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Title:
Avoiding another Bonfire of the Vanities

the Right to Object to Destruction under Moral Rights Doctrine

Avoiding another Bonfire of the Vanities: the Right to Object to Destruction under Moral Rights Doctrine

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A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of PhD in the Faculty of Social Sciences and Law, University of Bristol Law School, March 2018

91, 583words

ABSTRACT

At the heart of the research underpinning this thesis is the question of why moral rights doctrine in common law jurisdictions ignores the possibility of creators having a legitimate claim to protection when faced with the destruction of their creative works. It is a question rarely examined or analysed in depth by the courts or legal commentators. The thesis posits that this lacuna in the doctrine undermines its threefold role as protector of a creator's personality rights, a buttress against the erosion of cultural heritage, and a counterbalance to the overtly utilitarian and commercial nature of the copyright regime in common law countries. The thesis also critically examines the standard arguments raised against the recognition of such a right for creators. In the process, the research engages with a variety of sources from without the common law, namely, the ontology of art, the Roman concept of *Iniuria*, and anthropological studies on the concept of honour: sources not previously examined and applied in the context of this question. The research question is examined in the context of the United Kingdom's utilitarian copyright regime, whose weak moral rights doctrine arguably undermines the nation's artistic and cultural heritage. Lessons are sought from an appraisal of the cultural settings and moral rights regimes in other common law countries: Singapore, US, Australia and India. The underlying interdisciplinary and comparative law methods employed in the research ultimately aim to construct a case for the United Kingdom to embrace a widening of its moral rights, allowing its creators to object to the destruction of their works.

ACKNOWLEDGEMENTS

It seems a lifetime since I started on the PhD journey. Along the way, I have received much generous help and support from my supervisors, colleagues and family, and I cannot thank them all enough.

I have had the fortune of having three leading IP scholars as supervisors during my time at Bristol. I benefitted much from the invaluable advice and guidance given me by Professor Aurora Plomer and Dr Sujitha Subramaniam, for which I will always be grateful.

My most heartfelt thanks must go to my primary supervisor, Professor Andrew Charlesworth, who supervised my work from start to completion, for his unstinting support and advice, maddening attention to detail, his great sense of humour, and for pushing me always to raise my game. He has, over time, managed to (just!) cure me of my tendency to indulge in 'purple prose' and my penchant for archaic terminology.

Apart from the aforementioned (sorry for another archaic term, Andrew!) there are several other lovely people at Bristol to whom I must give acknowledgement and thanks for their help, support and guidance. Professor Tony Prosser and Ms Nina Boeger, for their critical eye and advice during my upgrade viva. Professor Joanne Conaghan, for believing in me and appointing me to a lectureship at this wonderful university. Professor Antonia Layard, for always lending a sympathetic ear and for all her sagely advice over coffee at the Boston Tea Party café, which have certainly helped to keep me sane throughout. And Mrs Stephanie Dimberline, for helping me through all the administrative headaches throughout the process.

I also wish to thank the Modern Law Review for the award of a two-year scholarship in support of my PhD studies.

Above all, I thank my family. My parents, Cheng Poh Yuen and Tjong Njie Tjhoen, for having encouraged my voracious reading habit and obsessive love for music and the arts. My brother, Dr Kenny Cheng, for always being so generous and thoughtful, even though I was as a child, and still am, the most annoying little sister. My two wonderful children, Tirion and Geraint for their unconditional love, infectious laughter, constant stream of tricks and jokes – they inspire me always. And, my husband Col, for his belief in me, dedication, incredible patience and the many mugs of hot, milky, sugary builder's tea which would appear magically on my desk – thanks from the bottom of my heart.

Author's declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Tania Cheng-Davies DATE: 19 October 2018

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Part I: Research Context

Chapter 1 - Introduction

> *It is not a legal question. It is a moral question. They have violated two fundamental elementary rights, the right of the artist to create, to express himself, and the right to receive the judgment of the world, posterity.*
>
> Muralist, Diego Rivera, on the destruction of his mural *Man at the Crossroads* (1933).[1]

1. Background

It might strike one as strange that, while the law is likely to protect fibreglass geese from having to wear ribbons,[2] it may be powerless to protect the same fibreglass geese, or indeed any work of art, from total destruction at the whim of its owner.[3] This is, however, the likely position in most jurisdictions, and the number of instances in which valuable or important works have been deliberately destroyed, leaving their creators bereft of any recourse, is considerable. A well known example in the United Kingdom (UK) is the destruction of Graham Sutherland's portrait of Sir Winston Churchill, reportedly within a year of its unveiling in 1954, another the destruction of a portrait of Bernard Breslauer painted by Lucien Freud, whose artworks are guaranteed a seven figure reserve price whenever they are placed on the market.[4] It was widely believed that Breslauer himself destroyed the painting as he had objected to how the famous artist had depicted his distinctive double chin.[5] In Canada, *Corridart*, an ambitious eight kilometre long installation, created by fifty Quebec artists specially for the Montreal Olympic Games in 1976, was destroyed by the city days before the Games began, on the basis that 'too many of the works showed unfavourable images of the city, its people, its growth.'[6] In 2013, graffiti artists appealed in a New York court against the demolition of 5Pointz: the Institute of Higher Burnin', a sprawling warehouse used, since the 1990s, simultaneously as an outdoor exhibit for legal graffiti and as a complex of artist studios. The appeal failed and on 19

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1 'Row on Rivera Art Still in Deadlock' *The New York Times* (New York, U.S.A., 11 May 1933).

2 These are the facts in the Canadian case of Snow v The Eaton Centre Ltd. (1982) 70 C.P.R. (2d) 105. *Flight Stop*, by sculptor Michael Snow, is a giant mobile of geese in flight, suspended from the galleria in the Eaton Centre shopping complex, Toronto, Canada. When the necks of the geese were adorned with ribbons for the Christmas season in 1981, Snow invoked his right to object to this act on the basis that it breached the integrity of his work. An injunction was granted by the Ontario High Court.

3 As noted by Stina Teilmann, 'Framing the law: the right of integrity in Britain' (2005) 27 European Intellectual Property Review 19.

4 Andrew Pierce, 'Lucien Freud portrait worth milllions destroyed by sitter' *The Telegraph* (London, 26 August 2008) <http://www.telegraph.co.uk/news/uknews/2625544/Lucian-Freud-portrait-worth-millions-destroyed-by-sitter.html>.

5 ibid.

6 Archives Canada, Corridart Collection (undated) <https://archivescanada.accesstomemory.ca/corridart>.

November 2013, the visually dramatic artwork on the exterior walls of 5Pointz was whitewashed overnight and in August 2014, the entire complex was finally demolished.[7]

The loss of even one work of art may be keenly felt, not only by the aficionados of art, but by the national or indeed the world community at large. As Professor Joseph Sax articulated in the introduction to his book, *Playing Darts with a Rembrandt*,

> ...to destroy a work of art is an act of vandalism, a triumph of ignorance over genius; so there is the rending of a value that is important to the community, a symbolic loss that can occur to others even though the thing destroyed was not theirs.[8]

The area of law in question is that of copyright generally, but more specifically, moral rights doctrine, which encapsulates a bundle of rights that aim to protect a creator's relationship with his creation. While copyright law governs the economic rights of a creator, for example, by granting the creator exclusive rights to make copies of his own work, or to distribute copies of his work, moral rights doctrine focuses on the creator's personal and spiritual relationship with his work, even after he has divested himself of his copyright, for example, by ensuring that his works are correctly attributed to him, or that they may not be treated in a derogatory manner. The scope and variety of moral rights differ from jurisdiction to jurisdiction.[9] Where the destruction of creative works is concerned, the relevant moral right is the right of integrity, which is generally the right of the creator to object to the mutilation or distortion of his work.

In jurisdictions which recognise moral rights in some form or other, including the right of integrity, it is generally accepted that the creator may object to a mutilation or deformation of his work, which is the traditionally accepted ambit of the integrity right. However, most of these jurisdictions fail to consistently recognise the author's right to object to the complete destruction of his work. Why this is so is curious. Unlike the mutilation of a work, the act of destroying a work is irreversible and leaves absolutely nothing behind which may be salvageable. Thus, it is surely reasonable to imagine that destruction would have a more detrimental impact on creators than mere mutilation and as such, there is a case for recognising a creator's right to object to destruction of their work. Whether moral rights doctrine can legitimately encompass such objection is a question that

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7 On 12 February 2018, the artists at 5Pointz were awarded $6.7 million in damages. This case is discussed in more detail in chapter 9.

8 Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 2.

9 Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) 1.

even civil law jurisdictions where moral rights receive extensive recognition, such as France and Germany, have yet to resolve satisfactorily.[10]

2. Aims of Thesis

It will be argued that the failure to recognise an author's right to object to the complete destruction of his work, consistently and robustly, suggests a logical inconsistency in the interpretation of the integrity right; one which undermines the aims of moral rights doctrine. Destruction has been described as the 'ultimate form of *mutilation*',[11] and as with acts of mutilation that leave the work in existence and salvageable, the clear subtext to a destruction of a work is, in the absence of a valid and legitimate reason, one of utter disrespect to its author. If the underlying ethos of moral rights doctrine is protection of the personality rights of the author,[12] then it might appear reasonable for the courts to interpret the right of integrity as including a right to object to an act of destruction that is disrespectful to the author. Since this interpretation is not applied in many jurisdictions that recognise moral rights, and is reluctantly and inconsistently addressed in the remainder, it is argued that there is a fundamental flaw in the right of integrity, one which may indicate a problem with the moral rights framework as a whole.[13]

In tandem with the role of moral rights in protecting the personality rights of the author, one should also consider the potential cultural role of such rights. The destruction of a unique work of art deals a blow not only to the unique cultural heritage of a particular country, but also to international cultural diversity. The destruction of an unique work of art, whether a wholly unique and one-off

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10 J.H. Merryman, 'The Refrigerator of Bernard Buffet' in J.H. Merryman (ed), *Thinking About the Elgin Marbles - Critical Essays on Cultural Property Art and Law* (Kluwer Law International Ltd 2000) 316, 327. The recognition of such a right is either denied outright or considered ambiguous according to some scholars: Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' [The University of Chicago Press for The University of Chicago Law School] (1997) 26 The Journal of Legal Studies 95, 110; Cyrill P. Rigamonti, 'Deconstructing Moral Rights' (2006) 47 Harvard International Law Journal 353, 371; Martin A. Roeder, 'The Doctrine of Moral Right: a study in the Law of Artists, Authors and Creators' (1940) 53 Harvard Law Review 554, 569. According to others, there is clear recognition in some countries: Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) 245.

11 Jacques de Werra, 'Le droit a l'integrite de l'oeuvre. Etude du droit d'aauteur suisse dans une perspective de droit compare' in H. Hausheer (ed), *Etudes de droit suisse* (Staempfli Editions 1997), translated by Teilmann-Lock in Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 207. Alternatively, it is considered as an act of utmost contempt: William Patry, *Copyright Law and Practice*, vol 2 (The Bureau of National Affairs, Inc. 1994) 1044 fn 128.

12 This is a widely accepted concept. See Adeney (n 9) 3 para In.07; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 7-9; Davies and Garnett (n 10) 5; Susan P. Liemer, 'Understanding Artists' Moral Rights' (1998) 7 Public Interest Law Journal 41, 44; John Henry Merryman, 'The Moral Right of Maurice Utrillo' (1995) 43 The American Journal of Comparative Law 445, 446; Merryman (n 10) 316, 318.

13 Fiona MacMillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier and Stina Teilmann (eds), *Art and Law: The Copyright Debate* (DJOF Publishing 2005) 72.

piece such as a painting or sculpture, or a musical score which has yet to be copied or recorded, arguably represents an irretrievable loss to future generations. The moral rights lacuna surrounding the destruction of works raises questions about the role of the law of moral rights in preventing such losses, and its ongoing effect upon cultural heritage preservation and future artistic development.

The argument for a two-pronged role for moral rights as firstly, a protector of the creator's personality rights, and secondly as a bulwark against the dissolution of cultural heritage, although rarely made, is not an entirely new one.[14] Sundara Rajan, for example, is the most recent advocate of this approach.[15] In *Moral Rights*, she argues strongly that the integrity right 'has two distinct objectives: the preservation of cultural heritage, and the protection of an author's reputation.'[16] In her article on moral rights in India, she emphasised that 'moral rights can make an important contribution to culture', particularly in developing countries.[17]

However, there is also a possible third string to the doctrine's bow: that of performing as an effective counterbalance to the overtly commercial and utilitarian leanings of the common law copyright regime.[18] Essentially, this might address a common criticism of the copyright regime in the common law, which is that it overemphasises the economic rights of creators and ignores or pays little heed to the inner or spiritual drives of the creator.[19]

This thesis seeks to show that, by countenancing destruction, the roles of moral rights are effectively undermined. In making this point, this thesis will focus on the United Kingdom's implementation of moral rights within its Copyright Designs and Patents Act 1988 (CDPA), the reasons for which are set down below.

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14 Cheryl Swack, 'Safeguarding artistic creation and the cultural heritage: a comparison of droit moral between France and the United States' (1998) 22 Columbia Journal of Law & the Arts 361, 364; Arthur L. Jr. Stevenson, 'Moral Right and the Common Law: A Proposal' (1953) 6 Copyright Law Symposium 89, 92; Adeney (n 9) 4; Hector L. MacQueen, 'Copyright Law Reform: Some Achievable Goals?' in Fiona MacMillan (ed), *New Directions in Copyright Law*, vol 4 (Edward Elgar Publishing 2007) 55, 66 (stating that '…copyright's cultural purpose is most evident in the moral rights.').

15 Rajan (n 12) 45-47.

16 ibid., 45.

17 Mira T Sundara Rajan, 'Moral Rights in Developing Countries: The Example of India - Part I' (2003) 8 Journal of Intellectual Property Rights 357.

18 Fiona MacMillan, 'Public Interest and the Public Domain in the era of Corporate Dominance' in Birgitte Andersen (ed), *Intellectual Property Rights: Innovation, Governance and the Institution Environment* (Edward Elgar Publishing 2006) 61-62; Rajan, 'Moral Rights in Developing Countries: The Example of India - Part I' (n 11) 357; Fiona MacMillan, 'Hans Christian Anderson and copyright today' in Helle Porsdam (ed), *Copyright and Other Fairy Tales* (Edward Elgar 2006) 88.

19 Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010); Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 Columbia Journal of Law & the Arts 297.

2. Structure of Thesis

The thesis is divided into three parts. Part I, which consists of this chapter, as well as chapters 2 and 3, puts the research query into context. Part II, consisting of chapters 4 to 7, interrogates the traditional arguments which have been raised against the recognition of any right to object to destruction, while Part III, consisting of chapters 8 and 9, examines relevant moral rights legislation in Singapore, the USA, Australia and India, in the context of their particular cultural backgrounds. The concluding chapter 10 offers a summary of the preceding chapters, emphasising the key points and arguments raised, before recommending other directions research in this area may usefully take.

Part I – Research Context

Chapter 2 firstly examines the roles and aims of copyright and moral rights in the UK in more depth and detail. It will argue that the failure of moral rights to consistently recognise a creator's right to object to the destruction of his work, undermines each of these roles, and ultimately, the very premise of the moral rights doctrine. Chapter 3 aims to explain why the destruction of art is damaging to artistic evolution and development, the preservation of culture and to society in general. It exemplifies this by highlighting some notable examples of art destruction. By evoking the brutality, senselessness and finality of destroying Botticellis, Picassos and other masterpieces, it aims to show that the sense of loss is keenly felt. It then focuses on the question as to why the fine arts are intrinsically valuable, which serves to underpin the claim that this thesis ultimately makes: that the fine arts are deserving of protection from destruction, and that moral rights doctrine is the means to address this claim.

Part II – Deconstructing Traditional Approaches to the Integrity Right and Destruction

The core originality of the thesis lies in Part II, which critically appraises the traditional arguments against the recognition of a right to object to destruction and identifies key counterarguments. These arguments are as follows:

1. As an artistic work, once created, remains in existence at least conceptually and in the public's perception, despite the destruction of its physical state,[20] it has been argued that it is redundant to create a right to object to destruction. This thesis argues that this contention fails to take into account the idea that the physical structure of an artwork is an integral part, and that both its physical and conceptual aspects are inseparable,[21] which is prima facie the case

[20] Augustin Waisman, 'Rethinking the moral right to integrity' (2008) 3 Intellectual Property Quarterly 268.

[21] Terry Barrett, *Criticizing Art: Understanding the Contemporary* (Second edn, Mayfield Publishing Company 2000) 63; Arnold Isenberg, 'Perception, Meaning and the Subject-Matter of Art' (1944) 41 The Journal of Philosophy 561; David F. Bowers, 'The Role of Subject-Matter in Art' (1939) 36 The Journal of Philosophy 617.

for sculptures.[22] Essentially, two questions are posed in dealing with the definition of 'work' where artistic works are concerned, firstly the question as to whether the material aspect, i.e. the medium, of a work of art is a fundamental and essential element of the same, and secondly, whether art can be destroyed, both of which are issues which have been subject to considerable scrutiny by art philosophers. A discussion of the ontology of art is therefore an important contribution to the present debate, where issues regarding the law and those regarding art intersect.

2. It is generally accepted that the integrity right is the right of the creator to object to acts of mutilation, distortion, modification or other derogatory treatment of his work 'which would be prejudicial to his honour or reputation'.[23] Hence, mere modification or mutilation will not infringe the integrity right; it has to be also prejudicial to the honour or reputation of the creator. It has been argued that, because destruction of a work leaves nothing behind which may affect or prejudice the *reputation* of the creator, it follows that the act of destroying the work cannot be an act which affects or prejudices the *reputation* of the creator.[24] While it remains arguable that the creator's reputation may not be affected in this way, the authorities are silent as to whether *honour* remains unaffected by destruction. It will be argued that honour should be considered as fully as reputation. We should explore more fully the question as to whether the destruction of a work prejudices the *honour* of its creator. To this end, the thesis firstly draws an analogy with the Roman law concept of *Iniuria* in formulating a definition of *honour*, supported by insights gleaned from seminal anthropological studies on honour before contending that the destruction of a work will prejudice its creator's honour.

3. It is argued that property rights trump the moral rights of creators, in that owners of creative works possess the prerogative to do as they wish with those works. In countering this argument, this thesis argues that the owners of unique pieces of fine art are placed in a position of responsibility, indeed stewardship, for the maintenance of such works.

4. It has been argued that the wording of s.80 CDPA, which implements Art.6*bis* Berne Convention and sets out the integrity right, precludes a right against destruction. A close analysis of both provisions will reveal that such an interpretation is not necessarily definitive.

These arguments will be examined primarily in the context of the common law jurisdictions, in particular, the UK for the following reason. While it will be argued that the moral rights regime

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22 Deming Liu, 'English copyright law makes the poor "snowman" poorer' (2013) 35 European Intellectual Property Review 674, 680.

23 Article 6*bis* (1) Berne Convention.

24 Berne Convention Article 6*bis* does not refer to destruction. See S. Ricketson and J.C. Ginsburg, *International Copyright and neighbouring rights: the Berne Convention and beyond* (Oxford University Press 2006) 316, para. 6.96.

provides a critical and perhaps essential counterpoint to the more utilitarian approach of the common law copyright regime as a whole, it is clear that moral rights doctrine has never developed fully in the common law countries. In contrast, the establishment and role of moral rights in the civil law countries is already well known, as are the tensions between the civil and common law jurisdictions over the nature and scope of the legal protection to be afforded to creators for their creative work. Much has already been written about these differences in the moral rights regimes between the civil and common law countries,[25] and the thesis will not explore these differences in detail. Reference to the existing literature on this aspect will of course be made in informing the research and thesis but only where this is relevant and necessary.

While inspiration and ideas may be gleaned from the civil law countries, it is not argued that the moral rights regime in the common law countries would benefit from a slavish copying of the moral rights regime in their civil law counterparts. It is instead argued that the reason why the destruction of works has been overlooked is that moral rights regimes in common law jurisdictions have placed undue emphasis on the 'reputation' of authors. This reflects the approach of the common law jurisdictions in formulating their copyright law and moral rights doctrines, which places primary emphasis on a utilitarian approach to protecting the economic incentives in producing creative work e.g. the ability to prevent reproduction of works. As a result, copyright law and moral rights doctrine as practised in these countries fail to adequately recognise other aspects of the creative process.

Moral rights in the civil law jurisdictions extend further, seeking to protect the more personal aspects of the creative process, i.e. the respect due to the author and the integrity of his work. This reflects the position that creators are not solely concerned about the copies made by others and resulting lost sales, but are equally, if not more, concerned with the integrity of their works. The dominance of the common law approach to intellectual property in the Twenty-first Century, however, means that the more expansive civil law understandings regarding moral rights have perhaps received less legislative and judicial attention in the common law world than they merit.

One of the aims of this thesis is to demonstrate that even if a jurisdiction recognises a right to object to mutilation which upsets the integrity of an author's work, this alone does not go far enough. A right to object to mutilation which amounts to the utter destruction of the work must also be recognised if the moral rights doctrine is to fulfil its role as an effective counterbalance to the utilitarian approach of the copyright regime in common law countries. The UK, as the ancestral seat of the common law, has conceived a copyright regime based on utilitarian aims and has only relatively recently and reluctantly enshrined a version of moral rights doctrine within its copyright

[25] See general discussions in the comprehensive texts on Moral Rights by Davies and Garnett (n 10), Adeney (n 9) and Rajan, *Moral Rights: Principles, Practice and New Technology* (n 12).

legislation, despite its rich artistic and cultural heritage: such it encompasses a novel set of factors that makes it an ideal jurisdictional case-study.

Part III – Evaluating the different approaches and influences of selected legal regimes

In its third and final part, the thesis engages in an analysis of the moral rights regimes in Singapore, the US, Australia and India. The US and Singapore provide interesting points of contrast with the UK where moral rights are concerned. While, unlike the UK, the US does not recognise the moral rights doctrine in its entirety, certain states have nevertheless recognised the integrity right to some extent, and in 1990, federal legislation, the Visual Artists Rights Act (VARA) of 1990, recognised the right to object to the mutilation and destruction of artworks of stature. Singapore, although it has enthusiastically promoted itself as a staunch defender of intellectual property rights, does not recognise moral rights, and in the name of development, has permitted the destruction of public artworks or removal of site-specific works with impunity. The question explored here is why these jurisdictions have approached the issue in such contrasting ways, taking into account their cultural and social backgrounds.

Singapore is a relatively young nation and is routinely accused of giving scant attention to the arts or cultural heritage. By contrast the UK has a long and proud cultural and artistic heritage, yet where moral rights are concerned, the protection the UK affords its artists is little better or stronger than that offered by Singapore. While the lack of moral rights in Singapore may be explained by its young age and even younger arts and cultural scene,[26] it is hardly the case in the UK, with its long and rich history of protecting and encouraging the fine arts. Lessons however may be learned from the US' experience since its enactment of VARA, and to ascertain if their approach towards the integrity of art works and rights of artists would be suitable for the UK.

Reference will also be made to the relevant legislative provisions of India and Australia, both also jurisdictions within the common law system. India, through a few High Court cases, has recognised a right to object to destruction on the basis of protecting cultural heritage,[27] while Australia has very recently amended its copyright legislation to allow for a right to object to destruction of works in limited circumstances, subject to certain conditions and restrictions. Again, ideas as to their approach and practice will assist in formulating best practice in the UK where the integrity right is concerned.

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[26] Merryman (n 10) 334; Swack (n14) 364.

[27] *Amarnath Sehgal v Union of India* (2005) 30 PTC 253 (Delhi); *Jatin Das v Union of India and others* CS(OS) No. 936 of 2012, April 10, 2012 (Delhi High Court).

