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The Refrigerator of Bernard Buffet

By John Henry Merryman*

The French artist Bernard Buffet was invited to decorate a refrigerator to be auctioned in Paris for the benefit of charity. He did so by painting a composition consisting of six panels: three on the front, one on the top, and one on each side of the refrigerator. He considered the six panels parts of one painting and signed only one of them. The refrigerator was duly auctioned along with nine others, decorated by nine other artists, at the Galerie Charpentier. Six months later the catalog for another auction included a “Still Life With Fruits” by Bernard Buffet, illustrated and described as a painting on metal. Inspection showed that the painting was one of the panels decorating the front of the refrigerator. The artist brought an action against the owner-consignor to prevent the separate sale of the panel, and the court so ordered.1


Gilbert S. Edelson, Albert E. Elsen, Paul Goldstein, Melville B. Nimmer, and Stephen E. Well thoughtfully criticized an earlier draft of this article, and Stefano Rodota, Sabino Cassese, and Jean-Louis Goutal gave expert advice on European law. The author is grateful for their generous assistance.


1. The judgment of the Tribunal de la grande instance de la Seine of June 7, 1960 is contained in the report of the appellate court decision. Buffet v. Fersing, [1962] Recueil Dalloz [D. Jur.] 570, 571 (Cour d'appel, Paris). The tribunal also awarded Mr. Buffet symbolic damages of one new franc, the right to publish its decision in three art periodicals of his choice at the defendant's expense, and costs. It refused the artist's request that the six panels be awarded to him as damages. Mr. Buffet appealed on two principal grounds. First, he contended that the tribunal had erred in limiting the order to the defendant to public disposition of the work on a piecemeal basis, holding that only such a public dismemberment of the work was a sufficiently grave impairment of the artist's moral right to warrant the limitation of defendant's right of property that the relief requested necessarily entailed. The court of appeal agreed with the artist on this point and revised the judgment to prohibit even private piece-by-piece disposition. Second, he contended that the tribunal should have awarded the six panels to him. On this point the court of appeal agreed with the tribunal that such relief was unwarranted. There is a thoughtful note on the case by Professor Henri Desbois. See id. at 572.
Guille, a painter, agreed to deliver to Colmant, a dealer, his entire future production for a period of ten years, at a rate of at least twenty paintings a month. The contract provided that the works furnished to the dealer would be signed with a pseudonym and that the painter would not sign the earlier works still in his possession. There was no evidence that the artist entered the agreement under duress or that he lacked capacity to contract. A dispute eventually arose, and the dealer sued the artist for breach of contract. The court of appeals held that the dealer could not prohibit the artist from using his real name in connection with works he created, despite the terms of the contract.\(^2\)

In 1893 Lord Eden commissioned the American artist James McNeill Whistler, then living in Paris, to paint Lady Eden's portrait. Through intermediaries they agreed on a price "between" 100 and 150 guineas. Whistler eventually completed the portrait, which he exhibited (with Eden's approval) at the Salon du Champs de Mars with the title *Brown and Gold, Potrait of Lady E.* . . . Meanwhile Lord Eden had sent Whistler a check for 100 guineas, which Whistler took as an insult (although he cashed it). On the return of the painting to his studio after the exhibition, Whistler painted out Lady Eden's head, painted in another, and refused to deliver the painting to Lord Eden, who sued to require restoration of the portrait, delivery, and damages. The trial court held for Eden on all counts,\(^3\) but in the court of appeal that part of judgment ordering restoration and delivery was reversed. Lord Eden was entitled to restitution of the 100 guineas he had paid and damages for breach of contract, but he could not compel restoration of the portrait or its delivery. The Cour de Cassation agreed.\(^4\)

\(^2\) See Guille v. Colmant, [1967] Recueil Dalloz-Sirey [D.S. Jur.] 284, [1967] Gazette du Palais [Gaz. Pal.] I. 17 (Cour d'appel, Paris). The trial court, the Tribunal de grand instance de Pontoise, had held for Colmant on all points but was rather thoroughly reversed by the court of appeal. The contract was an interesting one, containing, in addition to the terms already described, the provision that the dealer would select fifteen of the twenty paintings furnished each month and the five not kept would be destroyed by the painter. The court of appeal, referring to the "conditions draconiennes" of the contract, found it vitiated by them and therefore annulled it. The conditions the court of appeal found objectionable included those requiring the artist to sign some paintings with a pseudonym and to leave others unsigned; that requiring the artist to destroy his own paintings; and those committing the artist to produce so many paintings a month (twenty) for so long (ten years). In a note to the decision Avocat Raymond Sarraute strongly disagreed with the court of appeal as to the last of these points but agreed on the signature and destruction conditions. See [1967] Gaz. Pal. I. 18 (note by Sarraute).


These three decisions illustrate three principal components of "the moral right of the artist," a right that has had its major development in France but that is a part of the law of most European and some Latin American nations. The moral right of the artist is usually classified in civil law doctrine as a right of personality, and in particular is distinguished from patrimonial or property rights. Copyright, for example, which is available to artists in civil law countries as well as in the United States and other common law countries, is a patrimonial or property right which protects the artist's pecuniary interest in the work of art. The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual's personality. Rights of personality include the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy.

The Whistler decision is generally thought to be an important advance in French law over the position taken by the Cour de Paris in Bonheur v. Pourchet, [1865] D.P. II. 201, [1865] S. Jur. II. 233 (Cour impériale, Paris). There the painter Rosa Bonheur had accepted a commission from Pourchet but had never painted the work and eventually told Pourchet that she would not do so. He sued to compel performance, and the civil tribunal of Fontainebleau ordered her to provide the painting within six months or pay a daily fine, a peculiar French remedy called astreinte. The Cour de Paris reversed, holding that the painter could not be compelled to perform. However, it awarded exemplary damages of 4,000 francs for breach of contract. There was no claim that the artist was refusing to deliver a completed work. There was no mention of the artist's moral right in the opinion or in the anonymous note to it in the report. The notion of a special right of the artist both not to declare complete and not to deliver an apparently completed commissioned work, as part of a larger moral right of divulgation, thus appeared after 1865. See text accompanying notes 15-16 infra.

5. There is a persistent minority doctrinal position that treats the artist's moral right as an additional property right, rather than a right of personality. However the dominant view is to the contrary. For an authoritative discussion see Waline, Le Droit moral de l'artiste sur son oeuvre et le droit public, [1936] D.P. III. 57.


One point that is still argued in Italy and France is whether there is a general category of rights of personality or merely a group of specific rights that are so classified for convenience. Germany appears definitely to have adopted the general category position, and France and Italy are moving in that direction. The difference has practical consequences, as a case involving the artist Giorgio De Chirico shows. See text accompanying notes 27-31 infra.

