Vanderbilt Journal of Transnational Law

Volume 38
Issue 4 *October 2005*

Article 9

2005

A Comparative Law Analysis of the Retained Rights of Artists

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I. INTRODUCTION

This Article presents an analytical and theoretical discussion of how an artist's artwork should be treated once it enters the global marketplace. Considering only the visual arts, the answer is short and simple: this Author believes that all, or at least the better-known legal systems, uphold the rights granted to the artist when the work was created. Consequently, the artist retains some rights not only as the artist's intellectual property, but also in its tangible manifestation, for example, sculpture or painting—traditionally called *corpus mechanicum*—even though he does not own this particular sculpture or painting anymore. This, however, is only a simple explanation: the remainder of the problem is decidedly more complex. Transfer of ownership of the art object to a third party results in the imposition of the artist's rights on the property rights of the new owner of the work. In law this phenomenon is not anything

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new or special: similar examples exist in other areas. For example, when there are adjoining pieces of real estate, property law differentiates between certain competing neighbors' rights. As is easily seen, not all rights are created equal; on the contrary, some rights are mutually exclusive, thus creating areas of potential conflict. The problem does not exist as long as the artist retains the ownership of his work and its material embodiment because he is the only owner of the both aspects of the work. The moment of sale is the beginning of a hypothetical conflict with the new owner. Sometimes the hypothetical conflict becomes very real and requires application to a court for resolution. The judgment in such a case depends on the legal system in question, but regardless of the jurisdiction, it is often very difficult to gauge the outcome of such a conflict. Courts are not uniform in their decisions and the legal systems vary widely—even in the increasingly global world. This diversity results from, on one hand, a different appraisal of interests which come into play, and on the other hand, the enduring nature of some philosophies about artists' work and the work's purposes. Understanding these differences is fundamental to understanding the status of an artist versus the status of his work. Therefore, it is appropriate to start with some historical background. It will be necessary to concentrate on so called "moral" and "moral-like" rights; only these rights can be retained by the artist after the art object has been sold or disposed in another way.

II. ORIGINS OF ARTISTS RIGHTS

A long time ago there were no ownership conflicts. Millions of people visit Egypt each year to gaze on the remains of pyramids, sculptures, and paintings and probably do not realize that the artists who created these monuments of art were treated as narrow-minded, anonymous craftsmen; they were respected, at most, as *makers* of these wonders, but not as their *creators*.[1] Their work was seen as pure physical labor and, according to standards of the times, was disdained. It was difficult, therefore, to even think about artist-laborer rights.

The other reason artistic work was held in such low esteem was attributable to the place occupied by art in the ancient world. Art was purely functional in character and was mostly used to show religious images or to be a tool for propaganda. In such circumstances the creator of art had to remain completely anonymous and had no

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1. ARNOLD HAUSER, SOZIALGESCHICHTE DER KUNST UND LITERATUR 30 (C. H. Beck ed., 1967).

artist's rights. His work did not express his thoughts or emotions, but rather merely showed his talent and dexterity. It is not surprising then, that artworks remained in the total control of those who commissioned them and could be used to advance the commissioner's current political or religious needs and, consequently, could be changed or destroyed if necessary.[2]

The view of the artist as a physical laborer was not limited to Egypt: this perspective on the artist was also typical in Greece, Rome, and continued through to the Middle Ages.[3] The whole ancient world could not overcome the contradiction of scorning the laborer who created the work while praising the objects as beautiful art.[4] The creation of the art had no connection with the higher values of knowledge and education. Plutarchus stated: "No generous youth, from seeing the Zeus at Pisa (Olimpia), or the Hera at Argos, longs to be Pheidias or Polycleitus."[5] Seneca was even more blunt: "Paintings that depict gods are worshiped and people get on their knees before them . . . but look down upon the artists who created them."[6] Despite appreciation for the greatest artists, the law did not forbid copying or changing the works, because ownership of the art was most important. To put it in today's terms, art was not perceived as an "intellectual creation" that could be distinguished from its embodiment.

Writers, whose work was able to reach a wider audience because of contracts with publishers, were the first to perceive a problem. Cicero, in his letters, worried that his works would be published

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2. *Id.* This practice occurs even today. For example, the media reported that last year the city council of a Polish city decided to replace the statue of a communist general with a monument of another hero to be more in tune with the changes taking place in the country. One of the councilmen proposed that, to save money, all that needed to be done was to saw off the general's mustache and change the sign. The sculptor did not protest, perhaps because he did not want a reminder that he was the one who created the politically incorrect general.

3. EDGAR ZILSEL, DIE ENTSTEHUNG DES GENIEBEGRIFFS: EIN BEITRAG ZUR IDEENGESCHICHTE DER ANTIKE UND FRÜHKAPITALISMUS 35 (G. Olms ed., Hildesheim New York 1972) (1926).

4. *See id.*

5. 3 PLUTARCHUS, PLUTARCH'S LIVES: PERICLES AND FABIUS MAXIMUS, NICIAS AND CRASSUS 5 (Bernadotte Perrin trans., Harvard Univ. Press 1984) (1916).

6. In French, Seneca's original statement reads as follows:

> Ils vénèrent les statues des dieux, ils les supplient à genoux, ils les adorent, ils restent assis ou debout devant elles pendant une journée entière, ils leur présentent des offrandes, ils leur sacrifient des victimes; et, tout en les regardant avec tant d'admiration, ils méprisent les ouvriers qui les ont faites.

2 LACTANCE, INSTITUTIONES DIVINES 14, 39 (Pierre Monat trans., Les Editions du Cerf 1987).

incorrectly.[7] Horatio was angry at changes to or unauthorized copies of his works, and Ovidius complained when works were published without the awareness or consent of their creators.[8] Martialis was the first to use the word "plagiarism." Authors' criticism of the ownership scheme continued into the Middle Ages. For example, in the introduction to the well-known Sachsenspiegel code, Elke von Repkow reminded his readers of the need to prevent distortion of the work.[9]

The situation began to change in the Renaissance, even though many of the era's artists began as craftsman's apprentices. Leon Battista Alberti, trying to prove the scientific origin of art, claimed that art originated in science because knowledge of proportion and theory of perspective were part of mathematics.[10] Leonardo da Vinci added that painting stood even higher than science because science was objective and art was connected to one person and his inborn abilities.[11] The consequences of such revolutionary changes were that artists' sense of dignity grew, and they freed themselves from complete dependence on their employers and started independent initiatives. This paved the way to the idea of genius and to an appreciation of a work of art as a creation of the individual over tradition, science, or rule.

This shift of priority from work to its creator did not, however, change the artist's legal situation with regards to ownership. Despite repeated attempts, Albrecht Dürer was not able to prevent other artists from making and selling copies of his engravings.[12] Dürer's widow was ultimately successful in getting an order from the Nürnberg town council that forbade the use of Dürer's signature on copies of his artwork.[13] Michaelangelo's fresco, *The Final Judgment*, commissioned by Pope Julius II della Rovere and painted in the Sistine Chapel from 1536–1542, was subsequently "amended" by Danielle da Volterra in 1553 during the pontificate of Pope Pius IV.[14]

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7. Stefan Grzybowski, *Geneza i miejsce prawa autorskiego w systemie prawa, in* 13 SYSTEM PRAWA PRYWATNEGO *Prawo Autorskie* 1–3 (Janusz Barta ed. 2003).

8. *Id.*

9. *Id.*

10. HAUSER, *supra* note 1, at 343.

11. ALBERT DRESDNER, DIE ENTSTEHUNG DER KUNSTKRITIK IM ZUSAMMENHANG DER GESHICHTE DES EUROPÄISCHEN KUNSTLEBENS 72 (F. Bruckmann ed., 1915).

12. Dan Rosen, *A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 174 (1983) (exploring how Dürer's chosen medium allowed other artists to copy and sell his works).

13. JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 142 (1987).

14. This occurred because of continuing attacks on the way Michelangelo painted the saints, which

The painter covered some exposed body parts on the fresco. It was only recently that these "cover-ups" were erased during the large conservation effort undertaken by Pope John Paul II some years ago.[15] Still, the image of Christ remains with da Volterra's censorship "additions".

The eighteenth century brought slow changes. Artists, regardless of their individual styles, shared a profound awareness of the significance of their art and its mission in the world.[16] William Hogarth taught morality by painting a series titled *The Rake's Progress* and created the illustrations *Gin Lane* and *Beer Street*.[17] Fussli shocked the art world when, in 1783, he exhibited *The Nightmare* at the Royal Academy.[18] The artists believed that their art allowed one to discover the world, experience the present, and analyze and interpret the human being. Immanuel Kant interpreted this experience, which until then had been considered a mirror of reality, as a function of the artist's mind, "[h]is vision [being] 'an exertion of [his] will.'"[19] The Enlightenment artist became a modern man, a thinker—more than the skilled craftsman or a humble painter of the past.[20]

Simultaneously, the enlightened artist's legal situation changed. The stimulus for the change was Locke's theory that man has the

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> led eventually to the decision taken at a session of the Council of Trent at least to 'emendare' the fresco. Danielle da Volterra, who was given the task of 'censoring,' proceeded with the greatest possible discretion [he was a sincere and fervent admirer of Michelangelo], and went no further than the covering of a few figures with drapery, although he could not avoid completely repainting the figures of St Catherine and St Blaise, which had been singled out particularly in the attacks.

P. de Vecchi, *Michelangelo's Last Judgement*, *in* THE SISTINE CHAPEL: MICHELANGELO REDISCOVERED 194 (Muller et al. eds., 1986).

15. *Id.*

16. Daniel Arasse, *Der Künstler*, *in* DER MENSCH DER AUFKLÄRUNG 214 (M. Vovelle ed., 1996).

17. *Id.*

18. *See* NICOLAS POWELL, FÜSSLI: THE NIGHTMARE (John Fleming & Hugh Honour eds., 1972).

19. GEORGIOS MICHAÉLIDÈS-NOUAROS, LE DROIT MORAL DE L'AUTEUR 14 (A. Rousseau & Cie, 1935); ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES: ETUDE DE DROIT COMPARÉ 99 (E. Bruylant ed., 1993); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370–71 (1998) (describing Immanuel Kant's role in the evolution of *droit moral* and quoting Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 17 (1994)).

