



## The Issues Involved with Damaged Art by Living Artists

By Laura Murphy Doyle

*I think an art form should be a replica of life itself—life is not something which is cut and fixed, it is constantly changing. I want my artwork to change as the situation demands.*

—El Anatsui, 2007

There has been a major generational shift in collecting among clients at Chubb Group of Insurance Companies. This younger demographic is not collecting Impressionist or Modern pieces; they're buying Post-War and Contemporary, a shift that has extended into design, photography, ceramics, custom furniture, art glass and other decorative objects. In addition, more investment-focused collectors are trending toward Post-War and Contemporary as well, due to the enormous growth and potential in that segment. Many of these works are created with untested or ephemeral materials, which present new challenges in conservation and value. And when works in this category are damaged, and the artists are living, the artists themselves must be included in decisions involving restoration, conservation, and even total loss.

Living artists now have more say than ever before regarding any alterations and the future of their works, based on the Visual Artists Rights Act (VARA) of 1990, and should be consulted regarding conservation of their works. This legislation affects appraisers, conservators, insurers, art owners, art dealers, auction houses, and the value of the art.

During light sculptor Dan Flavin's lifetime, he would replace a damaged fixture upon presentation of a certificate on which there was a diagram of the work, its title, and the artist's signature and stamp. For new media works such as Flavin's, the actual value of the piece is in its concept or idea, which is stated in the certificate or instructions. If that documentation is lost, then the work is declared a total loss, even if the collector has the piece. In some cases, the owner is allowed to replicate the piece a certain number of times (as long as he or she has the instructions detailing how to do so), which means that the work is damaged but the owner can recreate it and there is no loss in value. The insurer would cover the cost to have the work recreated.

The rules are changing. The new challenges of contemporary materials, installation, and technology have insurance implications and affect the claims process when the artist is alive. In the vast majority of cases where an artwork is damaged, the artist is willing to be involved—actively or as consultant—in the conservation.

### Contemporary art materials

Artists are seeking more innovative ways of expressing themselves. New media works are exciting, and challenge thought and interpretation—as well as conservation. This category of art contains works created using digital, computer graphics and animation, video, robotics, 3-D printing, and biotechnology. Research projects such as the international alliance DOCAM (Documentation and Conservation of the Media Arts Heritage, established in France in 2004) are exploring the issues of this changeable art. In addition, and perhaps more problematic to conservators, are works incorporating ephemeral materials, such as organic matter, that naturally deteriorate over time.

As new media works based on rapidly changing technology become obsolete (film, VHS and other tapes, web browsers, software), it becomes more important to involve the artist in such a work's preservation. Or the artist may embrace the fleeting nature of his or her work, allowing it to erode with time, as El Anatsui believes.

Collector Andrew Augenblick, who is on the acquisition committee at MoMA for new media works, relies on the authors of such works. He is in current talks with the artist of one of his own pieces. “Technological obsolescence is an issue for this type of art. I’m speaking now with an artist about updating a software platform so his art will work with today’s computers.” For another work in his collection, he is consulting the artist of a paper-mache sculpture. “The artist, from mainland China, is coming to New York for an opening and will assess some deterioration of my sculpture then. But there is a language barrier, as she only speaks Mandarin, so we’ll need an interpreter. Such are the challenges in a global art market.”

## Damage or loss and the artist’s rights

Based on Chubb’s claims statistics, the most common and frequent type of damage to artworks occurs in transit. Careless handling, insufficient packing, and simple human error are more likely during the transportation of works.

In many collectors’ households, water damage and accidents are the most common sources of loss. Clients have experienced everything from burst pipes leaking onto canvases to cleaning solution overspray eroding painted surfaces or wood finishes.

More common in buildings, such as apartments or condos, is damage by water, even affecting dealers in New York City who customarily stored works below grade in basements. Water damage made headlines when Superstorm Sandy struck in October 2012, its floodwaters decimating thousands of artworks in the city. After Sandy, conservators and fine art storage facilities triaged thousands of paintings and art objects, some of which are still being treated.