Both the German Constitution and the European Declaration of Human Rights extend guarantees to personality and can thus be seen as elevating rights of personality to the level of constitutionally protected fundamental rights. See, e.g., WEST GERMAN GRUNDEGESETZ art. I; Judgment of May 25, 1954, 13 Entscheidungen des Bundesrichtshofs
It is interesting to note that the moral right of the artist in French law is entirely judicial in origin.\(^7\) This is in itself remarkable, since one of the most treasured tenets of the conventional wisdom about the civil law is that law is made by legislators and executives, not by judges. The development of the moral right of the artist is merely another example of the extent to which this tattered brocard is inapplicable to France.\(^8\) Although judicial in origin, the moral right of the artist has been put into statutory form in France and in many other civil law nations, and is regularly included in international conventions on the topic of copyright and related rights of authors and artists.\(^9\) Like other statutory rights, it continues to grow and develop through judicial interpretation and application, and it is probably accurate to say that the moral right of the artist, still comparatively young even in the nation of its origin, has not reached anything like its full development.

\(^7\) For the most thorough treatment of the moral right in French law see H. Desbois, Le Droit d'Auteur en France 421-545 (2d ed. 1966) [hereinafter cited as Desbois].

\(^8\) I have tried to show elsewhere that it is equally invalid for other parts of the civil law world. See J. Merryman, The Civil Law Tradition, 20-49, 86-91 & passim (1968).

\(^9\) See, e.g., Law of Mar. 11, 1957, No. 57-296, art. 6 (France); Law of Sept. 9, 1965, arts. 11-14 (Germany); Law of Apr. 22, 1941, No. 633, as amended, Law of Aug. 23, 1946, arts. 20-24 (Italy), reprinted in UNESCO, Copyright Laws and Treaties of the World (1974) [hereinafter cited as Copyright Laws]. In addition the Italian Civil Code provides: "The author has the exclusive right to publish the work and to exploit it financially in any form or manner. . . . Even after the assignment of [such] rights . . . the author can sue to confirm his authorship of the work and bring an action to object to any deformation, mutilation, or other modification of such work that can prejudice his honor or reputation." M. Beltramo, G. Longo & J. Merryman, The Italian Civil Code art. 2577, at 645 (emphasis added).

The Berne Convention for the Protection of Literary and Artistic Works, adopted by more than fifty nations, includes in article 6-bis language identical to that of article 2577 of the Italian Civil Code. The United States has never acceded to the Berne Convention, although it is a party to the Universal Copyright Convention (which includes no moral right protection). Professor Nimmer states that resistance to the moral right provision by United States "user groups"—primarily the motion picture and television interests—is one reason for United States abstention from Berne accession. See Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 Stan. L. Rev. 499, 524 (1967). For a thorough discussion of the moral right objection to Berne accession see id. at 518-25, 547-54.

The tendency to lump all "arts"—performing, literary, and visual—into one category occasionally conceals significant differences. Here the resistance of an extremely important sector of the performing arts world (motion pictures and television) to moral right helps prohibit its availability to visual artists, who are engaged in activities that are normally of only marginal interest to the motion picture and television industries.
The moral right of the artist is actually a composite right. The Buffet case involved one of the components: the right of integrity (of the work of art), also sometimes called the right to respect of the work. The notion is that the work of art is an expression of the artist's personality. Distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist's personality, affects his artistic identity, personality, and honor, and thus impairs a legally protected personality interest. To treat one of the six panels of the refrigerator-painting as a separate work distorted and misrepresented the artist's intention. The owner of the refrigerator could keep and enjoy it. He could dispose of the entire painting. He was not permitted to take it apart and dispose of it piece by piece.

The Guille case involved a second component of the moral right, the right of paternity. This is the right of the artist to insist that his work be associated with his name. In France and in some other nations the artist cannot waive this right, so that, as in the Guille case, the artist can insist that his paintings be attributed to him even though he has contracted to the contrary. The artist can also insist that his name not be associated with works that are not his creation.

10. See note 1 & accompanying text supra.
11. See note 2 & accompanying text supra.
13. For a discussion of the inalienability of the moral right under French and Italian law see notes 75-76 & accompanying text infra.
14. No cases on this point have been found, but the conclusion seems in principle undeniable. The question might have arisen in the Millet case, Millet, Judgment of May 20, 1911, [1911] Amm. I. 271 (Tribunal de la Seine), if the parties, their counsel, or the court had so wished, but as the case actually proceeded the point seems to have been left out of consideration. See note 19 & accompanying text infra. In Bernard-Rosseau v. Soc. des Galeries Lafayette, Judgment of Mar. 13, 1973 summarized in [1974] 48 J.C.P. 224 (Tribunal de la grande instance, Paris), the question could not arise because the artist's name was omitted entirely from the works in question. However, it is significant that the court thought the offense to the right of integrity would have been more serious if the artist's name had been used in connection with the disputed reproductions. See note 22 & accompanying text infra.

A potentially difficult problem is raised by the accidental damage cases. Can an artist claim that a seriously damaged painting or sculpture is no longer his work and have it suppressed? Does it make a difference that the damage is accidental when, so far as the public is concerned, the appearance is the same as it would be had the change in the work been deliberately made? If we are to distinguish between deliberate and accidental alterations of the work must we also distinguish between those accidental effects that are attributable to negligence and those that are innocent? It is enough in any case to give
The *Whistler* case is an example of the artist’s right to withhold the work, sometimes referred to as the right of divulgation. This component of the moral right gives the artist the absolute right to decide when (and whether) a work of art is complete, and when (and whether) to show it to the public. Even though knowledgeable third persons might conclude that a work of art is for all practical purposes complete, and even if their judgment is supported by the artist’s conduct with respect to the work, the artist still can insist that the work not be shown or treated as complete.\(^8\)

In addition to these three components (the right of integrity, the right of paternity, and the right of divulgation) French commentators usually mention other interests commonly treated as aspects of the more general moral right. Of these the “right to repent or to retake” is the most important and consists of the right of the artist to withdraw the work from its owner on payment of an indemnity.\(^7\) Related to this right, and sometimes treated as an aspect of it, is the “right of modification.”\(^1\) These rights are usually considered primarily applicable to literary works, although their potential utility in connection with works of visual art is apparent.

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15. See notes 3-4 & accompanying text supra.

16. There has been a good deal of litigation on the right of divulgation because of the consequence of the distinction between a completed (or divulged) and incomplete (or not divulged) work. In Bowers v. Bonnard, [1952] D. Jur. 390 (note by Desbois), [1951] Gaz. Pal. II. 290 (Tribunal civil de la Seine), the question was what works would be community property. In Martinez-Picabia v. Dame Mahler-Picabia, [1970] J.C.P. IV. 154, [1970] 63 Revue Internationale Du Droit D'Auteur [R.I.D.A.] 191 (Cour d'appel, Paris), [1971] J.C.P. II. 17164 (Cass. civ.), it was the same, complicated by the inheritance claims of children of an earlier marriage. In the two Rouault cases the dispute was between the painter (and his heirs) and the heirs of his dealer, Ambrose Vollard over ownership. See P. v. Rouault, [1965] J.C.P. II. No. 14186, [1965] Gaz. Pal. II. 45 (Cour d'appel, Orleans); Rouault v. Consorts Vollard, [1947] S. Jur. II. 3 (note by Desbois), [1947] J.C.P. II. No. 3405 (Tribunal civil de la Seine) (note by Plaisant). It is paradoxical that the right of divulgation, which is a component of the nonpatrimonial moral right, should be crucial to the decision of such thoroughly patrimonial lawsuits.


