpting the earth itself. Robert Smithson,<sup>69</sup> Nancy Holt,<sup>70</sup> and Michael Heizer<sup>71</sup> have sculpted huge parcels of land into vast vistas.

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<sup>69</sup> See *Robert Smithson Artworks*, Holt/Smithson Foundation, <https://holtsmithsonfoundation.org/artworks-robert-smithson> (last visited Oct. 14, 2020).

<sup>70</sup> See *id.*; see also *Nancy Holt Artworks*, Holt/Smithson Foundation, <https://holtsmithsonfoundation.org/artworks-nancy-holt> (last visited Oct. 14, 2020).

<sup>71</sup> Michael Kimmelman, *Michael Heizer’s Big Work and Long View*, N.Y. TIMES (May 17, 2015), <https://www.nytimes.com/2015/05/17/arts/design/michael-heizers-big-work-and-long-view.html> (last visited June 20, 2020).

These works cannot be moved—they are a part of the landscape that they inhabit. While di Modica can never claim that *Charging Bull* is as tightly connected to a site as the work of these earth artists, he does claim that the bull only attains its fullest symbolic power when placed in certain spaces with no other works to detract from or alter the perspective of viewers.

Site-specificity has been a critically important feature of many works for centuries. Altar pieces are obvious examples. Their removal to new locations or disaggregation for purposes of selling each part separately significantly detracts from or even destroys their intended religious power and compositional authority. *The Dance* by Henri Matisse, made for the Barnes Foundation in Philadelphia and pictured below,<sup>72</sup> is another renowned site-specific work made to be displayed in the particular arched doorways where it is currently located. Removing the work from this site would destroy the magnificent impact of the dancers gracefully flowing from lunette to lunette.



Henri Matisse, *The Dance* (1932–33)

Similar consequences would arise if Claude Monet's *Water Lilies* paintings were moved from their present location at the Musée de l'Orangerie in

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<sup>72</sup> See The Barnes Foundation, Photograph of Henri Matisse's *The Dance* in Phyllis Tuchman, *Matisse, in All His Glory: New Tome Chronicles the Artist's Work at the Barnes Foundation*, ARTNEWS (Jan. 29, 2016, 9:17 AM), <https://www.artnews.com/art-news/news/matisse-in-all-his-glory-new-tome-chronicles-the-artists-work-at-the-barnes-foundation-5739/>. This article also contains a brief history of the work. The image was taken at the Barnes Foundation in 2012.

Paris.<sup>73</sup> The space itself was designed in accordance with Monet's desires. The final dedication of the space took place in 1927, one year after the artist's death.<sup>74</sup> As the museum notes, the environment helps evoke a powerful set of images and themes:

According to Claude Monet's own suggestion, the eight compositions were set out in the two consecutive oval rooms. These rooms have the advantage of natural light from the roof, and are oriented from west to east, following the course of the sun and one of the main routes through Paris along the Seine. The two ovals evoke the symbol of infinity, whereas the paintings represent the cycle of light throughout the day.

Monet greatly increased the dimensions of his initial project, started before 1914. The painter wanted visitors to be able to immerse themselves completely in the painting and to forget about the outside world. The end of the First World War in 1918 reinforced his desire to offer beauty to wounded souls.

The first room brings together four compositions showing the reflections of the sky and the vegetation in the water, from morning to evening, whereas the second room contains a group of paintings with contrasts created by the branches of weeping willow around the water's edge.<sup>75</sup>

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<sup>73</sup> The museum's website gives an overview of the paintings and the galleries in which they are displayed. *Claude Monet's Water Lilies*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/claude-monets-water-lilies> (last visited June 19, 2020). The image below is in Alan Riding, *Paris's Jewel-like Orangerie, Home to Monet's Waterlilies, Reopens, Polished and Renovated*, N.Y. TIMES (May 16, 2006), <https://www.nytimes.com/2006/05/16/arts/design/16oran.html>. The image below appears in this article and the attribution is to Remy de la Mauviniere/Associated Press. Another classic setting designed with the collaboration of the artist is the Rothko Chapel on the campus of the Menil Collection in Houston. ROTHKO CHAPEL, <http://www.rothkochapel.org> (last visited June 19, 2020). For more on art that is integrated into a natural landscape, see Cristo and Jeanne Claude's *The Gates* installation in New York City, *The Gates*, CHRISTO AND JEANE-CLAUDE, <https://christojeanneclaude.net/projects/the-gates> (last visited June 20, 2020), and the works of Nancy Holt and Robert Smithson, *supra* note 70 and accompanying text.

<sup>74</sup> *The Installation of Water Lilies*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/installation-water-lilies> (visited Oct. 24, 2020).

<sup>75</sup> *The Set of the Orangerie*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/set-orangerie> (last visited June 19, 2020).



During a more recent renovation of the museum from 2000 through 2006, Monet's paintings, too large to move, had to remain in place.<sup>76</sup>



Claude Monet, *Water Lilies* (c. 1914–26)

Meanwhile, di Modica's claims about *Charging Bull* involve a somewhat more complex contention—not that his work is aesthetically well suited for display in a particular space, but that its cultural content requires placement near the epicenter of the nation's financial markets. The bull's symbolism is so tightly related to the N.Y. Stock Exchange and its environs that placing it somewhere else, di Modica claims, is inappropriate. Furthermore, he argues, allowing other works like *Fearless Girl* to be placed nearby reduces the power of the work's intended symbolism and, thus, should be barred.

There are a number of site-specific works that raise similar issues. Consider, for example, the Statue of Liberty, formally dedicated in 1886.<sup>77</sup> Its size and location at the entrance to New York harbor makes it easily visible to arriving ships and spectators on surrounding shores. This location has played a significant role in the statue becoming both an iconic symbol and a renowned work of art.<sup>78</sup> Placed in Times Square, the statue would acquire entirely different and less evocative symbolism. The famous inscription on its base—"Give me your tired, your poor.

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<sup>76</sup> Alan Riding, *Paris's Jewel-like Orangerie, Home to Monet's Waterlilies, Reopens, Polished and Renovated*, N.Y. TIMES (May 16, 2006), <https://www.nytimes.com/2006/05/16/arts/design/16oran.html>.

<sup>77</sup> *Liberty Enlightening the World*, NAT'L PARK SERV., <https://www.nps.gov/stli/index.htm> (last updated Oct. 7, 2020).

<sup>78</sup> The image above can be found in Mary Bellis, *Frederic August Bartholdi: The Man Behind Lady Liberty*, THOUGHTCO, <https://www.thoughtco.com/who-designed-the-statue-of-liberty-1991696> (last updated Jan. 11, 2020).

Your huddled masses yearning to breathe free.”—would lose much of its rhetorical power.<sup>79</sup>



The *Statue of Liberty* at the entrance to New York harbor.

