

But If It Isn't: What Does It Mean If the Pollock Isn't a Pollock?



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It sounds like a real-life version of the fairy tale we all want to believe can be true: the \$5 thrift shop find turns out to be a multi-million dollar work of fine art by a famous artist. The poured-paint-covered-canvas that a retired California trucker Teri Horton stumbled across has been a topic of fascination in national and international media and is the subject of a newly released film by New Line Cinema entitled "Who The @#\$% is Jackson Pollock?" (a title which purportedly reflects the comment Horton made when it was first suggested to her that this might be the artist who painted her acquired work).

This second-hand-store acquisition has now been photographed and portrayed in print, web, and television news around the world; and the film has opened in alternative theaters, sparking kudos from movie reviewers. According to media

reports, Horton turned down a \$9 million purchase offer and anticipates that the piece may be worth more on the order of \$50 million. But her opinion has not been universally shared. While some professionals concur as to the painting's origins, doubt as to the authenticity of the piece has been raised by others, including a California artist named Frank Brown who has expressed that he may be the artist who created this work.

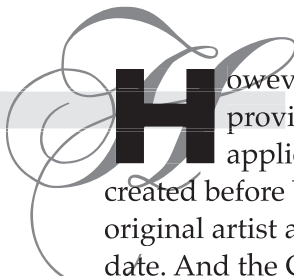
While the future of the painting remains to be seen, the assertion that this work might have been created by a living artist who is someone other than Jackson Pollock raises the fascinating question: If future testing, analysis, forensic study, or some other method were to determine that this painting is not a Pollock, what would that mean to the actual artist as well as to the world of fine arts generally?

An artist – the creator of a work – has two fundamental sets of somewhat overlapping legal rights regarding an artwork: moral rights, and copyrights. Both of these, (as well as a provision of California law, related to moral rights, which requires artists to be paid a royalty on future resales of their works), are implicated in our hypothetical situation.

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In 1990, the U.S. Congress codified moral rights into Section 106A of the federal copyright law, clarifying that federal law protects an artist's continuing rights of attribution and integrity in original works (single pieces and limited reproduction runs of less than 200). The statutory moral rights protects the artist's creative and professional reputation by allowing the artist the legal right to control how and where a piece may be displayed and presented and whether or not, and how, attribution is listed. The California Arts Preservation Act was passed in 1979 to protect visual artists' right to the continued physical integrity of their work. This state statute also specifically protects the rights of artists to claim authorship of, or attribution for, their works.



However, the federal moral rights provision adopted in 1990 only applies to works created after, or created before but still in the hands of the original artist after, the statute's effective date. And the California statute applies only to works created after a certain date in 1980. For either of these statutes to apply – and for the actual artist to be able to claim the actual damages, punitive damages, attorneys' fees and costs, injunctions, and other relief allowed by statute – he or she would need to show that the painting was transferred in ownership from the artist to its first owner's hands after the effective statutory date.

If this painting left the artist's hands after the effective statutory dates, moral rights might still be enforced, just not with the clear definitions prescribed by the law

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books. Long before the federal and state statutes were put on the books, courts applied common law to protect artists' moral rights. This would most likely make a difference in the nature of the damages which the actual artist would be able to collect. But whether under common law or statute, an ongoing public misidentification of the creator of a work would most likely be considered by a court to constitute a moral rights violation, and the actual artist would be entitled to damages for the misrepresentation of his or her creative work, especially if the misidentification was found to be willful and continued after the actual artist had made himself or herself known. The actual artist would also be entitled to a permanent injunction ordering that the painting's origin not be misidentified in the future.

While money damages for moral rights infringement would effect justice for the genuine artist regarding his or her damage to reputation from misidentifying the painting, copyright law would provide redress for damages done by using the painting in a commercial manner without license from the artist. In this case, the painting has been the subject

of a commercial film, and an image of the painting – a ‘derivative work’ – has been used to market that film. The use of a derivative work of this painting in advertising and media to promote the film has been for an unlicensed commercial purpose, and the artist would be entitled under federal copyright law to an injunction against the further use of the painting in this manner, as well as to money damages based on the commercial value of the painting as it was used.

Finally, California law requires a payment of a 5% royalty to the original artist on all future sales of an original work – a wonderful scheme which rewards artists for their investment in pieces which will appreciate in value, and protects artists against exploitation as well. If this painting were to sell for the predicted \$50 million, and then be proven to be the work of another artist, that actual artist might well be entitled to their cut of the proceeds.



For the art world as a whole, that is, for artists, art owners and collectors, galleries and museums as well as art insurers, the case of Horton’s alleged Pollock points out once again how critical it is for artists to keep close and careful records of the works which they create. While such record-keeping is frequently antithetical to the flush of passionate (and sometimes undisciplined) spirit that accompanies the creation of a work or series of works, an online publicly accessible database offered by Fine Art Registry™ makes it exceedingly easy and inexpensive for artists and original owners alike. Tracking an artwork’s provenance from

its creation or from that first transaction not only increases its marketable value, it protects the artist’s legal rights and allows him or her to collect appropriate royalties as well as damages for any infringements of moral rights or copyright. Had the original artist, or the original owner (even a thrift shop), registered this painting, there’d be no question today as to its origins or authenticity.

Beyond the money, the media, and competing claims, however, the world of people interested in art are best served by the truth – that is, by knowing with a level of community-accepted and scientific certainty what any given artworks’ origins are, so that we can all more accurately understand and appreciate the context of its creation and the contribution it is making to our collective cultural heritage. Publicly accessible registration of artworks on Fine Art Registry, along with proper copyright registration, are substantive advancements in that quest for truth in the arts. The open and public sharing of information about artwork identification and authentication is another necessary element of that quest, and the Fine Art Registry web site and database also provides an ample publicly accessible forum for doing just that.

While the ability of independent experts and other artists to view online information such as detailed photos or the records of authentication procedures might ultimately undermine the excitement of the art world’s occasional fairy tales, it would contribute to a much more worthy, and in the end, valuable cause: the making of genuine art history.