4. Research Questions

In addressing the aims which are articulated above, and developing an argument that the failure to recognise a right to object to the destruction of works within the moral rights framework is indefensible, the questions this thesis will examine are:

1. Does moral rights doctrine recognise a right to object to destruction? Should it? Why is there uncertainty as to the existence of the right?
2. What are the aims of moral rights? Does failure to recognise a right to object to destruction undermine such aims?
    a. If an aim of the moral rights doctrine is to protect the integrity of authors and to recognise their personality rights, does failure to allow authors to object to destruction of their works undermine that aim?
    b. If an aim of moral rights doctrine is to assist in preserving cultural heritage, does failure to allow authors to object to destruction of their works undermine that aim?
3. How does destruction of artworks affect artistic and cultural heritage? Is it a pernicious idea or is it actually beneficial to the development and progress of art? Does the failure to fully protect authors from mutilation or destruction have an effect on the social fabric of the society in which the authors reside?
4. If the moral rights doctrine were to recognise a right to object to destruction, then what form should this right take, should there be any exceptions to the right, and what might be considered the best practice?
5. Taking the United Kingdom as the main focus, critical insights drawn from the other common law regimes in the US, Singapore, India and Australia, how have cultural and social issues shaped how different common law jurisdictions have approached a right to object to destruction, and what have been the outcomes?

5. Limitation of Query to fine art

While the thesis will make reference to all types of creative works, literary, musical or artistic works, it is intended to focus the query in the thesis mainly on the destruction of visual fine art works, as opposed to the other types of creative works which are protectable under copyright law. For the purposes of this thesis, ‘fine art’ is given its contemporary ordinary meaning, and takes its definition from the Oxford English Dictionary: ‘the visual arts, esp. painting and sculpture, [whose products are intended to be appreciated primarily or solely for their aesthetic, imaginative, or intellectual

content]'.[28] The reasons for this limitation are as follows. Generally, especially in the age of digitisation, the impact of destruction of textual works, such as literature or music, is minimal. For the purposes of copyright law and moral rights, the protectable essence of textual works lies in their *content*, not their physical embodiment, of which copies are almost invariably made, and increasingly stored and reproduced digitally.

The same might possibly be said of artworks, i.e. that the representation, imagery, or subject-matter is the protectable aspect of an artwork, not its physical support. Copies are frequently made of famous paintings, as postcards, calendars or prints. The destruction of the original painting would leave the *content* intact, and furthermore, through their copies, their protectable content would remain accessible indefinitely.

However, the reality is that an original artwork is a *wholly unique entity*, which once destroyed, is utterly irreplaceable. It is obvious that the effect of destruction of even the first edition of a literary work is nowhere near as devastating and irrevocable as that of an original artistic work, hence the reason for focusing on artworks: their requirement for moral rights protection is more pressing.

It should also be noted that where countries have legislated on destruction of copyright works, they have invariably focused on the destruction of *artistic* works,[29] probably recognising that the total destruction of an original canvas or sculpture is utterly irredeemable.[30]

6. Methodology

The primary focus of the research is moral rights doctrine, a well established legal doctrine situated within the law of copyright. On the basis that the doctrine as implemented in the UK appears to lack any recourse for the destruction of creative works, its validity is questioned and analysed in this thesis, by employing the following approaches:

1. An interdisciplinary approach in analysing the extent to which copyright law and the moral rights doctrine impact upon creators and their works, utilising perspectives drawn from relevant non-legal disciplines, such as art philosophy and anthropology as well as other legal fields, for example Roman law, the law of property and personality rights.

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28 Oxford English Dictionary, *"fine art, n."* (Oxford University Press).

29 Examples of such jurisdictions include the US, Switzerland, Australia and Portugal.

30 This was recognised during the debates on VARA. In his statement presented to the Subcommittee on Courts, Intellectual Property and the Administration of Justice Hearing on H.R. 2690 VARA, the Honourable Mr Edward J. Markey made references to the 'irretrievable and irreparable damage' to art works and states that 'this legislation [i.e. VARA] is limited to a class of copyrighted works that is unique and clearly distinguishable from every other class of copyrighted material. The specific language of the bill addresses only works of which there is no multiplicity'.

As the main purpose is to study the encroachment of copyright law into the artistic realm, it is inevitable that the thesis should also engage with the works and opinions of artists and art philosophers. In a sense, because of this encroachment, this thesis is situated within the fledgling interdisciplinary area of 'art law',[31] which is in reality, a series of the law's encounters with art rather than a homogenous body of law.[32] The law and the arts have crossed paths in countless instances, ranging from issues relating to copyright, obscenity, customs and duties, and taxes. Problems in aesthetics have therefore necessarily been the subject of considerable judicial deliberation, although unfortunately usually without the assistance of or reference to any of the established aesthetic theories or expert opinion.[33] The courts' reluctance to enlist the help of experts in the field is explained by Lord Simon in *Hensher*,[34]

> ...the court will endeavour not to be tied to a particular metaphysics of art, partly because courts are not naturally fitted to such matters and partly because Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics...

Since the interpretation of art is left to the courts' own devices and the instances in which aesthetic problems arise vary enormously in terms of their legal context, the law has not been able to fashion a universal definition or conception of art. Different statutes govern these instances, and dictate how art is defined according to their various underlying policies. It is not the intention to argue here that the law should necessarily forge a single unifying meaning of art, an impossible task given the number of conflicting art theories which abound and the difficulty with which art philosophers, scholars and artists themselves have in pinning down and agreeing on a single definition. Instead this thesis is premised on the belief that the law should not ignore these theories and should instead embrace and engage with them, in order to arrive at the *best* result for any particular set

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31 Art law is an established discipline in some US law schools. The origins of the discipline can be traced back to Professors John Merryman and Albert Elsen who, in 1979, published the seminal text of the subject: Law, Ethics and the Visual Arts, to be used in conjunction with the art law course taught at Stanford Law School. In the UK, Professor Costas Douzinas of Birbeck College London leads research in this area.

32 Christine Haight Farley, 'Imagining the Law' in Austin Sarat, Matthew Anderson and Cathrine O. Frank (eds), *Law and the Humanities An Introduction* (Cambridge University Press 2014).

33 Peter Karlen, 'Legal Aesthetics' (1979) 19 British Journal of Aesthetics 195, 209; Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998), chapter 2; Farley (n 32) 307-310; Costas Douzinas and Lynda Nead (eds), *Law and the Image: the Authority of Art and the Aesthetics of Law* (University of Chicago Press 1999) Introduction 1-18.

34 *Hensher v Restawhile* [1976] AC 64, 94-95.

of circumstances which presents itself before the court.[35] At the present moment, the law's treatment of art in all these varying instances not only lacks coherence but also lacks validity as the law employs uniquely *legalistic* tools, such as precedent, analogy and common sense, to deal with artistic problems,[36] instead of employing art theories and definitions which would be more readily understood by the people and institutions most affected by legal decisions made on artistic problems and cases.[37] As a result, the law's current approach to artistic issues not only results in jurisprudential uncertainty which may impact unduly upon key players in the art world,[38] but also contributes to the handing down of unsatisfactory judgements.[39] It has long been recognised that the traditional approach of the law toward art is unsustainable and that a more imaginative response is required in order to address pressing legal problems.[40]

The tendency of the law to treat art with dispassion and objectivity has been the subject of scholarly scrutiny in the field of art law. The first major law journal in the wider interdisciplinary field of Law and the Humanities, of which art law may be considered a subset, the *Yale Journal of Law and the Humanities* was launched to explore such issues as well as to counter and question the rival interdisciplinary field of Law and Economics which purports to inject a 'scientific' approach to the study of law. In its pilot issue, the

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35 Farley (n 32) 310 (Farley refers to a number of legal commentators who exhort against judges making aesthetic determinations); Karlen, Legal Aesthetics (n 33) 210.

36 Karlen, Legal Aesthetics (n 33) 210.

37 In one rare instance, unlike his fellow judges in the case of *Hensher v Restawhile* (n 34), Lord Simon of Glaisdale discussed art theory and the history of the Arts and Crafts Movement in delivering his judgment.

38 For example, copyright law's taxonomic approach in categorising artistic works based on their medium is problematic for modern creators today whose works fall between categories, and hence do not qualify for copyright protection. Another example lies in how copyright law's stance on appropriation impacts upon or constrains 'the impulse of modern artists to use, refer, quote, challenge and praise the imagery that pervades the visual environment, thus placing unacceptable limitations upon artistic activity and free expression'- Daniel McClean and Karsten Schubert (eds), *Dear Images: Art, Copyright and Culture* (Ridinghouse 2002), 29.

39 For example, with respect to copyright's requirement of fixation, although not explicitly expressed for artistic works in the UK CDPA, the courts nevertheless have assumed such a requirement: see *Merchandising v Harpbond* (1983) FSR 32 in which Adam Ant's make-up was denied copyright protection. In Australia, the court denied that an artistic work which produced shifting sand patterns was a sculpture for the purposes of copyright law: *Komesaroff v Mickle* (1988) RPC 2204. The implication is that ephemeral works may not qualify for copyright protection: see ibid, 19. Also see Keith Aoki, 'Contradiction and Context in American Copyright Law' (1991) Cardozo Arts and Entertainment Law Journal 303 in which the author suggests that distinctions used in copyright law to resolve cases have resulted in 'confusing, inconsistent and erratic decisions'.

40 There is a growing body of scholarship that advocates a legal approach which engages more fully with input from artists and incorporates a better understanding of art, the world it inhabits and its practices. See e.g. Farley (n 32); Kearns (n 33); McClean and Schubert (n 38); Anne Barron, 'Copyright Law and the Claims of Art' (2002) 4 Intellectual Property Quarterly 368.

journal's editors reasoned that 'the study of law must be informed by an examination of the socio-cultural narratives that shape legal meaning and empower legal norm'.

In recognition of that stance, this thesis adopts a cultural analysis of the law in the area of copyright, rather than an economic or scientific approach. Rather than endeavouring to demonstrate the economic impact of the destruction of valuable works of art, it is intended to demonstrate the social and cultural value of such works, the consequent damage wreaked on the public through the destruction of such works, and the failure of copyright law to prevent or ameliorate such damage. Much of the current discourse on the copyright regime and the moral rights doctrine is set within a Law and Economics framework,[41] but in adopting that framework, ideas, knowledge and culture are assessed in purely monetary terms, and social benefits e.g., 'scientific progress', 'a more vibrant public sphere', are priced at zero, a trend criticised by some copyright scholars.[42] More pertinently, while acknowledging that moral rights can be analysed and understood through an economics framework, Ong argues that it fails to fully account for the respect and recognition moral rights accord to artists.[43] It has also been argued that 'aesthetics offers the law a rich and vibrant debate about both the nature of art and definitional approaches' and that 'the result would be more open and thoughtful resolutions of these cases', [44] and this thesis therefore adopts an interdisciplinary approach in addressing the problem that it has posed, seeking inspiration from relevant fields outside the law.

The adoption of an interdisciplinary approach means that not only will art philosophy inform the law in this chosen area, but where the concept of honour is concerned, reference will also be made to the field of anthropology. Honour, as it will be shown, is a vital element of the moral rights doctrine, and no study of honour can be complete without reference to anthropological studies as anthropologists are widely acknowledged as experts on this very subject.[45]

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41 Henry Hansmann and Marina Santilli (n 10); Wendy J. Gordon, 'Render Copyright Unto Caesar: On Taking Incentives Seriously' (2004) 71 The University of Chicago Law Review 75; Wendy Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and its Predecessors' (1982) 82 Columbia Law Review 1600; William M. Landes and Daniel B. Levine, 'Chapter 7 The Economic Analysis of Art Law' in A. Ginsburg and David Throsby Victor (ed), *Handbook of the Economics of Art and Culture*, vol Volume 1 (Elsevier 2006); William Landes and Richard Posner, 'Economic Analysis of Copyright Law' (1989) Journal of Legal Studies 325.

42 Anne Barron, 'Copyright Infringement, 'Free-Riding' and the Lifeworld' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge University Press).

43 Ong (n 19) 298.

44 Farley (n 32) 310.

45 Frank Henderson Stewart, *Honor* (University of Chicago Press 1994), ix.

Further insight into the concept of honour may also be gleaned from German insult laws, Anglo-Saxon laws and the Roman concept of *inuiria.* The practice of using foreign laws in helping to elucidate problematic issues is well established and acknowledged. According to James Gordley, foreign jurists 'were struggling with common problems, guided by similar concepts' and that 'we can learn much by seeing how others have faced similar problems.'[46] Legal problems are both universal and perennial, and hence there is much that foreign laws as well as seemingly antiquated laws such as Anglo-Saxon and Roman law may offer in furthering our understanding of the problems such as those posed in this thesis.

2. A comparative approach to ascertaining and analysing the different jurisprudential approaches to the issues in question, drawn from selected common law jurisdictions, namely the US and Singapore, with references made to the approaches in India and Australia. Inspiration and lessons from these other common law countries will assist in ascertaining the best practice for the UK. Progress in the field of moral rights has been achieved in the US, Australia and India, countries which all share a common legal background with the UK. It is intended to concentrate on these specific common law jurisdictions as despite the fact that the common law regime is traditionally resistant to any expansion of moral rights, they have made considerable strides in unpacking and addressing the problems identified in this thesis and may provide practical examples on which the UK may draw.

7. Summary and Contribution of Research

This research is intended to determine the boundaries of the integrity right of the moral rights doctrine, to ascertain the defensibility of the traditional objections to extending the right to integrity to recognise a right to object to the destruction of works. The research provides evidence to support the thesis that a jurisdiction which overlooks this fundamental right or applies this inconsistently, severely undermines moral rights doctrine and the roles it plays variously as a protector of the individual rights of the creator, a protector of cultural rights and as a counterweight to the utilitarian aims of copyright law. This issue is examined in using UK law as the primary jurisdiction and contrasting the UK approach with that taken in specific common law jurisdictions, the US Singapore, Australia and India.

The conclusion will summarise findings and crystallise the contributions made by the research undertaken. Certain key findings and arguments central to this thesis have been published elsewhere in three peer-reviewed journals. A version of chapter 5 on the concept of 'honour' and the

[46] James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2007).

role it plays in the integrity right appeared in the 2016 summer issue of the Oxford Journal of Legal Studies.[47] An article form of chapter 6 on the definition of 'art' in copyright law was awarded the John McLaren Emmerson QC Prize in 2015 by the Intellectual Property Society of Australia and New Zealand and was subsequently published in the society's own journal, Intellectual Property Forum.[48] Finally, an article version of chapter 7 on the interrelationship between property rights and moral rights was published in the Intellectual Property Quarterly in 2016.[49]

This thesis will culminate with the proposal of a new section 80A to be inserted in the UK CDPA, a draft of which is offered in the concluding chapter, together with explanatory notes. This new section offers authors a new right against destruction in relation to artistic works. Not only does it encapsulate the findings of the research, it also endeavours to resolve certain key issues surrounding similar legislative provisions which have been enacted in other jurisdictions and which are discussed in chapter 9. The right is only offered to creators of artistic works, which reflects a viewpoint advanced in the present chapter: that the problem of destruction has a particularly devastating impact upon artistic works, while other creative works which are offered in multiple platforms and media are less affected. As such the proposed draft section 80A focuses solely on artistic works.

47 Tania Cheng-Davies, 'Honour in UK Copyright Law is Not 'A Trim Reckoning' - its Impact on the Destruction of Works of Art' (2016) 36 Oxford Journal of Legal Studies 272.

48 Tania Cheng-Davies, 'Can A Work of Art Be Destroyed Under Copyright Law?' (2015) Intellectual Property Forum 32.

49 Tania Cheng-Davies, 'A work of art is not just a barrel of pork: the relationship between private property rights, moral rights doctrine and the preservation of cultural heritage' (2016) Intellectual Property Quarterly 278.

Chapter 2 – Legal Context: Aims and Roles of Moral Rights and Copyright Law

Only one thing is impossible for God: to find any sense in any copyright law on the planet.

Mark Twain, *Mark Twain's Notebook,* 23 May 1903

1. Introduction

This chapter attempts that which Twain claimed to be impossible: to make some sense of UK copyright law and moral rights doctrine, so far as they relate to the overarching aims of the thesis. In order to do so, some comparison with civil law copyright is inevitable, as the way UK copyright law and its version of moral rights are viewed and understood is influenced by the way they relate to their counterpart in civil law regimes.[1] A key difficulty lies in how copyright law and moral rights doctrine are viewed as irreconcilably different in terms of their historical origins, scope and focus, not just as between the two major systems of law, i.e. the common law and civil law systems, but also between different jurisdictions even those situated within the same legal system.[2]

As set out in the previous chapter, this thesis demonstrates that where a jurisdiction countenances the destruction of creative works with impunity, it exposes jurisprudential flaws in cracks in both copyright law and moral rights. In other words, it is difficult to reconcile the permissive stance towards destruction with the aims and roles of both copyright law and moral rights doctrine. This chapter examines those aims and roles.

What this chapter intends to demonstrate is that firstly, the natural law origins of moral rights have never been alien to UK copyright law and secondly, that moral rights doctrine does not oppose the UK copyright goal of public interest; rather, it is essential in attaining it.

It begins by offering a historical overview of the development of moral rights doctrine and its relationship to copyright law, before mapping out their perceived aims and roles, as well as those of copyright. The historical background provided is relatively brief as there is an abundance of existing literature on the topic.[3] The purpose here is to demonstrate that historically the UK has not always

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1 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014), 32.

2 Charles Marvin, 'The Author's Status in the United Kingdom and France. Common Law and the Moral Right Doctrine' (1971) 20 International and Comparative Law Quarterly 675, 676; Cyrill P. Rigamonti, 'The Conceptual Transformation of Moral Rights' [American Society of Comparative Law] (2007) 55 The American Journal of Comparative Law 67; Patrick Masiyakurima, 'The Trouble with Moral Rights' (2005) 68 The Modern Law Review 411.

3 Mark Rose, *Authors and Owners: The Invention of Copyright* (Havard University Press 1993); Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968); R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-century Britain*

been as inimical to the idea of moral rights as is commonly thought. As such it questions why the UK should have been 'compelled, kicking and screaming' to adopt moral rights,[4] or 'caught by surprise' at the Rome Conference in 1928 when Art.6*bis* was introduced into the Berne Convention,[5] when there is evidence that moral rights, or at least, the *sentiments* associated with moral rights, had been known to UK lawyers for some time prior to the 1928 Conference.

It will also be shown that civil law copyright and common law copyright are not that divergent,[6] in that they stem from common roots, although they may have each evolved differently, with common law copyright seemingly placing the public interest to the fore,[7] while the author is central to civil law copyright. Furthermore, it is clear that these two regimes are gradually converging under the influences of international harmonisation.[8] Essentially, it is a contention of this thesis that as moral rights have a long established pedigree in common law copyright, and is not as 'foreign' as is traditionally thought to be, then there should be little objection to an expansion of moral rights in the UK.

The chapter then moves on to examine the aims and roles of copyright and moral rights. The currently accepted predominant role of moral rights doctrine is that it is a source of personality rights for creators, which are non-economic in nature, as opposed to those rights endowed by copyright, which are economic in nature. While there has been some dispute as to whether the public interest was truly the aim of the Statute of Anne, it is commonly accepted that common law copyright law has been operating on this basis ever since.[9]

In order to demonstrate that moral rights support copyright's public interest goals, it will be shown firstly that the public interest in the 'encouragement of learning' stipulated in the Statute of Anne, is only achieved partially through the economic rights granted by copyright. The economic rights, such as the reproduction right, only serve certain creative industries well, particularly those of

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(1695-1775) (Hart 2004); Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010); L. Bently and M. Kretschmer, 'Primary Sources on Copyright (1450-1900)' (*www.copyrighthistory.org*) ; Ronan Deazley, 'The Myth of Copyright at Common Law' (2003) 62 Cambridge Law Journal 106; A. Birrell, *Seven Lectures on the Law and History of Copyright in Books* (Cassell 1899).

4 Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Commonlaw Countries' (1994) 19 Columbia Journal of Law & the Arts 229.

5 ibid., 231.

6 Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review 991.

7 Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002).

8 P. Goldstein and P.B. Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP USA 2013), 6.

9 Davies (n 7) 5.

a commercial nature and which deal with works which may be replicated easily, such as books and music. However, such rights are essentially meaningless for visual artists who typically produce one-off works or in limited editions. Furthermore, copyright protects works which are not created through economic inducements e.g. student works, personal letters etc. It is clear that economic incentives are not the only inducements for certain works.[10]

It will be argued that economic rights *alone* do not work effectively as incentives for creators. Moral rights are just as important in that they address crucial non-economic concerns shared by creators: that the integrity of their works is protected. If copyright's aim of 'encouragement of learning' includes a fostering of the arts, then moral rights are essential in fulfilling this aim. As the key to understanding the role of moral rights in fostering the arts is an understanding of just what exactly is entailed in the creative process,[11] part of this chapter is devoted to understanding this very process.

Essentially, this chapter argues that moral rights doctrine, properly interpreted and applied, with a more robust integrity right, will not only dovetail neatly with the key aims of UK copyright law, but will actually serve to fulfil and underscore these aims.

2. Background and history of Copyright Law and Moral Rights Doctrine in the UK – a search for the foundation of moral rights in the UK

It is generally accepted that moral rights doctrine originated in France and Germany in the late 18th and early 19th centuries.[12] The predominant conceptual model of the moral rights doctrine was developed in parallel in these two countries, but primarily through a series of mid-19th century court decisions in France,[13] subject to the influence of French and German jurists, such as Morillot, Gierke and Kohler, and the philosophers Kant and Hegel, who espoused the view that a creation was the embodiment of its author's personality.

In France, *droit moral* emerged from numerous debates which took place on the nature of *droit d'auteur* in the late 18th century. The notion that *droit d'auteur* was a natural right is credited to the French Revolution, during which time it was strenuously argued that *droit d'auteur* did not stem

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10 Alfred Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' (1990) 51 Ohio State Law Journal 517, 537.

11 ibid., 558.

12 Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) 16-21, para 2-003 to 2-005.

13 See Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) chapter 1; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 51-88.

from any royal privilege, but was instead a natural right arising from the author's act of creation.[14] The acceptance of this notion laid the foundation for the development of *droit moral* i.e. non-property rights which belong to the author, which gradually evolved through the French courts throughout the 19th century, until by 1880, the *droit moral* rights of *droit de divulation, droit a la paternite,* and *droit au respect de l'oeuvre* were well established in French jurisprudence.[15] In the development of the doctrine in these court decisions, it is clear that the courts had sought recourse to the natural law.[16] Therefore, moral rights doctrine, as it was first recognised, then later matured and finally codified in France, was based on natural law principles,[17] which was also the source of moral rights in the common law (see below). Similarly in Germany, the initial conception of moral rights as natural rights was developed in the writings of legal scholars, notably Kohler and Gierke, which in turn were influenced by the underlying Roman Law and natural law precepts in the German legal system.[18] The theoretical grounding for moral rights was thus nurtured in these two countries, eventually finding expression in Art.6*bis* of the Berne Convention.

Although France and Germany developed and articulated the theoretical basis for the moral rights doctrine, it is also clear that at some point English law recognised the features of moral rights independently, on the basis that these were natural rights belonging to the author. That point arguably came during *The Battle of the Books,* a series of cases involving authors, publishers, book-sellers and the courts in the eighteenth century, which culminated in a definitive judicial construction of the Statute of Anne 1710, generally regarded as the first English copyright statute.[19] It is noted that these cases and contemporary legal commentaries *pre-date* those French court decisions referred to above, and even the writings of Kant, Hegel and Schopenhauer, which first expressed and then developed

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14 Russell J. DaSilva, 'Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States' (1981) 28 Bulletin Copyright Society of USA 7-8. According to Ginsbrug, 'mixed motives underlay initial French copyright laws', although she acknowledges the presence of 'a strong authors' right in the revolutionary laws'. See Ginsburg (n 6) at 1014.

15 ibid., 10.

16 Robert Hauhart, 'Natural Law Basis for the Copyright Doctrine of Droit Moral' (1985) Catholic Lawyer 53, 64.

17 DaSilva (n 14) 4.

18 Davies and Garnett (n 12) para 2-004 20.

19 Although the Statute of Anne 1710 is generally regarded as the first copyright statute, it was preceded by a number of copyright related statutes e.g. Star Chamber Decrees of 1586, 1637, the Licensing Act of 1662 etc. However these early statutes were censorship laws primarily and the Statute of Anne itself was fundamentally legislation to regulate the book trade. See Patterson (n 3) for a historical description of copyright law in England.

moral rights, suggesting that common-law juridical conceptions of moral rights may actually have a much older pedigree than those developed in the civil law countries.[20]

The first clear English articulation of moral rights can be found in one of the *Battle* cases, specifically Lord Mansfield's judgment in *Millar v Taylor* (1769).[21] Lord Mansfield's description of the evils which may befall an author was clearly a precursor of moral rights:

> 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, the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of.