Landscape artists or architects sometimes create remarkably symbolic, site-specific sculptural works. And of course, sculptors and architects often work together to craft projects. In all these works, moving the three-dimensional forms from their original sites destroys a significant part, if not all, of the works' original visual and symbolic power. An extremely powerful connection between sculpture and site is evoked by Maya Lin's Vietnam Memorial in Washington, DC.<sup>80</sup> With one of the work's axes pointing to the Washington Monument and the other to the Lincoln Memorial, the work is a gash in the earth, invisible from behind, and framing a gradual decline from the front.<sup>81</sup> The wall is both funereal and magnetic, drawing people to solemnly walk its length, to touch and trace the names of family members and friends, and to leave tokens of love and respect. The designed shapes of the earth and the wall are tightly integrated. They are “one” work—a moving, emotional

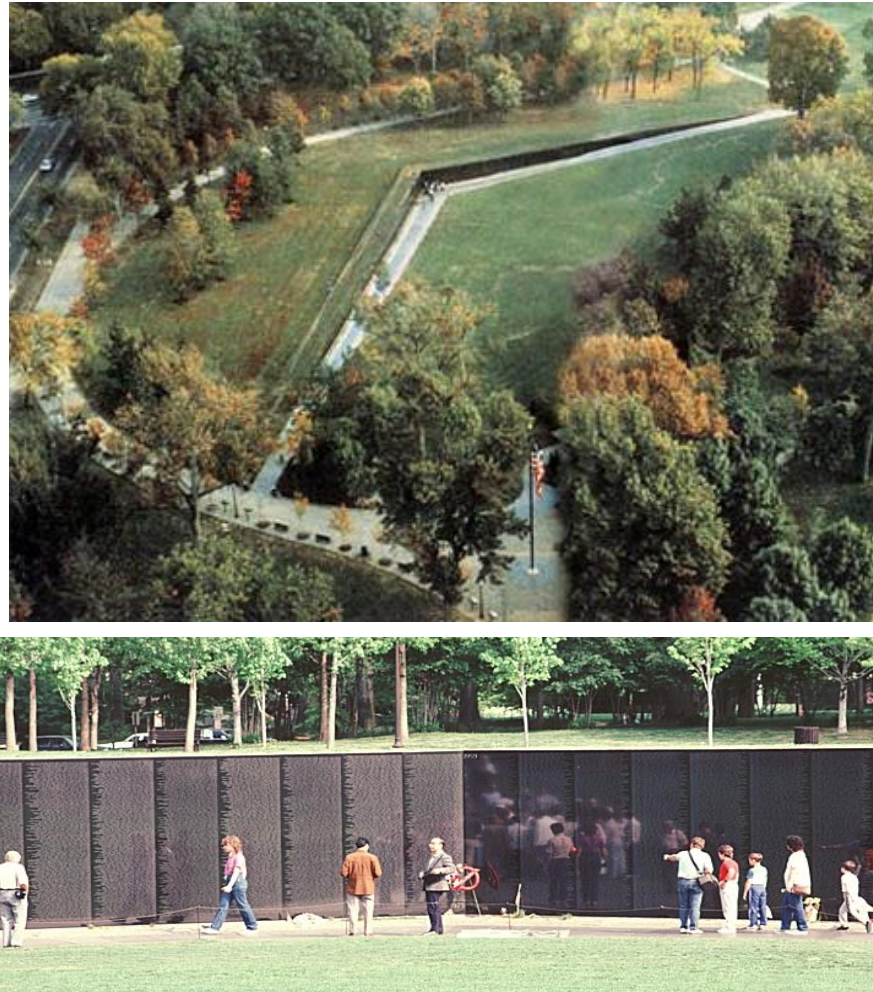
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<sup>79</sup> Emma Lazarus, *The New Colossus*, NAT'L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/colossus.htm> (last updated Aug. 14, 2020).

<sup>80</sup> *Vietnam Veterans Memorial*, NAT'L PARK SERV., <https://www.nps.gov/vive/learn/historyculture/vvmoverview.htm> (last visited June 20, 2020). The two images below are from Elizabeth Wolfson, *The Black Gash of Shame—Revisiting the Vietnam Veterans Memorial Controversy*, ART21 MAGAZINE (Mar. 15, 2017), <http://magazine.art21.org/2017/03/15/the-black-gash-of-shame-revisiting-the-vietnam-veterans-memorial-controversy/>.

<sup>81</sup> Wolfson, *supra* note 80.

space.<sup>82</sup> Its artistic, compositional contours are intimately tied to the site.<sup>83</sup>



Top: The *Vietnam Veterans Memorial*, designed by Maya Lin, from above.

Bottom: Visitors observing names of 58,000 American servicemen etched into marble at the site.

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<sup>82</sup> I walked its length shortly after the opening, before the tourist crush arrived and the walkway was constructed along its length. After the slow stroll, I sat on the grass at the crest of the hill. Deeply moved by its power, I wept. Having lived through the Vietnam War and participated in demonstrations against it, the scope of the tragedy marked by this simple but magnificent memorial was overwhelming.

<sup>83</sup> The same would have been said about Richard Serra's *Tilted Arc*, removed from the Foley Plaza in front of the Javits Building in downtown New York on March 18, 1989, two years before moral rights protections were embedded in the copyright code. For more, see Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 615–21 (2018).

### III *CHARGING BULL* AND COPYRIGHT

#### *A. Terms of the Legal Debate*

Where does *Charging Bull* fit in this complex configuration of artistic composition and environmental location? It certainly is easy to imagine the di Modica work sited in a museum gallery. In that setting it would retain its aesthetic power and, with the help of a note installed nearby, still convey a message of American resilience in troubled times. It cannot be denied that in such a setting, di Modica owns intellectual property interests in the three-dimensional sculptural work. But does he also retain some or all control over where and how the museum may display it? In other words, does he own something more than a copyright interest in the object itself? Are there merits to his contention that museum or other displays of *Charging Bull* may violate his right to control the work's environment?

At the other end of the spectrum, *Charging Bull* is not a wholly site-specific work. Di Modica cannot claim to be like Maya Lin—a designer of both a sculpture and its environment.<sup>84</sup> Nor is he similar to Monet who worked in collaboration with an architect in the 1920s to craft a special environment for his *Water Lilies*.<sup>85</sup> Di Modica was never involved with another person or institution to create a site-specific display for *Charging Bull*.<sup>86</sup> Quite the contrary. Recall that he placed the work on Broad Street, directly in front of the N.Y. Stock Exchange, in the dead of night without the cooperation of or permission from anyone other than those who performed the tasks associated with moving and placing the work.<sup>87</sup> Certainly, the location at the N.Y. Stock Exchange was integrated with di Modica's commentary about resilience in times of economic hardship. But that particular site is not the only place where a similar message may be evoked. If he has any compositional claims beyond the sculpture itself, they must arise from a feature of the work that requires its location in a certain type of space or that necessitates limitations on the ability of others to "comment" on the art. That set of issues—both compositional and copyright-based—is considered next.

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<sup>84</sup> See *supra* note 80 and accompanying text.

<sup>85</sup> See *infra* text accompanying notes 121-122.

<sup>86</sup> The copyright status of projects created by more than one person are discussed a bit later. See discussion *infra* notes 121-122. Definitionally, in copyright law, "[a] 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (2018).

<sup>87</sup> Kuesel, *supra* note 2.



There is some logic in di Modica's position that the ideal location for *Charging Bull* is close to, if not within sight of, the N.Y. Stock Exchange. It is after all a sculpture that literally expresses the notion of a "bull market" in making a statement about American resilience in troubled times. There is also some logic in his position that placing other works, such as *Fearless Girl*, close to *Charging Bull* alters di Modica's apparent or perceived artistic intentions and injects quite different social and cultural messages. The bevy of onsite reactions to both the bull and the girl make that quite evident.<sup>88</sup> Whether either of di Modica's claims—that he controls the physical location of *Charging Bull* and holds the power to insulate the work from onsite, critical, artistic commentary—can be resolved in his favor under U.S. copyright law is unclear.

Two provisions of copyright law are critical to the analysis—the concept of a "derivative work" and the contours of moral rights law. The code defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."<sup>89</sup> If a person makes a work that recasts, transforms, or adapts a preexisting copyrighted work without the permission of the author of the original, it is an infringement.<sup>90</sup> Di Modica may claim that the presence of *Fearless Girl* near *Charging Bull* recasts, transforms, or adapts his sculpture in two ways: by transforming the compositional environment in which the bull is displayed; or by recasting the symbolic importance of the sculpture.

Moreover, the moral rights section of the code provides that an artist during her life has 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."<sup>91</sup> Here, di Modica must raise concerns similar to those made in his derivative work contentions—that placement of *Fearless Girl* or other artistic statements close to or upon *Charging Bull* so substantially recasts the bull by modifying it in ways that prejudice di Modica's honor or reputation. *Fearless Girl* so profoundly distorts his artistic intentions, he might claim, that such commentary should be barred.