20. Arasse, *supra* note 16, at 221; *see* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 839–41 (1990).

right to the fruit of his labor.[21] In Europe, Wilhelm von Humboldt noticed art's spiritual aspect,[22] which led Otto Friedrich von Gierke to observe that creative work was materialized in its results and that works of art were the reflections of their creator.[23] Consequently, the object of art could be treated as an emanation and "extension" of the artist's personality.[24] The common law system drew more practical conclusions from Locke's theory. It stipulated that in the process of sale and exchange of goods, the result of the creator's work could not be legally taken by other people, such as an employer; this represented a significant change from the old system where the work was automatically owned by the master.[25]

III. LEGAL FORMULATION OF ARTIST'S RIGHTS

Two approaches to Lockean theory gave rise to two different legal systems: copyright and *droit d'auteur*.[26] The first system considers the creator's connection to his creation to be a result of creative work that reflects the creator's personality and requires physical and intellectual effort. Therefore, copyright is a general category that recognizes both the property and personal rights of the creator. In the *droit d'auteur* system, the artist's personality is of foremost importance and is the essence of the relationship between

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21. "Though the Earth, and all inferior Creatures be common to all Me, yet every Man has a Property in his own Person. This no body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his." John Locke, Two Treaties on Government 305–06 (Peter Leslett ed., 1967) (1690). Compare Locke's statement with Enfield's statement referring directly to artists, "labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works." WILLIAM ENFIELD, OBSERVATIONS ON LITERARY PROPERTY 21 (Printed for Joseph Johnson 1774) (original document on file with author). *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, *in* OF AUTHORS AND ORIGINS 23 (Brad Sherman & Alain Strowel eds., 1994).

22. *See* Palmer, *supra* note 20, at 835–37.

23. *Id.* at 839; *see* PIERRE RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIÉTÉ, HISTOIRE ET THÉORIE 82 (1969).

24. DELIA LIPSZYC, DROIT A'AUTEUR ET DROITS VOISINS 22 (1997); J.A.L. STERLING, WORLD COPYRIGHT LAW PROTECTION OF AUTHOR'S WORKS, PERFORMANCES, PHONOGRAMS, FILMS, VIDEO, BROADCASTS AND PUBLISHED EDITIONS IN NATIONAL, INTERNATIONAL AND REGIONAL LAW 15–17 (1994); S.M. STEWART & H. SANDISON, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 6 (1989).

25. *See* JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE 21 (Egbert J. Dommening & P. Bernt Hugenholtz eds., 1994).

26. *See* Rudolf Monta, *The Concept of "Copyright" versus the "Droit D'auteur"*, 32 S. CAL. L. REV. 177, 177 (1959); Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature*, *in* OF AUTHORS AND ORIGINS, *supra* note 21, at 235.

the artist and his work. The relationship is not based on the end result—i.e., the work of art—but on the materialization of the artist's personality in his creation. In other words, both systems accept the double spiritual-material nature of the relationship between the creator and his work. Copyright, however, sees the creation of the work mainly as an aspect of property—enrichment of the artist as a result of his work—while *droit d'auteur* sees it mostly as evidence of development and expansion of personality or a way to immortalize the personality of the artist.[27]

The copyright system was the first to be set in law. It focused on the economic effects of creativity. In 1709, England passed the "Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Time therein mentioned";[28] America followed with the Copyright Act of 1790.[29] In passing the Copyright Act of 1790, Congress acted pursuant to Article I, Section Eight, Clause 8 of the U.S. Constitution, under which Congress has the "power to promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[30]

Despite what is often argued, the French Revolution of 1789 did not much advance the concept of copyright law. Despite destroying the old order and claiming to support individuality and creativity, in reality, the Revolution enacted regulations very similar to the above mentioned English and American policies.[31] *Droit d'auteur* was defined by La Chapelier in his preparatory report preceding adoption of the decree of 1793[32] as *la plus sacrée, la plus personnelle de toutes les propriétés*.[33] Years would pass before the French courts would begin to recognize artists' personal rights arising from a deep socio-

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27. *See* Palmer, *supra* note 20, at 861.

28. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.).

29. Act of May 31, 1790, ch. 15, 1 Stat. 124.

30. U.S. CONST. art. I, § 8, cl. 8. For more on the origins of Anglo-American Copyright, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America, in* Of Authors and Origins, *supra* note 30, at 137.

31. Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 429 (1999). The first French decree on copyright was adopted in 1793. *Id.*

32. Décret-loi de la Convention le 19/24 juillet 1793 relatif aux droits de propriété des auteurs d'écrits en tous genres, des compositeurs de musique, des peintres et des dessinateurs. For more information on this statute see RECHT, *supra* note 23, at 139; Ginsburg, *supra* note 30, at 143.

33. LIPSZYC, *supra* note 24, at 17 (quoting *Le Moniteur universel*, Jan. 15, 1791). This opinion was very similar to the preamble of Statute of Massachusetts of 1789 that stipulated, "[t[here being no property more peculiar a man's own than that which is produced by the labor of his mind." *Id.*

political discussion about ethics and justice, which were subsequently named *droits moraux*—moral rights.

Before presenting the earliest French courts' decisions regarding moral rights it should be emphasized that English courts took rights of this kind into account much earlier. In the 1769 case *Millar v. Taylor*,[34] the great eighteenth century English judge, Lord Mansfield, explicitly stated that printing the work without the author's permission does not only deprive the author of due income and risk the dissemination of views that the author no longer holds, but also deprives the author of the right to have his name on the work, make corrections, and fix mistakes.[35] After this opinion, Lord Mansfield was known as the founding father of the moral rights doctrine, although this concept played little or no role in the subsequent development of copyright in common law countries.[36]

In France, the 1828 decision in *Widow Vergne v. Creditors of Mr. Vergne* was the first in a series of judgments to develop the doctrine of moral rights.[37] The court did not allow the printing of a manuscript by a creditor as partial payment of a prior debt.[38] The court ruled that the interests and rights belonged solely to the author or to his heirs, and only they could make decisions about the work's publication—that is to make use of their *droit de divulgation*.[39]

Eight years later, the French court recognized the right of paternity. In the 1836 case, *Masson de Puitneuf v. Musard*,[40] the court ruled that playing a musical piece at a concert without naming its composer violated his reputation. A few years later, in *Marquam*

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34. Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769).

35. *Id.* Lord Mansfield argued, *inter alia*, that if the author's work is pirated, he

> may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

Id. at 252–53.

36. Gerald Dworkin, *Moral Rights and the Common Law Countries*, 5 AUSTL. INTELL. PROP. J. 5, 6 (1994).

37. Widow Vergne v. Creditors of Mr. Vergne, Cour d'appel [CA] [regional court of appeal] Paris, le ch., Jan. 11, 1828, S. Jur. II 1828, 5; *see* A. BERTRAND, LE DROIT D'AUTEUR ET LES DROIT VOISINS 219 (1991); Peeler, *supra*, note 31, at 447.

38. Peeler, *supra* note 31, at 447.

39. *Id.*

40. Masson de Puitneuf v. Musard, Cour d'appeal [CA] [regional court of appeal] Paris, 1e ch., Aug. 8, 1836, D. Repertoire de Jurisprudence Prop. Lit. Et Art., no. 194 (Fr.).

v. Lehuby, the court established the right of integrity in a claim filed by a Protestant author, Marquam, when his publisher omitted sections relating to religious rights in his history textbook to assure sales in Catholic schools.[41] Finding that such abbreviations damaged the author's reputation, the court required the book's text to be returned to its original form.[42]

As evidenced above, moral rights were established independent of each other in the first half of the nineteenth century. The joint name *droit moral* was first used in 1872 by Andre Morillot in a legal journal[43] and was later defined by a U.S. author who stated that the "rights evolved from a societal concern about individual author's and artist's personality and reputation investments as they are exhibited through their creative work."[44] The concept of *droit moral* did not become part of French copyright law until 1957.[45] Currently, the laws are set forth in *Code de la Propriété Intellectuelle* of 1992, which is recognized as the most comprehensive protection given to artists by any nation.[46] The most important provision of this law states that the author enjoys ownership rights to his name, authorship, and work.[47] These rights are strictly attached to the artist and are perpetual, inalienable, and imprescriptible.[48] The first of these rights enables the artist to make the independent decision as to the manner and time of signing his creation, which allows him to chose to mark the work with his name or pseudonym, or to publish the work anonymously. Disclosing the author's name against his will gives the artist the right to terminate the contract—e.g. with a publisher—and to receive compensation for his loss. The second right protects the artist from usurpation of authorship, which includes protection from unlawful copying involving a clear usurpation of characteristic attributes of the work of art. The third right involves respect for the work itself, thus referring mostly to its integrity. French legislation and courts grant maximum protection to both the nature and the

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41. Marquam v. Lehuby, Tribunal de commerce [Trib. De Com.] Paris, Aug. 22, 1845, S. Jur. II 1845, 459.

42. *Id.*

43. A. Morillot, *De la personnalité du droit de copie qui appartient à un auteur vivant*, *in* REVUE CRITIQUE DE LEGISLATION 1872; *see* RECHT, *supra*, note 23, at 110.

44. Peeler, *supra*, note 31, at 426.

45. J. CHATELAIN & F. CHATELAIN, OEUVRES D'ART ET OBJETS DE COLLECTION EN DROIT FRANCAIS 199 (1990) (describing relevant provisions of Loi de 1957).

46. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 99 n.19 (1997).

47. "L'auteur jouit du droit au respect de son nom, de sa qualité et de son œuvre." CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L. 121–1 (2000) (Fr.).

48. "Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible." *Id.*

form of the artwork.[49] There are few exceptions to this strict rule in well-justified circumstances. One far-reaching consequence of the interpretation of the right to integrity is the possibility of violating the right without making a direct change in the artwork. Pursuant to a separate provision, the author has the right to divulge his work while, at the same time, the author can determine the method of disclosure and set the disclosure's conditions.[50] Finally, the artist is granted the right to withdraw the work from the market or to change it as he sees fit.[51]

Most of the rights discussed above may be inherited and exercised after the author's death by persons listed in his will or by his family members. Some rights may be exercised by the French Minister of Culture. For this reason, one can argue that the concept of *droit moral* includes three kinds of rights: (1) rights of the artists; (2) rights of the persons appointed by the artist or by law, allowing those appointed persons to protect the relationship between the artist and his work;[52] and (3) public law, which serves the society by preventing violations of works of art and misconceptions as to their authorship.[53]

A discussion of French law could not be complete without remarking on the right referred to as *droit de suite*.[54] Because of its economic dimension, it is not included in the category of moral rights.