Lord Mansfield argued that 'It is an injury, by a faulty, ignorant and incorrect edition, to disgrace (the author's) work and mislead the reader.' These perceived injuries were described alongside clearly more pecuniary wrongs which may also befall an author: '[The author] can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print and in a cheaper volume....The author may not only be deprived of any profit, but lose the expense he has been at.' Clearly, Lord Mansfield envisaged copyright as a composite of economic and moral rights.[22] Indeed, Rose argues that Lord Mansfield had reached his judgment based on an early and still developing concept of authorial control, which was 'based on honor and reputation rather than on specifically economic interests'.[23]

Furthermore, in the same case, Mr Justice Aston opined that the common law was '...founded on the law of nature and reason...', indicating the natural law origins of English common law, which included embryonic forms of moral rights as described by Lord Mansfield, and not just the economic rights with which UK copyright law is identified today. Essentially *Millar* recognised the natural rights which authors had in their literary works, and that such rights had always existed at common law.[24] There is other evidence that English copyright originated from natural law theories;

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20 Hauhart (n 16) 62-63; Andre Lucas, 'Moral Right in France: towards a pragmatic approach?' (ALAI); Rajan (n 13) 49, 89, 111.

21 *Millar v Taylor* 4 Burr 2303, 98 Eng Rep 201 (1769).

22 Dworkin (n 4) 230; Rose (n 3) 82.

23 Rose (n 3) 81.

24 Yen (n 10) 528.

Blackstone's restatements on literary property refers to Gaius, whose treatise on Roman Law cites natural law theory as the basis from which literary property may be derived.[25]

In any case, just because copyright law has been enshrined in legislation, it does not necessarily follow that the rights afforded by copyright should be considered merely discretionary and not natural rights.[26] It could be argued that as the general function of legislation is customarily to codify pre-existing rights, then particularly in the common law system, statutes function to reformulate pre-existing law and not supplant the common law or rules of equity.[27] The Statute of Anne and subsequent copyright legislation do not in themselves overturn the hypothesis that English copyright law was originally rooted in natural law. There is in any case some evidence that the Statute of Anne was not always perceived as a source of purely commercial or economic rights. Rose argues that an early Statute of Anne case, *Pope v Curll*,[28] invoked the Statute for personal as well as economic interests, and furthermore, that such personal rights were akin to what we recognise today as moral rights.[29] Another early case, *Burnet v Chetwood*,[30] was concerned with what Rose terms as 'propriety' issues,[31] i.e 'author's control over the form and content of his writings',[32] rather than economic concerns.

Lord Mansfield's affirmation of such rights at common law was however overturned five years later in *Donaldson v Beckett*,[33] which held that the common law right was supplanted by the

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25 Michael B. Reddy, 'The *Droit De Suite*: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 Loyola of Los Angeles Entertainment Law Journal 509, 537-538; Hauhart (n 16) 59, 65.

26 Gary Kauffman, 'Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents' (1986) 10 Columbia Journal of Law & the Arts 381, 388.

27 Jean Louis Bergel, 'Principal Features and Methods of Codification' (1988) 48 Louisana Law Review 1073, 1076.

28 *Pope v Curll* 2 Atk 342, 26 Eng. Rep. 608 (1741). Alexander Pope tricked Curll, a book publisher with an unsavoury reputation, into publishing his private letters, in order to bring about a lawsuit demonstrating that unscrupulous publishers such as Curll were precisely the sort of publishers against whom authors should be protected.

29 Mark Rose, 'The Statute of Anne and authors' rights: *Pope v Curll* (1741)' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010).

30 *Burnet v Chetwood* (1721) 2 Mer 441, 35 Eng.Rep.1008 (1720) 162, in which Dr Thomas Burnet's work *Archaeologia Philosophica* was translated from its original Latin into English without his permission, and hence became more widely understood. His nephew sought to prevent further printing of this book in English, not for any economic reasons but primarily because the family was embarrassed by the book. See Rose, *Authors and Owners: The Invention of Copyright* 50-51.

31 ibid., 81.

32 ibid., 32.

33 *Donaldson v Beckett* 2 Bro P C 129, 1 Eng Rep 837.

Statute of Anne, and apparently laid to rest the question of the existence of common law rights at least *post* Statute of Anne. Scholars remain in dispute as to whether the House of Lords in *Donaldson* in fact also denied the *prior* existence of common law copyright.[34]

The orthodox view is that, at most, the effect of *Donaldson* was to *extinguish* common law copyright, not *deny* its existence altogether, either *pre* or *post* Statute of Anne.[35] Apart from some evidence that cases preceding the Statute of Anne had referred to the existence of copyright at common law,[36] the basis for this orthodox view lies in the opinions proffered by the twelve common law judges who were summoned by the House of Lords for their expert views. Of the twelve, Lord Mansfield, who, we may recall, had expounded on the natural rights of the author in *Millar v Taylor*, remained conspicuously silent.[37] Little is known as to why he refused to give his opinion,[38] although it may be reasonably surmised that he simply retained his views which were already made known in *Millar*. Owing to the inconsistency in reporting at the time of *Donaldson*, it is hard to pin down with any accuracy what each judge had actually said.[39] There is some evidence that the reporter may have miscounted the judges' votes and that a majority had actually ruled that the common law copyright had survived *Anne*.[40] Indeed, the very thorough analysis of *Donaldson* by Judge Thompson, dissenting judge in *Wheaton v Peters*,[41] (a US case heard in 1834 on the question of common law copyright) concluded that the issue is not as clear as it seems. He argued that the twelve judges in *Donaldson* were actually *equally divided in their opinion* on the question of the continued existence of common law copyright. Only eleven judges had voted, with the exception of Lord Mansfield. But as pointed out above, Judge Thompson also surmised that Lord Mansfield had not voted because his

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34 David J. Brennan and Andrew F. Christie, 'Spoken words and copyright subsistence in Anglo-American law' (2000) 4 Intellectual Property Quarterly 309, 313.

35 Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2017) para 2-40; Patterson (n 3) 173; Brennan and Christie (n 34) 317. Contrary to this orthodox view, Abrams and Deazley both argue that the Lords in *Donaldson* had held that no common law copyright ever existed. See Howard B Abrams, 'The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright' (1983) 29 Wayne Law Review 1119 and Deazley (n 3). However, Gomez-Arostegui, on revisiting the primary sources, has argued that the orthodox view should prevail. See H. Tomas Gomez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 Connecticut Law Review.

36 According to Scrutton, it was noted that 'copyright was a thing acknowledged at common law' in the case of *Atkin v Stationer Co.,* Carter's Rep. 89 (1666). See T.E. Scrutton, *The Law of Copyright* (Lawbook Exchange 1903) 29.

37 Deazley (n 3) 115.

38 ibid., 116.

39 ibid., 115-118.

40 Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celetial Jukebox* (Hill and Wang 1994) 50; Rose, *Authors and Owners: The Invention of Copyright* 98-99.

41 *Wheaton v Peters* 33 US (8 Pet.) 591 (1834).

opinion was already clear and had not changed since *Miller v Taylor*. This meant that instead of a 6-5 vote in favour of the Statute of Anne taking away common law rights, the true import of *Donaldson* was that, if Lord Mansfield had voted, in conformity with his opinion in *Millar*, the judges were equally divided on this question. Judge Thompson concluded thus: 'That the law in England has not been considered as settled, in conformity with the vote on this last question [i.e. whether common law is taken away by the statute of Anne] is very certain.'

However, modern legal scholars, from an analysis of the individual judicial opinions, are in general agreement that a majority of the eleven judges who offered their opinion acknowledged the existence of the common law copyright but that it was simply overridden by the Statute of Anne. It is thus generally accepted that the final decision by the House of Lords was that the Statute of Anne had extinguished common law copyright,[42] although according to Deazley, the House of Lords denied altogether the pre-existence of common law copyright for public interest reasons (see below).[43]

It is significant that US copyright law, steeped in utilitarianism, having descended from the Statute of Anne,[44] also originally recognised natural rights.[45] In the years prior to the enactment of the US Constitution (ratified in 1788), there is evidence that twelve states had recognised the notion that authors possessed natural rights.[46] For instance, the law of Massachusetts in 1783 recognised that authors, scientists and other creators should be encouraged by securing the fruits of their intellectual labour, and explicitly declared that such security lay within the natural rights of all men.[47] The preamble to the New Hampshire statute utilises similar language while the preamble to the Connecticut statue of 1783 refers to the 'principles of natural equity and justice'.[48] James Madison declared that the 'copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law'.[49] Eventually, as in the UK, in the US case of *Wheaton v Peters*,[50] common law rights

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42 Francis C Montague, 'The Supremacy of Parliament and Rapid Growth of Statute Law 1688-1800' in James F Colby (ed), *A Sketch of English Legal History* (The Lawbook Exchange Ltd 1915) 155; Gomez-Arostegui (n 35).

43 Deazley (n 3) 125-126, 132-133; Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 23.

44 Davies (n 7) 5.

45 Yen (n 10) 528.

46 Alain Strowel, 'Droit d'auteur and Copyright: Between History and Nature' in Ben Sherman and Alain Strowel (eds), *Of Authors and Origins* (Clarendon Press 1994) 243; Goldstein and Hugenholtz (n 8) 18; Richard A. Spinello and Maria Bottis, *A Defense of Intellectual Property Rights* (Edward Elgar Publishing 2009) 40.

47 Strowel (n 46) 243.

48 Spinello and Bottis (n 46) 31.

49 William Patry, *Copyright Law and Practice*, vol 2 (The Bureau of National Affairs, Inc. 1994) 24.

50 (n 41).

were for the first time expressly denied, and from that point onwards, copyright law in the US, like the UK, began to distance itself from its natural rights roots. The point remains that Anglo-American copyright laws were founded in natural law. Yet, in analysing Anglo-American copyright jurisprudence, Yen concludes that 'the natural law concepts which inspired common law copyright and early copyright statutes remained part and parcel of copyright jurisprudence.'[51] Yen is not alone in arriving at this conclusion; other legal scholars also maintain that the basis for the justification of Anglo-American copyright law, although ostensibly utilitarianism, as initially described and emphasised in both *Donaldson* and *Wheaton*, may be more correctly described as a combination of utilitarianism and natural rights theories.[52]

According to current academic orthodoxy therefore, two propositions can be established; firstly that common law rights were merely supplanted by the Statute of Anne, and secondly that the common law rights were based on natural law theory. Further, it has also been pointed out that the judges in *Donaldson* were focused specifically on the duration of copyright, i.e. the perpetuity of copyright, and the right to re-print one's works.[53] It should also be remembered that the Statute of Anne itself only prohibited the 'printing and re-printing of books'. Therefore, a third proposition may be made. If there were any other common law rights which were not specifically dealt with in *Donaldson*, it could be argued that these rights were not supplanted by the Statute of Anne.[54]

Indeed, according to Hauhart, commentaries from this period continued to recognise the natural law and common law right to literary works,[55] suggesting that common law rights continued to subsist despite *Donaldson's* apparent interpretation of the Statute of Anne. Hauhart makes reference to Enfield's *Observations on Literary Property*, written in 1774, which concluded that the rights of authors were founded in natural justice, as well as the dissenting opinion in a Scottish case contemporary with *Donaldson*,[56] which expressed the view that the author's right had its origin in natural law, and was not removed by the Statute of Anne. Based on these sources, Hauhart thus also makes the point that the rights of authors in Britain were derived from the same source that *droit*

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51 Yen (n 10) 531.

52 Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 Fordham Intellectual Property Media and Entertainment Law Journal 497, 505-506; Stewart E. Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 Michigan Law Review 1197; J. Tehranian, *Infringement Nation: Copyright 2.0 and You* (Oxford University Press 2011), 53; R.P. Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 3, 9.

53 Patterson (n 3) 173-75; Hauhart (n 16) 66.

54 Patterson (n 3) 175.

55 Hauhart (n 16) 65; Reddy (n 25) 538.

56 *Hinton v Donaldson* 5 Bm 508 (1773).

moral sprang from: natural law.[57] If indeed the Statute of Anne did not supplant common law copyright *in its entirety*, it arguably left untouched vestiges of natural law and common law copyright, which would include the moral rights first identified by Lord Mansfield. While a succession of copyright statutes followed, for example, in 1735,[58] 1801,[59] 1814,[60] 1833,[61] 1835,[62] 1842,[63] 1911,[64] 1956,[65] and in 1988,[66] each one an expansion of copyright and its term of protection, the last remaining vestige of common law copyright, moral rights, was not officially legislated, save for a brief appearance in the Fine Arts Copyright Act of 1862,[67] which is discussed below, until their inclusion in the CDPA in 1988.

The eventual 1988 codification of moral rights in the UK was initially set in motion at the 1928 Rome Conference of the Berne Convention. The historical development of the Berne Convention and the UK legislation is discussed in more depth in Chapter 4 and a brief account suffices here. The original text of the Berne Convention did not provide specifically for moral rights until the 1928 Rome Conference when the concept was first proposed, apparently much to the surprise of the common law countries, and was 'coldly received' by the British countries.[68] The British contingent was eventually won over when the other delegates pointed out that what was proposed already existed in the common law.[69]

The UK's compliance with the Berne Convention underwent the scrutiny of the Gregory Committee in 1952 and that of the Whitford Committee in 1977. The Gregory Committee review judged that the Art.6*bis* rights were addressed adequately in other areas of UK law, (e.g. defamation,

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57 Hauhart (n 16) 66-67.

58 Engravers' Copyright Act 1735, 8 Geo. II, c.13 (Also known as Hogarth's Act).

59 Copyright Act 1801, 41 Geo.III.c.107.

60 Copyright Act 1814, 54 Geo.III, c.156 .

61 Dramatic Literary Property Act 1833, 3&4 Will.IV, c.15.

62 Publication of Lectures Act 1835, 5&6 will.IV, c.65.

63 Copyright Law Amendment Act 1842, 5&6 Vict., c.45.

64 Copyright Act 1911, 1&2 Geo.V. c.46.

65 Copyright Act 1956, 4&5 Eliz.2.Ch.74.

66 Copyright Designs and Patents Act 1988, c.48.

67 25, 26 Vict., c.68. The question as to whether the rights in the Fine Arts Copyright Act 1862 were true moral rights is one which has not been answered unanimously. Davies and Garnett argue that they were not moral rights at all, while Dworkin and Deazley appear to accept them as proto-moral rights.

68 S G Raymond, *Report of the New Zealand Delegate on the International Copyright Conference at Rome* (21 July 1928).

69 For example, the law of defamation and passing-off.

contract etc) and concluded that it was not necessary to formally recognise moral rights. The stance adopted by the Gregory Committee was arguably contradictory to the British position, taken at the Rome Conference, which was that moral rights were foreign and antithetical to the common law. Generally the UK's stance was inconsistent during this period. On the one hand, the UK viewed moral rights doctrine as foreign and incompatible with the common law,[70] on the other, the UK's position at the time of the Rome Conference or at the time of the Gregory Report, was that it had always readily provided for these rights in various areas of the common law, and hence such rights were not actually unknown or 'foreign' to the common law, and that therefore there was no need to specifically enact for moral rights. The Whitford review however found that the UK had not met its obligations under Art.6*bis* despite the findings of the Gregory committee. The eventual enactment of the CDPA, including sections relating to moral rights, finally heralded the formal recognition of moral rights within the UK.

The above account demonstrates the inconsistent, ambiguous and ambivalent relationship that the UK has always had with moral rights, from initially recognising such rights judicially in 1769, to expressing surprise, ignorance and scepticism when presented with the same rights in 1928, and to finally reluctantly endorsing the rights, albeit in their most minimal form, in legislation in 1988. Yet, underlying this turbulent relationship, is the point that moral rights have always been recognised to some extent and in one form or another in the history of UK copyright law, notwithstanding the commonly accepted view that the moral rights 'is relatively new and unfamiliar to UK copyright law',[71] or that it is 'unknown to our jurisprudence'.[72] Plainly it was not *unknown* or *unfamiliar* to the UK long before the enactment of most recent copyright acts in 1956 and 1988.

As an example of the UK's familiarity with moral rights, in the 19th century, artists received protection against unauthorised alteration and the fraudulent affixing of signatures to their work under a parliamentary statute: the Fine Arts Copyright Act 1862. Davies and Garnett argue that these provisions were not in any way related to recognising rights belonging to artists, only that these were undesirable activities which deserved to be treated and penalised as criminal offences,[73] and that any claim that the Act introduced basic notions of moral rights is unsubstantiated.[74] Yet, in the years immediately preceding the enactment of the Act, there was evidence that the legislators had the

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70 Cate Banks, 'Lost in Translation: A History of Moral Rights in Australia (1928-2000) Part One' (2007) 11 Legal History 197, 203.

71 Davies and Garnett (n 12) 3.

72 H.S. Gregory, *Report of the Copyright Committee* (HMSO 1951-1952) para 219.

73 Davies and Garnett (n 12) 16 para 2-002.

74 ibid.

artist's personal feelings and reputation in mind. Deazley,[75] in arguing that the Act did introduce a new form of moral rights, makes reference to Lord Chancellor Westbury's House of Lords speech which was made in support of the 1862 Act. The Lord Chancellor made it clear that the provisions related to fraudulent signatures and unauthorised alteration of works, were intended to be legislated with the artist's reputation and feelings in mind.[76] In a separate speech, the Lord Chancellor, in his capacity as Attorney-General at the time, also stated that these endeavours to introduce such legislation were 'an attempt for the first time to do *justice* to the artists of this country',[77] not simply to fulfil a purely utilitarian aim. While these acts may have been framed as criminal offences rather than as infringements of private rights, these above statements taken together would suggest that these proto-moral rights were introduced and justified in 19th century UK on the basis of natural rights accorded to creators.

While it could be argued that unlike France and Germany, the UK 'recognised no *doctrine* of moral rights' in that the doctrine had not been systematically described or theorised in the UK,[78] it is equally arguable that it is not entirely accurate to say that '...its laws sometimes *happened* to protect it' as observed by some academics.[79] As discussed above, apart from the existence of laws such as the laws of defamation and passing-off, which have been held to be approximate or at least supplementary to moral rights,[80] there were independent and explicit pronouncements of rights, by Lord Mansfield and later Lord Chancellor Westbury, which could not be described as merely coincidentally related to moral rights, being clearly moral rights as conceived by French and German jurists.

The above historical account of common law copyright, *droit d'auteur* and moral rights demonstrates that the economic rights of modern copyright law and moral rights arguably arose from a common ancestor, natural law. Spinello and Bottis also make the point that both *droit d'auteur* and Anglo-American copyright, even when recognised in statute, were from the outset 'tied to the author's

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75 Ronan Deazley, 'Commentary on Fine Arts Copyright Act 1862' in L.Bently and M. Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (www.copyrighthistory.org 2008).

76 ibid. The Lord Chancellor, Hansard HL Deb, 22 May 1862, vol 166 cc 2013-20 Copyright (Works of Art) Bill, 2nd Reading.

77 Attorney-General, Hansard HL Deb, 6 May 1861, vol. 162 cc 1637.

78 W.R. Cornish and J.J. Phillips, 'Copyright in the United Kingdom' (1984) Revue Internationale des droits d'auteur 59, 115.

79 ibid.

80 Davies and Garnett (n 16) 291-293, para 8-088 to para 8-90; Adeney (n 13) 433-440; Jonathan Griffiths, 'Misattribution and Misrepresentation: The Claim for Reverse Passing-Off as 'Paternity' Right' in Fiona MacMillan (ed), *New Directions in Copyright Law*, vol 4 (Edward Elgar 2007).

life' and as such, indicates that the nature of copyright in both systems is that of a natural law right.[81] Where the UK is concerned, copyright and moral rights have each pursued their own path, agenda and development. While each may have its origin in natural law,[82] both now arise through positivist legislation in the UK, which still remains underpinned by the utilitarian aims and principles first set out in the Statute of Anne i.e. '...the encouragement of learning...'. Such aims were to be achieved by means of a social contract between the author and the public, under which the author obtains a limited monopoly in return for making his work available to the public.

The issue to be explored next is whether the original utilitarian aims of UK copyright law set out in the climate of 1710 still endure in the modern day, or whether there are other public interest aims to be expected of copyright law today. More specifically and more pertinent to the broader objectives of this thesis, the key questions are firstly, whether, and if so, how moral rights doctrine might assist UK copyright law in achieving these aims, and secondly, what aims are pursued by moral rights doctrine itself and how these aims complement those aims of copyright law.

3. The Aims of Copyright Law and Moral Rights Doctrine

a. Aims of Common Law Copyright and Civil Law Copyright

It is noteworthy and perhaps surprising that the Berne Convention does not attempt to define copyright, which appears to support Mark Twain's grouse about the impossibility in making sense of copyright.[83] However, the Berne Convention does explain why it does not attempt the impossible:

> '…the very concept of copyright from a philosophical, theoretical and pragmatic point of view differs country by country, since each has its own legal framework influenced by social and economic factors. To define it in a manner binding on all member countries would be difficult if not impossible.'[84]

These differences in 'theoretical, philosophical and pragmatic' viewpoints of copyright refer to the diametrically opposing conceptions of copyright in civil law and common law regimes. While civil law countries, typified by France and Germany, view copyright as an author-centric set of laws,

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81 Spinello and Bottis (n 46) 39.

82 According to D'Amato and Long, 'a closer examination of the historical origins of copyright law in France and England shows that the copyright traditions of both nations share a common foundation in natural law'. See A.A. D'Amato and D.E. Long, *International Intellectual Property Anthology* (Anderson Publishing Company 1996) 145.

83 Quote in subheading to chapter title above.

84 Caddick, Davies and Harbottle (n 35) 2-01.

copyright in common law countries may be described as public or society-centric, [85] a position which stems from the Statute of Anne.

The 'encouragement of learning' exhorted in the Statute of Anne, and reflected in the US constitution's copyright clause,[86] is fulfilled by the social contract mentioned above, whereby exclusive rights are given to authors in order to reward them, and to induce them into producing further works. The aim is that the public will benefit from the production of new works. Apart from the production of new works, a corresponding aim is to maximise the dissemination of and access to these works, which means that the rights given to authors as a reward and incentive, should not hinder such dissemination and access unnecessarily, thus preserving the public domain. The public interest, not the author's, is the main focus of copyright in the UK and US.[87]

The utilitarian leanings of common law copyright would appear to contrast sharply with civil law's veneration of the author, which is reflected in the French term for its copyright, *droit d'auteur*. The basis for emphasising the author lies in the Romantic notion of the author as a creative genius, whose creative work is viewed as an extension of his personality. This unique and special relationship which exists between an author and his work in turn justifies the author's right in exercising total control over any use of his work. If the analogy of a parent and child is used, whereby the author is the parent and his work his child, it becomes easier to understand the nature of the bond which exists between author and work;[88] it is one that is deeply personal and protective. It is thus apparent why moral rights doctrine developed naturally from *droit d'auteur*.

However, notwithstanding the commonly accepted distinction between common law and civil law copyright, recent scholarship have eschewed such a strict delineation. Apart from evidence that both common law and civil law copyright have their roots in natural law, both possess more features in common than is apparent at first glance. For instance, in respect of civil law copyright, the work is viewed essentially as a set of property rights and the author's rights are property rights. French jurist, Le Chapelier, declared that 'the most personal of all forms of property is the work, the fruit of a writer's thoughts'.[89] In contrast, common law copyright is viewed essentially as a set of monopoly rights granted by statute. However, the distinction is not so clear and secure in practice. Author's rights are arguably not true property rights as they are temporary and consist of prerogatives expressly

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85 Ginsburg (n 6) 991-92.

86 Congress is vested with the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.

87 See Davies (n 7) generally.

88 Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010) 2; Strowel (n 46) 235, 245.