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<sup>88</sup> See *supra* Section I.A.

<sup>89</sup> 17 U.S.C. § 101 (2018)

<sup>90</sup> See 17 U.S.C §§ 106(2), 501 (2018).

<sup>91</sup> 17 U.S.C § 106A(a)(3)(A) (2018).

*B. Compare Guernica: Artistic Intention, Location, and Moral Rights*



Pablo Picasso, *Guernica* (1937)

To begin the inquiry, consider the connections between *Charging Bull* and Pablo Picasso's famous *Guernica*, pictured above.<sup>92</sup> The *Guernica* story is an important comparison for two reasons. First, like *Charging Bull*, there were disputes over the work's location. Second, when pressure to move *Guernica* to Spain increased during the 1970s, Picasso's heirs made moral rights claims about the work.

The history of Picasso's work is complex. In 1937, Picasso painted *Guernica*—a huge, mural-sized piece measuring 11'6" by 25'7".<sup>93</sup> At the time, the Spanish Republican government was in the midst of a civil war with the Francisco Franco-led Nationalists—one of a number of fascist movements gaining power across Europe. Early in 1937, Picasso was commissioned by the internationally recognized Republican government of Spain to create a work for display in the country's pavilion at the Paris Exposition scheduled to open later that year. Then living in Paris, Picasso was unsure about what to produce for the show.<sup>94</sup> But on April 26, a unit of Germany's Luftwaffe, loaned to and under the control of Franco's

<sup>92</sup> The work is now housed at the Museo Nacional Centro de Arte Reina Sofia in Madrid, Spain. See *Guernica*, MUSEO NAC'L CENTRO ARTE REINA SOFIA, <https://www.museoreinasofia.es/en/collection/artwork/guernica> (last visited June 24, 2020).

<sup>93</sup> See *Guernica, 1937*, PABLO PICASSO, <https://www.pablopicasso.org/guernica.jsp> (last visited June 28, 2020). The image above can be found at this website and is attributed to [www.PabloPicasso.org](http://www.PabloPicasso.org).

<sup>94</sup> GIJS VAN HENSBERGEN, *GUERNICA: THE BIOGRAPHY OF A TWENTIETH-CENTURY ICON* 31–35 (2004).

forces, carpet-bombed the small town of Guernica, located not far from Bilbao in the Basque country of northern Spain. Hundreds, if not thousands, of innocent people were killed and wounded.<sup>95</sup>



The ruins of Guernica, shortly after the 1937 bombing.

The bombing of Guernica galvanized Picasso to work on the well-known painting named for the town.<sup>96</sup> Picasso's leftist political leanings moved him to compose a painting protesting both the bombing of Guernica and the rising fascist movements on the continent. When the Paris Exposition ended, "there was no indication that Picasso had become either precious or obsessively protective about the painting. It had a job to do. It was as simple as that. And like a theatre backdrop, it could be easily untacked and rolled round a tube ready for transport."<sup>97</sup> And so, *Guernica* went on tours in Europe and other parts of the world to raise funds for the support of refugees from the Spanish Civil War. When Franco's forces took over

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<sup>95</sup> The number of casualties is unknown. Estimates of deaths range from 200 to 1700. Casey Lesser, *What Makes Guernica Picasso's Most Influential Painting*, ARTSY (June 12, 2017, 1:55 PM), <https://www.artsy.net/series/-1583427101/artsy-editorial-guernica-picassos-influential-painting>; cf. HENSBERGEN, *supra* note 94, at 47 (claiming that 1645 died and 889 were injured). The image is from Federico López-Terra, *80 Years on from the Guernica Bombing and Spain is Still Struggling to Honour Historical Memory*, Local (April 26, 2017, 6:41 PM), <https://www.thelocal.es/20170426/80-years-on-from-the-guernica-bombing-and-spain-is-still-struggling-to-honour-historical-memory>. The image attribution is to the AFP archive.

<sup>96</sup> See HENSBERGEN, *supra* note 94, at 45–48.

<sup>97</sup> HENSBERGEN, *supra* note 94, at 82–83.

Spain in 1939, the work was on display at the Museum of Modern Art (“MoMA”) in New York City as part of a retrospective exhibition.<sup>98</sup>

The painting remained at MoMA throughout World War II. During the early 1940s, Picasso requested that the museum serve as its guardian to protect it and to ensure that it would not be returned to Spain until “the reestablishment of public liberties” occurred there.<sup>99</sup> If he became unable to make such a decision, Picasso entrusted his lawyer, Roland Dumas, to determine when that condition was fulfilled. MoMA oversaw additional tours of the work until 1958, when MoMA’s staff deemed it too fragile to withstand further travel.<sup>100</sup> *Guernica* then remained at MoMA until its final move to Madrid in 1981. Arranging *Guernica*’s last move was not without controversy.

As early as 1968, Franco sought to have the painting brought to Spain.<sup>101</sup> Picasso quickly refused that request, saying the move could not occur until democracy was restored in Spain. Picasso died in 1973, followed two years later by Franco. In 1973, Franco had designated Juan Carlos, grandson of the last reigning king of Spain, as his successor.<sup>102</sup> Surprising many after he took over in November 1975, Carlos began the process of recreating a democracy. In 1977, the first general election was held. A new constitution went into effect the following year. In February 1981, an abortive military coup d’état was peacefully averted when Juan Carlos convinced the vast bulk of the armed services to stay on the sidelines. The first peaceful post-election transfer of power occurred the following year.

Though Spanish pressure to send *Guernica* to Spain began in earnest after Franco’s death in 1975, various roadblocks delayed the move another six years. Concerns raised by Dumas and four heirs of Picasso, delays by the MoMA, and practical issues about how and when to move the fragile work also caused problems. Both Dumas and Picasso’s heirs were concerned about the stability of Spain’s

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<sup>98</sup> *Id.* at 124–125.

<sup>99</sup> Grace Glueck, *Picasso's Antiwar 'Guernica' Quietly Leaves U.S. For Spain*, N.Y. Times (Sep. 10, 1981), <https://www.nytimes.com/1981/09/10/arts/picasso-s-antiwar-guernica-quietly-leaves-us-for-spain.html>; see also James M. Markham, *Spain Says Bienvenida to Picasso's 'Guernica'*, N.Y. Times (Sept. 11, 1981), <https://www.nytimes.com/1981/09/11/arts/spain-says-bienvenida-to-picasso-s-guernica.html> (describing Picasso’s reluctance to move the painting until democracy was restored in Spain).

<sup>100</sup> See HENBERGEN, *supra* note 94, at 210–12.

<sup>101</sup> Markham, *supra* note 99.

<sup>102</sup> HENBERGEN, *supra* note 94, at 257.

fledgling democratic government during and after the 1981 coup attempt.<sup>103</sup> The heirs also claimed the right to control the painting's whereabouts under French moral rights law.<sup>104</sup> In addition, some heirs raised questions about whether Spain actually owned *Guernica*.<sup>105</sup> If Spain could not confirm its ownership of the work, *Guernica* would have fallen into Picasso's estate, a result of obvious benefit to the heirs.

Adolfo Suárez González, the first elected Spanish prime minister after Franco's death, appointed the veteran diplomat Rafael Fernandez Quintinella to verify that Spain held the strongest tangible property ownership claim to *Guernica*. He did so in 1981 by discovering documents confirming that Spain had paid Picasso about \$6,000 to create the work for the Paris Exposition.<sup>106</sup> In 1981, with their concerns about the strength of Spanish democracy and the work's ownership chain assuaged, the heirs consented to moving the painting to Madrid. This occurred at a June 1981 meeting in Paris, convened by MoMA, where all relevant parties were present, and the documents confirming Spanish ownership of *Guernica* were on hand.<sup>107</sup> Dumas signed off on the details of the move in August, after the parties resolved insurance, transportation, and security issues. *Guernica* arrived in Madrid and became available for viewing by the public on October 25, the centennial of

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<sup>103</sup> KATHERINE O. STAFFORD, *Archeology of an Icon: Picasso's Guernica and Spanish Democracy*, in NARRATING WAR IN PEACE 109–10 (2015) (noting “[t]he greatest obstacles to the repatriation of the painting came from Picasso's contentious family,” including protestations over when the painting should be returned to Spain).