49, *See, e.g., id.*

50. "L'auteur a seul le droit de divulguer son œuvre. Sous réserve des dispositions de l'article L. 132–24, il détermine le procédé de divulgation et fixe les conditions de celle-ci." *Id.* art. L. 121-2.

51. "Nonobstant la cession de son droit d'exploatation, l'auteur, même postérieurement à la publication de son œuvre, jouit d'un droit de repentir ou de retrait vis-à-vis du cessionnaire . . . ." *Id.* art. L. 121-4.

52. "L'exercise peut être conféré à un tiers en vertu de dispositions testamentaires." *Id.* art. L. 121-1; *see e.g.*, art. L. 121-2.

> A près a mort, le droit de divulgation de ses oeuvres posthumes est exercé leur vie durant par le ou les exécuteurs testamentaires désignés par l'auteur. A leur défaut, ou après leur décès, et sauf volonté contraire de l'auteur, ce droit est exercé dans l'ordre suivant: par les descendants, par le conjoint contre lequel n'existe pas un jugement passé en force de chose jugée de séparation de corps ou qui n'a pas contracté un nouveau mariage, par les héritiers autres que les descendants qui recueillent tout ou partie de la succession et part les légataires universels ou donataires de l'universalité des biens à venir.

53. En cas d'abus notoire dans l'usage ou le non-usage du droit de divulgation de la part représentants de l'auteur décédé visés à l'article L. 121-2, le tribulal de grande instatnce peut ordonner toute mesure appropriée. Il en est de même s'il y a conflit entre lesdits représentants, s'il n'y a pas d'ayant droit connu ou en cas de vacance ou de déshénce. Le tribunal peut être saisi notamment par le ministre chargé de la culture.

Id. art. L. 121-3.

54. *See, e.g.*, William Cornish, *The Author As Risk-Sharer*, 26 COLUM.-VLA J.L. & ARTS 1 (2002).

It is of significance to this discussion, however, because it remains with the artist despite disposal of the work of art. *Droit de suite* gives the artist the right to receive a share of profits each time a copy of the artist's creation is sold. First introduced in France in 1920,[55] and subsequently incorporated into several different legal systems,[56] it finally become part of a European Parliaments and Council's Directive in 2001.[57]

The concept of moral rights, subject to some modifications, was widely accepted in many European countries. Polish doctrine,[58] for example, identifies nine moral rights of artists in the copyright law of 1994.[59] According to Article 16 of the law, "personal rights shall protect the bond between the creator and the work, which bond shall not be limited in time or susceptible of renunciation or assignment . . ."[60] The second part of the provision explained that the rights include the creator's right:

> (1) to claim authorship of the work, (2) to cause the work to appear under his name or pseudonym or to make his anonymous work available to the public, (3) to insist on respect for the inviolability of the content and form of the work, and on the proper use thereof, (4) to decide to make the work available to the public for the first time, (5) to oversee the manner of use of the work.[61]

According to further provisions the author has also a right: (6) to decide on the future of the original of a three-dimensional work located in a place accessible to the public if the decision is taken to destroy it,[62] (7) to claim the acquirer of the original of the work to

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55. The current formulation of this right reads as follows: "Les auteurs d'œuvres graphiques et plastiques ont, nonobstant toute cession de l'œuvre originale, un droit inaliénable de participation au produit de toute vente de cette œuvre faite aux enchères publiques ou par l'intermédiaire d'un commerçant." C. PROP. INTELL. art. L. 122-8 (2000) (Fr.).

56. *See* LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY, A COMPARATIVE STUDY (John M. Kernochan, ed., Louise Martin-Valiquette trans., Center for Law and the Arts, Columbia University School of Law 1991).

57. Council Directive 2001/84/EC, 2001 O.J. (L 372/32) (E.N.); *see* JOHN HENRY MERRYMAN, THE PROPOSED GENERALISATION OF THE DROIT DE SUITE IN THE EUROPEAN COMMUNITIES 16 n.1 (Intellectual Property Institute 1997).

58. ELZBIETA WOJNICKA, OCHRONA AUTORSKICH DÓBR OSOBISTYCH [Protection of the Moral Rights of Authors] 83, 101-02 (1997).

59. Copyright and Neighboring Rights Law of Feb. 4, 1994, art. 1–01 (1994) (Pol.).

60. *Id.* art. 16.

61. *Id.*

62. In particular, when such decision is taken, the owner must make an offer of sale to the creator of the work or to his relatives, if it is possible to contact them. The maximum price shall be based on the value of the material used to produce the work in question. If sale is not possible, the owner shall allow artist either to make a copy or, depending the nature of the work, to make appropriate documentation. *Id.* art. 32.2.

make it available to him in the manner essential for the exercise of copyright,[63] (8) "to withdraw from the contract or to terminate it in consideration of his essential interests as a creator,"[64] and (9) to make changes in the work prior to its disclosure.[65]

The United Kingdom was the first to codify a law based on copyright principles when it passed the Copyright, Designs and Patents Act.[66] It incorporated four moral rights: (1) the right to be identified as author or director (the right of paternity or attribution); (2) the right to object to derogatory treatment of a work (right of integrity); (3) the right not to be falsely attributed as author or director (false attribution of work); and (4) the right to privacy of certain photographs and films.[67]

The United States was the second to pass a copyright law. The law suggests setting forth all rights that the artist wants to protect in the contract.[68] This practice is followed in publishing, where contracts forbid, for example, making changes in the published works without the writer's consent. Some states have extended the rule to protect the rights of artists.[69] The most often cited example is the Art Preservation Act adopted in California in 1979,[70] which incorporated

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63. In such case the acquirer may demand an appropriate guarantee and appropriate remuneration from the author for the use of the work. *Id.* art. 52.3.

64. *Id.* art. 56.1. According to Article 56.2, however, if in the course of the two years following the date of withdrawal or termination, the artist intends to proceed with use of the work, he shall be obliged to propose such use to the acquirer or licensee, allowing him an appropriate amount of time for the purpose. If the withdrawal or termination occurs after acceptance of the work, its effectiveness may be subject, by the other party, to a guarantee of repayment of the costs borne by the said party in relation to the contract concluded. Repayment may not be claimed where the decision not to disclose is due to circumstances beyond the control of the creator of the work according to Art. 56.3. These provisions shall not be applicable to architectural and urban works, to audiovisual works and to works commissioned for exploitation in audiovisual works. *Id.* art. 56.4.

65. *Id.* art. 60. According to Articles 60.1 and 60.2, the person who makes use of the work shall be obliged to allow the creator to make an author's inspection prior to the disclosure of the work. If the changes made to the work as a result of that inspection are essential and attributable to circumstances beyond the creator's control, the associated costs shall be borne by the acquirer of the economic rights or licensee. Where the creator has not made his author's inspection within an appropriate time, he shall be deemed to have consented to the disclosure of the work.

66. *See* Copyright, Designs and Patents Act, 1988, c. 48 (Eng.).

67. *See* Dworkin, *supra* note 36, at 19.

68. *See* SCOTT HODES, LEGAL RIGHTS IN THE ART AND COLLECTORS' WORLD 119 (Irving J. Sloan ed., 1986); ROBERT PROJANSKY & SETH SIEGELAUB, THE ARTIST'S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT IN ART WORKS: LAW, POLICY, PRACTICE 81 (Franklin Feldman & Stephen Weil eds., 1974).

69. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.07 (Matthew Bender & Co. 2005) (1963).

70. CAL. CIV. CODE § 987 (West 2005) (amended 1982). For the text and commentary, see NIMMER, *supra* note 69, § 8D.99.

the right of paternity[71] and the right of integrity.[72] These rights refer, however, only to select works: (1) original paintings, sculptures, or original works of art in glass; (2) of recognized quality; (3) which were not "prepared under contract for commercial use by its purchaser."[73] When the United States became a party to the Berne Convention, it adopted the Visual Artists Rights Act of 1990, which was similar in principle, but narrower in scope.[74]

In the international law arena, the moral rights formula was incorporated to the Berne Convention for the Protection of Literary and Artistic Works in 1928.[75] The 1971 Paris Act of the Convention's respective clause reads as follows:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[76]

The Convention was based upon the "historical natural law concept . . . that the artist has a personal interest and the right in preserving his reputation as well as in the proper display and attribution of his work."[77] The Convention, however, represents only a minimalist approach[78] to artists' moral rights, as it identifies only the right to claim authorship and integrity of the work. In common law, the first of these rights is usually interpreted literally: not as an autonomous duty to reveal authorship—which is the norm in continental Europe—[79]but as a right that enables authorship to be

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71. "The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art." CAL. CIV. CODE § 987(d).

72. "No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." *Id.* § 987(c)(1).

73. *Id.* § 987(b)(2).

74. Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (1990). For commentary see NIMMER, *supra* note 69, § 8D.63.

75. Actes de la Conference réunie à Rome du 7 mai au 2 juin 1928, at 106 (original document on file with author); *see also* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 98–104 (detailing the 1928 Rome Conference).

76. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Jul. 24, 1971, S. TREATY DOC. NO. 99–27, 828 U.N.T.S. 221 (Mar. 1, 1989) [hereinafter Berne Convention].

77. Jody A. van den Heuvel, *Moral Rights for Artists: The Development of a Federal Policy*, 19 J. ARTS MGMT. & L. 8, 25 (Fall 1989).

78. Adolf Dietz, *Legal Principles of Moral Rights (Civil Law), in* THE MORAL RIGHT OF THE AUTHOR: CONGRESS OF ANTWERP ¶ 10 (1993) (source on file with author).