17. See Desbois, supra note 7, at 435.

18. See id. at 445.
The Right of Integrity

Although these components have a common basis in the notion of moral right, and are therefore in a certain sense inseparable, I do not propose to attempt a full discussion of them here. Instead I will focus on the right of integrity of the work of art. A closer look at the way the right of integrity has taken form in decisions of French and Italian courts exposes a number of fascinating questions about the social value of works of art and artists. Such questions are decided quite differently in the United States than in Western Europe and Latin America, and this observation provides the basis for some speculation about the position of art and artists in this country. First a look at one Italian, one German, and some French decisions.

Charles Millet, a son of the nineteenth century painter J. F. Millet, intervened in a suit between two publishers over which had the right to publish a reproduction of Millet's popular painting *The Angelus*. Millet claimed that both publishers' versions distorted and falsified his father's work and that, on the basis of the moral right, their publication should be prohibited. The court so held, stating that the reproductions brightened the light in the painting, made objects look real and vulgar, added a bonnet on one person's head and a scarf around a woman's neck, and changed an evening scene to one suffused by a glaring noonday sun. No one looking at such a "reproduction" could have believed that Millet was a great artist. The court spoke fervently of the "superior interests of human genius" which dictated that the work of art be "protected and kept as it emerged from the imagination of its author and later conveyed to posterity without damage from the acts of individuals with dubious intentions guided by some transient fashion or profit motives."

In 1948 a French theater commissioned Fernand Léger to design stage settings for the opera *Bolivar* with music by Darius Milhaud. Léger worked on the commission for a year and the opera premiered in 1950. In 1952 it was again produced, but with scene 3 of act 2, "The Crossing of the Andes," excised. Léger brought an action against the

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19. Millet, Judgment of May 20, 1911, [1911] Amm. I. 271 (Tribunal de la Seine). One of the publishers unsuccessfully argued that Millet's fame was so secure that nothing could mar his reputation and, further, that the original is in the Louvre, where those who wished could see the true colors, tones, and lighting.

Millet had requested one franc in damages, prohibition (astreinte) of publication or distribution of either reproduction, and destruction of those already printed. The court awarded the damages and the astreinte (at a fine of twenty francs per copy) but found it had no power to require destruction of existing copies.
theater, arguing that suppression of the setting for part of the opera without his consent impaired his moral right. He asked for damages and an order that the defendant reestablish the opera's stage setting in its entirety. The court agreed that the stage design constituted a work of art to which the moral right attached but said that other rights were also involved. The composer of the opera and its producer had rights, including the right to control the production. Still, the court held that the producer had no right to make a cut both without the artist's permission and without informing the public. It ordered that all advertising for any future performance of the opera include a statement that the stage settings were by Léger and that the setting for "The Crossing of the Andes" was not shown because of the removal of that scene from the production.  

In 1971, the Galeries Lafayette, a Paris department store, used reproductions of works by the painter Henri Rousseau in its window decorations. A granddaughter of the artist sued on counterfeiting, copyright, and moral right grounds, seeking repression of the reproductions and damages. The court had no difficulty in finding that the reproductions, which employed different colors and altered images, violated the right of integrity.  

20. See Léger v. Reunion des Theatres Lyriques Nationaux, [1955] 6 R.I.D.A. 146 (Tribunal civil de la Seine) 146. Léger had also argued that the opera was a complex work of which, as designer, he was coauthor and thus entitled to participate in production decisions. The court dismissed this claim, saying that the opera was essentially libretto plus music which could be recorded or radio-broadcast, and that the scenery and costumes were ancillary.  

21. Unlike copyright, which is for a limited time (life of the artist plus fifty years in most of the world), moral right is generally viewed as perpetual in duration. Hence the possibility of legal action with respect to the work of artists long dead. The durability of the right raises special questions of succession because of its non-property classification as a right of personality. Accordingly, some of the moral right statutes include specific provisions on succession. See note 9 supra. For example, article 23 of the Italian statute provides: "After the death of the author, the right . . . may be asserted, without limitation of time, by the spouse and children and, in the absence thereof, by the parents and other direct descendants and descendants; in the absence of such ascendants and descendants, by brothers and sisters and their descendants. If the public interest should so require, such action may also be taken by the Minister for Public Culture . . . ." See Copyright Laws, supra note 9.  

Germany is a prominent exception to the rule that the moral right is perpetual. See note 69 infra. The Berne Convention, article 6-bis (2), provides that in each member nation the moral right shall endure at least as long as the copyright period of life plus fifty years.  

22. See Bernard-Rousseau v. Soc. des Galeries Lafayette, Judgment of Mar. 13, 1973 summarized in [1974] 48 J.C.P. 224 (Tribunal de la grande instance, Paris 3e). The unpublished opinion contains a curious twist. The plaintiff had also complained that the reproductions failed to bear the artist's name, so that two components of the
The painter Bergerot contracted to sell all of his production to a dealer at the rate of eight oils and ten gouaches per month, and the dealer agreed to pay Bergerot a monthly salary of 1,200 francs, later increased to 1,800 and then to 2,500. At first all went well. As a result of the dealer's activity the painter's fame and his works' market value grew very rapidly. Eventually the painter and the dealer fell out and the painter sued the dealer and collected damages. This infuriated the dealer, who decided to destroy the painter's fame as quickly as he had created it. He published advertisements offering paintings by Bergerot at low prices and dumped the painter's works into auctions by the bundle. As a result the price dropped drastically.

The painter brought an action to restrain such acts and argued, as one basis of recovery, that this dumping of paintings by the dealer violated the artist's moral right because it led to a loss of respect for the name and the work of the artist. The trial court seemed to agree, but the Cour de Cassation quashed the judgment. The basic problem was that the right Bergerot was seeking to protect was seen not as a right of personality but as a pecuniary interest; he was complaining about the decrease in market value of his work brought about by the dealer's marketing methods. The court distinguished that kind of inquiry from an attack on the integrity of the work or on the artist's personality.
The distinction seems basically sound, particularly in the context of Bergerot, but it can be pushed too hard. At any given time there is bound to be a relation between the critical or historical estimate of an artist’s work and the market price of his paintings or sculpture. Indeed, the common assumption is that prevailing critical and historical judgments determine the market by their influence on the decisions of buyers and sellers. Can that proposition be reversed? It would seem so. The public can reasonably assume that the market reflects the opinion of art critics and historians and the purchasing preferences of collectors, museum curators, and acquisition committees. If that is so, then a deliberate campaign to depress the market prices of an artist’s work could reflect on the public estimation of the artist himself.