89 Strowel (n 46) 236.

specified by law, quite unlike property rights in more corporeal entities. As for copyright, it has also been argued time and again that it is a property right, not a mere monopoly.[90] Yet, at the same time, both author's rights and copyright can be described as monopolies, as they both grant exclusive rights over works. The distinction between the two thus is not clear.[91]

While it has been argued that both copyright and *droit d'auteur* originate from natural law roots, but have diverged from these origins and still appear divergent today, they are undoubtedly converging in terms of the scope of protection, duration and other aspects of copyright, principally owing to harmonising treaties and conventions.[92]

However, one area above all remains divisive: moral rights. In justifying the continued recognition of moral rights, or conversely, in dismissing them altogether, civil law and Anglo-American jurists tend to retreat to their respective recent philosophical underpinnings: natural law and utilitarianism.[93] As the objective of this thesis is to seek cogent arguments in support for an expansion of moral rights in the UK, the next section focuses on the currently accepted basis for its copyright regime, utilitarianism.

b. The public interest in UK copyright regime

The Statute of Anne was enacted with the aim of '...the encouragement of learning...'. Two questions arise from the pronouncement of such a lofty goal. Firstly, what was the impetus for such a goal, and secondly, how was it meant to be achieved via copyright.

The history of how the Statute of Anne came to be is well established and a brief account suffices here. The Stationers' Company, a group of booksellers and printers, had petitioned Parliament when their official licence, provided under the Licensing Act to publish,[94] expired in 1694. From the day the Licensing Act expired, they issued a series of petitions/bills to ensure their monopoly over the printing and publishing of books. Most of the early petitions/bills, which were rejected, were based on censorship laws.[95] Their tactics then changed course on 26 February 1706

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90 Michael Carrier, 'Limiting copyright through property' in Helena R. Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013); Deazley, *Rethinking Copyright: History, Theory, Language* (n 43) 139.

91 Strowel (n 46); Ginsburg (n 6) 994.

92 Goldstein and Hugenholtz (n 8) 6.

93 ibid., 7.

94 The Licensing Act of 1662 underwent several renewals until it was renewed for the last time in 1692. See Patterson (n 3) 138-39.

95 ibid., 138-142.

when they issued a petition this time emphasising the securing of authors' rights by law.[96] Their strategy was simple: once authors' *perpetual* common law rights were recognised, in practice the authors' copyrights and their manuscripts would then be purchased by the stationers, thus giving them a perpetual monopoly on the printing and re-printing of the authors' books. As their new found cause was also now supported by illustrious writers such as Jonathan Swift, Alexander Pope and Daniel Defoe,[97] their petitions gained credence. Furthermore, the basis for the legal recognition of such authors' rights was that it was in the public interest: by securing their rights, authors would thus be incentivised to produce more works.

Parliament went along with the public interest argument but also recognised that if the public were to truly benefit from the endowment of authors' rights, not only should an increased production of new works be encouraged, there should also be more widespread dissemination of created works. Thus the statute endowed authors with rights, in order to encourage them to produce books, but also, to the chagrin of the booksellers, imposed a temporal limit on these rights, ensuring that after a certain period of time, their books would enter the 'public domain'.[98] The statute also provided that there should be price controls on books,[99] and that a copy of each new book should be deposited in the nine privileged libraries,[100] both of which were clearly attempts at ensuring easier access to books. Unfortunately, save for the fact that Jonathan Swift drafted the original Bill, and the various petitions issued by the booksellers, no record exists of the subsequent debates and editing, and the true intentions of the drafters of the Statute of Anne may only be conjectured from the final form of the statute itself.[101] In sum, the public interests ostensibly envisaged by Parliament thus were to incentivise authors to produce more works and to ensure the widespread dissemination of those works to the reading public, both of which were deemed to be essential to achieving the overall aim of '...the encouragement of learning...'.

Deazley has argued, that it was with the public interest in mind, that the House of Lords in *Donaldson denied* the existence of common law copyright altogether. By so doing, they were

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96 Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, and Improvement of Printing 1706, Lincolns Inn Library: MP102, Fol.312. See Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

97 Birrell (n 3) 93.

98 Craig Joyce and others, *Copyright Law* (LexisNexis 2010) 18.

99 ibid.

100 Tanya Aplin, 'A global digital register for the preservation and access to cultural heritage: problems, challenges anbd possibilities' in E. Derclaye (ed), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (Edward Elgar 2010).

101 Birrell (n 3) 93-94.

'...acting in furtherance of much broader social goals and principles.'[102] According to Deazley, the 'common good' was and should ever be the overriding principle of the copyright regime.[103] He cites the Universities Act of 1775, which granted perpetual copyright to educational institutions, including the Universities of Oxford and Cambridge, in support of this contention. Although it may appear at first glance contradictory that perpetual copyright would be granted to universities at around the same time perpetual copyright was also denied in *Donaldson*, this apparent contradiction can be reconciled as follows. The granting of perpetual copyright to the universities clearly promoted the overriding public interest of advancing education and learning. Deazley takes this as evidence that the House of Lords' prevailing sentiment at the time was that a *public interest in promoting education was the paramount concern of copyright*. This explains why perpetual copyright generally was denied in *Donaldson*. The fear was that perpetual copyright would result in locking up works in the hands of booksellers. While it was desirable from a public interest standpoint that the universities, being seats of learning, were granted perpetual copyright, it was equally desirable that booksellers were *denied* perpetual copyright. Indeed, Lord Camden's speech on the Statute of Anne was concerned with the undesirable prospect of perpetual copyright locking up works in the hands of booksellers.[104]

It would appear that *Donaldson* was essentially a *policy* decision, concerned with the *consequences* or *utility* of copyright, rather than the revelation of an overriding legal principle or rationale, which disregarded the evidence of eminent common law judges and the pre-Anne cases which clearly spoke of a pre-existing common law or natural law copyright. Sherman and Bently also recognised that *Donaldson* was not so much concerned with the *nature* of copyright but with its *consequences*.[105] To Coombe, while *Donaldson* may have appeared to settle questions about the Statute of Anne, it failed to provide any *rationale* for its decision.[106] Despite misgivings about the unresolved debate over literary property, natural law or common law copyright, it is this underlying *policy* which has been sustained through the centuries to the present day, and which are the cards with which creators, owners, and users are dealt.

In summary, in light of available evidence and prevailing opinion, copyright in the UK was initially rooted in natural rights or the common law; that natural/common law copyright was subsequently supplanted by the Statute of Anne, and the extinguishment (which is debatable) of

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102 Deazley, 'The Myth of Copyright at Common Law' (n 3) 133.

103 ibid.

104 ibid., 122.

105 Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press 1999) 39.

106 R.J. Coombe, 'Challenging Paternity: Histories of Copyright' (1994) 6 Yale Journal of Law & the Humanities 397, 407.

natural rights in literary works by *Donaldson* was a decision based on policy considerations, not legal theory or principles.

If the public interest in the encouragement of learning, and not the recognition of natural rights in creative works, is the true goal of present day UK copyright law, it may seem logical to ask how such a goal is to be achieved and whether, and to what extent stronger moral rights might pose an obstacle, to the achievement of such goal. Yet, there are cogent arguments to support the view that stronger moral rights are in fact essential to the attaining of this goal, and that the failure to recognise a right against destruction actually undermines it.

4. The public interest in the encouragement of learning: the role of copyright

How is the public interest in the encouragement of learning to be achieved through copyright? Firstly, the economic returns derived from the exercise of the exclusive right to make copies provide an incentive to creators to produce more works.[107] Secondly, copyright law is designed to ensure that works are widely disseminated and communicated to the public.[108] It can be seen that both aims involve respectively, the attainment of money and the expenditure of money leading one copyright observer to opine bluntly: 'Mostly, though, copyright is about money.'[109] This view is true today in practice, and in the midst of the multitude of high stakes copyright infringement litigation and the multi-million pound deals forged in the profitable copyright industries, the lofty fundamental aim of copyright in either 'the encouragement of learning' or to 'promote the progress of science and useful arts' is too easily forgotten.[110]

The reasoning behind copyright's emphasis on economic rights is that economic rights would allow the copyright *owner* to exploit his rights efficiently, thus also ensuring efficient distribution of his works to the public, which is the main beneficiary of copyright. The copyright work is viewed as a *product*, a mere commodity,[111] while the public is its consumer. Additionally, it is reasoned that the economic returns afforded by copyright function to incentivise the further creation of new works. Moral rights doctrine, on the other hand, has different aims which focus on the *author*. It ensures that

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107 Jane C. Ginsburg, 'Moral rights in a common law system' (1990) 1 Entertainment Law Review 121, 122; Shyamkrishna Balganesh, 'The Normative Structure of Copyright Law' in Shyamkrishna Balagnesh (ed), *Intellectual Property and the Common Law* (Cambridge University Press 2013); Sony Corp. of America v Universal City Studios, Inc. 464 US 417 (1984); Fiona MacMillan, 'Hans Christian Anderson and copyright today' in Helle Porsdam (ed), *Copyright and Other Fairy Tales* (Edward Elgar 2006) 90.

108 MacMillan (n 107) 90.

109 Goldstein (n 40) 7.

110 R.L. Okediji, *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 1.

111 MacMillan (n 107) 85.

his work remains true to his vision first of all; it is not a mere product but a creative endeavour which emanates from his personality. From the viewpoint of creators therefore, while copyright aims to maximise monetary returns in exchange for their work, moral rights doctrine aims to preserve their vision and spiritual relationship with their work.

It can thus be seen why moral rights doctrine mean so much more to artists who work in the fine arts and performing arts, rather than those who work in more commercial lines, such as graphic design. This is because the former aim to communicate a message or a vision, whereas the latter aim to please clients. In this regard, Kwall has identified how moral rights doctrine not only recognises but values the 'intrinsic dimension of the creative process',[112] as well as the author's personal message embodied within his work,[113] which the copyright system fails to acknowledge. In failing to fully understand what creative works mean to their creators and how and why creative artists work and innovate, the copyright system with its emphasis on economic rights and minimal recognition of moral rights, fails them fundamentally.

a. What do creations mean to their creators?

In order to ascertain what 'encouragement of learning' meant in 1710, and what it means to us today, it is instructive to appreciate the state of literature and the fine arts at the time, and also what these works meant to their creators and to society. The following brief survey of selected opinions rendered at the time gives us an impression.

For instance, according to Milton, 'books are seen as the embodiments of authors and authors are presented as living in their books.'[114] At around the time immediately preceding the Statute of Anne, Milton wrote *Areopagitica*, primarily as a response to the enactment of the Licensing Order of 1643, which decreed, among other things, that books deemed offensive were to be seized and destroyed. Although primarily a treatise against censorship, the imagery Milton conjures in the *Areopagitica* reflects his own perception of literary works, that they are 'embodiments of authors':

> For books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them.[115]

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112 Kwall (n 88) chapter 2.

113 ibid., 2-7.

114 Mark Rose, 'The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 75.

115 John Milton, *Areopagitica with a commentary by Sir Richard C. Jebb* (Cambridge 1918) 6.

During the same period, Defoe wrote a series of pieces to put forward the view that it was authors who deserved the law's protection against copying.[116] In one of his *Reviews*,[117] Defoe used the analogy of parent and progeny to describe the relationship between the author and his book: 'A Book… tis the Child of his Inventions; the Brat of this Brain'.[118] In *An Essay on the Regulation of the Press*, Defoe does make reference to the 'due Reward' of authors, which is robbed from them when copies of their books are printed without their authorisation.[119] Interestingly, he is particularly concerned with the publication of imperfect copies of books, which are strewn with 'surreptitious and spurious corrections and innumerable Errors', calling such an act 'a most injurious piece of Violence', which results in 'the Design of the Author' being 'inverted, concealed or destroyed, and the information the world would reap by a curious and well studied Discourse, is dwindled into Confusion and Nonsense.'[120] Defoe was clearly concerned about the *integrity* of his works, anxious that they would not end up mangled and mutilated, either deliberately or callously, which would invert, conceal or destroy his message. This echoes the concerns raised by Lord Mansfield in *Millar v Taylor* which today are addressed by the right of integrity.

Taken together, these passages of Defoe and Milton display deep anxieties which occupied their minds. To Milton, books embodied the soul of their authors, while to Defoe, the integrity of his message was paramount. These concerns of creators were as significant as the economic incentives promised by copyright.

On the other hand, Samuel Johnson is reported to have been against perpetual copyright, and thought that authors should be given a reward in exchange for the free dissemination of their works, even though he acknowledged that authors had a 'metaphysical right of creation' which is 'stronger than that of occupancy'.[121] Johnson mulled over the role of the author and his claims to copyright constantly.[122] He strongly believed that books should be universally disseminated, for the general good of society, and perpetual copyright would pose an obstacle to this. In furtherance of his belief of

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116 William Cornish, 'The Statute of Anne 1709-10: its historical setting' in L. Bently, U. Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 18.

117 A series of periodicals containing political writings by Defoe, established on 19 February 1704 and issued over a period of nine years. See William Thomas Morgan, 'Defoe's Review as a Historical Source' (1940) 12 The Journal of Modern History 221.

118 Daniel Defoe, *A Review of the State of the British Nation* (1710) 513, 515.

119 Daniel Defoe, *An Essay on the Regulation of the Press* (1704) 19.

120 ibid.

121 Birrell (n 3) 121.

122 Edward Bloom, 'Samuel Johnson on Copyright' (1948) 47 The Journal of English and Germanic Philology 165.

what was good for society therefore, he opined that the author should retain the sole right of printing and selling of his work for his lifetime (and also belong to his heirs for a fixed period after his death) on the basis that 'this is agreeable to moral right, and inconvenient to the publick, for who will be so diligent as to the author to improve the book or who can know so well how to improve it?'[123] Johnson's reasoning was that not only would such a right provide the author with a source of income, it was also because only the author would publish the work *accurately* and indeed, make *improvements* upon it if necessary. Ultimately, for the good of society, the *accuracy* of the author's work was foremost to Johnson. This is reflected in his involvement in the publication of *Lives of the Poets*. A group of eminent booksellers had commissioned him to write the book in order to compete with another publication on poets produced at that time. This other publication was criticised in a letter dated 26 September 1776 from Johnson to Boswell,[124] as not only having type which was 'extremely small, that many people could not read them' but that 'the *inaccuracy* of the press was very conspicuous'[125]

Income to authors, important as it was at the time of Milton, Defoe and Johnson, and still is today, was arguably something that was necessary, to keep body and soul together. What was of critical importance however, even to a practical minded man like Johnson, was the accuracy, the integrity of one's work.

b. What drives the creative process?

It is contended that economic returns have never been *crucial* to creators in the sense of encouraging the creation of more works. On the contrary it has been suggested that an abundance of wealth would have the opposite effect. According to the 19th century writer, William Benton Clulow, 'Competence of fortune, and a mind at ease, have in thousands of instances given the death-blow to literary ambition and success.'[126] Clulow argued that adversity actually encouraged more prolific output, 'in countries where plenty is most widely diffused, and a general equality of social condition prevails, few writers of eminence ever arise.' In support of his contentions, he claimed that Lord Bacon wrote a considerable amount when unemployed and that Machiavelli composed his notable political treatises under similar circumstances. Indeed, he wrote, the world might not have acquired works such as *Paradise Lost* or *Robinson Crusoe* had their authors enjoyed a much more prosperous living.[127]

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123 ibid., 170.

124 ibid., 171.

125 ibid.

126 W.B. Clulow, *Aphorisms and Reflections: A Miscellany of Thought and Opinion* (J. Murray 1843) 307.

127 ibid., 308.

This is not to say that authors should never be rewarded for their output, the point is rather that wealth may be neither crucial to their continued creativity, nor of utmost importance to them. Orwell in *Why I Write* lists four motives for writing: egoism, aesthetic enthusiasm, historical impulse, and political purpose, but misses out wealth, claiming that 'serious writers,…[are] less interested in money.'[128] How then, and why, do authors, artists and composers create their works? They arguably do so from an impetus far removed from the mere prospect of economic success. For instance, although impecunious for most of his adult life, Mozart continued to produce unparalleled masterpieces. According to Abert, a Mozart scholar, the urge to create was Mozart's most basic form of existence and needed no external stimuli.[129] Tchaikovsky described the creative urge as a formidable force, which if left uninterrupted, was wont to break the creator.[130] In a letter describing his method of composing, he acknowledged the differences between works created as a result of a purely internal creative urge and those created merely in fulfilment of an external commission, the main difference being that the former are invariably the artist's best and most perfect works.[131] Significantly, Tchaikovsky admitted that his commissioned works were not necessarily of the highest quality.

Modern legal scholars have recognised the creative urge as being instrumental in the creative process and also acknowledged the spiritual importance of the creator's work. In *The Soul of Creativity*,[132] Kwall argues against the postmodern scepticism with the idea of the unique or single individual author. This latter view rejects the idea of the creative individual genius and questions why he should have any rights to what he creates. She says that 'the postmodern critique ignores the reality that when an author borrows from the cultural fabric in crafting her work, it is still the unique combination of past efforts and the author's original contributions that invests the author's work with its autonomous unique and inviolate stamp.'[133]

The individual and deeply personal stamp which an artist imprints upon his work is a notion which is taken up by art philosopher Denis Dutton. He makes two points about this. Firstly, it is this stamp which distinguishes the fine arts from the mere crafts, which are more commercial in nature. Dutton, relying on Collingwood's famous art/craft distinction,[134] argues that the craftsman has a

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128 George Orwell, 'Why I Write' in *Essays* (Penguin Books 2014) 3.

129 H. Abert, S. Spencer and C. Eisen, *W. A. Mozart* (Yale University Press 2007) 708.

130 P.I. Tchaikovsky, Letter addressed to N.F. von Meck dated 17 February 1878, Peter Illich Tchaikovsky, *The Life & Letters of Peter Ilich Tchaikovsky* (Rosa Newmarch tr, Haskell House Publishing 1907) 275.

131 P.I. Tchaikovsky, Letter addressed to N.F. von Meck dated 24 June 1878, ibid., 306.

132 Kwall (n88).

133 ibid., 2.

134 R.G. Collingwood, *The Principles of Art* (Oxford University Press 1958).

preconceived idea of the end product, whereas the artist embarks on a creative process which meanders until he achieves a form which encapsulates his personal message perfectly or conveys exactly the emotional feeling he wished to impress upon his audience.[135]

Dutton also goes on to make the point that the 'high-art traditions demand individuality',[136] that 'the work of art is another human mind incarnate: not in flesh and blood, but in sounds, words and colours',[137] echoing Milton's thoughts similarly expressed in *Areopagitica* more than three centuries before. Upon taking receipt of a work of art, the audience also gains, not only a mere reflection or impression of the artist's personality, but his personality itself. The work is not only a part of the artist; it is the artist personified. There is perhaps no stronger advocate of moral rights than John Merryman, whose rationale for the recognition of moral rights, also refers to the personality of the artist,

> The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality.[138]

Social psychologists have both conjectured and then empirically demonstrated the futility of reward in motivating artistic creativity. Indeed, they have demonstrated the converse, that reward may demotivate artistic endeavours,[139] and have advocated that the intrinsic dimension is key to artistic creativity.[140] Amabile and Tighe have thus proposed that 'a creative society can only be nurtured if people are *intrinsically motivated*.'[141]

Therefore, not only are economic incentives often insufficient on their own in encouraging creativity, it appears that, as Clulow averred, they may have a *negative* impact on creativity. An example of the capacity of copyright, with its emphasis on the economic to harm creativity is offered

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135 Denis Dutton, *The Art Instinct* (Oxford University Press 2009) 226-28.

136 ibid., 232.

137 ibid., 235.

138 J.H. Merryman, A.E. Elsen and S.K. Urice, *Law, Ethics, and the Visual Arts* (Kluwer Law International 2007) 423.

139 Teresa M. Amabile, Beth Ann Hennessey and Barbara S Grossman, 'Social Influences on Creativity: The Effects of Contracted-for Reward' (1986)50 Journal of Personality and Social Psychology 14; Teresa Amabile, 'Motivation and Creativity: Effects of Motivational Orientation on Creative Writers' (Annual Conference of the American Psychological Association); Mark R. Lepper, David Greene and Richard E. Nisbett, 'Undermining children's intrinsic interest with extrinsic reward: A test of the "overjustification" hypothesis' (1973) 28 Journal of Personality and Social Psychology 129.

140 Markus Baer, Greg R Oldham and Anne Cummings, 'Rewarding Creativity: When Does It Really Matter?' (2003) 14 The Leadership Quarterly 569, 571.

141 T.M. Amabile and E.Tighe, 'Questions of Creativity' in John Brockman (ed), *Creativity* (Touchstone 1993).

by Suggs' study of the jazz movement,[142] which demonstrates a correlation between a diminished capacity for innovation in jazz music, and the expanding scope and term of protection in copyright law.[143] Suggs argues that this is because current copyright law fails to appreciate the true significance of cultural works which lie in their 'social, psychological and even physiological' effects, rather than the economic revenues they generate.[144] Where jazz was concerned, he suggests that by creating formalities such as fixation and emphasising the value of recorded copies rather than live performances, an important element in the creation of jazz music, copyright law led to the slow demise in the development and evolution of jazz as an art form. In failing to recognise this, copyright not only fails creators but also fails to encourage the development and progress of certain art forms, such as jazz. His proposals for reforms may be different from those suggested here, but nevertheless he makes the same compelling points made in this thesis, i.e. that the emphasis of copyright law on economic rights clearly disregards inconvenient realities about the creative process.

The external stimuli of commissions and economic success is also referred to by Sentfleben, who argues for a recalibration of the current copyright model on the basis that it conflicts with Bourdieu's theoretical description of the social structures set within the literary and artistic field.[145] Essentially, according to Senftleben, Bourdieu explains that society consists of autonomous social spaces, or fields, which possess their own rules, norms and dominance structures. However, such internal workings are constantly tested by external influences, and the level of autonomy experienced by a field depends on the extent to which it resists or embraces these external influences.[146] According to Bourdieu, as explained by Senftleben, the social construct of the literary and artistic field dictates independence from economic and political powers.[147] In other words, monetary success is rejected as a standard of success. The quality standards set within the field are therefore independent of external stimuli, and instead are shaped by those who dominate the field. Those who dominate the field are essentially those artists who have been judged by their peers to be first among equals. It follows that the very highest quality works are those which are created entirely autonomously by artists who care

142 Robert E. Suggs, 'A Functional Approach to Copyright Policy' (2015) 83 University of Cincinnati Law Review 1293.

143 ibid., 1299.

144 ibid., 1300.

145 Martin Senftleben, 'Copyright, creators and society's need for autonomous art - the blessing and curse of monetary incentives' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) in which Senftleben makes reference to the following works by Bourdieu: 'Die Logik der Felder' in P. Bourdieu and LJD Wacquant (eds) Reflexive Anthropologie (Suhrkamp 1996) 124; *Die Regeln der Kunst, Genese und Struktur des literarischen Feldes* (Suhrkamp 1999); *Les regeles de l'art. Genese et structure du champ litteraire* (Editions du Seuil 1992).

146 ibid., 25-26.

147 ibid., 26.

only about their reputational rewards, not commercial ones, and are free from the trappings of profit-making.[148]

Sentfleben argues that copyright with its offer of monetary rewards for creative work is therefore at odds with Bourdieu's theoretical model.[149] Copyright is a hugely influential external factor that threatens to disrupt the autonomy of the literary and artistic field, risking an increase in the production of inferior works. Artists who are lured by commercial success would be inclined to produce more profitable, more mainstream works, instead of remaining *true* to their aesthetic sensibilities.[150]

It must be emphasised that it is not argued that the economic benefits of copyright are completely unimportant or irrelevant to creativity, as after all artists do need at least the basic amenities. However, the intrinsic quality of artistic activity also needs to be acknowledged on at least an equal footing with economic rights, and that it is moral rights which motivates and encourages the *best* work from artists and writers, not copyright. Artists do not live by bread alone. 'Writing for money and preservation of copyright are,...the ruin of literature' according to Schopenhauer.[151] Clearly, money has not always been the main driving force behind creative endeavours in any case; after all, as Suggs points out, '...expressive culture pre dates the invention of both money and mercantile trade.'[152] It is the deep desire to create something which embodies one's personality or to communicate a unique message, as described by Dutton above, which drives artists to do what they do, not mere economic rewards. Leonard Bernstein explains this drive thus: '(t)hey write, they paint, they perform, produce, whatever, because life to them is inconceivable without doing so.'[153]

5. The public interest in the encouragement of learning: the role of moral rights

We have seen above that the economic incentives of copyright do not always fulfil an artist's needs, apart from providing them with a living. The question therefore is whether moral rights might play a bigger role in this aspect. Moral rights protect a creator's interests in attribution and integrity. It will be argued below that these interests are just as important, if not more, to creators. In relation to copyright law's utilitarian goals of ensuring that social benefits flow from the protection of authorial

148 ibid., 27-28.