79. French law formulated a positive obligation to respect the name and the authorship of the artist. C. PROP. INTELL. art. L. 121–1 (2000) (Fr.).

revealed only on demand.[80] The second interpretative difference between the two systems is the right of integrity, concerning the scope of intervention in the work. Some authors claim that all activities listed are forbidden only if they are prejudicial to the artist's honor or reputation. For others, the initial action, distortion, mutilation, or other modification of the work, are always forbidden; other derogatory interventions are forbidden only if they are prejudicial to the artist's honor or reputation.[81]

Finally, a very general regulation regarding protection of *droit moral* is set forth in the 1948 Universal Declaration of Human Rights.[82] According to Article 27.2, "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[83] As Dietz noted, this instrument represents not only a high degree of moral authority, but this formula was almost literally incorporated into Article 15(1) of the International Covenant on Economic, Social and Cultural Rights which entered into force in 1976 as a binding international treaty.[84]

Recalling a philosophical justification for the protection of artists' rights may summarize the discussion. A society benefits if its legal system promotes artistic creativity. For the common and individual good, the law must therefore create legal instruments that will stimulate art desired by society. Artists' rights are therefore justified by the good consequences of their legal recognition; this concept is known as the consequentialist argument.[85] Protection of these rights can also have a deontological justification: protection may be based on the labor theory under which the creator deserves the fruits of his labor, or it may arise under the personality theory under which the

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80. For example, under English law this right does not arise until it has been asserted. Copyright, Design and Patents Act, 1988, c. 4, § 78(1) (Eng.). As Bently and Sherman explain, "[t]he imposition of the requirement of assertion is said to be justified because Article 6 bis merely requires members of the Union to confer on authors the right 'to claim' authorship," which also helps to overcome some of the problems that may arise in tracing authors. LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 238 (2001).

81. HENRI DESBOIS ET AL., LES CONVENTIONS INTERNATIONALES DU DROIT D'AUTEUR ET DES DROITS VOISINS 41, 211 (1976); Jan Corbet, *Le Droit Moral Dans les Instruments Internationaux*, *in* THE MORAL RIGHT OF THE AUTHOR, *supra* note 81, ¶¶ 4–6.

82. *Universal Declaration of Human Rights*, art. 21(3), GA Res. 217A at 71, U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc. A/810, at 71 (1948).

83. *Id.* art. 27(2).

84. Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law: A Comparative Approach*, 25 IIC: INT'L REV. INTELL. PROP. & COPYRIGHT L. 177, 178 (1994). The International Covenant on Economic, Social and Cultural Rights was adopted by UN General Assembly on Dec. 16, 1966.

85. D. A. Nance, *Foreword: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 763 (1990); *see* STERLING, *supra* note 24, at 55–62.

artist has a moral right to protect his relationship with his creation because the creation is an extension of his personality.[86] Generally speaking then, copyright is based on a promotional role of law while *droit d'auteur* is based on an ethical and personal approach. We cannot forget, however, that some deontological concepts gave rise to the beginnings of moral rights protection within common law copyright regulations.[87]

IV. ARTIST'S RETAINED RIGHTS VS. OWNER'S RIGHTS: CAN THEY BE RECONCILED?

Having described the origin and legal definition of an artist's rights, this Article now attempts to determine what happens to those rights after the artist disposes of the object in which the work is embodied.[88] Based on the above discussion, it is clear that obtaining an object does not automatically transfer all the rights embodied therein. The reverse is also true. Acquiring a copyright does not mean that physical ownership of the object is acquired. Most systems of law accept these principles and clarify them with appropriate regulations. We find such examples in Polish,[89] French,[90] German,[91] and American law, each stating that, unless otherwise stipulated in the contract, the artist retains his rights.[92] Such unequivocal statements,

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86. Nance, *supra* note 85, at 764.

87. *See, e.g.*, James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487, 487 (1968).

88. *See generally* Jean Chatelain, *The Original Work of Art: A Lawyer's View*, 1 INT'L J. MUSEUM MGMT. & CURATORSHIP 311 (1982) (regarding the originality and protection of art).

89. Unless otherwise provided, assignment of ownership rights in the copy of a work shall not constitute assignment of the economic rights in the work itself. 2. Unless otherwise provided, the transfer of the economic rights shall not constitute assignment to the acquirer of the ownership rights in the copy of the work.

Law of Feb. 4, 1994, Copyright and Neighboring Rights, art. 52.1-52.2 (1994) (Pol.).

90. "La propriété incorporelle définie par l'article L. 111-1 (L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de la propriété incorporelle exclusif et opposable à tous) est indépendante de la propriété de l'objet matériel." C. PROP. INTELL. art. L. 111-3 (Fr.).

91. "If the author sells the original of a work, he shall not be deemed in case of doubt to have thereby granted an exploitation right to the acquirer." Law on Copyright and Neighboring Rights of 1965, *amended by* Intellectual Property Laws and Treaties, Chp. 3, § 3, art. 44(1) (July 16, 1998) *in* World Intellectual Property Organization Rep. (Apr. 1999). This statute is also available electronically at www.unesco.org/culture/copy/copyright/poland/page1.html.

92. Ownership of copyright as distinct from ownership of material object. Ownership of a copyright, or of any of the exclusive rights under a

however, do not, clarify everything: how can the artist exercise his rights if the object is not in his possession because it is owned by someone else? It seems that we should accept, a priori, that it is not possible to judge whether the rights of the artist or the owner are paramount. Both *droit d'auteur* and copyright protect artists' rights, albeit in a different scope.[93] On the other hand, no legal system treats ownership as an absolute right. The owner has the freedom to exercise his rights or transfer them but always does it "within the limits of the law."

Therefore, in every legal system, neither the artist nor the owner enjoy enough protection to prevent potential conflict. Most often we have a situation where the owner's rights limit the artist and the artist's rights simultaneously limit the owner. Because, subject to few exceptions, neither of the rights will completely dominate the other, the only solution is to find a sensible compromise that will, depending on the situation, weigh the artist's and owner's interests and take into account other particular circumstances in given situations. Various legal systems balance these interests in different ways.[94]

A. *The Right of Paternity or Attribution*

The right of paternity or attribution has two aspects. The positive aspect, recognized by all legal systems, provides that the artist has the right to claim authorship or remain anonymous even after disposing of the original copy of the work.[95] The negative aspect acknowledges the artist's right to protect himself from so called false attribution—the signing a work of art not created by him with his

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> copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (2005).

93. *See* ROBERT E. DUFFY, ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS 291 (1977); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554 (1940) (regarding moral rights at an earlier stage of their protection).

94. *See* CLAUDE COLOMBET, GRANDS PRINCIPES DU DROIT D'AUTEUR ET DES DROITS VOISINS DANS LE MONDE: APPROCHE DE DROIT COMPARE 33 (1990) (providing a general overview of an author's rights under various legal systems).

95. BENTLY & SHERMAN, *supra* note 80, at 233; EUGENE ULMER, URHEBER- UND VERLAGSRECHT 213-15 (1980); William R. Cornish, *Moral Rights Under the 1988 Act*, 11 EUR. INTELL. PROP. REV. 449, 449 (1989).

name.[96] In real life, these rights protect the author of the work when, for example, the signature is removed from a work, even if the work of art is completely inaccessible to the public. The principle was directly confirmed in *Millar v. Taylor* in 1769, when the court first formally dealt with the right to attribution.[97] The French case of 1836, *Masson de Puitneuf v. Musard*, stated that "the collaborator whose name has been omitted without his knowledge from the title of the work may obtain recognition of his authorship and his right through the courts."[98] Further, in 1966, a French court voided a ten-year-old contract between a painter and art dealer where the painter was required to sign some of the works with a pseudonym, and not sign other works.[99] The judgment was commended for declaring that the contract violated the artist's right to authorship by prohibiting him from signing a number of works and by forcing him to use the pseudonym.[100]

An author can demand the removal of a false signature from a work which is not his, or demand action to prevent his association with a work he did not create, including, for example, changing an incorrect attribution in a museum album or auction catalogue.[101] Such situations do not require additional explanation. Other situations exist where the artist tries to deny authorship of his work or attempts to remove his signature.[102] Whatever the artist's motives, we must fully agree with a court's decision to dismiss the claims once authenticity of the works is proven. If we grant the artist protection from false attribution, then there is no reason to deny protection to the owner of an authentic work of art who is trying to establish the work's authenticity. Thus, we can positively judge the court's decision in the case against the painter Vlaminck. Not only was Vlaminck's claim dismissed, but he also was ordered to pay compensation to the owner of the painting for injuring its marketability by groundlessly

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96. *See, e.g.*, 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE *Germany* § 7[1][b] (Mellville B. Nimmer & Paul E. Geller eds., 1993) (discussing an author's ability to exercise his right to recognition both positively and negatively).

97. Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) (mentioning several authors' interests affected by "piracy," including the right to have his name on the work when it is published with his consent).

98. Cour d'appel [CA] [regional court of appeal] Paris, Aug. 8, 1836, D. 1836, 241-43 (Fr.).

99. Cour d'appel [CA] [regional court of appeal] Paris, Nov. 15, 1966, Gaz. Pal. 1967, 181 (Fr.).

100. *Id.* at 478.

101. *See* John H. Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 445 (1995) (discussing the problem of succession to the artist's right of attribution).

102. *See* Raymond Lindon, *Droit moral de l'auteur*, *in* DICTIONNAIRE JURIDIQUE LES DROITS DE LA PERSONALITÉ 59 (1983) (discussing two such French cases).

questioning its authorship.[103] Such decisions are not only in the owner's or artist's interest but also in the public's interest, since falsely attributed works are prevented from reaching the market.

B. *The Right of Access*

If ownership of an object in which the artist's rights are embodied is transferred, the artist may not be able to exercise his rights because he cannot access the object. Specifically, it may not be possible to take pictures or make copies of the art. Although giving the artist the right to access the work is a serious interference with the owner's rights, it seems nevertheless understandable and justified to support such a right, especially if access is a condition to the exercise of copyright (for example, if the work was never publicly shown). French courts and legal doctrine uphold such a view.[104] French courts require a good reason before they will substantiate an owner's refusal to allow the artist access to his work.[105] German law clearly defines this right, saying that: "The author may require the owner of the original or of a copy of his work to afford him access to original or the copy, provided it is necessary for making reproductions or adaptations of the work and is not opposed by any legitimate interest of the owner."[106] An example of enforcement of this provision is the court decision concerning access to the death mask of Max Liebermann that had never been publicly shown.[107] Despite initial doubts in the court of first instance, the court granted the author of the mask the right to make a copy. This decision significantly interfered in the owner's rights since the owner had to agree to allow the object to be taken to a foundry for casting. Therefore, not only was

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103. Cour d'appel [CA][regional court of appeal] Paris, Apr. 19, 1961, R.I.D.A. 1962, II, 218 (Fr.); *see* Marcel Rousselt & Raymond Sarraute, *Current Theory of the Moral Right of Authors and Artists under French Law*, 16 AM. J. COMP. L. 465, 477 (1968).