In 1950 the Venice Biennale, which customarily arranged an important one-man show to run concurrently with the exhibitions at the national pavilions that were the Biennale’s feature, drew together works by the Italian artist Giorgio De Chirico from public and private collections for a retrospective exhibition. None of the paintings belonged to the artist, but he brought an action to prohibit the exhibition. His principal argument was that the show misrepresented him by overincluding his earlier paintings and underincluding the later ones. In fact art historians, critics, and the public generally consider the early paintings his major artistic contribution. The artist, however, considers his later work a continuing series of important artistic developments, and he places a very high value on later paintings and devalues the earlier ones. The dispute with the Venice Biennale was, accordingly, merely another episode in a continuing disagreement between the artist and the art world. The trial court accepted the artist’s claim.\(^7\) It observed that the one-man show at the Biennale was a very important one, that it would be viewed as a critical and representative exhibition of the artist’s work, that it would strongly affect the public estimation of the artist, and that accordingly the artist had a legally protectable interest in being accurately and fairly represented in it.\(^8\) At some points in the decision construe the statutory moral right provisions (Law of Mar. 11, 1956, No. 57-296, art. 6 reprinted in COPYRIGHT LAWS, supra note 9) narrowly in order to avoid the conflict.


28. Although no other case on this point has been found, article 9 of the Spanish Ley de la Propiedad Intelectual of January 10, 1879, cited in the opinion of the court of appeal, provides that “[t]he transfer of a work of art does not constitute a transfer . . . of the right of public exposition of the work . . . unless there is agreement to the contrary.” Mr. De Chirico was, in effect, arguing for a similar rule under Italian law.
the court seemed almost to say that such an exhibition could not be held without the artist's prior consent. At the least it said that it would listen sympathetically to a claim by the artist that such a show seriously misrepresented his work.

The Court of Appeal of Venice, however, disagreed. Unfortunately, it did not really deal with De Chirico's argument. Instead the court treated the moral right as though it were a purely statutory creation (as in fact it is in Italy, though not in France), read the statute narrowly and literally, and found that it provided no right in the artist to control the exhibition of works he no longer owned. To the court the artist's remedy was through private agreement at the time of sale of the painting. One cannot help wishing that the court had reached the issue. It seems undeniable that an exhibition can be stacked, whether deliberately or not, so as to misrepresent the artist's work. This could adversely affect the artist's reputation and thus arguably impair his moral right. But to ask a court to intervene is to suggest something close to, if not indistinguishable from, censorship. Just as one would be reluctant to suggest judicial suppression or "editing" of a book that, in the selection of paintings illustrated and in the text, misrepresented a painter's work, so one ought to avoid similar suppression or "editing" of an exhibition. Yet if one agrees with this argument, how is it possible to support a right of integrity at all? Is there a convenient line to be drawn between the kinds of mistreatment of the artist's work that ought to be legally prevented and other kinds for which, in order to protect freedom of expression or other overriding social interests, no such legal remedy is available? The instinctive response is that there is such a line, at least in the sense that most cases fall clearly into one or the other category, but experience leads us to

31. In one sense the decision of the court of appeal is a rejection of the notion of a general right of personality in favor of the position that there are only specific rights. See note 6 supra. Hence its holding that the statute is the exclusive source of moral right and its narrow interpretation of its terms. This approach seems particularly striking in view of language in the ministerial report introducing the bill that became the Law of April 22, 1941, No. 633, which would seem to argue for a more generous interpretation, including the following: "The artist lives in the work of art, and in the work of art he finds support of his honor, his reputation, his spiritual existence, his life . . . ." In his note on the case Professor Rava calls the court's reasoning "a strictly exegetic interpretation of the terms of the statute . . . ." See [1955] Foro Ital. I. 717 (note by Rava).
expect that there will be difficult cases, just as there are difficult cases wherever legal lines must be drawn.\textsuperscript{32}

A painter, Lacasse, was commissioned to paint frescoes in a chapel in a small French town. The commission was awarded and the work carried out without the knowledge of the bishop, the owner of the chapel. Eventually, the bishop heard that the frescoes had been done and that there was criticism of them. He inspected them and found them of dubious taste, decided that even modification would not make them acceptable, and ordered them effaced. The artist objected, and litigation ensued. The court found the case to involve a conflict between the right of the artist and the right of ownership and, in this case, found in favor of the owner. Accordingly there was no liability for effacement of the frescoes.\textsuperscript{33}

Two years later, however, another action arose involving destruction of a work of art. In this case the sculptor Sudre had been asked to decorate a public fountain in his native village and had done so by creating a statue of a woman wearing the local costume. Apparently the sculpture was not properly maintained, and finally the city council decided, without a serious attempt at restoration, to have the sculpture removed and destroyed. On a visit to the village Sudre found the pieces of his broken statue used to fill holes in the road. He brought an action against the city council and was awarded substantial damages. The court found that the destruction violated the artist’s moral right of integrity of the work of art.\textsuperscript{34}

The Lacasse and Sudre cases appear to arrive at inconsistent results, but it should be noted that in Lacasse the paintings were executed without the consent of the church’s owner. It is not clear that, had the bishop given prior consent to the execution of the frescoes, he would have been allowed to efface them against the artist’s objection.\textsuperscript{35} As the court of appeal suggested, the artist could sell the work subject to the restriction that it not be exhibited without his consent. In Spain the problem has been anticipated by the statutory provision that the transfer of a work of art does not transfer the right of public exposition in the absence of a contrary agreement. See note 28 \textit{supra}. The effect of such a statute is to transfer the onus of procuring the other party’s assent from the artist to the purchaser. One advantage of such a statute is to remove much of the reason for an action like that in \textit{De Chirico}, and thus to make this kind of line-drawing problem more academic than real.

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\textsuperscript{34} See Sudre v. Commune de Baixas, [1936] D.P. III. 57 (Conseil d'Etat) (note by Waline).

\textsuperscript{35} Professor Waline’s note in the report of the decision of the Conseil d'Etat
other distinction is that in Sudre not only was the statue destroyed, but the pieces of it were used to repair the road. Had the statue's remnants been disposed of in some less public and degrading way, the result might conceivably have been different.36

It is interesting to note that the total destruction cases present a question that has not yet been clearly resolved in any jurisdiction in which the moral right exists: Does the total destruction of a work of art, as distinguished from its distortion or mutilation, violate the artist's moral right? One instinctively assumes that destruction is worse than mere damage—particularly if the damage is reparable—but the opposite may be true. A damaged or altered painting continues to exist and, in its imperfect form, to misrepresent the artist's work. Destruction is sometimes less serious. For example, when the artist's production is very large and the piece destroyed not an outstanding example of his work, the loss to his reputation and honor may be insignificant. But when the work to part of a small total artistic production, or is one of only a few examples of that period in the artist's work, or is an example of his most highly regarded work—perhaps his masterpiece—then it seems clear that the interests protected by the moral right are impaired by destruction.