<sup>104</sup> See Grace Blueck, *Picasso's Antiwar 'Guernica' Quietly Leaves U.S. for Spain*, N.Y. TIMES, Sept. 10, 1981, at A1 (describing heirs' disagreement over when the painting should return to Spain and claims for certain moral rights to the work as the artist's survivors). In the United States, moral rights claims—including the ability to bar modification or mutilation of a work that undermines the reputation of the artist, and destruction of a work of recognized stature—end at the death of the artist. See 17 U.S.C. §§ 106A(a)(3), 106A(d)(1) (2018). Di Modica, of course, is still alive. Similar rights in France continue indefinitely, passing to heirs after the death of the artist. See Art. 6 du loi 57-298 du 11 mars 1957 sur la Propriété Littéraire et Artistique [Article 6 of Law 57-298 of March 11, 1957 on Literary and Artistic Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 14, 1957, p. 2724. Moral rights controls may not be transferred in France; they may be waived in the United States. Compare *id.* with 17 U.S.C. §106A(e) (2018).

<sup>105</sup> See RUSSELL MARTIN, *PICASSO'S WAR* 213–16 (2012).

<sup>106</sup> *Id.* at 218–24. A more complete version of the final part of the story than is presented here may be found at pp. 224–32. See also the finely detailed summary in HENSBERGEN, *supra* note 94, at 280–332.

<sup>107</sup> MARTIN, *supra* note 105, at 224.

Picasso's birth.<sup>108</sup>

It was only after the 1981 meeting's resolution of the potential disputes between MoMA, Dumas, and the heirs over moving *Guernica* to Spain that a complex legal dispute was avoided. In reality, each side raised issues about the same problem—the location of the work. Dumas claimed that Picasso's desires should govern the outcome of the dispute, and that his oft-stated wishes governed both the meaning of the art and the propriety of its display in Spain. The heirs claimed that, as successor defenders of Picasso's moral rights in the painting, they controlled the decision about *Guernica*'s location. Recall that in France, transfer of moral rights, either by an artist or an artist's successors, is generally barred.<sup>109</sup> According to the heirs, prematurely moving it to Spain would not only undermine Picasso's intentions but would also alter or mutilate the meaning of the work itself.

Di Modica makes very similar claims about *Charging Bull*, declaring that his ownership of the work's intellectual property and the associated moral rights gives him control over the proper location for his work and the artistic environment that may come to surround the piece.<sup>110</sup> The factual underpinnings for the disputes over location and environment emerge in both cases from statements and desires enunciated by the artists themselves.

There are, of course, significant differences in the story lines of the two works. Di Modica deposited his work unannounced on a city street. Picasso was commissioned to make a work. Di Modica objected to the relocations of his work, but Picasso was much more precise about the reasons for his desire to permanently display *Guernica* only in Spain. Because of its outdoor location, di Modica's work became an easy target for direct artistic confrontation and commentary. Picasso's work was rarely a physical target or a subject of onsite, artistic efforts to interpret or reinterpret its meaning.<sup>111</sup> Unlike *Charging Bull*, another work of art directly

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<sup>108</sup> Much of the basis for the delay is expressed in the communiqué on *Guernica* issued in April 1977 by Maitre Roland Dumas, Picasso Family Lawyer (reprinted in an addendum at the end of this essay). Dumas, *infra* note 147.

<sup>109</sup> See discussion *supra* note 104.

<sup>110</sup> The dispute can't be about physical ownership of either *Guernica* or *Charging Bull*. The former was purchased by Spain in 1937 and the latter was explicitly designated as a gift to the city of New York when di Modica deposited it in front of the Stock Exchange in 1989. Di Modica's claim of physical ownership is discussed in more detail above. See discussion *supra* note 48.

<sup>111</sup> *Guernica* was once marred by spray paint. See HENSBERGEN, *supra* note 94, at 276–77; Michael Kaufman, 'Guernica' Survives a Spray Paint Attack by Vandal, N.Y. TIMES (Mar. 1, 1974), <https://www.nytimes.com/1974/03/01/archives/guernica-survives-a-spraypaint-attack-by-vandal-floor-is-sealed-off.html>.



commenting on *Guernica* and intentionally placed nearby has never appeared. Di Modica never made arrangements with persons in authority to create or monitor the sculpture's placement. Picasso, in essence, appointed the MoMA, then voluntarily the custodian of *Guernica*, as its guardian.

The two works are, however, similar in at least three important ways. First, neither work has ever been displayed in a site specifically designed for an artistic contribution by the artist. Second, the closest either of the artists came to stating a preference about where their work should be displayed was to describe an area or a city. Put another way, both di Modica and Picasso only stated their general desires (near the N.Y. Stock Exchange and in Madrid) about placement of their creations. Third, neither di Modica nor Picasso made statements about where their works should be located until some time after they were first displayed to the public. They definitely were not site-specific creations. What is the impact of statements of intention made after a work's initial installation on the contours of the copyrights in either or both works? Do statements of intention about a work made after its initial installation and display alter its compositional or other artistic characteristics in ways that enhance the likelihood that works placed nearby constitute derivative works? Does a similar impact arise in the moral rights context?

### C. Copyright, Intention, and Location

#### 1. Intent

Artistic intention has long been relevant to determining the scope and contour of copyright protection in the United States.<sup>112</sup> It is especially pertinent to disputes over the relevance of artists' statements about the location of works that were not originally fashioned as site-specific creations. In these cases, a work's extant location may not clearly present inferences about the artist's preferred placement. Additional issues arise because the most important court opinions about copyright and intent are not about painting or sculpture. Exploring the disputes over *Charging Bull* and *Fearless Girl* therefore requires some thought.

One of the most cited cases about artistic intention and its relevance to determining the scope of intellectual property protection arose in a dispute over the fact-expression dichotomy. Though it is a staple of copyright law that expression is protected while facts are not, the definition of "fact" for these purposes means something quite different from its standard use as a synonym for "truth." A statement may be "factual" for copyright purposes not because it is true but because the author

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<sup>112</sup> I've written about this issue in a different context—the temporary quality of installation and conceptual art. See Chused, *Conceptual Art*, *supra* note 53.

declares it to be factual. The best-known example of this strange phenomenon is *A.A. Hoehling v. Universal City Studios, Inc.*<sup>113</sup> Hoehling wrote a book, which he described as historically accurate, claiming that the Hindenburg exploded in 1937 due to sabotage. In doing so, he rejected the widely accepted theory that static electricity caused the hydrogen-filled airship to burst into flames. When filmmakers later used his sabotage storyline in a movie, Hoehling sued for copyright infringement. The United States Court of Appeals for the Second Circuit concluded that the tale Hoehling labeled as factual was not copyrightable.<sup>114</sup> The storyline (but not Hoehling's expression of it) was left in the public domain under the copyright code provision barring protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery."<sup>115</sup> Facts are treated more like ideas, concepts, or discoveries than as expression.<sup>116</sup> They are the cornerstone for conversation, politics, life, and culture—the sorts of discourse necessary for the maintenance of a flourishing public forum. While the form of a "factual" story—its expression—could be protected, the storyline itself was available for use in general civil discourse and other creative, expressive works.

Note well that the Second Circuit never made an actual determination that Hoehling's story was true in any epistemological sense. Again, his version of the tale was widely considered inaccurate. The court merely held that the author's description of the story as "true" resolved the issue of copyrightability. Hoehling's statements—his intention—determined the scope of the book's intellectual property protection.

At first glance, this conclusion is difficult to justify. How can the law classify

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<sup>113</sup> *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

<sup>114</sup> *Id.* at 978–79.