104. *See, e.g.*, Law. No. 57-298 of Mar. 11, 1957, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 11, 1957, art. 32, p. 2723, *reprinted in* 1 UNESCO & WIPO, COPYRIGHT LAWS & TREATIES OF THE WORLD (1984) (codifying the artist's right is merely one component of the French doctrine).

105. CLAUDE COLOMBET, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DROITS VOISINS 132, 146, § 3 (Dalloz 1986) (1957).

106. Law on Copyright and Neighboring Rights of 1965, *amended by* Intellectual Property Laws and Treaties, ch. 3, § 3, art. 25, ¶ 1 (July 16, 1998) *in* World Intellectual Property Organization Rep. (Apr. 1999). This statute is also available electronically at www.unesco.org/culture/copy/copyright/poland/page1.html.

107. Kamergericht Berlin, 83 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [G.R.U.R.] 742 (May 22, 1981); Kamergericht Berlin, 85 G.R.U.R. 507 (Feb. 8, 1983); Landesgerich München, 27 FILM UND RECHT 561 (Sept. 9, 1983); *see* Adolf Dietz, *Letter from the Federal Republic of Germany. The Development of Copyright Between 1979 and the Beginning of 1984*, 20 COPYRIGHT 426, 436–37 (1984) (discussing current West German law).

the owner temporarily deprived of the object, but he also ran the risk that the object would be damaged. In light of these risks, general consent to the right of access should be granted under the certain conditions. First, an author should only be granted access to his work to enable him to exercise the rights that he could not exercise without access to the work. Second, the right of access should be exercised in the manner least burdensome to the owner. Third, the author should appropriately compensate the owner for the scope and manner of access. Last, the author should cover all costs resulting from the access, especially those related to potential damages. Article 52.3 of the Polish copyright law is a good example of a well-balanced right to access: "An acquirer of the original copy of the work is obliged to make it accessible to its creator to the extent necessary for the exercise of his author's rights. However, the acquirer may demand that the creator provides proper security for the work and remuneration for its use."[108]

C. *The Rights of Disclosure* (Divulgation) *and of Withdrawal* (Retrait)

The right of disclosure allows the author to determine when his work can be made available to the public, particularly when it will be shown for the first time. This right is regularly granted to artists and is based on the premise that the artist is the only person who can decide when the work of art is finished, and when the object is made public: the work "represents" its creator. Considering the subjective character of such a decision, it is often difficult to determine the moment when the artist has exercised his right with regard to a particular work of art. Numerous judgments, especially in France,[109] show the difficulty of the determination. The German court provided an answer to this question in a slightly different context.[110] A certain portrait was presented to the public at the exhibition and was later shown on television, although not within the framework of legally authorized reporting covered by Article 50 of the Copyright Act, as Dietz explained.[111] The court agreed with the artist and declared that his right of disclosure "covered not only the first dissemination but that the author in any event preserved the right to decide whether his work was to be disseminated by means or in a form that had not

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108. Law on Copyright and Neighboring Rights of Feb. 4, 1994, art. 50 (1994) (Pol.).

109. *See* Frederic Pollaud-Dulian, *Le Droit Moral en France à travers la jurisprudence récente*, 145 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 127, 163 (1990).

110. Landesgericht Berlin, 85 G.R.U.R. 761 (June 9, 1983).

111. 17 U.S.C. § 501 (explaining provisions governing causes of action for infringment).

yet taken place—which could also mean specific place."[112] This Article will not go further in discussing this problem and merely indicates that regardless of whether the author will regret his decision, the voluntary sale of the work should always be interpreted as an act of disclosure. It would therefore be difficult to sensibly argue that the decision to transfer ownership of a work does not equal consent to the first instance of public access. Such an interpretation would be obvious if not for an unexpected precedent which occurred in the late 1920s. The painter Camoin brought suit when he found out that paintings that he had cut and thrown away were subsequently found and offered by Carco for sale. The court recognized Camoin's claim and ordered the paintings to be destroyed "completely in the presence of Camoin and Carco."[113] Because the right of disclosure overrode ownership rights, it is worthwhile to quote the court's reasoning:

> Whereas literary and artistic rights comprise a right which is in no way pecuniary in nature but which, attached to the very person of the author or of the artist, permits him during his lifetime to surrender his work to the public only in such a manner and under such conditions as he sees fit, the gesture of the painter who lacerates a painting and throws away the pieces because he is dissatisfied with his composition does not impair this right; and although whoever gathers up the pieces becomes the indisputable owner of them through possession, this ownership is limited to the physical quality of the fragments, and does not deprive the painter of the moral right which he always retains over his work. If the artist continues to believe that his painting should not be put into circulation, he is within his rights to oppose any restoring of the canvas and to demand, if necessary, that it be destroyed.[114]

The person who found the destroyed paintings undoubtedly became their owner since they were "abandoned property."[115] In property law this means that the owner loses title, and thus the painter should not have been able to demand their return. As mentioned above, however, the court ordered that the paintings be destroyed, indicating that, regardless of title or ownership, the artist still had the right of disclosure of his creations. Camoin asserted this right by destroying the paintings and disposing of the paintings. The

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112. Dietz, *supra* note 107, at 436.

113. Tribunaux de premiere instance [T.P.I.] [ordinary courts of original jurisdiction] Seine, Nov. 15, 1927, D.P. 1928, II, 89-93, note M. Nast (Fr.); Cour d'appel [CA] [regional court of appeals] Paris, Mar. 6, 1931, D.P. 1931, II, 88-89, note M. Nast (Fr.). For an English translation of the judgement and the note see BARNETT HOLLANDER, THE INTERNATIONAL LAW OF ART FOR LAWYERS COLLECTORS AND ARTISTS 314 (1959). *See also* Colombet, *supra* note 105, at 152 (discussing these cases); Hansmann & Santilli, *supra* note 46, at 136–37.

114. *See* Rousselt & Sarraute, *supra* note 103, at 469 (discussing the relevance of this quotation).

115. According to Roman law tradition, under *res derelicta*, the works were indeed abandoned since the painter voluntarily got rid of them.

only way to respect his decision and his copyright was to prevent sale of the paintings and order their destruction. It was not, as doctrine emphasized, a vindication claim referring to the return of the works, but a decision based on *droit d'auteur*. In other words, the moral right prevailed over the ownership right to the extent that it could be used against the physical owner of the work.[116] Commentators were immediately critical of the decision and argued that the deletion of the artist's signature from the restored work and the prohibition of the public exhibition or sale of the work under the artist's name was the only sanction the artist should have been allowed in the case.[117]

An extension of the right of disclosure is the right to withdraw. The right is far-reaching for the artist since it allows him to temporarily withdraw the art to correct it or withdraw the art permanently, if it no longer represents the artist's opinions or if the art was not well-received by the audience. In principle, French and German laws, as well as laws in some other countries, grant the author the withdrawal rights if the author is prepared to pay compensation,[118] although it seems that such a right has a greater effect in the publishing industry than in the visual arts.[119] In any case, it would be difficult to argue that withdrawal should be exercised against the owner's will. Accordingly, the artist cannot effectively demand that the owner release the work after it is sold to make changes or to request the return of the work altogether, even if the artist is willing to reimburse the owner. Doctrine holds that this would be no different than expropriation and there would be no grounds for demanding such a return.[120] The uniform approach did not, however, prevent attempts by some artists to have their works returned. One artist, the painter Vlaminck, mentioned above, was unable to claim withdrawal and demanded a return of the paintings on the grounds that he was not the author of the works and the signatures were falsified. Both claims were rightfully dismissed. The court stated that even if the artist wanted to correct a work that he

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116. MICHAÉLIDÈS-NOUAROS, *supra* note 19, at 198 ("Le droit de l'auteur de rester maître de son œuvre et d'en disposer souverainment existe également contre des tiers ayant obtenu par suite d'un mode originaire la propriété de ses œuvre.").

117. *See* Rousselt & Sarraute, *supra* note 103, at 470 (discussing the decision previously identified in Nast's note).

118. *See* C. PROP. INTELL. art. L. 121-4 (2000) (Fr.); German Law. Comp. art. 41; *see also* J.L. Bismuth, *Droits des créateurs et de leurss héritiers*, *in* 3 INTERNATIONAL SALES OF WORKS OF ART 210, 210–11 (Martine Briat & Judith A. Freedberg eds., 1991) (discussing other legislation).

119. Hansmann & Santilli, *supra* note 46, at 139 (noting that the opinion is based on the quoted decision denying the right of withdrawal to painter Vlaminick); *see* Pollaud-Dulian, *supra* note 109, at 180–82 (discussing this problem further).

120. Quentin Byrne-Sutton, *The Owner of a Work of Visual Art and the Artist: Potential Conflicts of Interest*, *in* INTERESTS IN GOODS 281, 290 (Norman Palmer & Ewan McKendrick eds., 1993).

deemed unsuccessful, he could not claim the work's return. The ability to make corrections ends at the moment ownership is transferred and the signed work of art is released.[121]

Finally, a clear consequence of such a view is that the artist cannot demand that the work be destroyed, even if it is damaging to his reputation.

D. *The Right to Exhibit*

The right to disclose must be differentiated from the problem of public display. Two issues come into play in this context: (1) whether the artist can demand that an artwork's owner release the artwork to show it at an exhibition, or (2) whether the artist can demand that artwork remain on permanent exhibition in a public place.

The artist cannot demand that an owner release his work so that it may be shown in an exhibition. Though it is understandable that an artist would want his work to be exhibited as often as possible, it would not be acceptable to expect the owner to release the artwork whenever the artist demanded. The interference would be too far-reaching into ownership rights and, at least with the most popular works, it could virtually prevent the owner from exercising his rights. Furthermore, this demand cannot be interpreted as exercising the right to access since the goal is very different. Thus, unless otherwise stipulated in the contract of sale, releasing the work to the artist for an exhibition would have to stem from a special provision in the law. In general, laws do not include such provisions, but exceptions exist, such as the 1988 revision of the Canadian Copyright Act. According to the Act, the artist has a right to present at a public exhibition any of the artist's works owned by another person, as long as it is for a purpose other than sale or hire.[122]

The solution to the second issue about art objects on permanent exhibit is similar, but not as absolute. If the work is to be removed, doubts arise as to whether the work is an inseparable part of the spatial composition. This case also creates an infringement on the right of integrity, which will be discussed below. In circumstances where there is no infringement on the right of integrity, it will be more difficult for the artist to demand that his artwork remain exhibited in a public place against the will of those who can decide on the change of the work's location. There are, however, possible exceptions. One example is the 1954 decision in *Christos Kapralos v.*

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121. Cour d'appel [CA] [regional court of appeal] Paris (Trib. Gr. Inst. De Paris), 1e ch., Apr. 19, 1961, Gaz. Pal. 1961, 2, 218; 34 R.I.D.A. 119 (1962) (Fr.).