On balance the argument that destruction violates the right of integrity seems persuasive. It is supported by analogy to the case of the publisher who buys an author's manuscript and then destroys it or merely refuses to publish it or allow others to do so; a remedy based on the moral right is available to the author in such a case under French law.37 Even more significant is the argument that destruction nullifies other rights of the artist, including rights that are in some nations perpetual and inalienable (such as the right of paternity) as well as more limited rights (such as the right of reproduction and the droit de suite) ordinarily retained by the artist.38

How would a United States court have decided these “right of integrity” cases? It is likely that all would have gone against the artist. The moral right of the artist, and in particular that component called the

distinguishes the cases on this basis, as does an unsigned note to the decision on remand. See Sudre v. Commune de Baixas, [1937] Gaz. Pal. I. 347 (Conseil de Prefecture de Montpellier).


right of integrity of the work of art, simply does not exist in our law. 39 Indeed, this proposition is so clear that there are few recorded instances in which artists have attempted to seek judicial protection of interests analogous to those of the moral right of the artist. One outstanding exception is the case of the Crimi v. Rutgers Presbyterian Church, 40 in which Crimi had been commissioned to do frescoes in a church, had executed the commission, and had been paid. Some years later criticism developed within the church’s congregation, and eventually the frescoes were obliterated. Basing his claim in part on the moral right of the artist, Crimi brought an action to compel the congregation to have the frescoes restored or removed and to pay damages. The court denied the remedy and, in doing so, explicitly stated that the moral right of the artist did not exist under New York law or, so far as it could find, elsewhere in the United States. 41 If Crimi wished to retain such rights he would have to do so by contract. 42 It was also held in Vargas v. Esquire, Inc., 43 that the right of paternity, and indeed the entire notion of the moral right of the artist, does not exist in the United States. 44 A


40. 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

41. “Thus, the claim of this plaintiff that an artist retains rights in his work after it has been unconditionally sold where such rights are related to the protection of his artistic reputation, is not supported by the decisions of our courts.” Id. at 576, 89 N.Y.S.2d at 819.

42. The court also held that even if the artist had by express agreement retained the right claimed against the church it would have to have been in writing to be enforceable under the New York Real Property Law, since the fresco was part of the wall of the church building and thus part of the real estate. See id.

43. 164 F.2d 522 (7th Cir. 1947).

44. Vargas was found to have sold certain drawings and the right to use his name (or not use it) to Esquire Magazine. He complained that Esquire published the drawings without his name. In deciding against the artist the court stated: “Plaintiff
right to withhold the work of art, although not necessarily identical to that exemplified in the Whistler case, does, however, exist in our law as a component of the common law copyright.

The basic position in the United States can be summarized in this form: A work of art is like any other object of property for legal purposes, except as modified by the copyright law, and the copyright law protects only property rights. The position in France and other civil law countries is, on the contrary, that a work of art is different for some legal purposes from other objects of property, so that the law of property must be appropriately modified in order to deal properly with the special considerations that are raised by works of art.

There is a curious aspect to some of the legal periodical literature on moral right in the United States. Beginning with the 1955 article by William Strauss one finds both an effort to depreciate the actual extent of protection provided by the right in civil law countries and an earnest attempt to find functional equivalents—remedies that "amount to the same thing"—in our law. Thus breach of implied agreement, unfair

advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called 'moral rights' of the author, said to be those necessary for the protection of his honor and integrity. These so-called 'moral rights,' so we are informed, are recognized by the civil law of certain foreign countries. What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.” Id. at 526.

One reason is that the common law copyright, which is lost by publication, should not be lost through publication without the artist's consent. For a discussion of the right to withhold publication see 1 Nimmer on Copyright §§ 46-59 (1975).

If, as I believe, there is a strong and probably irreversible trend in the United States toward special legal treatment for works of art and artists, then the matter of legal differentiation becomes important. What shall be considered a work of art and who an artist for the purpose of the right of integrity, for example? That question, which is merely one variation of the more general line-drawing problem in the law, is both inevitable and, in an ultimate sense, insoluble. The best working definitions still dispose of only the majority of cases, and it is seldom difficult to find or imagine examples of their inadequacy. However, this is a road we have already begun to travel—for example, works of art are imported free of duty, so it becomes necessary to distinguish those objects which are duty-free from those which are not. See Derenberg & Baum, Congress Rehabilitates Modern Art, 34 N.Y.U.L. Rev. 1228 (1959). There is no indication in the decisions or doctrine that the distinction has created unusual difficulties in France, Germany, or Italy.

See Strauss II, supra note 39.

See, e.g., J. Whicher, The Creative Arts and the Judicial Process 8-32 (1965); Strauss I, supra note 39; Roeder, The Doctrine of Moral Right: A Study in the
competition, libel, and other relatively flexible legal categories are shown to be expandable to include something like the moral right. This posture has been adopted in the context of revision of the Copyright Act50 and undoubtedly contributes to the disinclination to provide explicitly for protection of the moral right in the draft revision.51

Both aspects of this position inaccurately state the law. Consider, for example, the total destruction cases. It is not correct either to equate Crimi52 to Lacasse53 or to ignore Sudre.54 To do so misrepresents the French position.55 The artist created the frescoes in Crimi at the request of the owners of the church; in Lacasse the owner of the church neither requested nor assented to the creation of the mural. Sudre, a later French decision than Lacasse, which did not involve the problem of consent of the owner of the site of the work, held for the artist and is a better precedent for Crimi. It is true that, on comparable facts, a German court has stated, in dictum, that the owner of a house could, without legal liability, totally paint out a mural against the artist's protest.66 It is also true, however, that an Italian court, again in dictum, stated that the right of integrity protects against destruction of the artist's work.67 Thus the European position on destruction tilts in favor of an aspect of the moral right explicitly claimed by the artist and

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50. The article by Strauss was prepared for the United States Senate Subcommittee on Patents, Trademarks and Copyright for use by it in considering proposals for copyright law revision. See Strauss I, supra note 39.

51. The Strauss article, basically a revision of an earlier article, is particularly influential in this context. See id.; cf. S. Berke, The Moral Right of the Artist in the United States and the Proposed Copyright Revision, May 1974 (unpublished paper in author's file).

52. See notes 40-42 & accompanying text supra.

53. See note 33 & accompanying text supra.

54. See note 34 & accompanying text supra.

55. The court in Crimi refers to Lacasse without noting the factual difference. Strauss refers to Lacasse with approval, noting the factual distinction but treating it as insignificant. See Strauss I, supra note 39, at 134-35. Neither mentions Sudre.

56. See Felseneiland mit Sirenen, Judgment of June 8, 1912, 79 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 397. The owner of the house had commissioned the mural and then, offended by nudity in it, had the offending figures clothed by another painter. The artist claimed that this violated his moral right, and the court agreed; the artist's work could not be altered without his consent. Although the question was not at issue, the court also briefly considered the alternative of totally effacing the mural and reached the conclusion stated in the text.

explicitly denied by the court in the only reported 68 American case in point.

Crimi is one of the few American decisions addressing the moral right question, 69 and its response is unequivocal: there is no moral right. The Vargas opinion, cited and quoted with approval by the Crimi court on the moral right question, stated the same view. In a music case, Shostakovich v. Twentieth Century Fox Film Corp., 60 the court found no violation of the composer's claimed moral right, while, on identical facts, a French court found a violation. 61 There is no basis in any reported litigation involving claims of moral right, or functional equivalents of it, to assume that an American court would have enjoined auction of the Buffet panel or publication of one or the other Millet reproduction, that it would have required published notice of the omission of one scene from the Léger stage settings, or that it would have suppressed the Rousseau reproductions. An American court might have awarded relief of the sort the French court granted in Bergerot, 62 since the real interest claimed was a pecuniary one, rather than a mere personality interest.