<sup>115</sup> 618 F.2d 17 U.S.C. § 102(b) (2018).

<sup>116</sup> A related notion was discussed by Justice O'Connor in her opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The dispute was over the copyrightability of listings in the white pages of a telephone directory. Facts, O'Connor noted, are not protected, though original compilations of facts are. In describing the difference between unprotected facts and protected expression, she wrote that facts cannot be original. "This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery. The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Id.* at 347. This notion is at least as challengeable as the concept of "fact" in *Hoehling*. Just because someone "discovers" a fact does not mean that originality or creativity was missing when the "fact" was "discovered." There is, therefore, a dilemma in copyright law that newly found "facts" can never be protected from use by others. That puts historians in a particularly disfavored position. Clever fact finding based on something other than labor by itself goes unrewarded.



a story as factual for the purposes of copyrightability when virtually everyone who knows about the events in question declares it to be false? Over the centuries, the search for “truth” has been one of the most slippery tasks humanity has tackled. Is the *Hoehling* “solution” simply an efficient way for courts to avoid participating in the philosophical debate? For copyright purposes, this strategy might work tolerably well.

But the *Hoehling* result may also cause nightmares. On the one hand, it creates an incentive for artists and authors to label material as non-factual, thereby permitting intellectual property protection over their purportedly original, expressive works. On the other hand, consider a *Hoehling*-opposite dispute in which an author labels a story as fictional even though virtually everyone else in the world views the tale as true. This *Hoehling*-opposite case might well lead to a finding of non-copyrightability. What justifies granting an author protection for a story that has previously been in the public domain as a factual tale? If followed, the version generally recognized as accurate would be barred from use by anyone other than the author labeling it as false. Intent as a copyright guideline almost surely has its limits, especially with regard to issues of truth.<sup>117</sup>

Nonetheless, the underlying notion that intention has a substantial impact on copyrightability cannot be gainsaid.<sup>118</sup> Consider another example, this one pictorial.

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<sup>117</sup> The most puzzling expression/fact problem I’ve confronted involves Norman Mailer’s *EXECUTIONER’S SONG*, published in 1979, the story of Gary Gilmore’s last crime spree and eventual execution in Utah. NORMAN MAILER, *THE EXECUTIONER’S SONG* (1979). Mailer himself labeled the tome as a “true life novel.” Tony Schwartz, *Is New Mailer Book Fiction, in Fact?* N.Y. TIMES, Oct. 26, 1979, at C24, <https://www.nytimes.com/1979/10/26/archives/is-new-mailer-book-fiction-in-fact-tries-to-explain.html>. In the book’s afterword, Mailer wrote that he made “the story . . . as accurate as one can make it. This does not mean it has come a great deal closer to the truth than the recollections of the witnesses. While important events were corroborated by other accounts wherever possible, [those corroborations] could not, given the nature of the story, always be done and, of course, two accounts of the same episode would sometimes diverge.” MAILER, *supra*, at 1020. In such conflict of evidence, the author chose the version that seemed most likely. *Id.* It would be vanity to assume he was always right. He also confessed to altering news articles, as well as interviews with and letters from Gary Gilmore. *Id.* at 1020–21. In short, he admitted the reality of dilemmas every reputable historian faces when writing a book: What is *really* true is often hard to know.

<sup>118</sup> In a related vein, intent also governs whether a work may be treated as temporary or permanent. If an artist agrees to make a work for short-term public display, knowing that it will be destroyed when the exhibition concludes, she has no moral rights claim for destruction of the work. When its display ends according to the original intention of the artist, the scope of the work has been fully validated, not modified or mutilated. This result recently was adopted in the 5Pointz

Suppose an abstract artist has a canvas in her studio leaning against a wall that she painted over years ago with white gesso—a substance often used as a primer upon which to paint a composition. After painting on the gesso, she set it aside and never got around to using it. In that hypothetical setting, it probably is not an original work eligible for copyright protection.<sup>119</sup> Though the level of originality required for protection is quite low,<sup>120</sup> a gesso-covered canvas leaning against a studio wall for years probably does not suffice. But what happens if the artist looks at the canvas after ignoring it for all these years and concludes that she now really likes the way she brushed the primer onto the canvas, gives it a name (say “Composition #36 in White”), and places it in an exhibition of her work at an important gallery? That step is a statement of intention that she thinks of the piece as a work of art. The likelihood that it is now original increases dramatically. There are many important and widely praised white canvases by well-known artists hanging in important museums around the world.<sup>121</sup> While the search for the meaning of originality is often as open-ended as that for intention, there can be little doubt that the intention of an artist has an impact on the scope of originality. Just as a writer’s statement claiming a work to be factual may lead to a conclusion that a book is not copyrightable, so may an artist’s claim of beauty make her work both expressive and original.

Such examples help explain why the scope of protection for the works of di Modica and Picasso is much more challenging to decipher than in the case of Monet’s *Water Lilies* at Musée de l’Orangerie. The intentions of Monet were unequivocally concerned with both the painted images and their environment. He worked closely with the architect, Camille Lefevre, who in 1922 crafted plans for remodeling the l’Orangerie building into a viewing space for art.<sup>122</sup> The museum

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graffiti site litigation. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167–68 (2d Cir. 2020) (citing Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 597–98 (2018)). Though all the artists working at the world-famous graffiti site knew their creations were temporary, that did not give the property owner the right to whitewash them himself, outside the standard understanding of the graffiti culture he allowed to work there. When another party destroys a temporary work before its planned demise, that does violate moral rights.

<sup>119</sup> 17 U.S.C §102(a) (2018) requires a work to be original to gain protection; the code does not define the term.

<sup>120</sup> The classic case is *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>121</sup> Robert Ryman and Agnes Martin are two examples. Ryman’s work is in the collection of Dia Beacon. *Robert Ryman*, DIA, <https://www.diaart.org/collection/artist-a-to-z/ryman-robert> (last visited Oct. 23, 2020). So is Martin’s. *Agnes Martin*, DIA, <https://www.diaart.org/collection/artist-a-to-z/martin-agnes> (last visited Oct. 23, 2020).

<sup>122</sup> *The Installation of the Water Lilies*, MUSÉE DE L’ORANGERIE, <https://www.musee-orangerie.fr/en/article/installation-water-lilies> (last visited July 3, 2020).

describes the links between the paintings and the rooms in which they are displayed to this day in this way:

From the late 1890s to his death in 1926, the painter devoted himself to the panoramic series of *Water Lilies*, of which the Musée de l'Orangerie has a unique series. In fact, the artist designed several paintings specifically for the building, and donated his first two large panels to the French State as a symbol of peace on the day following the Armistice of 12 November 1918. He also designed a unique space consisting of two oval rooms within the museum, giving the spectator, in Monet's own words, "an illusion of an endless *whole*, of water *without* horizon and *without* shore", and making the museum's *Water Lilies* a work that is without equal anywhere in the world.<sup>123</sup>

Under contemporary American copyright law, this statement by l'Orangerie is highly likely to support a conclusion that Monet and Lefevre were authors of a joint work—"a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>124</sup> Put another way, the paintings and the environment in which they are still displayed are inseparable parts of the same original work. Removing the paintings from the architectural space would be a significant mutilation of the original work. That step would undermine the intentions of both Monet and Lefevre and probably violate the terms of American moral rights law if done in the United States during the lives of the artist and architect. The paintings and the rooms in which they hang are a unified compositional undertaking. Under the statute, an author may "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."<sup>125</sup> Similarly, modifications made to the environment in which Monet's paintings are displayed would create a derivative work, not only of the architectural work, but also of the joint work that includes the paintings themselves.<sup>126</sup> If the modifications were made without the permission of the authors, it would be an infringement. In short, place and painting may be linked in intimate and jointly copyrightable ways. The locational intentions

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<sup>123</sup> *Claude Monet*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/artist/claude-monet-0> (last visited July 3, 2020).