149 ibid., 28-30.

150 ibid., 31.

151 Arthur Schopenhauer, *The Essays of Schopenhauer; The Art of Literature* (T. Bailey Saunders tr, IAP) 13.

152 Suggs, 1312.

153 Leonard Bernstein, *Findings* (MacDonald & Co Ltd 1982) 229.

works, moral rights play a vital role in protecting attribution and integrity interests and as such foster a climate which is conducive to creativity.[154]

An empirical study carried out by Kenyon and Wright demonstrates that creators, particularly visual artists, see their interests in their works quite differently from how law makers perceive their interests to be.[155] Although this study was conducted with particular aims in mind i.e. Australian law reform in respect of fair use provisions, the responses of the participants, who were all practitioners within the cultural and creative communities, were revealing in terms of how they wished themselves and their works to be treated. It was telling that not all creators interviewed desired payment for all types of public use. The reason they gave was because use by museums and similar institutions would generate other types of benefit which were *more valuable than monetary payment*, such as publicity and in particular, *preservation*.[156] The revelation lies in just how much creators value the *preservation* of their works. This demonstrates the importance which creators attach to maintaining not only the *integrity* of their works, but also the lifespan of their works, and which reflect that which creators *truly* desire from copyright laws.

As we have already seen above, literary authors also emphasise the importance of the integrity of their work. Balzac for instance has grumbled incessantly about dramatists who turned his work into theatre pieces, grumbling that his work has been 'butchered, drawn, stripped, quartered, grilled on the footlights.'[157] As for musical composers, while we will never know what Mozart might make of the use of his music as the soundtrack to *Amadeus*, music critics have described the soundtrack as amounting to a 'mutilation' of his music, while Disney's *Fantasia* has been described as 'musical blasphemy'. [158] Pop and rap/hip-hop musicians too have objected to the use of their music in what they consider to be inappropriate contexts. Connie Francis objected to the use of her works for 'sexually themed' films,[159] while hip-hop artist 'Pitbull' objected to the distortion of one of his works by an Australian DJ.[160]

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154 Ginsburg (n 6).

155 Andrew T Kenyon and Robin Wright, 'Whose Conflict? Copyright, Creators and Cultural Institutions' (2010) 33 UNSW Law Journal 286.

156 ibid., 296.

157 P. Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014) 97.

158 J. Joe, *Opera as Soundtrack* (Taylor & Francis 2016) 163.

159 *Connie Franconero aka Connie Francis v Universal Music Corp* No. 02-cv-01963 (S.D.N.Y. filed Mar 11 2002).

160 *Perez & Ors v Fernandez* [2012] FMCA 2 (10 February 2012).

Artists and other creators do not live by bread alone, but lead rich and productive lives by simply being able to experience the deeply satisfying process of creating art works, although it is acknowledged that there are artists who thrive on the commercialisation of their works e.g. Andy Warhol. What matters more to most creators is the *preservation* of their precious creations, not merely their commercialisation. This is where moral rights come into play. Basically moral rights doctrine encapsulates a bundle of rights which aim to protect a creator's relationship with his creation, while copyright law governs the economic rights of a creator, for example, by granting the creator exclusive rights to make copies of his own work, or to distribute copies of his work. Moral rights doctrine focuses on the creator's personal and spiritual relationship with his work, even after he has divested himself of his copyright, for example, by ensuring that his works are correctly attributed to him, or that they may not be treated in a derogatory manner.

It is an understatement to simply define moral rights as a set of personality rights as they do so much more. Adeney for instance has outlined the many different functions of moral rights. In addition to protecting personality, some of these include the following: to uphold human rights, to prevent consumer deception, to maintain reputations, and 'as a guardian of civilisation and the arts, and as a bulwark against the dilution of the arts'.[161] Vaver has also argued a public interest role for moral rights, on the basis that firstly, moral rights ensure the authenticity of works, secondly, that they function as a social reward to creators, thirdly by ensuring the continuous record of country's culture, and finally they empower creators with the ability to have a say over their creations.[162] For moral rights thus to countenance the destruction of creative works would be to undermine any or all of these identified functions.

Moral rights thus complement and supplement the protection given by copyright law. This was recognised by Richard Serra, whose work *Tilted Arc*, was destroyed in 1989,[163] shortly before the enactment of the US Visual Artists Rights Act (VARA) in 1990. He regarded the economic protection afforded by copyright law to art works as insufficient and that the moral rights bill introduced by Senator Kennedy (eventually enacted as VARA) would be a 'legal acknowledgement that art is something other than a mere commercial product'.[164]

Moral rights thus may just as equally stimulate creativity through offering protection for the creator's works. Furthermore, the public is also served by moral rights in that they can be assured in

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161 Adeney (n 13) 3 para In.07.

162 David Vaver, 'Moral Rights Yesterday, Today and Tomorrow' (1999) 7 International Journal of Law and Information Technology 270, 276-277.

163 The events leading up to the destruction of *Tilted Arc* are discussed in detail in Chapter 3.

164 Clara Weyergraf-Serra and Martha Buskirk (eds), *The Destruction of Tilted Arc: Documents* (MIT Press 1991) 17.

the authenticity of works served up for their consumption.[165] Public interest lies not only in the increased availability of works or the ease of dissemination, the oft stated goals of copyright, it also lies in ensuring the *accuracy* and *longevity* of the works made available to the public. If the public has an interest in learning, it surely makes sense that they have access to works which accurately reflect their creators' vision and the lessons that their creators wish to impart. However, not only is the accuracy of the public's learning important, the continued existence of works which may contribute to their learning is also important. The destruction of a work of art today means that it is lost to future generations who might have been able to generate new insights or inspiration from it, which in turn would have contributed to the growing body of knowledge available to the public. In this way, if moral rights do not also include a right against the destruction of any creative work, including art works, their role in supplementing copyright's public interest role in the 'encouragement of learning' is somewhat undermined.

6. Conclusion

This chapter has sought to clarify the aims of the UK copyright system, through an analysis of its historical development, from its beginnings with the enactment of the Statute of Anne through to the present day. What emerges from this analysis is evidence for the fact that the principles embodied by moral rights have always been a substantive and important element of UK copyright law. As such, there is scope for moral rights to play a much larger role within the UK copyright system, not least, in supporting and achieving the perceived aims of copyright.

Moral rights primarily serve to supplement the economic character of the current UK copyright regime. Simply rationalising the copyright system solely on the basis that it provides economic incentives raises several issues which may be addressed by moral rights. Firstly, if the goal is to disseminate new works for the benefit of the public, then it is arguably counterproductive for misleading or inaccurate works to be communicated to the public.[166] Moral rights would serve to correct this, specifically through recognition of the integrity right in particular. Society is not necessarily best served by a surfeit of works; what also matters is the quality and authenticity of the works which are on offer for public consumption.

Secondly, as we have seen above, purely economic rewards fail to recognise the main driver behind human creativity. Artistic creators are driven by an innate compulsion to create without the need for external incentives. This is evident from the testaments of famous creators such as Mozart, Tchaikovsky and Bernstein, as well as recent empirical research conducted by social psychologists.

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165 Commission of the European Communities, "Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society" COM (96) 568 final, 20 November 1996, 27.

166 D'Amato and Long (n 82) 78.

Furthermore, creators are profoundly concerned about the welfare, integrity and posterity of their creations, such concern stemming from their identity with their works. They view their creations as deeply personal messages and are anxious to ensure that these messages remain intact and true to their visions. Moral rights, in offering protection to the integrity of a creator's work, embrace these impulses fully and thus offer as much incentive, if not more, to creators as economic rights.

However, in order for moral rights to effectively perform its proper role in upholding the public interest in the creation and dissemination of new works, not only should the UK copyright system give more consideration to moral rights than it currently does, the existing inconsistent approach towards the destruction of works of art has to be resolved. The central question that is addressed by the thesis is why the integrity right should stop short of acknowledging the devastating impact of destruction, which is permanent and irreparable.

This chapter thus underpins the aims of this thesis, which is to make the point that it is exceedingly difficult to reconcile copyright's public interest goals of encouraging new works, of 'enhancing the common store of culture',[167] with a corresponding failure to protect works against destruction. The following chapters will reveal that current reasons for rejecting a right for artists to object to the destruction of their works are unsustainable, and that such rejection exposes a persistent emphasis on the economic aspects of UK copyright law, which in turn fails to consider the non-economic attributes of the creative process. Indeed, it will be shown in chapter 8, which uses Singapore as a case study, that by emphasising economic rights over moral rights, this may lead to an actual diminishing of the artistic and cultural scene. However, before all these issues are dealt with, the following chapter will outline and plead a case for the vital importance of art to society, which should be recognised by any copyright regime. Essentially, copyright's failure to protect against the destruction of creative works is illogical and unreasonable, given its devastating consequences, not only in terms of the irreversible loss of a work of art, but also in terms of the undesirable wider message that the absence of a right to object to destruction delivers: that acts of 'cultural vandalism'[168] may escape censure.

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167 Baldwin (n 157) 11.

168 A term used by Diego Rivera in describing the destruction of his mural *The Man at Crossroads*. 'In destroying my paintings the Rockefellers have committed an act of cultural vandalism. There ought to be, these will yet be, a justice that prevents the assassination of human creation as of human character' *The New York Times*, 13 February 1934.

Chapter 3 – Social Context: The Destruction of Art and its Impact on Art and Society

> *'Immodest figures should not be painted, lest children be corrupted by the sight. What shall I say to you, ye Christian painters, who expose half nude figures to the eye? But ye who possess such paintings, destroy them or paint them over and ye will then do work pleasing to God and the Blessed Virgin'*
>
> Attributed to Girolamo Savonarola[1]

1. Introduction

The previous chapter explored the aims of copyright, and the extent to which moral rights doctrine serves to fulfil those aims. The failure of moral rights doctrine to recognise a right against destruction not only demonstrates its inherent inconsistencies but is also testimony to the doctrine's failure in upholding the role it plays in supporting and supplementing copyright law. This chapter follows up by explaining why the destruction of creative works, in particular artistic works, is ultimately damaging to society. If the principal aim of copyright is to encourage the production of more creative works for the good of society, then it is argued that it should not permit the destruction of creative works without good reason, as this is likely to have negative outcomes for society.

The key objectives of this chapter are as follows, firstly to assess the importance of art to society, and secondly, to ascertain the extent of the impact that destruction of art inflicts upon society. In order to attain these objectives, this chapter will first outline and make reference to historical instances of deliberate art abuse, while emphasising the repulsion with which these acts have been greeted by society. The point here is that if was not considered important to society, then such acts of destruction would not have been greeted with such public condemnation. It also emphasises the fact that men can be so moved as to incinerate paintings or pulverise statues reveals firstly, the depth and intensity of passion which art instils in us and secondly, the significance of its role in society. This is why this initial section focuses on instances of destruction rather than starting the enquiry with an outline of art history or an examination of the meaning of art, which might be considered a more traditional or conservative route. An account of Cromwell smashing a stained glass window at Peterborough Cathedral,[2] or of the Nazis setting ablaze works they labelled as degenerate art, or recently the Taliban toppling the Bamiyan Buddhas, surely evokes a greater sense of just what it is

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1 Dominican friar and instigator of the Bonfire of the Vanities, Florence 1497, which destroyed thousands of artistic and literary masterpieces, including copies of the *Decameron*, paintings by Botticelli and drawings by Da Vinci. .

2 Tabitha Barber and Stacy Boldrick, *Art Under Attack-Histories of British Iconoclasm* (2013), 75

about art that inflames the passions of both the attacker and the onlooker, while at the same time hopefully engendering an understanding of why art might deserve the protection of the law.

The analysis moves on to focus on those characteristics of art which make it so intrinsically valuable, rather than the more readily quantifiable economic or utilitarian benefits conferred by the arts (for example increased numbers of tourists lured by art galleries, museums and exhibitions) which tend to be relied upon and valued by policy and legislation makers in justifying state support for the arts. This is not to say that economic or utilitarian benefits are irrelevant, but as discussed in chapter 8, using the example of Singapore's cultural policy, a heavily utilitarian or economic perspective on the benefits of the arts tend to favour those sectors of the arts which are more commercial, to the detriment of the purely fine arts. Once these issues are identified, it then becomes clearer as to why the fine arts, which tend to be unique one-off creations, are deserving of protection and why lawmakers and other parties interested in copyright, moral rights and art should address the issue of destruction with a serious sense of urgency.

2. Examples of Destruction

This section surveys a brief selection of the countless instances of mutilation, vandalism and wanton destruction of works of art in history, and maps out the reasons as to why people have felt the need to commit such atrocities, and the effect that such acts have had on art and society.[3] While traditionally, art historians have tended to sideline the issue of art destruction,[4] on the basis that the intention behind a destructive act is irrelevant when an artistically or culturally significant work has been irredeemably destroyed,[5] others have pursued a study of this phenomenon,[6] on the belief that such a study helps to shed more light on the functions of art. Art historian Freedberg has published extensively on these themes,[7] seeing value in assessing the 'dialectic between material image and beholder',[8] although Reau's engagement with destructive acts was purely to 'denounce the destruction, regardless of

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3 For much more in-depth surveys and studies, see for example Elizabeth Childs (ed) *Suspended License: Censorship and the Visual Arts* (University of Washington Press 1997); Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution* (Reaktion Books 1997); D. Jones, *Censorship: A World Encyclopedia* (Fitzroy Dearborn 2001).

4 Gamboni (n 3) 13; David Freedberg, 'Iconoclasts and Their Motives (2nd Horst Gerson Memorial Lecture, University of Groningen)'12.

5 Lauren Reynolds Hall and Megan Cross Schmitt, 'Literature Review' (2015) 5 Change Over Time 152.

6 ibid., 154.

7 Freedberg 'Iconoclasts and Their Motives'(n 4); David Freedberg, *The Power of Images: Studies in the History and Theory and Response* (Chicago University Press 1991).

8 Freedberg, 'Iconoclasts and Their Motives (2nd Horst Gerson Memorial Lecture, University of Groningen)', 13.

causes'.[9] Gamboni, in his seminal study on art destruction,[10] states at one point that there are broadly two kinds of destruction in history: iconoclasm and vandalism. While iconoclasm revolves around a condemnation of the beliefs symbolised by the art work, vandalism on the other hand does not offer a particular reason, intention or justification. It is gratuitous and baseless. However, Gamboni eschews the use of these terms and adopts a neutral approach in his own examination of destructive acts, in the hope that these acts themselves reveal much more than the assumptions adopted in the use of such terms, and in the process reveal the power and potency of art. The ambition of this chapter is similar but on a smaller scale.

It should be noted that alongside tales of censorship, vilification, mutilation, and destruction, there are also tales of people who have risked their lives in protecting art throughout history. Examples include the Monuments Men, a group of men and women who worked tirelessly, and at considerable risk to themselves, to protect cultural treasures from the Nazis during the Second World War.[11] The recent example of renowned Syrian scholar, Khaled al-Assad, who was beheaded by ISIS in 2015 for refusing to reveal the whereabouts of valuable archaeological artefacts,[12] serves to remind us that, sadly, art and those closely associated with art, are just as vulnerable today as they have been for millennia. While the passions and ideologies which give rise to destructive acts are instructive, so too are the courageous acts of these heroic individuals, as they serve to underscore the responsibility which people feel that they owe to the preservation of art and cultural heritage. When the Nazi authorities hosted an art auction of works they considered degenerate in 1939, Joseph Pulitzer, Jr. was among the bidders. It was not just an opportunity to add to his collection. Pulitzer explained that 'to safeguard art for posterity, [he] bought – defiantly! The real motive in buying was to preserve the art.'[13] It is necessary to understand why people destroy art or conversely risk their lives to protect art, in order to understand the importance and value of the arts to society. It is a crucial prelude to the question as to why, or indeed, whether art is deserving of any protection.

This section does not profess to be a comprehensive study of the reasons why people destroy art. There are a myriad of causes and reasons: religion; iconoclasm; political ideology; changing tastes; vandalism; controversial art; poor preservation techniques; commercial reasons; and destruction

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9 Louis Reau, *Histoire du vabndalisme. Les mounments detruits de l'art francais* (Hatchette 1959) cited in Gamboni (n 3) 16.

10 Gamboni (n 3) 17-20.

11 The story of these men and women is told in *Lynn H. Nicholas, The Rape of Europa: the Fate of Europe's Treasures in the Third Reich and the Second World War (Vintage 1995)* and featured in a film entitled *The Monuments Men,* directed by George Clooney and released in 2014.

12 Kareen Shaheen and Ian Black, 'Beheaded Syrian Scholar refused to lead Isis to hidden Palmyra antiquities' *The Guardian* <https://www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria>.

13 Nicholas (n 11) 4.

perpetrated by the artists themselves. Notwithstanding the wide variety of reasons, the end result remains: the irreversible loss of a work of art.

a. Mass Destruction of Art: The Bonfire of the Vanities, 1497 and 1498; Nazi Bonfires, 30 March 1939 and 27 July 1942

In Renaissance Florence and in Nazi Germany, mass burnings of art and books took place. The works which were destroyed in these events were works which today are overwhelmingly accepted as priceless masterpieces. Those destroyed in Florence included works by Di Credi and Botticelli, while those destroyed by the Nazis included works by Klimt and Picasso.

These are well-established, indeed canonical works, which have been obliterated and lost to us forever. Because of their indisputable and widely accepted worth and esteem, their destruction serves to communicate more poignantly and more clearly the irredeemable loss suffered when the destruction of art is permitted, hence why this chapter begins with an account of these events, before proceeding onto more contemporary works, whose worth have been subject to more debate or have not had the luxury of time in which to establish themselves.

Bonfire of the Vanities

The *Bonfire of the Vanities* referred to in the title to the thesis, is the name given to the great purges of artistic and literary treasures instigated by Girolamo Savonarola in Renaissance Florence. Savonarola was a puritanical Dominican Friar who preached zealously against the excesses of the day. When the Medici fled Florence in 1494, Savonarola was propelled to the helm of Florence for a brief period, during which time, he pushed on with his reforms, at first enacting legislation banning non-Christian art and literature, culminating in the two bonfires instigated by him.[14] In the first bonfire of 1497, artistic and literary treasures together with items considered to be responsible for corrupting morals, such as mirrors, perfume and cosmetics, were piled into a wooden pyramid more than 60 feet high. Among the masterpieces lost forever included paintings by di Credi, Botticelli, Donatello and Leonardo da Vinci, as well as writings by Boccaccio, Plato and Dante. According to a contemporary eye witness, 'sculptures of great value, paintings of admirable beauty' perished in the flames.[15] By also attacking the Pope and the Catholic Church for its excesses, Savonarola's reign was brought to a premature end, which culminated in a trial for heresy barely a year after the second bonfire.

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[14] There were two bonfires instigated by Savonarola, one on 7 February 1497 and another on 27 February 1498. '"Savonarola, Girolamo." Grove Art Online' <<http://www.oxfordartonline.com/subscriber/article/grove/art/T076215>.>.

[15] Attributed to Fra Pacifico Burlamacchi, 'How he set fire to all the vanities', in Donald Beebe, Anne Borelli and Maria Pastore Passaro (eds), *Selected Writings of Girolamo Savonarola: Religion and Politics, 1490-1498* (Anne Borelli and Maria Pastore Passaro trs, Yale University Press 2006) 257.

Savonarola was hanged and his body burned on a pyre, which flames were ironically fuelled by copies of his own writings.[16]

The important questions here are firstly, what drove the owners of art and artists themselves to consign their precious works to flames, and secondly, to what extent has Savonarola and his bonfires affected the development of art in Renaissance Florence. Although the events took place some 500 years ago, fascination in the bonfires prevails today. As recently as 2012, an important exhibition hosted at Palazzo Strozzi in Florence showcasing masterpieces by Renaissance artists, culminated in a display of the bonfires together with Botticelli's late works which were clearly influenced by Savonarola's puritanical views.[17]

The political and religious context in which the bonfires took place should be understood. Savonarola's bonfires were not the first to be carried out. Other burnings had taken place previously in Bologna, Florence, Milan, Perugia, Rome, and Siena.[18] In Florence, the opulence and lavishness of the lifestyle of the rich and powerful, epitomised by the Medici, aroused the ire of the ordinary populace. Furthermore, there was a growing suspicion of idolatrous paintings and sculptures, perhaps in part owing to the patronage of such works by the Medici. Savonarola's sermons reflected this sentiment: '...they nowadays make for churches which are done with such craftsmanship and are so ornate and elaborate, that they obscure the light of God and true contemplation, and people do not consider God, but only the craft within the image.'[19] Apart from the perceived corrupting influence of paintings and sculptures depicting the naked human body, Savonarola was concerned about the distraction posed by highly embellished paintings and ornately carved sculptures. To him, art should 'reflect the basic virtuous simplicity of the original church.'[20] This view, exhorted in Savonarola's fiery sermons, was widely shared at the time,[21] lending support to his calls for reform. Essentially, his stirring sermons together with a charismatic personality combined to whip up a frenzied support for the eventual mass destruction of perceived indecent and idolatrous objects. Underpinning his

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16 Douglas Palmer, *Girolamo Savonarola Italian friar, politician and religious reformer 1452-1498* (Fitzroy Dearbron Publishers 2001) 2154.

17 Michael Glover, 'Money and Beauty: Bankers, Botticelli and the Bonfire of the Vanities, Palazzo Strozzi, Florence ' *The Independent* (20 November 2011).

18 David Cast, 'Review: Fra Girolamo Savonarola: Florentine Art and Renaissance Historiography by Ronald M. Steinberg' (1979) 61 The Art Bulletin 134, 136.

19 Quoted in K. Woods, C.M. Richardson and A. Lymberopoulou, *Viewing Renaissance Art* (Yale University Press 2007), 75; Ronald M Steinberg, *Fra Girolamo Savonarola, Florentine Art, and Renaissance Historiography* (Ohio University Press 1977) 55.

20 Steinberg (n 20) 55

21 Cast (n 18) 136.

entreaties for penitence and austerity was an unflinching vision of an apocalyptic future for sinners.[22] Fear of hell and damnation ensured that the bonfires of artistic and cultural riches were greeted with unbridled enthusiasm, even hysteria by the Florentines.[23]

If the foregoing explains the inflamed passions which led to the destruction of artistic masterpieces, the following endeavours to describe the effect of Savonarola's preaching and his bonfires on Florentine art at least, if not the development of Renaissance art. At the time of Savonarola's arrival in Florence, the city was home to exceptionally brilliant artists, including da Vinci, Botticelli and Michelangelo. The transformation of Botticelli's art in particular would attest to the rise and fall of the artistic scene in Florence pre and post the bonfires. Much has been made of the fact that he had tossed several of his own works into Savonarola's bonfires.[24] However, prior to Savonarola's descent upon Florence, Botticelli enjoyed the patronage of the Medici and his most celebrated paintings, such as *The Birth of Venus* (c.1485) and *Primavera* (c.1482) reflected the Medici's interests in humanism and mythology. The subsequent stylistic change in his work together with the dramatically reduced output of his secular works in the late 1480s have been attributed to the growing influence of Savonarola's preaching.[25] The richly ornamental backdrops in his earlier works were no longer utilised in his later works, which now assumed a more ascetic style.[26] According to Giorgio Vasari, the first Italian art historian, Botticelli was 'of [Savonarola's] sect so ardent a partisan that he was thereby induced to desert his painting, and having no income to live on, fell into very great distress.'[27] Rothko in describing Savonarola's profound influence on the artists of his day, in particular, Botticelli, as well as the influence of the Reformation (of which Savonarola was part) on art, concludes that 'this change constituted its own type of vandalism, for it contributed greatly to the decline of great classical art.'[28] As for the effect on Florence itself, that jewel of the Italian Renaissance, art historian Joost Keizer records that because of the bonfires and Savonarola's influence, patrons no longer commissioned new works, causing many artists to flee elsewhere, resulting in 'one of the most benighted moments in the history of Florentine culture.'[29]

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22 D. Weinstein, *Savonarola: The Rise and Fall of a Renaissance Prophet* (Yale University Press 2011) 28-41.