At the bottom of it all is the significant fact that where the artist claims a violation of a personality interest, rather than a patrimonial interest, the civil law responds and our law does not. That is the real difference.

The matter is far from academic. There has recently been a great deal of publicity about the treatment of the estate of David Smith, an

58. Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). A matter involving the sculptor David Smith is an unreported example of one artist's futile attempt to find a legal remedy against alteration of his work. See notes 63-65 & accompanying text infra. Another American sculptor, Gabe Kohn, is said to have been so enraged and frustrated by an alleged alteration of his work (cleaning off accumulated grime, which he insisted it was part of his artistic intention to let accumulate) and the lack of a legal remedy that he left his dealer and New York. Conversation with Albert E. Elsen, Walter Haas Professor of Art, Stanford University. It seems likely that there are other unreported examples.

59. In Meliodon v. School Dist., 328 Pa. 457, 195 A. 905 (1938), there is no discussion of moral right, perhaps because counsel for the plaintiff did not raise the issue. The plaintiff, a sculptor, sought damages and an order of destruction of work that the defendant had commissioned and subsequently altered without the artist's consent. Relief was denied on technical grounds, but with tantalizing reference to an "adequate remedy at law" that the court did not specify and that seemed in any case to be barred by sovereign immunity. In any event, the artist lost.


62. See notes 23-26 & accompanying text supra.
influential American sculptor. According to published reports,\(^6\) the art critic Clement Greenberg, an executor of Smith's estate, has stripped the paint from some of the sculptures in the estate and has placed others in exposed positions in order to encourage removal of paint by weathering. It is true that unpainted David Smith sculptures are preferred by collectors and museums and bring higher prices in the art market. It is difficult to determine, however, the extent to which this market preference is separable from Greenberg's own activity, since he is an influential critic who has had much to do with the acceptance of and high value placed on David Smith's work and has consistently favored the unpainted sculptures and depreciated the painted ones. Greenberg's action has been described by some critics and experts as "an act of vandalism" and as "an aesthetic crime."\(^6\)

There is evidence that Smith would have objected; at one time he was enraged to learn that an owner of one of his painted sculptures had altered it. He was further angered to find that he had no legal remedy. In his frustration, he attempted to "disown" the work and publicly made statements to that effect.\(^6\) But suppose Smith had lived in France or Italy or Germany (or Argentina, Chile, Colombia, Mexico, Uruguay or Venezuela\(^6\)); he would have been able to compel restoration of the work (and probably could also have received damages).

Who cares? What difference does it make to anyone that an artist's work has been revised without his consent? It seems clear that Smith, if he were still alive, would care. His heirs arguably might care and would, in a civil law nation, have standing to object. There is no indication in the published stories that Smith's heirs have attempted to take corrective action, however, and it might be unreasonable to expect them to do so. The unpainted sculptures have in the past brought higher prices than the painted ones, so the heirs have at best conflicting

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65. For a recounting of the incident together with the text of letters Smith wrote to Art News and Arts Magazine, see Krauss, Changing the Work of David Smith, ART IN AMERICA, Sept.-Oct. 1974, at 30. In the letter to Arts Magazine, Smith wrote: "There seems to be little legal protection for an artist in our country against vandalism or even destruction. . . . Possibly we should start an action for protective laws." Id. at 33.

interests. Even if they have contemplated corrective action, they will have found that our law provides them with very discouraging prospects of success.

If the artist is dead and his heirs do not object, is there a problem? Is it the purpose of the moral right to protect individual interests alone, and if so what are those interests? If there is, in addition, a collective social interest calling for protection, what is its nature? These are interesting questions which deserve more thorough consideration than they can be given here. At a minimum, however, it seems reasonable to suggest the following:

1. On the level of individual interest there is more at stake than the concern of the artist and his heirs for the integrity of his work. There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted and "unimproved" by the unilateral actions of others, even those with the best intentions and the most impressive credentials. We yearn for the authentic, for contact with the work in its true version, and we resent and distrust anything that misrepresents it.67

2. The machinery of the state is available to protect "private" rights in part because there is thought to be some general benefit in doing so. Thus the interests of individual artists and viewers are only a part of the story. Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from.68 To revise, censor, or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.

These truisms are to some extent supported by two related aspects of the moral right that deserve additional comment. First is the rule in many jurisdictions (Germany is a major exception) that the moral right

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67. "My own view is that the paint Smith applied to the surfaces of these works . . . is, at the very least, a faithful expression of Smith's desire to create a sculpture that combined the resources of both color and construction. All evidence of that desire, which so consumed the artist in his later years, has been obliterated with the sandblasting or erosion of the painted surface. In a choice between Smith's partial realization of his ambition and Mr. Greenberg's radical revision of it, one naturally wants the artist's own version. Even an incomplete work by a great artist is preferable to the revisions of an alien hand." Kramer, Questions Raised by Art Alterations, N.Y. Times, Sept. 14, 1974, at 25, col. 2.

68. The text at this point paraphrases, with considerable loss of eloquence, a position frequently advanced by Albert E. Elsen, Walter Haas Professor of Art, Stanford University, in conversations with the writer.
is perpetual. Unlike the copyright, which eventually expires, the moral right continues even though the artist and his heirs have vanished. This naturally leads to the provision of some alternative agent of enforcement, since a perpetual right with only temporary enforcement is an anomaly. The establishment of a foundation or other legal person for this purpose is an alternative that is permitted by French law and has been adopted by several French artists. The statutes of a number of civil law nations also provide for enforcement of the moral right by a public official, clearly in pursuance of a perceived public interest.

Thus, by comparison with the situation in France, Germany, Italy, and many other nations, our law concerning the integrity of the work of art is underdeveloped. In its present state our law does not distinguish rights of personality from patrimonial rights; our law provides no remedy to the artist whose work has been distorted or destroyed; our law provides no way to protect the public interest in preservation of our culture against revision of works of art by unilateral unauthorized action.

The underdeveloped state of our law on this topic is not surprising. The moral right of the artist is a relatively recent growth in France, where it has had its principal development. By the time the moral right began to develop, French art had been of world importance for nearly a century. By comparison, American art has achieved international recognition only in the last two decades; what has been rather lyrically called "the triumph of American art" is a very recent phenomenon. Legal change usually lags behind social and cultural change.

We are now at the opportune historical moment for consideration of this question: Given the cultural importance of American art, should our law be modified in such a way as to protect the integrity of works of art? I believe that the answer to that question is clearly "yes." That does not mean that we should attempt rote adoption of the civil law

69. For the doctrinal basis for the German decision to make the moral right coextensive with the copyright, see A. Dietz, Das Droit Moral des Urhebers im Neuen Französischen und Deutschen Urheberrecht (1968); E. Marcus, The Moral Right of the Artist in Germany, Dec. 1975 (unpublished paper in author's file).