<sup>124</sup> 17 U.S.C. §101 (2018).

<sup>125</sup> 17 U.S.C. §106A(a)(3)(A) (2018). Note well that American moral rights only exist for the life of the artist. Monet, of course, died some time ago, as did Picasso. Di Modica, however, still lives. Since he is the primary concern of this essay, it makes sense to consider how American law might operate in his case.

<sup>126</sup> For the definition and meaning of "derivative work," see *supra* note 49.

of di Modica and Picasso, however, are much less well-defined.

## 2. *Derivative Work*

Di Modica, recall, claims that others will violate his right to control the creation of derivative works of *Charging Bull* if they change the work's location. That is a difficult challenge to meet. Di Modica simply left his sculpture in a publicly accessible space for what he thought would be a short-term stay.<sup>127</sup> He also announced the work was a gift to the city. These actions are hardly evidence of intent about siting the bull in an aesthetic environment for the long term. Instead, di Modica's overnight placement of the work was more like commandeering a site than helping to craft one. Further, after *Charging Bull* was removed, di Modica enthusiastically consented a short time later to placing it in a new location at Bowling Green, several blocks away from the N.Y. Stock Exchange. If he has any control over location, it must be limited to an area, not a specific place.

In the absence of a contractual agreement between di Modica and the city about the permanence of *Charging Bull*'s current location at Bowling Green, it is unlikely that di Modica has any control over future siting decisions. It would stretch expression in copyright law to the breaking point to allow an artist to deposit a work in a public space, enthusiastically support its movement to another public location with the blessing of public officials, later proclaim that the work is legally and permanently bound to that location, and then top it all off by demanding that no other works of commentary be placed nearby. While di Modica may bar others from making souvenir models of his work, it is quite doubtful that he can control broader aspects of the bull's location under copyright law.

Similarly, di Modica's after-the-fact declaration that he has the power to preclude movement of *Charging Bull* to a new location without his approval also stretches the power of intention in copyright law to the breaking point. While di Modica approved of the bull's move to Bowling Green, that consent does not change the compositional contours of the work. There is nothing unique about Bowling Green that adds to the artistic qualities of the sculpture. It is difficult to see how it is an original addition to the pre-existing work that might make the location part of a new derivative work. If anything, the work's subsequent move detracted from the work's original novelty by moving it further from the N.Y. Stock Exchange and that institution's connection to bull markets.

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<sup>127</sup> See Kuesel, *supra* note 2.

Picasso's *Guernica* presented similar predicaments. Picasso did enunciate a location preference for *Guernica*, but only after Franco's forces prevailed in the Spanish Civil War and World War II began. As the Public Broadcasting Service so eloquently noted, *Guernica* became a refugee just like so many others during World War II.<sup>128</sup> As with the bull, can such after-the-fact declarations be allowed to modify the copyrightable, compositional contours of a work and thereby create something derivative? Given the circumstances in which a willing party (MoMA) took custody of the painting and promised to follow the wishes of Picasso, there was some artistic control over the future location of *Guernica*. But that control did not arise naturally from the scope of copyright protection held by the artist. It arose from a separate contractual or trust-like undertaking between Picasso and the MoMA.<sup>129</sup> In addition, calling for *Guernica* to be located in Spain hardly referred to a well-defined space. May such a statement of intent and desire about location made long after a work's creation and public display in an array of locations be considered a modification of an underlying work that creates a new derivative work? Or is it simply a moral statement—an "ethical will"—that creates a social, and in this case political, sense of obligation? Indeed, the same questions may be posed about *Charging Bull*, especially since it was relocated to Bowling Green in large part because of negative public reaction to carting it away from the N.Y. Stock Exchange and placing it in storage.

For similar reasons, moving either work probably does not violate any conception of moral rights unless the new location serves to undermine the reputation of the artist. Given the somewhat haphazard process by which both di Modica and Picasso dealt with the location of their works during the time following their creation, it is difficult to see how the reputational authority of either di Modica or Picasso would be disturbed. In neither case may an element of their artistic creativity be decided by such post-creation statements of intent.

#### D. Copyright, Intention, and Proximate Artistic Commentary

Though it is difficult to justify giving either di Modica or Picasso management over the particular places their works are displayed under copyright law, there are other ways they may maintain some control over the nature of the spaces surrounding

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<sup>128</sup> *Guernica in Exile, Treasures of the World*, PUB. BROAD. SERV., [https://www.pbs.org/treasuresoftheworld/guernica/glevel\\_1/4\\_exile.html](https://www.pbs.org/treasuresoftheworld/guernica/glevel_1/4_exile.html) (last visited July 8, 2020).

<sup>129</sup> It is not even clear if Picasso had the right to create such an arrangement with MoMA. After all, Spain, not Picasso, owned the property rights in the object itself. *See supra* notes 48, 110.

their original works. The same rule structures discussed above—moral rights and derivative works—are in issue here as well. Reconsider the *Charging Bull/Fearless Girl* tale by picturing the girl placed eye-to-eye with and a quarter inch away from the bull—something like this:<sup>130</sup>



Direct confrontation: author's rendering of more proximate placement for *Charging Bull* and *Fearless Girl* (edited)

This placement of *Fearless Girl* is a much more direct confrontation to *Charging Bull* than its original location some yards away. Di Modica, recall, claimed that both the original location of *Fearless Girl* at Bowling Green staring down *Charging Bull* and the proposed relocation of his work to the N.Y. Stock Exchange not far from the present location of the girl violate his rights to control the making of derivative works and his moral rights in the sculpture.<sup>131</sup> By moving *Fearless Girl* to a spot directly in front of the bull, the compositional impact on *Charging Bull* rises dramatically. Viewing one piece simultaneously requires looking at the other. They arguably become more like a single composition. This raises the stakes for

<sup>130</sup> Assume that no physical changes are made to the bull itself. The image of the bull is from *NYC's Charging Bull Statue*, 19 DUTCH (May 17, 2019), <https://www.19dutch.com/blog/nyc-charging-bull-statue>. No image credit is listed. The image of the girl is from 'Fearless Girl' Gets New Home at New York Stock Exchange, JAKARTA POST (Dec. 12, 2018, 5:02 AM), <https://www.thejakartapost.com/life/2018/12/11/fearless-girl-gets-new-home-at-new-york-stock-exchange.html>. The image credit is to AFP/Timothy A. Clary.

<sup>131</sup> This is just a reminder that, under United States law, di Modica does not have a moral rights claim since his bull was made before the statute went into effect. See 17 U.S.C. § 106A(d)(2) (2018); see also *supra* text accompanying note 47. I am simply treating the issue as live as a thought exercise.



both claims. Perhaps decoding this example will shed light on the actual settings involved in this dispute.

### *1. Fearless Girl as a Derivative Work*

A derivative work is defined in the statute as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>132</sup> From earlier discussion of Monet’s *Water Lilies* at l’Orangerie and Maya Lin’s Vietnam Veterans Memorial,<sup>133</sup> we already know that a two- or three-dimensional art object may include within the parameters of its copyright areas outside the particular object itself, especially if the artist has a well-articulated intention to broaden her artistic frame of reference. Thus, the copyrightable scope of a work placed in a building designed for it or a work that is a combination of a number of objects in a particular setting may extend beyond the limits of that particular two- or three-dimensional work. The code also gives the holder of copyright in such an original work the right “to prepare derivative works based upon the copyrighted work.”<sup>134</sup> Outsiders may not unilaterally make a derivative work in the absence of fair use.<sup>135</sup> Presumably, therefore, an artist may approve (or disapprove) as a derivative work an “addition” to it that is outside the exact physical limits of the piece while still having the effect of recasting, transforming, or adapting the original. The dramatization of a novel performs a very similar role. By placing the book version in a new spatial setting with altered linguistic characteristics, a play makes use of the original while recasting and transforming it. Similarly, there is no reason why an artist may not claim the right to control some aspects of adjacent works if they also recast or transform the original. Di Modica’s argument, that he enjoys some level of control over works located near his bull, is therefore not without credence and different from his claim about location. Exactly what the scope of such protection may be is as ineffable as the artistic notion of composition. Proximity and compositional authority speak with related tongues; logical results, therefore, may be difficult to discern.