121. Copyright Act, 142 R.I.D.A. 407 (1989), *amended by* 35-36-37 Elizabeth II, ch. 15 (Can.); Byrne-Sutton, *supra* note 120, at 295.

Rhodes City Council.[123] The council removed Kapralos's sculpture from a square and decided to locate it elsewhere. The court ruled that the council's decision infringed on the moral rights of the artist.[124] There have also been other court decisions favorable to artists. In these cases, however, other elements played a role: for instance, in one case, a fountain created by artist Scrive was specifically commissioned to decorate a supermarket.[125] In another case, the contract with the artist Jean-Philippe Dubuffet was terminated and the sculpture returned to the artist before it was completed.[126] The latter judgment was particularly important to Colombet, who said that it implicitly declared that *le droit moral de l'auteur* prevailed over the right of property.[127]

Discussion of the right to exhibit must include a negative approach to this right: can the owner be prevented by the artist from exhibiting his work? Generally it would be difficult to obtain such a ban pursuant to a court decision, because public exhibition of an acquired work of art represents legitimate use of property. Most legal systems accept that the owner is free to do as he wishes in this respect; an exception to this principle may only be provided by a specific provision of law. Again, pursuant to the Canadian Copyright Act, the artist has some control over public exhibition of his work after it is sold. Interestingly, the right pertains also to the work's successive owners.[128] Polish copyright law provides yet another

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123. Conseil d'Etat [CE] [highest administrative court] Nov. 9, 1954, Session Pleniere, 55 E.E.N. 1954, 78.

124. J.L. Bismuth, *supra* note 118, at 266.

125. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 14, 1974, 84 R.I.D.A. 219 (1975); Cour d'appel [CA] [regional court of appeal] Paris, 25e ch., July 10, 1975, 91 R.I.D.A. 114 (1977); COLOMBET, *supra* note 105, at 142–43.

126. Tribunal de grande instance [T.G.I] [ordinary court of original jurisdiction] Paris, March 23, 1977, 93 R.I.D.A. 191 (1977), note Desbois; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., June 2, 1978, D. 1979, 14, note Colombet; 98 R.I.D.A. 85 (1978); Cour de Cassation, Jan. 8, 1980, 83, note Edelman. For futher comments see Cour d'appel [CA] [regional court of appeal] Versailles, July 8, 1981, 111 R.I.D.A. 201 (1981); Cour d' Cassation, Mar. 16, 1983, 117 R.I.D.A. 80 (1983); CAVersailles, Mar. 16, 1983, EUROPEAN COMMERCIAL CASES 1983, 453; CHATELAIN & CHATELAIN, *supra* note 45, at 201; COLOMBET, *supra* note 105, at 143–44; Dietz, *supra* note 107, at 189–90.

127. COLOMBET, *supra* note 105, at 144.

> Cet arrêt présente une grande importance puisque, très justement selon nous, il fait implicitement prévaloir le droit moral de l'auteur sur le droit de propriété. Sur renvoi, la Cour de Versailles, affirmant l'obligation, pour le contractant de l'artiste, d'assurer la construction de lœuvre commandée, a bien souligné que seule la force majeure pouvait justifier l'inexécution, et la Cour de cassation a rejeté le pourvoi, donnant ainsi definitivement raison à l'auteur.

128. Bismuth, *supra* note 118, at 96; Byrne-Sutton, *supra* note 120, at 296.

example. According to Article 32.1, if there is nothing to the contrary in the sales contract, the owner of an original three-dimensional work may show it in public on the condition that no profit-making purpose is pursued thereby. Finally, one general exception, set forth in the Berne Convention, gives the artist control over showing his works on television. A broadcast is deemed as a separate form of exploitation, which goes beyond normal use of the artwork by the owner.[129]

Lastly, there have been demands to expand the right to exhibit. Such far-reaching proposals are put forth by some authors pursuant to so called *droit de destination.*[130] This approach proposes that the author be granted the exclusive right to define and control the use of the work by its successive owners,[131] especially with regard to public showings. One proposal suggests that the author be given the right to decide this matter, giving him the right to demand or prohibit the showing of the work at a given exhibition. If these proposals were accepted, the right of the owner would be significantly limited.

E. *The Right of Integrity*

As can easily be seen, the artist's right to demand that his work remain unchanged and whole—that is, not mutilated or modified without consent—is very controversial and the most difficult of the artist's rights to execute. Thus, legal regulations show a marked diversity of approaches, from wide acceptance for protection of integrity to excluding it completely with regard to certain works. Court decisions are similarly diverse. Lest it drown in an analysis of the details, this Article will address the basic question: what is the goal of the right of integrity? Is it the maintenance of integrity of the artistic message contained in the work, aimed at preserving the artist's reputation? Is it the protection of works from mutilation more generally, which would go beyond protecting only the artist's interests? Though the question seems hypothetical, it contains a practical dimension. We have to make a choice between two approaches to this right: first, a restricted approach which protects only from interferences which the artist believes changes his artistic intent and is thus derogatory to him as an artist and therefore forbidden by law; or second, an expansive approach which aims to

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129. *See* Berne Convention, art. 11bis ("(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images . . . .").

130. Andre Francon & Henri Desbois, *L'avernir du droit d'auteur*, 132 R.I.D.A. 3 (1987).

131. Francon & Desbois, *supra* note 130, at 10.

prevent any interference, protects the artist's rights, and benefits society.

The first approach is embraced by the countries that favor a narrow interpretation of Article 6 bis of the Berne Convention under which an author may object only to such action in relation to his work which would be prejudicial to his honor or reputation. A similar definition of the right of integrity is included in the laws of several countries, though they offer different levels of protection. An example of minimum protection is English law, which preserves mostly only the basic integrity of a work.[132] The key to understanding the level of protection is the right interpretation of the term "derogatory treatment of the work."[133] This is proved when (1) the work has been or will be subject to addition, deletion, alteration, or adaptation; and (2) such damages "amount[ ] to distortion or mutilation of the work or [are] otherwise prejudicial to the honor or reputation of the author or director."[134] The formula covers, for example, unauthorized colorization of a black and white film, but does not include the physical relocation of artistic work to a place other than originally agreed upon by the artist. Nor does British law proscribe the placement of the work in an inappropriate context, even though it may be damaging and objectionable to the artist.[135]

German law provides the artist with much wider scope of protection. The artist may prohibit any distortion or mutilation of his work which would jeopardize his legitimate intellectual or personal interest in the work.[136] This right, however, has no discretionary character and in every individual case must be properly justified by the author. If proven that a distortion of the work damages the artist's reputation or any of the artist's other interests protected by law, copyright theory balances the interests to resolve the conflict

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132. According to some opinions, Britain regards artist's moral rights "as a brake on the exploitation of copyright" and consequently incorporated them into copyright law as minimally as possible so that their U.K. edition is, as McCartney said, "well below the Berne Convention standard." Irini A. Stamatoudi, *Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators*, 4 INTELL. PROP. Q. 478, 506 (1997).

133. SIMON STOKES, ART AND COPYRIGHT 74 (2001).

134. Cornish, *supra* note 95, at 450. For a discussion of the term "artistic" in the area of copyright law, see David L. Botton, *Legal Determinations of Artistic Merit Under United Kingdom Copyright Law*, 1 ART ANTIQUITY AND L. 125 (1996).

135. *See* Dworkin, *supra* note 36, at 22 (explaining the right of integrity may not provide protection when, for example, a "respectable" work is placed in an exhibition of pornographic material or used for advertising).

136. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, *available at* http://www.iuscomp.org/gla/statutes/UrhG.htm#14 (last accessed on Nov. 1, 2005) (Article 14 of the German Copyright Act).

between the owner and the artist.[137] French and Polish laws provide examples of the widest possible interpretation of the right of integrity. As stated above, the obligation to respect the artist's work stipulated in the French code should be treated literally—the owner has a general obligation to respect the shape and form of the work—and courts permit only minor or necessary modifications. The most often quoted example is a case in which painter Bernard Buffet decorated a refrigerator to sell it at a charity auction. Some time after the sale, the artist discovered that the separated front panel was offered for sale and brought a suit against the owner to prevent the sale. The court prevented the sale of the separate decorated panels of the refrigerator, ruling that they formed an integral work of art and that taking them apart would be an infringement of the moral rights of the artist.[138] It was argued by the court

> that the moral right which is vested in the author of an artistic work entitles that author to ensure that after the work has been disclosed to the public it is not distorted or mutilated when, as in this particular case, the Court of Appeal has held with sovereign jurisdiction that the work of art at issue, purchased as such, formed a single unit in the subjects chosen and manner in which they had been handled and that, by cutting up the refrigerator's panels, the purchaser mutilated it.[139]

This ruling is often cited as an example of the supremacy of the moral rights of artists over owners' rights to freely use the work. As Merryman noted, "the right of integrity arguably reduces to some extent the owner's legal power over the work of art by forbidding him to modify it."[140] Polish judicial decisions ban making modifications in the works and do not limit the bans to cover acts that are prejudicial

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137. *See* Dietz, *supra* note 107, at 183 (discussing, but not necessarily endorsing, a balancing of interests).

138. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Siene, June 7, 1960 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 30, 1962, at 570–71; note H. Desbois, J.C.P., 1963, II, 12989; note R. Savatier, Cour de Cassation, July 6, 1965, Gaz. Pal. 1965, no 2, at 126; CHATELAIN & CHATELAIN, *supra* note 45, at 202–03; COLOMBET, *supra* note 94, at 142–43; H. DESBOIS: LE DROIT D'AUTEUR EN FRANCE, 498–500 (1966); STROWEL, *supra* note 21, at 500.

139. COLOMBET, *supra* note 94, at 142–43 (quoting Pollaud-Dulian, *supra* note 109, at 210). Colombet quotes this judgement in the original version as follows:

> le droit moral qui appartient à l'auteur d'une œuvre artistique donne à celui-ci la faculté de veiller, après sa divulgation au public, à ce que son œuvre ne soit pas dénaturée ou mutilée lorsque, comme en l'espèce, la cour d'appel relève souvrainement que l'œuvre d'art litigieuse, acquise en tant que telle, constitutant une unité dans les sujets choisis et dans la manière dont ils avaient été traités et que, par le découpage des panneaux du réfrigérateur , l'acquéreur l'avait mutilée.