70. See Law of Mar. 11, 1956, No. 57-296, art. 6, reprinted in Copyright Laws, supra note 9.

71. See, e.g., id. art. 20 (France); Law of Apr. 22, 1941, No. 633, art. 23 (Italy), reprinted in Copyright Laws, supra note 9. One writer states that enforcement of the moral right by public officials was rejected in Germany because it offered the possibility that the government would "steer" culture, a sore point in Germany after the Nazi experience. See E. Marcus, The Moral Right of the Artist in Germany, Dec. 1975 (unpublished paper in author's file).
moral right. International experience with the transplantation, as distinguished from the adaptation, of legal institutions has not been encouraging. We can learn from the French-German-Italian-Spanish experience, but we must develop our own method of employing its lessons.  

Since the notion of moral right is foreign in origin, it seems reasonable to ask whether it is in some basic sense alien to American ideals and experience. In this connection it should be emphasized, first, that the moral right is the product of legal development in western, bourgeois, capitalist nations with whom we have deep cultural affinity. Much of our own culture is derived or directly imported from Greece, Italy, France, Germany, and Spain. Even though our legal traditions often seem quite different from theirs, the differences are superimposed on a common, shared cultural base. That is one reason why the occasional adaptation of novel (to us) civil law institutions has been accomplished without undue difficulty. The condominium is a recent example; community property is a somewhat older one. Second, it is difficult to argue that the concern for the right of integrity is very different from more familiar legal concerns, such as the right to privacy and the interest in freedom from defamation and the infliction of indignity or emotional distress. These also are based in part on respect for the personality, identity, and reputation of the individual, and protection of the integrity of the work of art is, in a sense, merely a logical extension of that concern to the peculiar problems of visual artists.

It might be argued that the artist can always protect the interest involved in the right of integrity by including appropriate provisions in the original agreement of a sale of the work, and indeed some artists try to do so. However, for most artists that is not a workable suggestion. They do not, as a general rule, execute formal agreements on the sale of their work. (Perhaps they should do so, but at present few attempt it.) Most have never thought of doing such a thing and would not know how to go at it if the problem were in their minds; others shrink from negotiations and bargaining. Nor is the artist, particularly when young and unknown, in a very powerful bargaining position. If the buyer (or the artist’s dealer) resists, it is hard for the artist to insist.

An additional problem grows out of the fact that works of art change hands. Even if the first owner expressly agrees to respect the
work, there is no way of securely binding his successors. The notion of a servitude of the sort commonly attached to land by private agreement depends for its effectiveness on notice to subsequent takers; a purchaser without notice of the restriction takes free of it. Such a system of servitude works reasonably well for land both because of the system of public records (and the notion of "record notice") and because of the apparentness of many kinds of servitudes to one who physically inspects the land. But there is no equivalent system of public records of transactions affecting paintings, drawings, and sculpture. And most works of art would be unacceptably defaced by any attempt to attach notice of restrictions to them in some permanent and indelible, and at the same time reasonably apparent, way.

For these reasons it seems right to suggest that, if the matter is to be the subject of express agreement, the burden should be on the purchaser. This could most simply be accomplished by establishing a legal right of integrity in the work of art and requiring one who wished to take free of the restriction, or to be subsequently freed of it, to acquire the artist's consent. That, in effect, is the situation under the Berne Convention and in several nations, including Germany.

In France, however, we are confronted by the statutory provision that the moral right is "perpetuel, inalienable et imprescriptible." What this has come to mean with respect to the right of integrity is that waivers of the right by the artist are not enforceable against him. It does not mean that the artist's consent to reasonable modifications of the work is ineffective. The position, developed primarily in the literary and motion picture fields, seems to be that agreement to a specific modification is possible if it seems reasonable and not seriously damaging or distorting to the work. The obvious intention is to prevent the artist from adhering to an agreement he may have been too weak or too innocent to resist.

73. For a discussion of covenants running with the land and equitable servitudes see 2 AMERICAN LAW OF PROPERTY §§ 9.1-.40 (A. J. Casner ed. 1952).
74. See note 9 supra.
75. Law of Mar. 11, 1956, No. 57-296, art. 6, reprinted in COPYRIGHT LAWS, supra note 9. The Italian statute also provides that the components of the moral right are inalienable and adds: "However, if the author was aware of and accepted modifications in his work, he shall not be entitled to intervene to prevent the performance thereof or to demand its suppression." Law of Apr. 22, 1941, No. 633, art. 22, as amended, Law of Aug. 23, 1946, No. 82, reprinted in UNESCO, supra note 9. The French rule of inalienability is also qualified, but in a slightly different way. See text accompanying note 76 infra.
76. See DESBOIS, supra note 7, at 489-95.
Thus three major positions can be identified. One position is that of the United States, which places the burden on the artist to extract an agreement from the purchaser, with the real danger that subsequent acquirers of the work will not be bound by the agreement. The intermediate position, in the Berne Convention and the law of Germany, places the burden on the purchaser to acquire the artist's consent if he wishes to modify the work. The third position, in France (and in Italy, which had a different but comparable rule), places the onus on the purchaser and protects the artist against his own assent unless the modification of the work is a reasonable one to which the artist has specifically assented. There is room for argument about whether the Berne-German or the Franch-Italian position is the preferable one, but little can be said in favor of the United States rule, which leaves the artist with no possibility of adequate protection.

What would be lost by introducing a "right of integrity" into our law? A colleague has suggested that the right may unduly inhibit interpretations of the work, using the example of a brilliant production of a play that the author finds inconsistent with his intention in writing it. The objection illustrates the difficulty of applying examples drawn from one kind of art, such as drama, to another, such as painting, drawing, or sculpture. The performance of a play and the reproduction of a painting are not equivalent, for a variety of reasons. Most fundamentally, a play is meant to be produced, and this necessarily involves interpretation. A painting is meant to be seen, not performed. The proper analogy to reproduction of a painting is reproduction (for example, by publishing) of the text of a play. The moral right of the author would be impaired by a distortion of the play (for example, by substantive changes made in the text without the author's consent) just as the moral right of the painter is offended by unauthorized alteration of his work. The question of the permissible limits of interpretation of a painting (by paintings "after" the work of another artist, parodies, tableaux vivants) is clearly distinguishable from the question of the permissible limits of treatment of the original work itself.

Different forms of creative expression are typically divulged in different ways. A dance or a play is performed, a novel is published, a painting is exhibited. Another significant difference lies in the networks of institutions and relationships associated with the forms of creation. The world of the performing arts, for example, is quite separate from that of the visual arts, and both are readily distinguishable from the literary world. Visual artists, dealers, galleries, collectors, museums, auction houses, art critics, art historians, and the art press
cohere in a dense pattern of complex relationships that gives the visual art world a distinct identity. The performing and literary arts worlds are similarly distinct and coherent and seldom impinge significantly on the visual art world. It should not seem surprising that problems of vital importance to one of these will be of only marginal interest to the others.\footnote{One consequence of the separate existence of a visual arts world, a performing arts world, and a literary arts world is the possibility of overkill. Whatever may have been the perceived threat that led the motion picture and television industries to fear the moral right,\footnote{It can hardly have been concern about loss of their freedom to mistreat paintings and sculpture. Yet, copyright laws and treaties generally lump all protected forms of expression together. This places all forms at the mercy of the one associated with the most powerful interests.} it can hardly have been concern about loss of their freedom to mistreat paintings and sculpture. Yet, copyright laws and treaties generally lump all protected forms of expression together. This places all forms at the mercy of the one associated with the most powerful interests.