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<sup>132</sup> 17 U.S.C. §101 (2018).

<sup>133</sup> See discussion *supra* Section II.B.

<sup>134</sup> 17 U.S.C. §106(2) (2018).

<sup>135</sup> Fair use allows copyrighted works to be used in subsequent creations when it creatively uses the original without damaging its market. The law of fair use is complex and impossible to fully describe in a brief statement. Its contours are beyond the scope of this essay. See 17 U.S.C. §107 (2018).

For example, suppose di Modica had rendered another bronze sculpture of a woman that raised sensibilities quite different from *Fearless Girl*. Picture a bold figure of Sojourner Truth standing beside the bull with one arm wrapped supportively around its neck. Truth, born into slavery in 1797, escaped from bondage in 1826 to become a critically important leader in the abolitionist and women's civil rights movements before her death in 1883.<sup>136</sup> Placing a statue of Truth next to *Charging Bull* would present a quite different image about gender than *Fearless Girl*. Rather than confronting the bull, Truth would portray a message supportive of di Modica's original intention about American resilience in difficult times, while reducing the masculine qualities of a bull standing alone with a somewhat threatening countenance.



Photograph of Sojourner Truth (c. 1864)

The Truth work, viewed together with the original bull, would be a derivative work. The work would recast di Modica's original bull by adding compositional and cultural implications to his message about resilience. An artist other than di Modica who made and installed such a sculpture without his permission would be infringing—just as a play made from a novel without permission would be infringing. For similar reasons, the placement of *Fearless Girl* eye-to-eye, directly in front of the bull might also be derivative—as a critique of *Charging Bull* but

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<sup>136</sup> See LARRY G. MURPHY, *SOJOURNER TRUTH: A BIOGRAPHY* (2011). The biography contains a detailed timeline of her life. *Id.* at xvii–xxiv. See also NELL IRVIN PAINTER, *SOJOURNER TRUTH: A LIFE, A SYMBOL* (1996). The image of Truth used in the text is in the collection of the Library of Congress. *Sojourner Truth*, LIBR. CONG. (1864), <https://www.loc.gov/item/98501244/> (last visited Oct. 23, 2020).

nonetheless derivative. Such a conclusion rests on one pivotal supposition—that an artist has some control over the spatial and compositional characteristics of artistic works in the area surrounding a creation that may recast or transform the nature of the original work. Given the analysis to this point that is a logical and appropriate conclusion about the meaning of artistic composition, the nature of artistic spaces, and the impact of artistic intention.

How far does this legally protected compositional space extend? Surely it would be inappropriate to conclude that a museum could never mount an exhibition without obtaining permission from all artists whose work is scheduled to be shown in the same room. One creative soul should not have the ability to veto showing the work of another because it connotes negative commentary on the first. Each work must have its own arena of compositional authority. Implicitly, this suggests that the two *Fearless Girl* cases posited here—one with the girl placed across a square and the other with her standing belly to nose next to the bull—might not be treated the same way.

Given the impetus in American culture to encourage open discussion and critical commentary about artistic works, the extent of spatial control by one artist over the creations of another, sited without the knowledge or participation of the original artist, should not be extensive. While placing *Fearless Girl* adjacent to *Charging Bull* might well infringe upon di Modica's derivative work rights, locating *Fearless Girl* some distance away from the bull probably does not. Kristen Visbal, the sculptor of *Fearless Girl*, and State Street, Visbal's financial backer, certainly were free to critique di Modica's use of masculine imagery about financial markets as a symbol of American cultural persistence and resilience. While they may not be free to place their critique directly adjacent to and almost touching the bull, locating *Fearless Girl* across a plaza should be permitted. And, even if the placement of *Fearless Girl* across a plaza is derivative, its critical observations are surely fair use, even if its power as a symbol of gender diversity is tainted by its sponsor's own history.<sup>137</sup> Crafting of social and political commentary is archetypal activity protected by the fair use doctrine.<sup>138</sup> Though *Fearless Girl* may transform the

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<sup>137</sup> See 17 U.S.C. §107 (2018), see also *supra* note 132.

<sup>138</sup> The classic case is probably *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). Hustler Magazine ran a caustic, scatological, "advertisement" for Campari with commentary about the first time Jerry Falwell "did it" with his mother in an outhouse. Falwell responded by putting an image of the "ad" in a fund-raising brochure for Moral Majority, his conservative, religious charitable organization. Hustler then sued copyright infringement and lost

imagery of the bull, it does so in a productive burst of controversial social commentary typically protected by the doctrine of fair use. Note well that when placed some distance apart, each work may be perceived either independently or in tandem, either as a solitary cultural comment or as combined evidence of social conflict. The echoes of compositional power are strong but not insurmountable.

## 2. Fearless Girl and Moral Rights

A similar outcome arises under moral rights concepts. Placement of *Fearless Girl* directly adjacent to *Charging Bull* significantly alters the compositional power of the larger sculpture. While not destroying the bull, this placement of *Fearless Girl* may “mutilate” the original work. Though not physically altering the sculpture as the banjo-wielding Texan did, the girl modifies the force and power of di Modica’s intentions for the bull and weakens his compositional authority. Neither “mutilation” nor “modification” is defined in the copyright code. But given the importance of spatial composition—the artistic ability to encompass a volume of space outside the physical boundary lines of a work—it would be quite strange if placing one work directly next to another could never be a modification or mutilation. The more difficult problem is deciding whether such a step “would be prejudicial to his or her honor or reputation”—a requirement for protection under the moral rights provision of the statute.<sup>139</sup>

The most frequently cited case on the meaning of “prejudicial to his or her honor or reputation” is *Carter v. Helmsley-Spear, Inc.*<sup>140</sup> Using common meanings given to the phrase, the *Carter* court concluded that reputation may refer to both the artist and the work at issue, and that the artist need not be well known to claim rights under VARA. Rather, the focus is on whether alteration or mutilation of a work

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on fair use grounds. Even though Falwell used the Hustler “parody” for monetary purposes, the court noted:

There was no attempt to palm off the parody [in Hustler] as that of the Defendants. In fact, the opposite was true. Falwell was not selling the parody, but was instead using the parody to make a statement about pornography and Larry Flynt, the publisher of Hustler.

Section 107 [the fair use portion of the Copyright code] expressly permits fair use for the purposes of criticism and comment. . . . Therefore, the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness [that arises from the financial use of the ad].

*Id.* at 1153 (footnote omitted).

<sup>139</sup> 17 U.S.C. § 106A(a)(2) (2018).

<sup>140</sup> There are three reported opinions: *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), and *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

“would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.”<sup>141</sup> A coherent argument certainly may be made that placement of *Fearless Girl* directly adjacent to *Charging Bull* would humble, if not demean, the power of the original work and thereby diminish its reputation in the community of visitors, artists, and critics.<sup>142</sup> The presence of *Fearless Girl* insinuates that the optimistic view of American resilience di Modica intended to convey would wilt, replaced by an image of the powerful bull diminishing the experience of women. The closer the girl is to the bull, the more powerful is its ability to diminish the reputation of the original work and its artist.<sup>143</sup>

### CONCLUSION

This essay has revealed a critically important truth about the relationships between copyright law, two-dimensional art, sculpture, and architecture. Too often, the copyright law of pictorial works is considered easily separable from the copyright law of sculpture and architecture. There is a reason why so many people hang pictures on their walls and place decorative objects on surfaces shortly after moving into a new home. Those images help to define the nature of walls, transforming a room into a living experience and giving the architecture of a space depth and meaning. Traditional wall and table-top art define space, and space defines traditional wall and table-top art. In day-to-day lived experience, a space and the objects in it cannot be quickly and easily aesthetically separated. They are an interconnected, lived reality.