COLOMBET, *supra* note 105, at 173.

140. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1047 (1976).

to artist's honor or reputation. Therefore, it is understood that the ban is extensive and a potential claim should be based on the argument that the change in the work not only violates the formal right of integrity but also the "bond existing between the creator and his work."[141]

The Visual Artist Rights Act of 1990 (VARA) is an example of a law that affords authors a narrowly formulated right to integrity. Special Section 106A added to the U.S. Copyright Act allowed authors of visual art to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to the artist's honor or reputation.[142] There are several exceptions to this right: when artwork incorporated into building, when modification is a result of passage of time, or when modification is a result of the inherent nature of the material. One should also remember at this point that the relevant definition of visual art covers only certain artwork. For example, under VARA, the author's right of integrity to original paintings, drawings, or sculptures,[143] endures only for a term of the life of author.[144] This is not the case under European laws.

In comparison to VARA and civil law systems, the California Civil Code goes beyond the traditional right of integrity and provides a more general protection formula justified by public interest. Irrespective of the rationale behind the protection of integrity of fine art against actions which are detrimental to an artist's reputation,[145] the state legislature declared that public interest mandated preserving the integrity of cultural and artistic creations. Accordingly, the California state legislature granted certain organizations the right to commence action against "any defacement, mutilation, alteration, or destruction" of a work of fine art of recognized quality and of substantial public interest.[146] The motives for enacting this law were explained by its initiator who said, that "works of fine art are more than economic commodities and they oftentimes provide our communities with a sense of cohesion and history. The public's interest in preserving important artistic

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141. JANUSZ BARTA ET AL., PRAWO AUTORSKIE I PRAWA POKREWNE [COMMENTARY ON THE LAW ON COPYRIGHT AND NEIGHBORING RIGHTS] 238 (2005).

142. 17 U.S.C. § 106A(d).

143. 17 U.S.C. § 101; NIMMER, *supra* note 69, § 8D.06[A].

144. 17 U.S.C. § 106A(d).

145. CAL. CIV. CODE § 987(a) (West 2005) ("The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction . . .").

146. *Id.* § 987(c)(1); *see also* CAL. CIV. CODE § 989(c) (authorizing an organization acting in the public interest to commence an action for injunctive relief to preserve or restore the integrity of a work of art from the acts described in § 987(c)(1)).

creations should be promoted and our communities should be able to preserve their heritage when it is in jeopardy."[147] This law fills a void existing in the protection of art until the art is embraced by cultural heritage law.[148]

There were also other proposals made under U.S. law to protect and preserve important works of art. For example, it was suggested that courts could adopt the common law doctrine of public dedication of art[149] that would allow government representatives and private individuals to bring suit to protect the visual integrity of culturally valuable works of art from both intentional and negligent injury. This doctrine was found to properly "balance the public welfare, not merely the rights of an individual artist, against the rights of an individual owner of art."[150]

The right of integrity, next to the right of paternity, it is the most important of the discussed rights. Regardless of its function for the artist, its exercise serves an important public interest. Works of art are, on one hand, always individual achievements of the artists, but on the other hand form a part of our common heritage. No one doubts that it is in society's interest to protect this heritage as a value attesting to society's current quality of life. Less often we remember the equally important duty to keep works of art for future generations.[151] To properly and honestly accomplish these goals the works of art have to reflect the intentions of their creators. They have to be true and authentic, as they were when they left the hand of the artist or artisan. Otherwise, works of art do not truly reflect their time period (whether distortions of artwork also reflect the time period is another issue altogether).[152] It must be emphasized that such a view of the public interest is in no way against artists' interests and, on the contrary, strengthens their protection. In reality, these interests intertwine at the moment the artwork is

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147. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 24 (1999) (quoting a Letter from Senator Alan Sieroty to Honorable Edmund G. Brown Jr. dated Sept. 3, 1982, and on file with California State Archives); *see also* Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 433 (1994) (noting that such an approach "may be viewed, at least in part, as a vehicle for accomplishing the goal of historic preservation").

148. For more on this subject see Swack, *supra* note 19.

149. This doctrine could be based on the theory of public dedication of land, which is seen as a well-established method of asserting public rights in private property. *See* Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 126 (1981).

150. *Id.*

151. *See* 2 E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 128–32, 270–76 (1989).

152. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 346 (1989).

created, creating the temptation to accept a wider interpretation of the right of integrity than is stipulated in the Berne Convention. In particular, claims against any and all distortions—not just those prejudicial to the artist's honor or reputation—could be possible. Though in principle this Author agrees with this approach, one precaution should be taken into account: copyright law should not strive to replace or even compete with cultural heritage law. Acceptance of a wide interpretation of the right of integrity should go only as far as it protects the interest of the artist and the public interest, but protection of the public interest in itself should remain within cultural heritage law. If this law focuses only on the protection of properly old objects, it could be supplemented with rights being granted to organizations under California law, as discussed above.[153] The laws could be responsible for the protection of valuable works of art in the interim period—before the work of art is considered cultural heritage but when its protection is in the public interest. The scope of activity should, however, be classified as protection of cultural heritage rather than enforcing the artist's right of integrity, even though in practical terms the activity helps artists and exercises some scope of their right.

The above cannot lead to an extremist approach—that all artistic creations should be preserved wholly and completely. One must remember that the point is not to find one absolute solution, but to balance the rights of the artist and the owner of his work.[154] Problems do not usually arise with respect to typical artworks and, in those cases, we tend to accept a wider breadth of artist's rights. Problems arise with respect to applied art, especially architecture. Architecture is undoubtedly artistic creation and, subject to few exceptions, is treated the same as other fields of art. Architecture's function, however, often justifies necessary limitations to the right of integrity. French courts, although paying particular attention to artists' rights, supply numerous decisions proving the above point. One example is a court ruling concerning the adaptation of a space inside a building by its owner—space which according to the architect was to remain empty.[155] When the architect found out about the

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153. The National Endowment for the Arts is an example of such an organization, and according to one commentator, "[it] should further protect the public interest in art by promulgating regulations that allow that agency to sue to protect publicly supported artwork from injury." Note, *supra* note 149, at 127.

154. For a discussion on the problems connected with balancing these interests, see Pollaud-Dulian, *supra* note 109, at 212; Dietz, *supra* note 107, at 182–86.

155. Cour d'appel [CA] [regional court of appeal] Paris, May 15, 1990, 147 R.I.D.A. 1991, 311; Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, March 29, 1989, D. 1990, Somm. 54, note C. Colombet; Première chamber civile [Cass. 1e civ.], Jan. 7, 1992, D. 1993, Somm. 88, obs. C. Colombet; COLOMBET, *supra* note 94, at 144–45.

changes, he claimed that the building had been mutilated and that the integrity of his work was violated.[156] The Paris court ruled that the adaptation was justified by the economic need and, moreover, the changes were made in a way which were not very visible and did not significantly harm the design.[157] Another argument was used in the *Théâtre des Champs-Elysées Case* in 1990,[158] when the court held that

> even if the emotion felt by both the plaintiffs and the intervening parties is understandable, . . . the alterations made to the work do not constitute a substantial distortion of the creation by the Perret brothers and Antoine Bourdelle, but are in keeping with a necessary evolution of architectural works in time and space.[159]

These decisions should not, however, suggest that courts always rule in favor of owners making changes to buildings that are unauthorized by the architect. For example, when the interior of the Lille town council auditorium was changed from the architect's original plans, the court found "that the work on the inner shell of the building, which had been carried out without the architect's agreement, had disfigured his work by destroying the harmony of the original ensemble he had designed and that none of Lille town council's alleged technical imperatives could be substantiated . . . "[160] Consequently, the architect was declared "justified in invoking the right to respect his work against the owner of the structure."[161] Another example is a Swiss copyright infringement case brought when the shape of a roof was changed. The court ruled that the changes were not justified by economic need and stated that claimant proposed only a slightly more expensive design, which would have met the owner's needs and preserved the architectural design.[162]

These and other court decisions demonstrate that since architecture is an applied art, it may be modified for economic need if there is no other alternative which would be less damaging to the architectural design of the building. This approach—aiming to balance the interests of the owner and the architect—seems best. Pursuant to such a view it is not necessary to exclude architectural works from protection. Accordingly, provisions of the Architectural

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156. *Id.*

157. *Id.*

158. Cour d'appel [CA][regional court of appeal] Paris, 1e ch., July 11, 1990, 146 R.I.D.A. 1990, 299; Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Apr. 4, 1990, 145 R.I.D.A. 1990, 386.

159. Pollaud-Dulian, *supra* note 109, at 214.

160. Première chamber civile [Cass. 1e civ.], Dec. 1, 1987, 136 R.I.D.A. 1988, 137.

161. Pollaud-Dulian, *supra* note 109, at 214.

162. *Urteil des Kantonsgerichts St. Gallen, in* 5 ZEITSCHRIFT FÜR URHEBER-UND MEDIENRECHT 297 (1990).

Works Copyright Protection Act[163] that reduce the protection only to structures that are both "original" and "not wholly functional" seem to go too far.[164]

Analysis of the right of integrity would not be complete without discussing the owner's right to destroy a work of art and, possibly, the artist's right to prevent its destruction. It is often argued that this is a form of infringement on the right of integrity. There is another, possibly more prevalent, interpretation: complete destruction of the work is not as detrimental to the artist's honor or reputation as modifying an artist's work and artistic message. A similar argument was raised by a German court: complete destruction does not affect the integrity of the work when the work ceases to exist, preventing the honor and reputation (moral rights) of the creator from being prejudiced.[165] In another case, a German court ordered the partial removal of a building complex decoration by Otto Hajek, but also allowed the final removal of remaining parts of the decoration by the owner of the building.[166] This opinion was later confirmed by a second decision in the same case, where the court maintained that the owner was entitled to destroy the decoration completely, adding that the owner could do so for any reason whatsoever, including simply "that he had had enough of it."[167]

In France, the law in this area is unclear. For example, a French court held that the destruction of the frescoes in the chapel in Juvisy and the sculpture in the park in Grenoble was justified as being within the property rights of the owner,[168] or as being dictated by the necessity of public safety.[169] There are other cases, however, where courts were more generous to artists. For example, the destruction of the fountain commissioned for a commercial center by the artist Scrive was found to infringe the artist's rights because this act could

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163. Architectural Works Copyright Protection Act, Pub. L. No. 101-12, 104 Stat. 5089 (codified as amended in scattered sections of Title 17 U.S.C. (1990)).