The consequences of this “superstorm” prompted more interest in the Artist Interview Workshops, launched in 2011 by the International Network for the Conservation of Contemporary Art–North America (INCCA–NA), which aim to provide conservators, curators, educators, and other arts professionals with a greater understanding of the methodology and skills needed to conduct successful artist interviews. Executive Director Lauren Shadford Breismeister says, “The loss or significant damage of one’s artwork by a catastrophic event such as Sandy undoubtedly leaves many artists with new thoughts about their legacy and its conservation. In [a panel discussion after Sandy], we explored differing experiences surrounding artwork damaged by the storm and considered how these experiences have affected the art world’s relationship to contemporary conservation.” The workshops continue, providing collaborative dialogues on new media art, including performance-based sculpture and digital art. INCCA-NA has also established its Artist’s Voice program series dedicated to preserving artists’ legacies by exploring information about artists’ works, methods of fabrication, collectors’ information on specific artworks, preservation, and conservation.

When a client’s work is damaged, the insurer has the work assessed by a conservator. Most conservators work within the guidelines of the Visual Artists Rights Act of 1990, which protects authorship and modification of artworks. If the artist is living, he or she is consulted before any restoration work begins. Unless the artist has waived his or her VARA rights, prior to damage, artists have the following options:

- 1) Perform restoration themselves; however, most artists are not trained conservators, and may not know the best treatments to address the condition. Regardless, this is the best-case scenario for the work to maintain its value.
- 2) Perform a portion of the treatment, collaborating with conservators who work on other aspects of the restoration.
- 3) Approve the treatment plan and have conservators perform the entire restoration using conservation techniques and following industry guidelines.
- 4) Declare the work a total loss if the artist feels the work has been distorted, mutilated, or modified to the extent that it is no longer his or her original piece, he or she can denounce it, which effectively means there is no market value. Per VARA, the artist must be consulted first before an item is declared a total loss. (Some gallery owners who threw away works after Sandy were later sued by those artists.)

Since VARA only covers works of visual art, including paintings, sculpture, drawings, prints, and still photographs produced for exhibition in single copies or in limited editions of 200 or fewer copies, signed and numbered by the artist, its application to new media works is unclear. Among the exclusions defined under VARA are works made for hire, posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or container, or any work not subject to general copyright protection.

Also notable, and applying to many artworks made of ephemeral materials, is VARA's exception in cases where "natural modifications resulting from aging or the inherent nature or quality of the materials used do not constitute statutory modification, distortion or mutilation," according to "A Guide to the Visual Artists Rights Act" by Cynthia Esworthy, NEA Office of General Counsel, JD Washington & Lee Law School, 1997. Termed "inherent vice," wear and tear, gradual deterioration, rust, rot, warping, damage by insects or vermin are not covered by VARA or most insurance companies. Daria Keynan, conservator of works on paper, explains that some artists consider a recurring problem like flaking an acceptable inherent vice. "Sometimes the artists themselves will cause the change in classification by publicly embracing these changes, which were once considered damage."

## **Insurance coverages and conservation**

When a work of fine or decorative art is damaged, a collector should document the damage with photographs. A claims adjuster will work with the collector to assemble the facts of the damage, similar to how lawyers prepare a case: type of damage, location where damage occurred, exact or estimated time of damage, witnesses (if any), and circumstances of the discovery of damage. A qualified appraiser, such as those in the International Society of Appraisers (ISA), should be contracted to examine prior records to determine a pre-damage value—based on retail replacement value, not current value. Considerations that determine value are artist, subject, size, provenance, exhibition history, publication history, body of artist's work (rarity), medium, and condition.

Conservators who are entrusted with restoration should abide by the code of ethics defined by the American Institute for Conservation. These guidelines dictate that the conservator use safe and reversible treatments that will retain the original integrity of the work and restore the artist's intended vision. Costs for such work should be based on the conservator's time and materials, not on the value of the item. If a living artist is not involved in the process, he or she could invoke VARA rights, even if the restoration is minimal. After the work is restored per the artist's choice, the appraiser determines post-restoration value in a detailed report.

Insurance companies that have specialty departments devoted to fine arts distinguish between blanket coverage and itemized coverage policies. In essence, a blanket policy is often capped at a lower limit, regardless if the item's value has significantly appreciated. Typically, individual items of lower value, or a collection of lower-value items, are insured under a blanket policy. Examples would include silver, stamps, wine, or porcelain. To ensure the most accurate estimation of value, the collector should have periodic appraisals done and update his/her blanket policy accordingly. Regular appraisals are more important than ever in the constantly growing and changing art market. (Note: Chubb does not require appraisals on fine or decorative art objects valued below \$250,000, or jewelry valued below \$100,000.) A good rule of thumb is to update appraisals every three to five years.