Taking that idea into account alters the ways we typically apply copyright law. Rather than viewing a traditional painting as independent of the space in which it hangs, the art and the environment should more frequently be considered as a combined entity. In our homes we may act like curators mounting exhibitions, considering the nature of each painting, their relationships to other pieces in the room, and the impact of each work on the display space. The success of an exhibition can rise or fall depending on the sophistication of the curator’s arrangement.

These relationships between a single work, nearby compositions, and the space in which a group of works are displayed should routinely be taken into account when evaluating the meaning of copyright “terms of art”<sup>144</sup> like “compilation,”

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<sup>141</sup> *Carter*, 861 F. Supp. at 323.

<sup>142</sup> See, e.g., *supra* text accompanying note 35.

<sup>143</sup> It may, of course, have the opposite impact of enhancing the reputation of the first work. Maybe that happened here!

<sup>144</sup> Here I use “term of art” not in an aesthetic sense but as an indication of the ways a complex legal term may be understood.

“collective work,” “work of visual art,” “derivative work,” or “moral rights.” In each case, analyzing a single work without regard to its environment may overlook important aesthetic considerations, especially the nature of artistic composition. *Charging Bull* and *Fearless Girl* forcefully convey this idea. When placed in close proximity to each other, they are no longer standalone objects. They become parts of a composition in ways that may have a critical impact on the application of copyright law.

Intuitively, we sense this as we stroll around certain environments, especially urban historic neighborhoods. Most preservation laws require that the design of a new building in a protected historic area be reviewed and approved by preservation authorities before construction begins. Debate about whether a proposed structure “fits” with a neighborhood is essential to deciding whether it may be built. Is it designed to be contextual and fit with aesthetic features of the existing environment? Does it “clash” with the neighborhood’s ambiance in acceptable or unacceptable ways?

One of the most interesting examples of this problem mirrors the *Charging Bull/Fearless Girl* controversy. It reflects the sometimes-ineffable qualities of decisions about the meaning and impact of “composition” on aesthetic choices in architecture and urban planning—an arena tightly related to the world of deciding how best to place a sculpture in an appropriate environment. The original house at 18 West 11th Street in New York City’s Greenwich Village—an historic 1845 Greek Revival building—was destroyed in a 1970 explosion when members of radical leftist group Weather Underground were living in the building.<sup>145</sup> A new house was constructed at the site in 1978 after a review by the Neighborhood Community Board and the New York City Landmarks Preservation Commission determined that the plan was “appropriate.”<sup>146</sup>

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<sup>145</sup> The calamity was caused by an accident while five individuals associated with the Weather Underground, a radical offshoot of the Students for a Democratic Society, were assembling bombs on the property for possible use at an army base and Columbia University. Three people perished; two survived and were imprisoned. A summary of the history of the original house and its replacement may be found in Michelle Young, *Greenwich Village’s Weather Underground Townhouse that Exploded in 1970 is For Sale*, UNTAPPED N.Y. (Jan. 27, 2020), <https://untappedcities.com/2020/01/27/greenwich-villages-weather-underground-townhouse-that-exploded-in-1970-is-for-sale/>. The image in the text may be found in this article.

<sup>146</sup> As vague as this standard is, that is what the commission uses to decide if a new building may be constructed in a historic district. See N.Y.C. Admin. Code § 25-307 (2020); see also *Public Presentation Guidelines*, N.Y.C. LANDMARKS PRES. COMM’N, <http://home2.nyc.gov/html/lpc/html/permit/presentation.shtml> (last visited Aug. 9, 2020).





Exterior of the reconstructed 18 West 11th Street

As is evident from the picture above, the top floor of the new house is contextual while the first two floors are provocatively unusual. The jutting, angular bay is a vivid reminder of the dislocation and destruction caused by the 1970 explosion. Yet, the Landmarks Preservation Commission concluded that the new house was “appropriate.” Like the controversy over *Fearless Girl*, the new building raises questions about what level of commentary about neighboring architectural designs is acceptable. While the question on 11th Street involves historicity, the issues are quite similar to those raised by di Modica. What is the impact of compositional proximity and aesthetic commentary? The new house was only partially derived from the neighboring designs. Does that explain why the Landmarks Preservation Commission was both granted some control over its construction and eventually approved the design? Or is it so much in conflict with the overall ambiance of the block that its erection is similar to a moral rights violation—a mutilation of the neighborhood’s composition that should never have been built? Perhaps your answer to these questions about whether the new house at 18 West 11th Street should have been constructed will help you find answers to the questions posed in this Article about the *Charging Bull/Fearless Girl* compositional controversy. Reaching definitive answers, however, may best be left in the hands of those who love to dance on the heads of pins.

## COMMUNIQUE RE GUERNICA

Issued in April 1977 by Maître Roland Dumas, Picasso Family Lawyer

The status and fate of Guernica—the famous painting by Picasso of 1937 executed following the destruction of the small Basque village by Nazi planes—is the object of unfounded rumors and speculation.

The commotion concerns, particularly, the sending of the masterpiece to Spain by The Museum of Modern Art in New York, where it has been on extended loan since September 1939 consistent with the wishes of Pablo Picasso.

Pressed by a request from the Spanish government for Guernica—which he deemed improper—Pablo Picasso charged me in 1969 with preparing documents describing his express wishes concerning the future of his picture.

Pablo Picasso confirmed in writing what he had already on several occasions declared—notably to Mr. Barr, the Director of The Museum of Modern Art in New York, and to Mr. Rubin, Director of that Museum's Department of Painting—namely that “Guernica and its preparatory studies belong to the Spanish Republic,” but that the transfer to Spain could only be envisaged after the complete reestablishment of individual liberties in that country.

Pablo Picasso spoke of this decision on several occasions, both to his close friends and to the representatives of The Museum of Modern Art in New York, and to myself.

The fragility of the painting, he said, precludes any further travel after its installation in Madrid. Furthermore, he continued, a certain time should be allowed to pass to verify that once established, the democratic regime is no longer subject to a forcible coup which might reopen this question and that, finally, political relaxation should accompany a general détente.

All those who have heard directly from Picasso the instructions which he gave for Guernica are unanimous in believing that, while the wishes of the famous painter to see this prestigious work in Madrid were distinct and without ambiguity, he intended prudence in the realization of his decision.

He spoke to me numerous times about this anguishing subject. His preoccupation about Guernica took precedence over everything else. He furnished proof of this in agreeing to make arrangements in writing, which he has not done for

any other problem touching on either his succession or his work. He did me the honor of confiding in me the responsibility of overseeing the execution of his wishes.

Admittedly, some progress had been realized in Spain. And a not negligible evolution has occurred since the death of General Franco. But I cannot consider that his evolution has as yet terminated.

Neither have the conditions posed by Picasso himself touching on the security of the paint and the stability of a new and totally democratic regime been achieved.

The transfer of Guernica, finally, demands manifold technical precautions. These arrangements will require several months from the day when the decision of transfer shall be made.

For all these reasons and in accord with The Museum of Modern Art in New York which agrees to continue as “guardian”, a mission which was initially confided to it by Picasso himself, Guernica shall stay in New York, to remain there until a new order is achieved in Spain,

Consequently, its transfer to the Prado in Madrid—which is agreed upon in principle—cannot be realized for several years.

The present communication has been read to Rubin, Director of the Department of Painting of the Museum of Modern Art in New York, who has been good enough to agree to its terms.

Roland Dumas<sup>147</sup>

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<sup>147</sup> Press Release, Roland Dumas, Picasso Family Lawyer (Apr. 1977), <https://guernica.museoreinasofia.es/en/document/roland-dumass-communique-guernica> (also archived in Museum of Modern Art Archives, Department of Public Information/Communications Records, New York, PI II.B.1639)