23 ibid., 218-19; Steinberg (n 19) 7.

24 B. Deimling, *Botticelli. Ediz. Inglese* (Taschen 2000) 79.

25 ibid., 69.

26 ibid., 74.

27 Giorgio Vasari, *Lives of the Most Excellent Painters, Sculptors, and Architects from Cimbabue to our Times* (Gaston C.De Vere tr, MacMillan and Co. & the Medici Society 1550).

28 Mark Rothko, 'Art as a Natural Biological Function' in Christopher Rothko (ed), *The Artist's Reality* (Yale University Press 2004) 7.

29 Joost Keizer, 'Michelangelo, Drawing and the Subject of Art' (2011) 93 The Art Bulletin 304, 318.

The Nazi Bonfires

The Nazi art auction at Lucerne attended by Pulitzer in 1939 displayed 126 paintings and sculptures including works by Picasso, Matisse, Gauguin, and Chagall, undoubted modern art masters. The Nazi authorities who hosted the auction had regarded these works as degenerate but nevertheless were aware of their monetary worth, and were not above selling them in order to raise money for the Reich. The works were among thousands of art works gathered from Germany's major public galleries in order to 'purify' them,[30] all denounced as degenerate and a testament to 'cultural decadence'.[31] What exactly did the Nazis mean by 'degenerate' however?

The infamous 'Degenerate Art' show which took place in the summer of 1937 was held in order to explain to the public as to what exactly was deplorable about modern art.[32] Essentially, Hitler believed that modern art trends, which included Expressionism, Impressionism, Dadaism, Cubism, and Futurism, had a 'disintegrating influence on the life of the people' and sought to cleanse Germany of such influences.[33] He gave a series of inflamed speeches about the debilitating influence of modern art, and accused Jewish art dealers of promoting such undesirable works for their own benefit. At a Nazi sponsored pageant celebrating German art, or more specifically Nazi approved forms of art, he claimed that 'degenerate' artists were 'stupid or sick', [34] and thundered, '…prehistoric Stone Age culture-barbarians and art-stutterers can return to the caves of their ancestors…'[35] For the first two days of the pageant, the Nazi authorities exhibited several hundred works of approved art, which consisted of banal paintings depicting idealised German peasants and heroic scenes. On the third day, the Nazis launched the Degenerate Art show. The 650 works destined for this show were removed from their frames and crowded together on the walls in dimly lit exhibition rooms, clearly designed to be displayed in the worst possible light.[36] The 650 works on display were only the tip of an iceberg of works confiscated by the Nazis.

It is estimated that almost 16,000 works of art were seized by the Nazis from public collections alone. Of these, approximately 5000 works were consigned to flames on 20 March 1939,[37] while on

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30 Almost 16000 works were confiscated by the Nazis from public collections. Nicholas (n 11) 23.

31 Unknown, *Guide to the "Degenerate Art" Exhibition* (1937).

32 Jones (n 3) 940. This was not however the first 'degenerate art' exhibition. The first of such shows took place in 1933. See Stephanie Barron (ed) *"Degenerate Art" - The Fate of the Avant-Garde in Nazi Germany* (Harry N Abrams Inc 1993) 15.

33 Jones (n 3) 938.

34 Nicholas (n 11) 20.

35 Barron (n 32) 17.

36 Nicholas (n 11) 21-22.

37 ibid., 25; Barron (n 32) 128.

27 July 1942,[38] works by Picasso, Ernst, Dali, Miro, Klee and Leger perished in another bonfire.[39] As for the impact of such atrocities upon our artistic heritage, the mere roll call of such illustrious names suffices to demonstrate the incalculable loss we bear today.

b. Destruction by patron-owner: Diego Rivera, 'Man at Crossroads Looking with Hope and High Vision to the Choosing of a Better Future'

While inflamed religious passions essentially caused the destruction of great artistic masterpieces in Renaissance Florence, an irreconcilable difference in political ideologies accounted for the destruction of a sixty-three foot long fresco painted by Diego Rivera, who was Mexico's most revered and celebrated artist. Rivera's works still command a large following and worldwide respect today. In 2016, a number of global exhibitions centred on or featuring his works were sold out.[40] A 2016 exhibition at the Los Angeles County Museum of Art, entitled *Picasso & Rivera*, featured the Mexican artist sharing top billing with Picasso, who is universally regarded as the world's greatest artist in the 20th century,[41] demonstrating the high esteem in which Rivera is regarded in the art world.[42] It is said that Picasso's masterpiece *Guernica* was clearly inspired by Rivera's famed murals.[43]

In 1932, the Rockefeller family commissioned Rivera and two other artists to produce nine murals for the lobby of the Rockefeller Centre in New York. The Rockefellers were admirers and avid collectors of Rivera's work. Despite Rivera's known communist leanings, the Rockefellers, exemplars of capitalism, were not unduly concerned at their choice of artist at first. Rivera's brief was to portray man looking at the future with uncertainty but with high hopes for a better and brighter future. This was to reflect the theme of the Rockefeller centre, 'New Frontiers' and the Rockefellers' vision of the future. However, it came to be that Rivera's vision did not coincide with that of the Rockefellers'.[44]

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38 Nicholas (n 11) 170.

39 ibid., 170.

40 One in New South Wales, Australia was termed a 'blockbuster' and had to be extended owing to popular demand. Clarissa Sebag-Montefiore, 'Frida Kahlo and Diego Rivera review - romance, heartbreak and a must-see exhibition' *The Guardian* (28 June 2016).

41 David W. Galenson, 'The Greatest Artists of the Twentieth Century' in David W. Galenson (ed), *Conceptual Revolutions in Twentieth-Century Art* (Cambridge University Press 2005).

42 Jordan Riefe, 'Picasso and Rivera review - a lifelong conversation between artistic frenemies' *The Guardian* (9 December 2016).

43 ibid; L. Bethell, *The Cambridge History of Latin America* (Cambridge University Press 1986) 481.

44 Alison Keys, 'Destroyed by Rockefellers, Mural Trespassed on Political Vision' (*National Public Radio,* 2014) <http://www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision>.

Indeed, soon after Rivera commenced work on the mural, it became evident that Lenin was to be portrayed within the work, and that the developing mural was beginning to look very different from the early sketches he had produced at the start of the project. One half of the mural depicted workmen and Lenin holding hands, appearing serene and content, while the other half depicted John D. Rockefeller Jr. downing hard liquor, surrounded by police and soldiers attacking street protestors. The media immediately picked up on this, mocking both the mural and also the Rockefellers for unwittingly sponsoring a communist propaganda piece,[45] thereby creating much unwanted publicity for the Rockefellers. As a result of press coverage, there was growing public interest in the work, and crowds would gather to watch Rivera work.[46] In the face of the growing tension, Rivera was asked by Nelson Rockefeller to substitute Lenin's face with that of an unknown man. He flatly refused to relent on his communist ideals, and after a brief impasse, Rivera was ordered to cease work and was escorted ignobly from the premises on 9 May 1933.[47] Almost immediately there was a huge uproar and protests were mounted by three hundred people on the same evening.[48] The mural was then covered over and would remain so for about ten months, during which period, intense campaigns were waged by intellectuals, workers, artists and activists on both sides of the controversy. During this time, Diego Rivera reportedly became increasingly despondent and resigned to the mural's fate.[49] Attempts at saving the mural failed and on 10 and 11 February 1934, it was sandblasted and completely obliterated.

There was widespread condemnation of the destruction. An open letter signed by a group of artists in March 1934 condemned the destruction and criticised the Rockefeller's decision to 'establish an Art Center in the very building where a monumental work of art was destroyed by them'.[50] Even non-artists expressed profound disgust. The intense feelings aroused by the destruction is summed up in a letter written by a private individual to John D. Rockefeller Jr. which stated 'about midnight [when the mural was destroyed] last Saturday, your family achieved a little measure of immortal fame...as long as the towers of Rockefeller Center stand, they will stand as a grandiose and mocking monument to this piece of vandalism.'[51]

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45 'Rivera Paints Scenes of Communist Activity and John D. Jr. Foots Bill' *New York World Telegram* (New York, 24 April 1933).

46 P. Marnham and D. Rivera, *Dreaming with His Eyes Open: A Life of Diego Rivera* (University of California Press 1998) 252.

47 Hal Foster and others, *Art Since 1900* (Thames & Hudson 2004) 258.

48 Marnham and Rivera (n 46) 254.

49 ibid., 257.

50 A. Lyford, *Isamu Noguchi S Modernism: Negotiating Race, Labor, and Nation, 1930 1950* (University of California Press 2013) 71-72.

51 Quoted in Marnham and Rivera (n 46) 260.

c. Public disapproval and government sanctioned destruction: Richard Serra, site specific public sculpture entitled 'Tilted Arc'

Bestowed with countless international honours and awards for his work,[52] Richard Serra has been hailed as the 'greatest living sculptor',[53] voted as one of the six greatest living artists in the world today in a poll conducted by Vanity Fair of 100 art experts and connoisseurs,[54] and his latest exhibition at Gagosian in London in 2016 was a triumph, receiving rave reviews in The Guardian and the Financial Times.[55] Yet, even with such esteem and considerable credentials, Serra was powerless in preventing the destruction of his monumental work, *Tilted Arc* in 1989.

In 1979, the General Services Administration (GSA), a US federal agency responsible for the commissioning and acquiring of public art associated with Federal Buildings, awarded Richard Serra the commission to create a work to be installed at the Federal Plaza, New York.[56] The result was a mammoth wall constructed from steel, tilting one foot off its vertical axis. The aesthetic effect intended by Serra was to make the viewer 'aware of himself and of his movement through the plaza.'[57] The physical effect on the site was that the view of the plaza from the doors of the main federal building flanking the plaza was obscured.[58] The material from which *Tilted Arc* was constructed did nothing to endear itself to the public for it was made of Cor-ten steel, a metal which was designed to rust quickly. Furthermore, the positioning of *Tilted Arc* meant that workers intending to cross the plaza had to circumvent the wall, which measured 120 feet in length. According to Storr, it was 'placed directly in the path of people largely ignorant of and for the most part alienated by modern art.'[59] In this context, and without any attempts by the GSA at forewarning the local populace of the arrival of *Tilted Arc,*[60] it can be seen why the immediate reaction of the workers to this steel

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52 Among others, he has been awarded the *Praemium Imperiale Prize*, Japan, 1994; *Golden Lion*, Venice Biennale, 2000; *Prince of Asturias Award for the Arts*, Spain 2010; *Chevalier, Legion of Honour*, France, 2015.

53 Sean O'Hagan, 'Man of Steel' *The Observor* (5 October 2008).

54 Mark Stevens, *Paint by Numbers* (December edn, 2013).

55 Jonathan Jones, 'Richard Serra review - rusting hulks that trap the ticking of time' *The Guardian* (13 October 2016); Edwin Heathcote, 'Richard Serra, Gagosian, London - review' *Financial Times* (7 October 2016)

56 Gamboni (n 3)156.

57 Robert Storr, '"Tilted Arc" Enemy of the People' in Arlene Raven (ed), *Art in the Public Interest* (UMI Research Press 1989).

58 Gamboni (n 3) 157.

59 Storr (n 57) 271.

60 Gamboni (n 3) 157.

behemoth on their doorstep was one of hostility and extreme negativity.[61] Not only were ordinary workers unimpressed and inconvenienced by *Tilted Arc*, it also did not escape censure from art cognoscenti. *Tilted Arc* was savaged as an 'awkward bullying piece...conceivably...the ugliest outdoor work of art' by the then arts editor of the New York Times.[62]

As public resentment towards *Tilted Arc* mounted, a series of panel hearings, legal suits and campaigns ensued over the following years. A petition bearing more than 1200 signatures was presented to the GSA, but the GSA refused to consider removing the work.[63] However, a new regional director of the GSA, one William Diamond, was appointed a few years later and its policy towards *Tilted Arc* began to change. At Diamond's behest, the GSA decided to hold a three day panel hearing in March 1985, with Diamond chairing, to decide the fate of the sculpture. In preparation for the hearing Diamond launched an aggressive campaign, including the posting of a thousand flyers generating interest in the hearing, as well as placing petitions for the removal of *Tilted Arc* in the lobby of the buildings surrounding Federal Plaza.[64]

Although the survey commissioned by the panel was in favour of retaining the sculpture, and despite compelling pleas from luminaries such as artist Oldenburg,[65] and composer Philip Glass,[66] Diamond reached the decision to relocate, which was approved at federal level.[67] In response, Serra instituted a legal suit to stay the destruction.[68] Serra's stance was crystal clear: '[*Tilted Arc*] was commissioned and designed for one particular site: Federal Plaza. It is a site specific work and as such not to be relocated. To remove the work is to destroy the work'.[69]

The thrust of Serra's legal suit, primarily premised on breach of contract (on the understanding that *Tilted Arc* was to be a permanent installation) and freedom of speech, sought

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61 David Coggins, 'Divide and Conquered: Richard Serra's 'Tilted Arc'' (*NYC 1981*, 2015) <http://1981.nyc/divide-conquered-richard-serras-tilted-arc/>; Jennifer Mundy, *Lost Art* (Tate Publishing 2013) 109.

62 Grace Glueck, 'An Outdoor-Sculpture Safari around New York' *New York Times* (New York, 7 August 1981).

63 Mundy (n 61) 113.

64 Harriet F Senie, *The Tilted Arc Controversy - dangerous precedent?* (University of Minnesota Press 2002) 28.

65 Clara Weyergraf-Serra and Martha Buskirk (eds), *The Destruction of Tilted Arc: Documents* (MIT Press 1991).

66 Harriet Senie, 'Richard Serra's "Tilted Arc": Art and Non-Art Issues' (1989) 48 Art Journal 298, 300-301.

67 Gamboni (n 3) 158.

68 Douglas McGill, 'Artist Sues US Over "Tilted Arc"' *The New York Times* (New York, 24 December 1986).

69 Richard Serra, letter to Donald Thalacker, 1 January 1985, in Weyergraf-Serra and Buskirk (n 65).

compensation for harm to his career and reputation. The suit and the appeal that followed failed, with the courts finding that *Tilted Arc* had been sold to the government and as such became its property in 1981, which allowed it to be used and disposed of as the government saw fit.[70] On 13 March 1989, Serra made another attempt to stay the execution of *Tilted Arc* in order to give his lawyers sufficient time in which to study the newly enacted Berne Convention Implementation Act of 1988. However, very quickly, Serra and his legal team realised that the Act had omitted implementation of Article 6*bis* Berne Convention, which they had hoped to invoke.[71] On 15 March 1989, *Tilted Arc* was cut into three pieces, dismantled and removed to a scrap metal yard warehouse.

While ostensibly the considerable public distaste for the work was the main reason for the eventual demise of *Tilted Arc*, there were questions raised over Diamond's role in the saga. Although he maintained that he was merely protecting the right of the people who had to face the 'menacing and overwhelming' sculpture daily, [72] it was clear that in time, *Tilted Arc* may well have withstood the public's hostility,[73] and indeed the initial outcry died down soon after it was first installed.[74] It was thus questionable when Diamond called for a panel hearing, over which he not only presided but also to which he appointed non-artists, which suggests that he was trying to ensure a voting majority.[75] Furthermore, he expressed disapproval of the work, ordered petitions for the removal of the work, and despite the survey results coming down in favour of retaining the work, he ordered its removal. It has been suggested that Diamond, as a Republican, had ambitious political plans and that this was an opportunity for him to gain political leverage by destroying a work installed under a Democratic administration.[76]

Thus, widespread public ignorance,[77] hostility, and distaste, together with an individual's political ambitions, may all have played a part in the destruction of *Tilted Arc*, echoing aspects of Savonarola's *Bonfires*. The import of the *Tilted Arc* controversy is significant. It brought to the fore important questions of legal, moral and public policy issues, involving the precedence of property

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70 Richard Serra, 'Art and Censorship' (1991) 17 Critical Inquiry 574, 575.

71 ibid., 576.

72 Mundy (n 61) 114.

73 Gamboni (n 3) 159.

74 Senie (n 66).

75 Storr (n 57) 272.

76 Weyergraf-Serra and Buskirk (n 65) 5; Senie (n 66) 299; Storr (n 57) 273; Gamboni (n 3)158; Mundy (n 61) 115.

77 Some commentators have proposed that the commissioning of *Tilted Arc* should have been accompanied by an education programme to prepare its audience. See Senie (n 66) 299.

rights over artistic rights,[78] the integrity of art works,[79] the boundaries of artistic freedom,[80] and the functions of public art,[81] issues which have been debated constantly ever since.[82]

As for the aesthetic effect stemming from the removal of *Tilted Arc*, Federal Plaza reverted to its previous nondescript self, with the addition of commonplace park benches and planters,[83] while *Tilted Arc,* hailed as a 'bold and masterful work' by the Museum of Modern Art and the Guggenheim, is no longer with us.[84] They were not the only ones to have labelled *Tilted Arc* as such. At the time of the panel hearings on the removal of *Tilted Arc*, artists, art critics, art historians and art academics hailed the work as 'a great work of art',[85] 'beautiful, though...an unconventional beauty',[86] 'an excellent example of Minimalism',[87] and 'a major work by a major American artist'[88].

Certainly, it is regrettable that *Tilted Arc*, was not allowed to stand the test of time, as '(t)he more controversy there is at the time it is created by a tried-and-true artist, the more chance there is that it is a significant statement.'[89] Judging from the amount of controversy generated over *Tilted Arc*, there is a chance of *Tilted Arc* being a 'significant statement', indeed a masterpiece.

3. The Value and Function of Art

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78 Serra (n 70); Eric M. Brooks, '"Tilted" Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention' [California Law Review, Inc.] (1989) 77 California Law Review 1431, 1468.

79 Judith Bresler, 'Serra v USA and its Aftermath: Mandate for Moral Rights in America?' in Daniel McClean (ed), *The Trials of Art* (Ridinghouse 2007).

80 Hilton Kramer, 'Is Art Above the Laws of Decency?' in Ralph A. Smith and Ronald Berman (eds), *Public Policy and the Aesthetic Interest* (University of Illinois Press); Serra (n 70); K.E.Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy' (2011) 69 The Journal of Aesthetics and Art Criticism 355; Robert M. O'Neil, 'Artistic Freedom and Academic Freedom' (1990) 53 Law and Contemporary Problems 177.

81 Arthur C. Danto, *The State of the Art* (Prentice Hall Press 1987), 90-94; Gregg M. Horowitz, 'Public Art/Public Space: The Spectacle of the Tilted Arc Controversy' (1996) 54 The Journal of Aesthetics and Art Criticism 8; Barbara Hoffman, 'Law for Art's Sake in the Public Realm' (1991) 17 Critical Inquiry 540.

82 Michael Brenson, 'The Messy Saga of 'Tilted Arc' is Far from Over' *The New York Times* (2 April 1989).

83 Senie (n 66) 301.

84 Donald Thalacker, Letter to Editor of the New York Times, 3 October 1981.

85 Testimony of Rosalind Krauss in Weyergraf-Serra and Buskirk (n 65) 82.

86 Testimony of Coosje Van Bruggen in ibid., 78.

87 Testimony of Roberta Smith in ibid., 104.

88 Testimony of Jerald Ordover in ibid., 141

89 Robert Buck, Director of the Brooklyn Museum, quoted in Douglas C McGill, ''Tilted Arc' Removal Draws Mixed Reaction' *The New York Times* (New York, 6 June 1985). *Tilted Arc* was reportedly removed and placed in storage. It was not physically destroyed but according to Serra, as it was a site-specific work, its removal from its site amounted to destruction of the work.

While the above examples demonstrate the seeming ease with which masterpieces may be destroyed at the whim of a religious fanatic (Savonarola), billionaire art owner (the Rockefellers) or a government agency (GSA) for a variety of reasons, the question is whether such losses are really that significant, whether to the world of art, cultural heritage, society or humanity. It is contended that such losses are indeed significant because art has intrinsic as well as instrumental value.

For the sake of clarity, as is the case for the rest of the thesis, the focus here is on the visual arts, for reasons already specified in the preceding chapters. Much scholarly work embraces the arts as a whole (including visual, literary, musical and performing arts) when discussing values, whether instrumental or intrinsic. The points made in such discussions are however no less pertinent and applicable to the visual arts on its own. The principal point of this chapter is that, ultimately, the intrinsic value of art matters more than, if not just as much as, instrumental goals. There is substantial scholarship which attests to the intrinsic value of the arts, yet it is always the instrumental values which drive cultural policies or underpin copyright systems. By disregarding the intrinsic qualities of art, perhaps it is no wonder that the current copyright regime places more emphasis on the economic and instrumental goals of creative works, and hence, gives more prominence to copyright, as opposed to moral rights.

a. Intrinsic v Instrumental values in art

The quest for an instrumental value in art, i.e. how it benefits certain non-artistic goals, such as public welfare or the economy, is one which has been at the heart of cultural policies of most modern governments.[90] A review conducted by the Arts Council in England in 2014 into the value of the arts (including visual, literary and performing arts) to society identified four areas in which the arts have substantial value: the economy, health and wellbeing, society and education.[91] According to the review, the arts contributed £5.9 billion to the UK's economy in 2011, art appreciators and theatre goers were more likely to report good health, the arts contribute to 'community cohesion' and there is heightened levels of literary and numeracy amongst school children as a result of exposure to the arts. The instrumental value of the arts has also long shaped American cultural policy, in the belief that the arts are a form of 'cultural spinach' to improve society.[92]

But the arts are not only a means to social and economic development. Even if it is arguable that the arts have an instrumental value, it does not necessarily mean that their value is *directly*

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90 Kees Vuyk, 'The arts as an instrument? Notes on the controversy surrounding the value of art' [Routledge] (2010) 16 International Journal of Cultural Policy 173; Kevin F. McCarthy and others, *Gifts of the Muse: Reframing the Debate about the Benefits of the Arts* (RAND Corporation 2004) 67.

91 Andrew Mowlah and others, *The Value of Arts and Culture to People and Society* (2014).

92 Joli Jensen, *Is Art Good for Us?* (Rowman & Littlefield, Inc 2002) 2.

involved with elevating such tangible goals as the economy, community, health or education. It may be that the arts do contribute to these goals, but they operate in a much more subtle and indirect manner than policy makers understand them to do so. Empirical studies which purport to demonstrate direct correlations between the arts and social or economic benefits have been criticised as spurious,[93] or demonstrated to be methodologically weak or lacking in specificity.[94] Certainly such a criticism may be levied for instance to the above finding that 'art appreciators and theatre goers were more likely to report good health'.

Kees Vuyk for instance argues that while it is no bad thing that the arts are deemed to have an instrumental value, as that in itself means that the arts do matter, he does not think that the instrumental value of the arts lie directly in social and economic development.[95] There are, he says, better ways of enhancing wealth and welfare after all. This is not what the arts do. According to Vuyk, we should recognise the *true* value of the arts, which is to function as a window to new perceptions and new ways of thinking, thus opening up our ability to be more creative and innovative, which in turn would *eventually* contribute to our social and economic development. However, Vuyk's view that the arts may serve an instrumental value through enriching our lives and in turn fostering a generation of people who are more creative and innovative, is clearly dependent on the intrinsic value of the arts, which is essentially the enriching experience which the arts offer to us.

Chris Higgins, in challenging the instrumentalist view of aesthetic education for instance, exhorts us to understand first, what it is exactly that we wish to get out of education, and then, ascertain that which the arts can offer us in terms of achieving these goals.[96] If education is about the mere acquisition of skills and information in order to equip us with the tools required for navigating the everyday obstacles of life, i.e. we live in order to work in order to earn money in order to spend money in exchange for material comforts and goods, then the arts are a mere decorative diversion for us, a bonus or luxury. However, if education is tasked with ensuring that each one of us is able to answer the question Socrates posed in the *Republic*, 'How should I live?',[97] or the question, 'what sort of person do I want to become?', then the arts enable us to do this, by opening up new vistas of experience and perspectives in our lives. Higgins uses various examples from the depiction of tables and chairs in Van Gogh's works to Duchamp's Readymades, illustrating how these pieces provoke our senses and challenge us to perceive much more in ordinary objects than merely recognising and

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93 ibid.