It seems unlikely that a right of integrity of works of visual art would impair any respectable social interest. By adding to the catalog of legally enforceable rights it might add to the burden on legislatures, courts, and lawyers. That additional burden can be translated into social cost, but seldom is—and in any case few law reforms are costless in those terms.

A potentially more serious objection is to the possible misuse of the right of integrity. This translates into a concern about the proper initial definition and subsequent judicial treatment of an unfamiliar legal concept. Might it be pressed too far, misapplied, made the basis for plausible but really undesirable claims? That is initially a problem of legal technique: careful legislative draftsmanship supported by thoughtful explanation and documentation is the basic requirement. Beyond that point it is difficult to imagine that the right of integrity would create unusually troubling problems of interpretation and application.

\footnote{An example is the so-called \textit{droit de suite}, or proceeds right, provided for visual artists under French and German law and recently much discussed in the United States. The proceeds right is the right of the artist to participate in the subsequent resale of the work of art. It is not comparable to the author's right to royalties, although the comparison is frequently made—usually by partisans of the proceeds right who argue that artists are treated badly because they do not receive royalties. In fact, an artist who copyrights his work can get royalties for its reproduction, just as the author does for his novel. Moreover, like the American artist, the author has no right to a piece of the price received if the original object itself—his manuscript—is resold by its owner (for example, if the author's manuscript of a Faulkner novel is auctioned.) But as it happens, royalties for reproduction of a copyrighted work are normally of little value to a visual artist and the proceeds right unimportant to an author; conversely, royalties are important to writers and proceeds rights are energetically sought by artists.}

\footnote{See note 9 \textit{supra}.}
It is tempting to dramatize some of the right of integrity cases as conflicts between the right of property and the moral right. In Lacasse,\textsuperscript{79} Felseneiland mit Sirenen,\textsuperscript{80} and Crimi,\textsuperscript{81} so the argument might go, the right of integrity of the artist came into conflict with the right of the owner of the property to which the work was attached, and in each case the artist lost. The force of this suggestion is diminished by language in Crimi and other American cases denying the existence of a right of integrity, so that no conflict of rights arose in them. Lacasse is explainable by lack of the bishop's knowledge of or assent to the frescoes in the church. This leaves Felseneiland mit Sirenen as the only case in point. There the court did wrestle with the suggested conflict and held for the artist; it was only in dictum that the court suggested that the owner might prevail if he destroyed, rather than altered, the painting. That is a slender thread on which to hang so heavy a generalization.

There is another sense in which the right of integrity (and the other components of the moral right) appears to come into conflict with property rights—if by property rights one means the right of the owner to deal with the thing as he wishes. 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. Consequently one whose definition of property rights is based on a priori religious, philosophical, or political preconceptions—as most definitions of property are—may well see the right of integrity as an infringement or limitation of the property right of the owner of the work of art. Conversely, a thorough positivist will insist that property rights are defined (for legal purposes) by the positive legal order, so that the right of integrity—like the law of nuisance or zoning—is merely one element of the legal definition of the right of property and consequently cannot be in conflict with it.

It is only slightly unfair to suggest that the positivist evades the question and the apriorist begs it. That question is how to decide whether to modify the existing law to create a right of integrity in works of art. Strictures about protecting or limiting the right of property seldom advance the rational discussion of that question, since they usually assume rather than seek the answer. Still, it is necessary to address the concern of those who perceive the right of integrity as a threat and who phrase their anxiety in property terms.

\begin{footnotes}
\item \textsuperscript{79} See note 33 \& accompanying text supra.
\item \textsuperscript{80} See note 56 \& accompanying text supra.
\item \textsuperscript{81} See notes 40-42 \& accompanying text supra.
\end{footnotes}
One aspect of that concern can be met by examining the extent to which legitimate expectations are threatened by the right of integrity. At the core of the right is the rule that the owner cannot alter the object itself—the piece of painting or sculpture—without the artist's consent. Does such a rule seriously impair the reasonable expectations of those who acquire works of art? Do American collectors and museums place a significant value on their liberty to change the artist's product?

The more significant and difficult questions arise as one leaves the core conception and moves toward the periphery—toward claims like those advanced in *De Chirico*, *Léger*, *Bergerot*, and *Lacasse*. Those cases suggest extensions of the basic right of integrity, and it is significant that in France, the nation in which the moral right is most advanced, all of them were decided in a manner that should reassure the most anxious property rights advocate. *De Chirico*, *Bergerot* and *Lacasse* were decided against the artist. *Léger* granted only a right to published notice of the alteration.

There remains the nagging question whether these cases were properly decided. In this connection consider *Lacasse* together with *Crimi* and *Léger*. In each case it can be argued that the work of art—frescoes in *Lacasse* and *Crimi* and stage settings in *Léger*—was ancillary to some principal thing—churches in *Lacasse* and *Crimi* and an opera in *Léger*. (Indeed, in *Léger* the court expressly found that the stage settings were ancillary and that the opera existed without them.) These cases thus involve conflicts between claims in different things, not conflicting claims in the same thing. It is not a sufficient answer in such cases that the artist has a right of integrity in the work of art; it is also necessary to show that the defendant's interest in other property should yield to that right. In *Lacasse* the court held for the bishop, who neither knew of nor authorized execution of the frescoes in the church. In *Léger* there was a compromise: the producers of the opera could suppress the scene but had to inform the public (and presumably could not destroy the setting for the scene). The result in *Crimi*, however, is troubling precisely because the resolution was so drastic: effacement of the frescoes in the church, even though they had originally been commissioned by and executed for the responsible congregation. Such a result was possible only because the New York court found no countervailing legal interest in the artist. *Crimi* illustrates an unworthy and intolerable hiatus in our law.

82. See notes 27-31 & accompanying text *supra*.
83. See note 20 & accompanying text *supra*.
84. See notes 23-26 & accompanying text *supra*.
The current copyright revision proposals before Congress include no provisions on integrity of works of art. One reason has already been alluded to: the comfortable, but incorrect, argument that our law already deals adequately with the problem. The matter deserves reconsideration on the basis of a more accurate understanding of the substantial distance that lies between protection of the integrity of the work of art in other parts of the world and the feeble functional equivalents in our law. Only after we have conceded that the distance is appreciable can we begin the dialogue about how to deal properly with the problem it symbolizes.

85. See notes 32-40 & accompanying text supra. Another possible reason for failure to address the question in current copyright revision drafts is the belief that the matter is one for the states. Emphasis on a distinction between copyright and rights of personality reinforces that view, while the habit of including moral right protection in national copyright laws and the Berne Convention argues for assimilation of the right of integrity to the copyright clause of the United States Constitution. See Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 Stan. L. Rev. 499, 518-19 (1967).