164. *See* 17 U.S.C. § 120(b) ("[T]he owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building.").

165. Reichsgericht [RG][Federal Court of Justice] June 8, 1912, 147 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 397.

166. Landesgericht München [LG] [national court] Dec. 8, 1981, Film und Recht 510, 1982 (F.R.G.).

167. Landesgericht München [LG] [national court] Aug. 3, 1982, Film und Recht 513, 1982 (F.R.G.); Dietz, *supra* note 107, at 438.

168. *See* Tribunaux Civ. Versailles, June 23, 1932, D.H. 1932, 487 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, Apr. 27, 1934, D.H. 1934, 785 (Fr.); COLOMBET, *supra* note 105, at 141

169. *See* Tribunaux administratifs [TA] [regional administrative courts of first instance] Grenoble, Feb. 18, 1976, 91 R.I.D.A. 1977, 166, note A. Francon (Fr.); COLOMBET, *supra* note 105, at 143.

not be "exonerated by something unforeseeable and irresistible."[170] Similarly, the demolition of church sculpture by protestors, the disassembling and dispersing of work of art commissioned for a chapel,[171] and the destruction of the roof sculpture by new owners of the house[172] were all declared to be infringements of the artist's rights.

A variety of these judgments leads to the more general conclusion that the issue remains controversial. Therefore, neither the law nor the courts have formulated a general ban on these actions. "Nothing is said [in law] expressly about destruction" stated Crewdson, while commenting that the destruction of Graham Sutherland's portrait of Sir Winston Churchill was "one of the most outrageous pieces of vandalism of this century."[173] The only exception seems to be already partly presented in VARA. The Act provides that the author of visual art has a right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."[174]

The protection of the artist's rights, however, may in no way expand to allow the work to be destroyed simply because of the artist's volition. This interference in ownership rights would be too far-reaching and difficult to justify.

The final issue, in discussing the right of integrity, is the exercise of the right upon death of the artist. Following the principle in the Berne Convention, national laws resolve this problem differently: either the right expires upon death or it may be exercised by heirs or other institutions, even upon expiration of economic rights.[175] Pursuant to the legal nature of moral rights and their strict

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170. Tribunaux de grande instance [T.G.I.] [ordinary courts of original jurisdiction] Paris, May 14, 1974, 84 R.I.D.A. 1975, 219 (Fr.); *see* Cour d'appel [CA] [regional court of appeal] Paris, 25e ch., July 10, 1975, 91 R.I.D.A. 1977, 114 (Fr.); COLOMBET, *supra* note 105, at 142–43.

171. *See* Cour d' appel [CA] [regional court of appeal] Paris, 1ére ch., Apr. 10, 1995, 166 R.I.D.A. 1995, 316 (Fr.).

172. *See* Cour d' appel [CA] [regional court of appeal] Paris 163 R.I.D.A. 148–51 (1995); Cour d'Appel [CA] [regional court of appeal] Paris, 1994, 163 R.I.D.A. 1995, pp. 149–50, note Kéréver.

173. Richard Crewdson, *Relations between Artists and their Heirs and Dealers, Galleries and Patrons, in* INTERNATIONAL ART TRADE AND LAW 341, 343–44 (Martine Briat & Judith A. Freedberg eds., 1991) (This opinion was expressed at the Amsterdam Conference of 1990, before the Visual Artist Rights Act was issued).

174. 17 U.S.C. § 106A (2005); *compare* Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (N.Y. App. Div. 1949) (holding that, in the absence of a contract to the contrary, an artist has no right to prevent the destruction of his artwork by its owner) *with* NIMMER, *supra* note 69, § 8D.06 [C][1] (noting that "recognized stature" need not rise to the level of a Picasso, Chagall, or Giacometti).

175. *See* C. PROP. INTELL. art. L. 121-1 (Fr.) (stating that the right to respect for work is perpetual and imprescriptible, may be transmitted *mortis causa* to the heirs of the author, and may be conferred on another person under the provisions of a will).

connection to the person whom they protect, we should assume that these rights expire upon the author's death. Without a doubt, however, both the interest of the heirs as well as public interest speaks for preserving the integrity of works regardless of the fate of their creators. It may be possible in such circumstances to have two parties exercising the right of integrity—the heirs and bodies which protect the integrity of the works *pro publico bono*. Initially, these entities should complement each other and in the future the public interest element should take over the protection of integrity of the work.

F. Droit de Suite *and Exercise of Copyright*

The so called *droit de suite*, or artist's resale right, is the artist's right to an interest in any sale of his work. It is an economic right fashioned after moral rights; *droit de suite* is an inalienable right, pertains to artworks which the artist does not own, and extends to the artist's heirs.[176] As noted earlier, the concept was adopted in France over eighty years ago and later adopted by several European legal systems and by the Californian legislature. It became part of E.U. law in a 2001 Directive. The adoption of *droit de suite* has raised widespread criticism. Many arguments have been made against the right—for example the claim that in today's world the value of a work of art cannot only be credited to its creators.[177] Artists' orientated forces are more influential, however, and the arguments have no effect on the development of the right. A European lawyer can only note the expansion of *droit de suite* despite the fact that its statutory form is sometimes contrary to its essence. For example, Polish regulations currently in force entitle the artist to participate in the price for which the copy of his work was sold regardless of whether it was higher or lower then the price he was paid for his work.[178]

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176. *See* INTERNATIONAL INTELLECTUAL PROPERTY LAW 163–82 (Anthony D'Amato & Doris Estelle Long eds., 1997) (discussing the concept of a *driot de suite* in a wider context).

177. For a comprehensive discussion of the pros and cons of *droit de suite*, see John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, (1993); Merryman, *supra* note 57, at 21.

178. *See* Law of Feb. 4, 1994, Copyright and Neighboring Rights. art. 19–1 (1994) (Pol.).

> The creator and his successors shall be entitled to remuneration amounting to 5 [percent] of the proceeds of the sale by auction of the original of a three-dimensional work or of the manuscript of a literary or musical work. The vendor shall be obliged to pay the said remuneration and, if he is acting on behalf of a third party, shall be jointly liable with that party.

Furthermore, upon the sale of a copy of his work, the artist is still entitled to basic copyright protection independent of *droit de suite*. The reason for this, as specified above, is that protection is not connected to ownership of the copy and is not automatically transferred to the buyer as a result of sale. This issue is quite clear in light of regulations quoted above, but exercise of copyright may create difficulties for the owner in using the work and thus limits his ownership rights. Such a situation takes place if the work has only one copy and the artist needs to get access to the work.

V. CONCLUSIONS

Artistic output and its embodiment, though viewed as legally equivalent, are in fact subject to two sets of legal regulations, owed simultaneously and independently to two persons. The first person is the author of the work, and the second is the buyer of the object in which the work is embodied. Such a situation is understood, accepted, and appreciated, but can also lead to problems and legal conflicts. A conflict of interest is most often witnessed with the exercise of the artists' rights. Regardless of the regulatory details of the rights of access, disclosure, withdrawal, exhibit, or integrity, the execution of the rights will always infringe on the use of the material art object or, in other words, will interfere with the right of ownership. While the artist's rights are universally justified and take into account paternity—the unbreakable bond between the artist and his work—as well as the present trend aiming to widely interpret artists' rights, any limitation in their scope is not considered. Quite the opposite is true: the interpretation may only become wider, for example by introducing so called right of destination (*droit de destination*),[179] which would give artists control over how their art is used, even by successive owners. This would constitute an even more significant encroachment on ownership rights. There are other limitations to ownership. Most often they are connected with the increase of public interest in cultural issues, which is well characterized by Professor Sax:

> [W]hile one can own things, no one can own ideas or knowledge. They belong in the public domain because they are basic building blocks of our common agenda: the acquisition and dissemination of knowledge, and the

179. *See* STROWEL, *supra* note 19, at 238; Thierry Desurmont, *Le droit de l'auteur de contrôler la destination des exemplaires sur lesquels son œuvre se trouve reproduite* [*The Author's Right to Control the Destination of Copies Reproducing His Work*], 134 R.I.D.A. 3 (1987).

> encouragement of genius. The fate of objects important enough to be pivotal to those enterprises should not be at the mercy of purely private will.[180]

A practical effect of such an approach is a constant development of many different methods of protecting cultural heritage. One example is the right of certain California organizations to actively prevent attempts to modify or destroy works of art regardless of when they were created. Another example of this thinking is the question raised by certain authors as to whether the right of ownership properly protects cultural heritage. Some suggest that the concept of property be replaced by some form of trust, which would more effectively formulate, not just owners' rights, but also his duties.[181] Even if these new legal instruments or recommendations are not legally recognized, the fact that they are put forward is symptomatic of this trend and may indirectly lead to strengthening and widening authors' rights, for example, by including the right of integrity.

Under presently binding regulations and pursuant to court decisions, the only method of preventing conflicts between authors and owners is finding a sensible compromise which recognizes the interests of both sides. Other than the generally phrased provisions of law, there are no unequivocal, universal principles that provide a clear solution in each case. Often the artist's and owner's interests compete, and often both should be protected. Therefore, a decision should be made on a case-by-case basis taking into account all circumstances and sometimes simply choosing the lesser damage or evil. Furthermore, we must remember that in each case it will not be only the owner's and artist's interests which will be considered, but also the public's interest. Sometimes the consideration of the public interest will operate in favor of the artist, and sometimes it will work to the artist's detriment. For example, it will be "positive" when public interest supports actions aimed at protecting the work in an unchanged state; it will be "detrimental" if public interest supports the argument that the work is to be destroyed for of public safety reasons.

We should also observe that in a practical sense the problems analyzed in this Article will more often pertain to a certain type of work—those more vulnerable because of their applied nature or perhaps because of their renowned artistic quality. The analysis will not, for instance, apply with respect to works which are mass-produced, despite the fact that they are treated as the same as other works by legal systems in continental Europe.

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180. Sax, *supra* note 147, at 197–98.

181. *See* Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?*, 1 INT'L J. CULTURAL PROP. 307 (1992) (discussing why property law is inadequate and inappropriate to protect cultural resources such as artwork).

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