94 McCarthy and others (n 90) 67-68.

95 Vuyk (n 90); McCarthy and others (n 90).

96 Chris Higgins, 'Instrumentalism and the Cliches of Aesthetic Education: A Deweyan Corrective' (2008) 24 Education and Culture 6.

97 ibid., 10.

labelling them. We do not just see a chair in Van Gogh's work; we see rich swirls of colour, lines and shapes, and much else besides which make up the humble chair.[98] We then have a richer, much more meaningful relationship with everyday encounters, because art teaches us to see more in everyday things and events. We learn to appreciate the aesthetics of everyday life.

In *Culture Counts*, Roger Scruton argues for the preservation of an essential classical cultural education, in which young people are schooled in the canonical works of Western culture, and in so doing, defends the intrinsic value of the aesthetics vigorously.[99] Culture, *high* culture in particular which has stood the test of time, consists of moral judgments and emotional knowledge i.e. we know what we should do and what we should feel, values which are fundamentally essential and precious to our way of life. The constant exercise of passing judgments is part and parcel of culture; we judge works constantly and rigorously, and we strive to appreciate and understand them thoroughly before subjecting them to judgment, eventually resulting in the careful and reasoned selection of the canonical masterpieces in our culture. This habit of judging sincerity, profundity, obscenity, beauty and elegance in our culture, Scruton argues, is essential to our moral development. This is illustrated clearly in literature, which entreats us to sympathise with characters and their emotions, to imagine their lives, and through such imagination, we attain what Scruton terms as 'emotional knowledge', which prepares us for our own encounters in life.[100]

b. Evolutionary foundation for the arts

While Scruton's views are grounded within aesthetic philosophy, his views bear much similarity to those held by scholars in the field of evolutionary psychology, anthropology and biology, specifically those involved in the study of aesthetic Darwinism. These scholars explore what it is that make us desire the arts, from an evolutionary perspective. In other words, they ask if our desire and passion for the arts is a biological or evolutionary necessity.[101] A consideration of these issues serves to underscore the main thrust of the argument in this chapter. If the arts are intrinsically valuable to us as shown above, and that furthermore, our desire for the arts are naturally ingrained within us because they confer a natural evolutionary benefit upon us, then, *a fortiori*, the demand for more robust laws for the protection of art is justified.

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98 ibid., 13-14.

99 Roger Scruton, *Culture Counts: Faith and Feeling in a World Besieged* (Encounter Books 2007).

100 ibid., 38.

101 Denis Dutton, *The Art Instinct* (Oxford University Press 2009); J. Carroll, *Literary Darwinism: Evolution, Human Nature, and Literature* (Taylor & Francis 2004); Ellen Dissanayake, 'The Arts After Darwin: Does Art have an Origin and Adaptive Function' in K. Zijlmans and W. van Damme (eds), *World Art Studies: Exploring Concepts and Approaches* (Valiz 2008); Geoffrey Miller, *The Mating Mind: How Sexual Choice Shaped the Evolution of Human Nature* (Heinmann 2000); Steven Pinker, *How the Mind Works* (Penguin Books 1997).

Scruton's views are similar to those held by Joseph Carroll,[102] a scholar in English literature and literary Darwinism, in his spirited response to Steven Pinker's famous charge that the arts are analogous to strawberry cheesecake i.e. that they merely give us sensual pleasure, and are otherwise quite unnecessary for our being.[103] In short, Pinker says that the arts are pleasurable but they are not necessary for our survival and as such are biologically functionless and are mere by-products of other adaptations. But he stands alone in his view among other evolutionary psychologists and anthropologists. Carroll has responded, saying that the arts play a vital role in our healthy development and makes use of characters in Dickens' *Hard Times* and other novels, to illustrate his point: children deprived of art and literature, or the space and freedom to exercise their imaginations, grow up to become emotionally stunted adults, for the arts fuel our imaginations, which enable us to adapt successfully in the wider world and become better human beings.[104]

While it is possible to argue that the effects of literature on our moral development apply similarly to the visual arts, there have been separate studies conducted on the beneficial effects of the visual arts. Evolutionary anthropologist, Dissanayake, in arguing that the arts have an adaptive function, [105] refers to the work of neurologists, specialising in neuroaesthetics,[106] who study the biological mechanisms which allow our brains to engage aesthetically with works of art, landscapes, architecture, food, other people and other objects of beauty,[107] in particular, Semir Zeki's work in this area. Zeki's work is apposite to the present discussion as it centres on the visual arts, exploring what it is that artists attempt to do and also what effect visual art has on the viewer, from the perspective of neurology.

Zeki, in *Art and the Brain*, concludes that the function of art is 'a search for the constant, lasting, essential and enduring features of objects, surfaces, faces, situations and so on...'[108] Neuroscience explains that because our vision constantly moves, because our bodies are in constant motion and light is always shifting, the basic function of vision is to seek out the essential elements of whatever we are seeing at that very moment, in the process discarding all other extraneous information, as we try to make sense of the thing that we are seeing. Art extends this function even further. The artist

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102 Carroll (n 101) 63.

103 Pinker (n 101) 525.

104 Carroll (n 101) 68.

105 Dissanayake (n 101) 8.

106 Neuroaesthetics is the study of 'the neural processes underlying our appreciation and production of beautiful objects and artworks' - Anjan Chatterjee, 'Neuroaesthetics' The Scientist <https://www.the-scientist.com/?articles.view/articleNo/39802/title/Neuroaesthetics/>.

107 ibid.

108 Semir Zeki, 'Art and the Brain' (1998) 127 Daedalus 71, 76.

seeks out the *essence* of the thing that he chooses to represent in art, discarding all other constituents that make up the thing. Zeki also draws parallels in the language used by philosophers and artists with the language utilised by neuroscientists, arguing that they are all talking about the same phenomenon, that art serves to distil from the constantly shifting angles and images, the essential character of the subject-matter being captured in a work of art.[109] Why do artists do this and why are we so fascinated by art and what do we gain from looking at art? Zeki's answer is that this seeking of constancies and essences is fundamentally a pursuit for truth and knowledge in that which surrounds us.

4. Conclusion

The aim of this chapter is twofold. Firstly, it aimed to impart a sense of tension and shock by describing the events which led up to the destruction of important works of art, as well as a sense of loss at the finality, and futility, of such acts. Secondly, it focused on the intrinsic value of art, by referring to a wide variety of different studies, ranging from art philosophy, evolutionary studies to neuroaesthetics.

The loss of Botticellis, da Vincis, Klimts, and Picassos in the Florence and Nazi bonfires described is keenly felt because they were works by artists who are widely established and regarded as some of the greatest masters of art, and in any case, some of these destroyed works are known to us as masterpieces. The sense of despair and loss we experience lies in the realisation that they are lost to us forever and that we and future generations will never have the chance to acquaint ourselves with them. As for the more contemporary examples of destruction involving Rivera and Serra, they are examples of works by acknowledged masters, but which have not had the benefit of time in which to establish their worthiness or value. However, in view of the immense reputation enjoyed by both artists, as well as the opinions of those acquainted with both works, it is possible that the world has lost two great masterpieces.

This chapter's focus on the intrinsic rather than the instrumental values of art is intentional. Cultural and copyright policies have always been informed by the instrumental values of the arts i.e. the tangible benefits bestowed upon us, and which are calculated in quantitative terms, such as visitor numbers and box office takings, which in turn translate into a tangible contribution to the nation's economy. What appears to be missing from consideration is the intrinsic value of the arts. The Arts Council Review of 2014 itself makes reference to the intangible qualities of the arts, saying that 'we should always start with the intrinsic – how arts and culture illuminate our inner lives and enrich our emotional world. This is what we cherish.'[110] However, the report goes on to report the hard facts and numbers which can somehow be linked to an appreciation of the arts, so that we can understand the

[109] ibid., 77-78.

[110] Mowlah and others (n 91) 4.

contribution that the arts make to our lives. This thesis will argue however, that the problem with depending heavily on or focusing on the instrumental values of art, is that policies, and the laws which reflect and regulate those policies, lose sight of that which is truly valuable about the arts i.e. how they enrich our lives and contribute to our personal, spiritual and moral development. After all, and this is a point raised by Vyuk above, there are other, better and more appropriate ways in which to generate wealth or improve our health or educational standards. We value and cherish the arts for other reasons. Copyright law is blind to these intrinsic qualities and that is why it focuses on strengthening its economic rights, not moral rights.

This chapter seeks to make clear those intrinsic qualities which elude policy and law makers. The arts challenge us to view the world from different perspectives, for instance where the visual arts are concerned, by being able to appreciate that strokes of amber coloured oil on canvas may represent a chair or conversely, that an urinal may be regarded as a work of art, which in turn enables us to see things differently and to see things anew each time we see them, rather than merely recognising and instantly dismissing the things that surround us. Visual art, in this manner, firstly awakens our senses to new perspectives and secondly, provokes us into pursuing the truth within things and events that we encounter. Not only do art philosophers and psychologists show this to us, such findings, at least the function of art in interrogating our senses, are now backed up by empirical research carried out by neurologists.

Furthermore, when faced with so many artistic works and performances, in order to extract the most out of them, we engage with them critically, forming judgments constantly, sifting the good from the bad, or the worthwhile from the mediocre or the depraved and contemptible, choosing those works which represent the best of our culture. Armed with a secure knowledge of the highest standards of the arts, each time we confront a work, we hone our skills in analysing and judging aesthetic standards against these highest standards, which are the same skills in which we judge our moral actions and behaviour, in order to 'do the right thing'. These, not the apparent tangible impacts of the arts,[111] are the reasons why the arts, and by implication, the visual arts are invaluable to society, and it is those qualities which the law should also serve to protect.

[111] These include outcomes such as improved literary and numeracy attainment and higher employability. See ibid., 35.

Part II: Deconstructing the Traditional Approaches to the Integrity Right and Destruction

Chapter 4 - Implementation of s.80 UK Copyright Designs and Patents Act 1988

When the right of integrity is enacted, it would be desirable to deal with this issue [destruction] *clearly...The issue may be difficult to resolve, but it should not be glossed over.*

Gerald Dworkin on the proposed UK Copyright Designs and Patents Bill[1]

1. Introduction

This chapter focuses on the UK's adoption of moral rights in its copyright legislation and will examine the implementation and application of s.80 of the Copyright Designs and Patents Act 1988 (CDPA) in particular. It begins with a critical examination of the background of events leading up to the UK's eventual recognition of moral rights, starting with the International Copyright Conference of 1928 (Rome Conference), through to the International Copyright Conference of 1948 (Brussels), before critically examining the parliamentary debates on the CDP Bill and finally subjecting s.80 itself to critical scrutiny. The aim here is to examine the intentions behind the introduction of moral rights through the Berne Convention as well as its adoption in the UK, in order to ascertain evidence of the following:

a. the nature and boundaries of moral rights as envisaged by the members to the Berne Convention;
b. the idea that moral rights may protect cultural rights/heritage;
c. the reasons for inserting 'honour' and 'reputation' in Art.6*bis*;
d. the UK legislature's position on moral rights and what they were intended to encompass;
e. the extent to which 'destruction' may be embraced within s.80 CDPA 1988

The chapter is divided into two parts. The first examines the proposed adoption of moral rights into the Berne Convention at the Rome Conference in 1928, as well as debates on the same at the Brussels Conference in 1948, paying close attention to the common law countries' response to the proposal, in particular that of the United Kingdom. An examination of the civil law countries' contributions in the debates at the revision conferences is also instructive as those countries were

[1] Gerald Dworkin, 'Moral rights in English law - the shape of rights to come' (1986) 8 European Intellectual Property Review 329, 335.

instrumental in introducing the concept of moral rights and no doubt influential in informing the UK's perception of moral rights. This is followed by a consideration of the reports of the UK Gregory (1951) and Whitford (1977) Committees on copyright law. The aim of this part is to ascertain both the scope of moral rights as originally envisaged, and the UK's early perception of, and relationship with, the concept of moral rights.

The second part focuses on s.80 CDPA as it reads today. The wording is closely analysed with reference made to Parliamentary debates on the CDP Bill, where relevant. In particular, the analysis aims to explain firstly, why a claim against destruction appears *prima facie* to be restricted under s.80 and secondly, why on close inspection, such restriction is arguably not as absolute and insurmountable as originally perceived. Following on from this examination, chapter 5 will focus more specifically on the requirement of 'honour' in s.80.

2. The Berne Convention, Art.6*bis*

The source for moral rights in the UK is the CDPA, which implemented Berne Convention Art.6*bis*. In order to understand the ethos behind the Berne Convention's conception of copyright and moral rights, as well as its approach towards resolving conflicts engendered by differing copyright philosophies and principles, it is useful to understand the principles which underpin the Berne Convention. In the preface to a special edition book to celebrate the centenary of the Berne Convention (1986), the then Director General of WIPO, Arpad Bogsch, asserted that the underlying principle was a sense of justice, which served both authors and the interests of the public.[2]

The Berne Convention was born of a campaign encouraging greater international recognition for authors' rights. The momentum for this was an ever increasing focus on authors' rights in copyright law. Prior to the Berne Convention, copyright laws were territorial in nature. The precursor to modern day copyright was the system of privileges, which privileged booksellers, not authors, whereby booksellers were bestowed an exclusive right to print and sell copies of manuscripts. There was initially little recognition for authors' rights. As outlined in chapter 2, this infant form of copyright gradually evolved over time, perhaps in slightly different directions in the common law and civil law regimes, but common to both regimes, there was an increased recognition of rights for the author. Empowered by this enhanced acknowledgement of their worth and rights, authors increasingly took it upon themselves to demand more comprehensive and universally recognised rights. In 1858, a group of authors from several countries met in Brussels, forming the Congress of Authors and

[2] Arpad Bogsch, 'The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works' in *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (International Bureau of Intellectual Property 1986).

Artists,[3] which later became the *Association Litteraire et Artistique Internationale* (ALAI), established in 1878 by Victor Hugo.[4] The aim of this group was to press for legislation which recognised international rights for authors. Their resolutions were to form the bedrock for the Berne Convention. Essentially, the aim of the Berne Convention was to establish universal copyright protection for authors, although the initial approach was gradual and cautious, primarily owing to the differing philosophies of the participating countries.[5]

In the years prior to the Rome Conference, there had been numerous resolutions passed at various conferences and congresses appealing for the international recognition of moral rights: the International Press Congress (Rome) 1899, International Literary and Artistic Association 1898, and the International Literary and Artistic Association 1927 as well as the Berne Convention revision conferences: the Paris Conference of 1896, and the Berlin Conference of 1908,[6] The time was thus clearly ripe for international action designed to stimulate national protection of such rights.

a. Rome Conference 1928

i. The debates surrounding Art.6bis

The original text of the Berne Convention did not provide specifically for moral rights until the Rome Conference of 1928 when the Italian delegation's report presented a passionate, but coherent argument for their inclusion.[7] The Italian delegation report set out several reasons as to why it was a particularly appropriate time to protect the moral rights of authors.

Firstly, the report noted that despite the different theories on the nature of copyright, moral rights had begun to assume a more coherent and precise constitution, consisting at the minimum of rights of publication, authorship and integrity, and were thus increasingly capable of recognition by all countries.[8] By the time of the Rome Conference, several of the convention countries had already legislated or were about to legislate on moral rights.[9]

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3 P. Goldstein and P.B. Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP USA 2013) 34.

4 ibid; Peter Burger, 'The Berne Convention: its history and its key role in the future' (1988) 3 The Journal of Law & Technology 1.

5 Burger (n 4) 13.

6 Stephen Ladas, *International Protection of Literary and Artistic Property* (Macmillan 1938) 579-80.

7 Memorandum by the Italian Delegation (Moral Rights) Rome Conference 1928 in Bogsch (n 2) 162.

8 ibid., 163.

9 Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) 41-42.

Secondly, the report recognised the argument that, because of the increased uniformity of moral rights and universal acceptance, there was no further need to codify them, but countered that it was nevertheless imperative that such rights be formally safeguarded primarily because they tended to be in conflict with other legal rights, notably the rights of copyright assignees or, where artistic works were concerned, their owners.[10] Indeed the latter observation is of key importance to this thesis – as the well-being of artistic works is particularly at the mercy of their owners, where the works may be threatened with poor conservation, mutilation or destruction, it is vital that artists' rights are properly defended.

Finally, the report highlighted the increasing prevalence of developing technologies and practices likely to have a significant impact on the author, such as reproduction of works in the mass media, the adaptation of musical works and broadcasting of works on radio. The report emphasised that these uses of works should be subject to the protection of moral rights.

The Italians were not the only delegation to have proposed wording for Art.6*bis*. Others had either proposed their own or suggested amendments to the Italian suggestion. The original Italian suggestion was 'The right to object to any alteration of the work that would be prejudicial to his moral interests.'[11] It is noted that the Italians were at pains to emphasise that the right should not allow claims based on the 'excessive sensitivity' of authors,[12] an issue which is discussed later in chapter 5, where it is argued that employing the correct interpretation of 'honour' in the final formulation of Art.6*bis* and in s.80 CDPA would address such concerns.[13] Because of the reference to 'any alteration', the scope of the treatment intended to be captured was unclear, and only envisaged alterations which were 'prejudicial to [an author's] moral interests.' It is also not clear as to what the Italians had intended by the phrase 'moral interests', which was deemed too vague by the common law countries. It was subsequently acknowledged by all present that 'more intelligible wording' was required.[14] Some guidance as to the 'moral interests' envisaged can be found in the Italian memorandum. They suggested that it encompassed the author's 'more delicate interests of his scientific, literary or artistic personality'.[15] However, it is doubtful that this addition of the idea of

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10 Bogsch (n 2).

11 Memorandum by the Italian Delegation (Moral Rights) Rome Conference 1928 in Bogsch (n 2) 162.

12 ibid., 164.

13 See discussion under subheading 7a in chapter 5.

14 E Piola Caselli, *Actes de la conference reunie a Rome du 7 mai au 2 juin 1928 General Report of the Drafting Committee* (1928) in Bogsch (n 2) 172; Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) 120.

15 Memorandum by the Italian Delegation (Moral Rights) Rome Conference 1928 in Bogsch (n 2) 164.

'delicate interests' did much to aid in clarifying the nature of 'moral interests', described as 'elusive' by Adeney.[16]

Other delegates proposed alternative wording which went some way to demonstrating the sentiments of the other convention countries. Poland's suggestion was that the author should have the right to object to any distortion of 'the way in which his work was *intended to be presented* to the public', which suggests that they were very concerned with the author's intentions. This contrasted with the Romanian delegation's suggestion that only modifications which were 'prejudicial to [the author's] *reputation*' should be encompassed. The Belgian contingent were concerned about any modification which would '*alter the character*' of the author's work while the Czechoslovakian delegates emphasised that any proposal should be resolved in favour of ensuring the *work's integrity*. Clearly, the Polish, Belgian and Czechoslovakian delegations were all concerned that the author's vision of his work should be preserved, independently of whether his reputation was affected. A similar sentiment was expressed at the previous conference held in Berlin in 1908, at which the right of translation was debated. Although the translation right is traditionally viewed as one of the author's exclusive economic rights, the French delegate expressed his opinion from a moral rights viewpoint: 'The author is the best judge of whether his work can be translated and which translator is the most competent to do so: in this way, he is in a position to prevent any distortion of his thought'.[17] There was a clear concern that the author's vision should not be altered.

Adeney describes the approaches of the delegations at the Rome conference on this point as 'highly varied'.[18] However, although the terminology utilised by the various delegates was indeed varied, it is submitted that the Polish, Belgian and Czechoslovakian delegates were all essentially addressing the same thing. There is arguably a common theme in their initial approaches, in that the author's creation is paramount and that he has the right to object to any act which interferes with his creation or distorts the message which he wishes to convey *without needing to make any reference to his reputation*. Although the final version of Art.6*bis* accepted at Rome made reference to 'distortion, mutilation or other modification of the work which would be prejudicial to the author's honour or reputation', the application and operation of 'honour or reputation' in the final version was not without question.

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16 Adeney (n 14) 120.

17 Lous Renault, *Actes de la Conference de Berline 1908 General Report of the Drafting Committee* (1908) in Bogsch (n 2) 151.

18 Adeney (n 14) 120.

ii. The requirement of 'honour or reputation'

One of the first matters of contention concerned the French wording of Art.*6bis.* Because in the definitive French version of Art.6*bis*, '*qui serait prejudiciable*' ['which would be detrimental'] was in the singular, it was thought that honour and reputation were only applicable to one of the listed treatments in Art.6*bis*, namely 'modification',[19] and that distortion and mutilation were objectionable *per se*. There was no need to also show prejudice for these acts, which reflects the position of some countries today.[20] At the Brussels Conference in 1948 however, a plural construction was substituted in the French version of Art.6*bis*, [21] and it would appear to be the generally accepted position today, i.e. that all treatments were to be similarly affected, not just modification. In the UK, the conventionally accepted interpretation of s.80 CDPA is that all acts, including distortions and mutilations, are subject to the requirement for prejudice, [22] although there does exist judicial opinion to the contrary.[23]

The question still remains as to why it was *initially* thought important that the author's vision should be protected even if the treatment of it does not harm his reputation. There was at least, at the time of the Rome Conference and thereafter when the interpretation of Art.6*bis* was being scrutinised and debated,[24] some degree of opinion that some treatments of an author's work were objectionable without requiring the author's reputation to be harmed. Although it has been argued in some quarters that the initial French wording was possibly a drafting error,[25] it is submitted that there is some merit in acknowledging the original French wording at face value and accepting that some treatments were at least initially thought to be objectionable *per se*. Indeed, those treatments which were initially not subject to the 'honour or reputation' limitation had a negative or damaging connotation in any case: distortion and mutilation. As stated above, in some Berne Convention countries today, for example Belgium, France, and Greece, the integrity right is not restricted to acts which are prejudicial to honour or reputation of the author.[26]

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19 ibid., 121.

20 France and Belgium for instance.

21 Adeney (n 14) 121, 140-41.

22 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014), 285-86; Adeney (n 14) 14.72.

23 *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144, ChD; *Tidy v Natural History Museum* (1998) 39 IPR 501, 504.

24 Adeney., (n 14) 6.52.

25 It has been argued that it was possibly a drafting error: ibid., 140 para 7.31.

26 Davies and Garnett (n 9) para 11-012, para 13-011, para 15-015.

What did the delegates at the time consider to be the harm that is caused by any act affecting the integrity of an author's work *per se*? Indeed, why do some countries today still refrain from restricting the integrity right, even after Art.6*bis* was amended at Brussels? The answer to this question may lie in the general perception of the value of moral rights in these countries.

Firstly, the theory underpinning moral rights doctrine in these countries is that the author imbues his work with his personality and forges an intimate unbreakable bond between himself and his work. This combination of the authorial bond, his message and the creative process in which the message is produced and the importance of recognising these elements in formulating safeguards for creative works have already been discussed at length in the preceding chapters. The point made here is that because an author's work encapsulates his personality, *any* interference with the work, *prejudicial or not*, necessarily interferes with this bond and would distort the author's personal vision and message.

Secondly, although the safeguarding of the author's personality is paramount in civil law countries, there is also evidence that moral rights are meant to protect *much more* than just the author's personality. The perpetuity of moral rights in France and other countries suggests that moral rights also play an important role in cultural protection.[27] If moral rights are merely solely personality rights and hence only intended to protect the author as an individual, it is difficult to discern any harm or prejudice which he may suffer personally from a post-mortem act. Why then are such rights protected beyond the author's death? Even in countries which do not recognise perpetual moral rights today, they at least allow moral rights to endure for as long as the copyright period which typically endures *beyond* the author's lifetime, which is also the position in the UK. While it may be argued that, as moral rights serve to protect the author's personality *as reflected in his creation*, and hence can theoretically and justifiably endure beyond his death, the question remains as to how the author should be compensated for any post-mortem infringement or what the appropriate remedy should be. The author is now dead and hence personally suffers no loss. McCutcheon argues that without any personal loss to the dead author, the recognition of post-mortem moral rights is incoherent.[28] Therefore, she argues that post-mortem moral rights may be more appropriately justified by protecting the public interest in its cultural heritage.[29] Her views reflect Martin Roeder's, who back in 1940, argued that 'the real reason...for protection of the moral right after the creator's death lies in the need

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27 Adeney (n 14) 170.