Chubb's Masterpiece Policy, for example, explains blanket coverage for total loss:

For a covered loss to valuable articles with blanket coverage, we will pay the amount required to repair or replace the property, whichever is less, without deduction for depreciation. If the restored value is less than the market value immediately prior to the loss, we will pay the difference. But we will not pay more than the amount of blanket coverage for that category. And we will not pay more than the blanket limit for loss to any one article as shown in the Coverage Summary.

For art collectors, listing each article under an itemized policy offers more protection. In the case of a total loss, some fine art insurers will pay the scheduled value or market value up to 150 percent, whichever is higher. For a partial loss, the insurer will pay the costs to restore the article to its condition immediately before the loss up to the amount of itemized coverage. If the item cannot be restored to its pre-loss condition or the owner opts not to restore, the insurer will pay any loss of market value plus the restoration costs up to 150 percent of the itemized coverage. Even with the 50-percent coverage enhancement, the potential exists that the item is underinsured if the collector is not updating values on a regular basis.

After a loss, collectors can work with a conservator of their choice, or the insurer may refer them to vetted conservators. Most policies do not cover works being repaired, restored, or retouched while with a conservator. After restoration, an appraiser determines post-restoration value. Collectors can choose a specialist or the insurer will provide a referral to an appraiser.

## **Restored work outcomes**

Insurance companies have the right to keep all or part of the damaged property after paying for a total loss. This salvaged art

market, which has sprung up from these reclaimed/recycled lost works, is a tricky area that impacts value, artist rights, and art market integrity. Total loss is relative, defined by conservators and appraisers.

In the case of Chubb, it always attempts to conserve the work first. If the item is a total loss, Chubb has donated works to conservation schools and artist's foundations for research purposes.

VARA dictates that the artist has final authority, however. If the artist declares a total loss, the insurer requires documentation from the artist or gallery for the donation, destruction or disposal of the work. Evidence of the destruction must be sent to the insurer to help prevent the work from resurfacing on the art market; examples can include a piece of canvas, a painting that was slashed by the artist using a knife, bits of material from the work, etc.

Artists' responses to damaged work vary. Artist Cady Noland famously disclaimed authorship of a piece due to relatively minor damage to the work's aluminum surface. Joel Shapiro restored one of his sculptures, resulting in no loss of value. Mariko Mori agreed to refabricate a photograph and destroy the damaged one, costing the insurer just a refabrication cost. Conceptual artist Damien Hirst has worked with insurers to replace portions of his ephemeral pieces; for one installation piece, he replaced dying and rotting flies, which were causing a foul odor, with a fresh batch.

In an extreme case, Chubb even chartered a Russian cargo plane, the only carrier at the time large enough and available, to transport a major large-scale Contemporary work from the United States to the artist's studio in Germany for repair.

## General considerations

Works on paper, including prints and photographs, are subject to more loss in value since they cannot be restored as seamlessly. Conservation treatments are, in many cases, very different from how an artist worked initially. Paper conservator Keynan says, "Some artists want to design the treatment for me to carry out according to their instruction. These are by far the most complicated because often the artist assumes that the way in which something was originally created is also the way to repair damage to it." The Chubb team of art specialists advises the following safeguards: careful protocols for moving, installation and re-installation; and controlling temperature, relative humidity, and light levels.

All restoration work should be reversible. If something has been added to the surface during restoration and can be removed, it affects less loss in value than if something was torn or chipped away from the work.

Not only are the materials of contemporary art changing, but also rules governing the conservation, administration, legal, ethical, value, insurance, and market considerations. Whether owner, appraiser, conservator, dealer or insurer, best practice when assessing damage to a contemporary artwork is to consult with the living artist first.

Fine art coverage is a specialty niche not addressed by most insurance companies. Collectors need to work with a carrier that understands how to underwrite valuable artwork, offer loss prevention advice, and manage the fine art claims process. An informed insurer and an owner who keeps the value of his or her art regularly updated are the best protections for valuable articles.



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