28 Jani McCutcheon, 'Dead Loss: Damages for Posthumous Breach of the Moral Right of Integrity' (2016) 40 Melbourne University Law Review 240.

29 If moral rights are to play a role in the protection of cultural heritage, it may be queried as to why the UK only recognises moral rights up to the end of 70 years following the death of the author, instead of in perpetuity.

of society for protection of the integrity of its cultural heritage'.[30] As an author's work is a legacy to the cultural heritage of a nation, any act which diminishes his work in any way, is an assault on the nation's cultural heritage.

Indeed, at the time of the Rome Conference, there was a growing interest in the protection of cultural heritage, particularly in Germany and Italy. German lawyers Marwitz and Kohler expressed the view that authorial works were also cultural objects, and were part of the culture of the community.[31] There was also acute concern with the effect of technology, such as reproduction and broadcasting technology on the state of culture.[32] Evidence of this interest in the protection of cultural heritage at the Rome Conference was particularly clear when delegates debated the issue of post-mortem moral rights. The Sub-Committee on Moral Rights expressed the hope that in time 'every citizen [has] the right to claim respect for works that are the common heritage of mankind' and on that note passed a resolution which encouraged the convention countries to adopt protective measures which would operate post-mortem.[33] The cultural protection idea was therefore certainly at the forefront of the debate over the introduction of moral rights at the Rome Conference. If cultural protection is a key aim of moral rights in some of the Berne Convention countries, this would account for the absence of the 'honour or reputation' restriction in their moral rights legislation.

A third answer may lie in the inclusion of 'honour' in the finalised version of Art.6*bis*. There are questions surrounding its inclusion. The requirement of both 'honour' and 'reputation' was in response to the British delegation's lukewarm reception of the Italian's initial proposal. Despite the Italian delegation's confidence that the countries of the Union were in unanimous appreciation of moral rights, their proposal had taken the common law countries by surprise, and was, as mentioned in chapter 2, initially 'coldly received' by the British countries.[34] The vagueness of 'moral interests' was part of the reason for this chilly reception, and 'moral interests' was altered to 'honour or reputation' in the final version, mainly to accommodate the common law countries' defamation laws.[35] Although the common law countries were clearly familiar with the concept of 'reputation',

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30 Martin A. Roeder, 'The Doctrine of Moral Right: a study in the Law of Artists, Authors and Creators' (1940) 53 Harvard Law Review 554, 575.

31 Adeney (n 14) 70.

32 ibid., 72.

33 Bogsch (n 2) 165.

34 S G Raymond, *Report of the New Zealand Delegate on the International Copyright Conference at Rome* (21 July 1928).

35 Ladas (n 6) 532; Mihaly Fiscor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2003), BC-6*bis*.4; Mira T. Sundara Rajan, 'Tradition and change: The past and future of authors' moral rights' in Toshiko Takenaka (ed), *Intellectual Property in Common Law and Civil Law* (Edward Elgar 2013) 139.

there is some question over the inclusion of 'honour'. Adeney reports that it was 'suggested by nobody but which evidently satisfied all parties at the time',[36] which is curious as 'honour' was as unfamiliar a concept as 'moral interests' to the common law countries, and yet was not questioned but allowed to remain. Apart from some reports that the common law countries were sceptical of the proposal to include moral rights, there appears to be limited information available on their *actual* objections, and regrettably little information regarding their opinions on the concept of 'honour'.

According to Adeney, the term 'honour' had been previously referred to in French and German cases.[37] It is possible to postulate that 'honour' was a reflection of the French conception of moral rights, which was premised on a 'right to respect', now codified in its intellectual property code.[38] The 1978 WIPO Guide to the Berne Convention also confirms that the right of integrity is also sometimes referred to as the 'right of respect.'[39] Marcel Plaisant, the French delegate, expressed his views on 'honour', saying that it was to 'prohibit deformations which risk prejudicing the reputation of the author, or *even more simply, altering the moral physiognomy under which the author presents himself to the cultivated public*'[40] thus employing a rather wide interpretation of the restriction and was evidently concerned with any changes which would misrepresent an author's work, and thus his personality, to the public. Plaisant's take on 'honour' clearly reveals a concern with the *author's control* over any representation of his work.

The conclusions that can be drawn from the above discussions are, firstly, that many of the civil law countries were in favour of moral rights which addressed the *integrity* of works per se, without the need to subject to a requirement for prejudice. Based on the views expressed by the representative delegates of these countries, they were clearly concerned about the *integrity* of the author's message, in other words, the work's *completeness*. The inclusion of 'honour or reputation' aimed to appease the common law countries but did not truly reflect their preferred approach. Indeed, many Berne Convention countries have chosen not to include this restriction in their legislation today. If the *completeness* of a work is paramount in interpreting the integrity right, then in line with the underlying premise of this thesis, the destruction of a work will fall foul of this.

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36 Adeney (n 14) 120. However in Elizabeth Adeney, 'The moral right of integrity: the past and future of "honour"' (2005) 2 Intellectual Property Quarterly 111, Adeney claims that the Italians had proposed the term, although she does not cite an authority for this.

37 Adeney (n 14) 120; Adeney 'The moral right of integrity: the past and future of honour' (2005) (n 36).

38 Intellectual Property Code art L121-1 ('An author shall enjoy the right to respect for his name, his authorship and his work.').

39 WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (1978) 42.

40 Quoted in Adeney (2005) (n 36) 123.

Secondly, it is clear that at the time of the Rome Conference, many countries were concerned with the role played by moral rights in protecting cultural heritage. It is reiterated that the protection of post-mortem moral rights may only be justified logically on this basis. This point is in line with the contention of this thesis: that the cultural protection role of moral rights should not be overlooked.

iii. Input of the UK and common law countries

The civil law countries led the debates surrounding the formulation of Art.6*bis* and the development of an international conception of moral rights. The influence of the British contingent on the development of the Berne Convention, especially the introduction of Art.6*bis* was curiously limited, or in Ricketson's view, merely reactive,[41] considering the extensive wealth and dominance of the UK at the time. The reasons why, are unknown, and the only conclusion that can be drawn is that the UK and other common law countries were, albeit grudgingly, ultimately accepting of the general concept of moral rights.

b. Brussels Conference 1948

If the UK and the other common law countries failed to take the initiative at the Rome Conference and were not particularly involved in the formulation of Art.6*bis*, their approach at the Brussels Conference was markedly different. The delegates were apparently adamant that the provision should not be reinforced or developed any further.[42] For instance, it was proposed by the civil law countries that authors should be able to object to *any utilisation* of the work but this was strongly objected to by the British delegation. The definitive French version adopted at the conference, '*a toute autre atteinte a la meme oeuvre'* ['to any other violation of the same work'] thus referred instead to '*atteinte*' which can be translated as 'violation'.[43] However, it is interesting to note that the official but *not* definitive English version merely refers to 'action', which is surely broader and less specific than 'violation', and was very likely an oversight, as the word 'derogatory' was inserted before the word 'action' at the Stockholm Conference in 1967 in order to bring it in line with the French version. In respect of the proposal to extend the duration of moral rights beyond the expiration of the copyright term or at least until the death of the author, the UK insisted that member states should be left to decide on the term.

Thus the UK delegates were far more rigorous in their approach post the Rome Conference, reflecting their concerns over the scope of moral rights. Given the UK's much more robust objections

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41 Sam Ricketson, 'The Public International Law of Copyright and Related Rights' in Isabella Alexander and H. Tomas Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016).

42 Adeney *The Moral Rights of Authors and Performers* (n 14)134.

43 ibid., 136.

at this time, it is somewhat surprising that the UK was apparently open to the idea of including 'destruction' within the right of integrity as will be discussed below.

i. Debates on Destruction

The Hungarian delegation proposed extending the right of integrity to encompass destruction, arguing that this could be logically included as it 'would complete the notion of mutilation'.[44] Interestingly, the British delegation is recorded to have expressly agreed to and supported the use of the word 'destruction'.[45] According to the New Zealand delegate's report, there was such considerable debate on this point, that it clearly indicated the Conference's desire 'to protect works effectively against *all derogations*',[46] including destruction. In the end, the term 'destruction' was not expressly included. However, it should be noted that the Italians had argued that the words '*a toute autre atteinte a la meme oeuvre*' were sufficiently wide to include destruction and that importantly, not one delegate at the conference opposed this interpretation.[47] Additionally, a recommendation was passed urging member countries to include destruction expressly within their own legislation.

The conclusion thus is that firstly, destruction was clearly contemplated, and indeed desired by the delegates, *including the British representatives*. Secondly, even though Art.6*bis* was not amended to specifically refer to destruction, the wording of the recommendation passed at the conference suggests that countries wishing to find *implicit* prohibition of destruction within the article could do so. The recommendation was worded as follows:

> Noting that Article 6*bis* of the Convention, though it permits the author to object to any deformation, mutilation or other modification of his work, or to any other violation of the same work which would be prejudicial to his honour or to his reputation, *does not prohibit in express terms the destruction of works* [emphasis author's], the Conference makes the recommendation that the countries of the Union should introduce into their domestic legislation dispositions prohibiting the destruction of literary and artistic works.

The words 'does not prohibit *in express terms* the destruction of works' implies that destruction has merely not been *expressly* prohibited but that all the same, such prohibition is warranted under the

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44 Marcel Plaisant, *Documents de la conference de Bruxelles 5-26 juin 1948* (1948) 197.

45 ibid., 197.

46 H.G.R. Mason, *Report by the New Zealand Minister of Justice on the International Copyright Conference at Brussels in 1948* (1948) 4.

47 Plaisant (n 44) 197.

convention.[48] In any case, there is an *express* recommendation that convention countries should allow for such a restriction.

3. UK Implementation of Art.6*bis*

The UK's copyright laws, and its compliance with the Berne Convention underwent two reviews, by the Gregory Committee in 1952 and the Whitford Committee in 1977. The Gregory Committee were satisfied that Art.6*bis* rights were met with adequately in other areas of UK law, although the Whitford review was of a different opinion.[49] In particular, where the integrity right was concerned, it was recognised by both committees that the UK had to rely on the law of defamation in order to fulfil its obligations. However, the Whitford Committee pointed out that in comparison with the integrity right formulated in Art.6*bis*, the law of defamation failed authors in at least two ways, firstly because for a defamation action to succeed, the public must have known that the claimant was the author and secondly, an action for defamation dies with the person defamed, unlike the integrity right which endures beyond the death of the author.[50] It was not until the enactment of the CDPA in 1988, which included sections relating to moral rights, that moral rights were formally recognised within the UK.

a. Parliamentary debates on the Copyright Designs and Patents Bill

The debates on the moral rights provisions of the CDP Bill were lively and impassioned in parts, particularly so in the House of Lords. The clear sentiment underpinning the bill as a whole was the recognition of creativity as a valuable asset to society. In the House of Commons, Mr Toby Jessel declaimed that 'to be creative seems to me to be fundamental. The creativity of artists, performers, composers and writers is basic to the enrichment of people's lives.'[51] In introducing the Bill for a second reading, Mr Kenneth Clarke pointed out that the aim was to 'promote and protect creative talent'.[52]

As for moral rights in particular, both Houses recognised their importance to creators. The proposed Act was 'to help authors and directors to establish and defend their artistic reputation'.[53] At

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48 Adeney, *The Moral Rights of Authors and Performers*, (n 14) 138. While it is clearly not a requirement to include destruction within moral rights, this recommendation indicates that it is certainly 'desirable' for member states to consider doing so. See Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1994) 19 Columbia Journal of Law and the Arts 229, 251 fn 81

49 Rajan (n 35) 138.

50 *Report of the Committee to consider the Law on Copyright and Designs* (Cm 6732, 1977) paras 52-53.

51 Mr Toby Jessel MP, Hansard HC Deb 28/4/1988, vol 132 cc 579-580.

52 Mr Kenneth Clarke MP Hansard HC Deb 28/4/1988 vol 132, cc 525.

53 Hazel Carty and Keith Hodkinson, 'Copyright Designs and Patents Act 1988' (1989) 52 The Modern Law Review 369, 371.

first glance therefore, the debates would appear to centre on the 'reputation' of authors. For instance, the Earl of Stockton said that 'moral rights are of great importance to authors and other originators of copyright works, who value their artistic reputation as much as their financial rewards for their works.'[54] This was not the only reference to 'reputation', and it should be noted it is used as a contrast to 'financial rewards'. Lord Morton of Shuna and Lord Hutchinson also claimed that moral rights were to do with reputation, although as it will be seen later, they used the word *in support of* compensation for *injured feelings*, which in turn suggests that they did not consider 'reputation' as an economic criterion. In general, the parliamentary debates on moral rights were centred on reputation, which nevertheless arguably has an economic dimension,[55] a point which is made in chapter 5 of this thesis.

Lords Morton and Hutchinson made their reference to reputation in response to the Government's spokesman, Lord Beaverbrook's proposal to insert a clause excluding claims for injury to feelings, on the basis that such a clause would defeat the purpose of moral rights, which was to protect reputation *not economic rights*. Lord Beaverbrook's reply to Morton and Hutchinson on this point was that *as the loss of reputation was an economic loss*, it would still be protected adequately despite the exclusion clause.

Thus it is interesting to note that while the members in both Houses made reference to the term 'reputation' in the debates on moral rights, it appears that there may have been a divergence in opinion about the precise character and scope of 'reputation'. On the one hand, Lord Beaverbrook, as the Government's representative, clearly saw reputation as embodying economic rights while the other members appeared to use the word reputation in direct contrast to economic rights. Other members who did not make express reference to reputation focused on the proposed sub-clause to avoid compensation for injured feelings. Baroness Birk expressed disapproval of the proposal, saying that 'there must be some compensation if we are to have this scheme of moral rights',[56] while Lord Willis wondered why copyright owners should not be compensated for injured feelings if other areas of law recognised such a remedy. Lord Graham pointed that 'the point of moral rights is that emphasis should be placed on the artistic and creative integrity of directors and writers and not only on economic criteria'.[57] However, Lord Beaverbrook replied to these objections saying that he had been advised that compensation may not be obtained generally for injured feelings in law. This was a somewhat surprising response as it was then, as it is now, possible to obtain damages for injured feelings in other areas of the law, and thus was specifically provided for in the Race Relations Act

54 Earl of Stockton, Hansard HL Deb 12/11/1987 vol 489 cc 1478.

55 As is the case in the law of defamation.

56 Baroness Birk, Hansard HL Deb 10/12/1987 vol 491 cc 416.

57 Lord Graham of Edmonton Hansard HL Deb 10/12/1987 vol 491 cc 415.

1976 and the Sex Discrimination Act 1975, both of which were highlighted later in the debates by Lord Morton and Lord Williams of Elvel.[58]

Indeed, Lord Williams set out several cogent reasons for leaving out the proposed exclusion clause. Firstly, he argued that the UK's obligations under the Berne Convention should not be limited by such an exclusion and if the reason for this was to discourage frivolous actions, then the courts were more than able to deal with them. He then pointed out the other areas of law in which injured feelings are compensated and concluded that 'we do not think that injured feelings are to be taken lightly'. Lord Lloyd supported this view saying that as the infringement of moral rights is likely to be in the nature of a tort, then as tort recognised damages for injured feelings, he could see no reason why such exclusion should be made.[59]

The extent to which the debates considered this issue of injured feelings is telling. It at least goes to show the regard that several members of the House of Lords had for moral rights, in that they understood that there was a subjective element to this set of rights, and that they stood in stark contrast to the economic rights afforded to copyright owners. The slight ambiguity in the members' understanding of 'reputation' also demonstrates that although the participating members were all talking about 'reputation', they may well have been approaching the concept from different angles. In any case, the idea of compensating injured feelings was clearly of prime importance to the debaters of the copyright bill when considering the proposed moral rights provisions. This in turn suggests that despite the Government's emphasis on the economic elements of copyright law and also moral rights, the actual legislators who debated the bill were clearly more mindful of the non-economic concerns of authors and artists.

b. Providing for 'destruction' in s.80 CDPA 1988

Unfortunately, the parliamentary records do not reveal any reference to the inclusion of 'destruction'. We have to examine the relevant provisions in the CDPA and cases to ascertain if 'destruction' may possibly be contemplated under UK moral rights provisions.

Not only is there no express provision for destruction under the CDPA,[60] it is also possible to argue that the reason why the integrity right does not include the act of destruction is the fact that

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58 Lord Williams of Elvel Hansard HL Deb 25 February 1988 vol 493 cc1363-1364.

59 Lord Lloyd of Hampstead Hansard HL Deb 25 February 1988 vol 493 cc1364.

60 It is worth noting that the Directive 2004/48/EC (Enforcement of IP Rights), implemented in the UK by The Intellectual Property (Enforcement, etc.) Regulations 2006, may apply to a breach of moral rights for causing 'moral prejudice', i.e. damage above and beyond economic damage. However, at the moment, destruction does not appear to constitute a breach of the integrity right in the UK. This means that even if the author has been unduly affected by it, beyond the economic damage suffered, he is unable to claim damages for 'moral prejudice'.

nothing remains behind post-destruction which may affect the author's honour or reputation. This argument is examined and challenged in chapter 5 and will not be discussed further here. Apart from this, other reasons have also been posited. It has been argued firstly that the narrow and exclusive definition of 'treatment' under s.80 is unable to encompass destruction, and secondly, that the additional requirements of s.80 subsections (3), (4), and (6), which call for the public communication of the derogatory treatment, would exclude at least private acts of destruction. It is contended below that they are not as obstructive as it may be thought.

i. Definition of 'treatment'

The first argument proceeds as follows: the definition of 'treatment' within s.80 is a closed category of four distinctive acts: addition to, deletion from, alteration or adaptation, none of which may at first glance conceivably include 'destruction'. However, several challenges may be raised against this view.

Firstly, it may be argued that the words 'deletion from' could include 'destruction' in the sense that the entire work has been deleted from itself. In ordinary language, this is not as much as a stretch than it might first appear. After all, in arithmetic, the act of taking away the quantity of 1 away from itself leaves 0. This is arguably further supported by s.89(2) which states that the rights conferred by s.80 apply in relation to 'the *whole* or any part of a work'. While this subsection was presumably inserted to clarify that 'addition to' or 'deletion from' are not necessarily subject to any requirement of substantiality,[61] and that therefore even the smallest addition or deletion may be considered 'treatment', it is argued here that s.89(2) can also operate conversely, i.e. that the 'whole' work may be deleted from itself.[62]

Secondly, there has been judicial commentary on s.80(2) which suggests that s.80(2) should not be narrowly construed. To date, there has been no case on the destruction of a work in the UK, thus still leaving open the question of the UK courts' likely interpretation of s.80 where destruction is concerned. HHJ Fysh has however commented that 'treatment' was a 'broad, general concept; *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of an entire work.'[63] HHJ Fysh further ventured that he saw 'no legislative intention to limit the meaning of the word' notwithstanding the wording of s.80(2), and that any limit to the generality of 'treatment' would arise from any prejudice which may result to

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61 Davies and Garnett (n 9) 235 para 8-013.

62 ibid., 245.

63 *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* [2010], ECDR, 3 (PCC) [60].

the honour or reputation of the author.[64] HHJ Fysh also referred to the judgment delivered in *Amar Nath Seghal v Union of India*,[65] which stated that destruction could be considered the ultimate form of mutilation.[66] This is meaningful as the relevant section of the Indian Copyright Act is similar to Art.6*bis* of the Berne Convention.

Thirdly, it has been suggested that destruction of a work may be considered to be distortion or mutilation carried out to its fullest extent, [67] or the 'ultimate infringement of [artists'] moral rights'.[68] Professor Jacques de Werra states that to destroy is to '*nier purement et simplement l'existence de l'oevre, forme ultime de l'irrespect*' i.e. to 'deny the work its existence: the ultimate form of disrespect*'*.[69] Hence, it is arguably erroneous to conclude unreservedly that 'treatment' does not include the act of destruction.[70]

ii Further requirements in s.80 CDPA

The requirements set out in subsections (3), (4), and (6) of s.80 CDPA are a deviation from the requirements of Art.6*bis* of the Berne Convention. Subsections (3) and (4) provide that infringement only occurs if the derogatory treatment of a literary, dramatic, musical or artistic work is published commercially, exhibited, or performed in public. The subsections also specify the issuing to the public of copies of the film, sound recording, graphic work or photograph of the treatment. s.80 (6) provides that, in relation to a film, infringement occurs when the derogatory treatment is shown in public or copies of the derogatory treatment are distributed to the public.

Therefore, while Art.6*bis* states that the author has the right to object to derogatory actions *per se*, under UK law, ss.80(3), (4) and (6) provide that the author may only do so if a *further act* has taken place, i.e. that basically the derogatory treatment of his work is publicised. The author in the UK

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64 *Harrison* (n 63) [60].

65 Judgement delivered by Judge Pradeep Nandrajog, 117 (2005) DLT 717, 2005 (30) PTC 253 Del. See Mr Justice Fysh's discussion *Harrison* (n 63) [61].

66 *Harrison* (n 63) [31].

67 Dworkin (n 1).

68 Simon Newman, 'Intellectual property law: Part II—The moral right of the author: The view from France, Germany and the United Kingdom' (1997) 13 Computer Law & Security Review 96.

69 Jacques de Werra, 'Le droit a l'integrite de l'oeuvre. Etude du droit d'aauteur suisse dans une perspective de droit compare' in H. Hausheer (ed), *Etudes de droit suisse* (Staempfli Editions 1997), translated by Teilmann-Lock in Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 207.

70 According to *Copinger & Skone James*, '[destruction] almost certainly amounts to a treatment': Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2017) para 11-52.

has no redress against derogatory treatment *per se*, surely a departure from the intention of Art.6*bis*.[71] However, it must be pointed out that although it may be very attractive to interpret s.80(1) as implying a right to object to derogatory treatment itself, Adeney, in examining the legislative history behind s.80, thinks it highly unlikely that Parliament intended this outcome, and that it had always intended to limit the integrity right as set out in the subsequent subsections in s.80.[72] The manner and extent to which subsections (3), (4) and (6) may affect destruction are discussed below.

The requirement in subsections (3), (4) and (6) that a further act of publication has to take place before infringement may be established, may present an obstacle to authors wishing to protest against the destruction of their works. This is especially so if, following the intricate analysis of the term 'derogatory treatment' by Davies and Garnett in *Moral Rights*, 'derogatory treatment' is interpreted as 'the *result* of an action', rather than 'the *action of treating* a work'.[73] Davies and Garnett assert that the use of 'derogatory treatment' in the CDPA is ambiguous and is used in both possible senses. However, where subsections (3), (4) and (6) are concerned, the authors construe 'derogatory treatment' as clearly being 'the result of an action'.[74]

Evidently, if this is the case, total destruction of a work would leave nothing behind, i.e. there will not be any tangible *result* post act, and thus, it could not be 'commercially published' for the purposes of s.80(3) or form the subject of a photograph or graphic work for the purposes of s.80(4)(c). It is submitted that this particular interpretation of 'derogatory treatment', even for the purposes of subsections (3) and (4), is not absolutely clear and consistent. While it may be arguable that perhaps only the *result* of a treatment may be 'commercially published', 'exhibited' or be the subject of a photograph, the other acts stipulated in the subsections do not necessarily imply the same. For instance, s.80(3) also lists '*performs* in public...a derogatory treatment of the work', which seems to suggest the *action* of treating a work. In such a situation, the public burning of a book or painting may fulfil this requirement. It could also be argued that the showing of a film of burning an artwork may fulfil s.80(4)(b).[75] Therefore, it is arguable that the public destruction of a work of art may fulfil these

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71 Adeney (n 14) para14.85.

72 ibid., paras 14.83-14.84.

73 See Davies and Garnett (n 9) para 8-027, at which the authors engaged in an analysis of the term 'derogatory treatment' in their discussion of the situation where a work is subject to a first treatment and its result subject to a subsequent treatment. Their analysis suggests that the term is used in both senses within the Act at different points, i.e. either as the action of treating a work, or as the result of the action.

74 ibid.

75 s.80(4)(b) provides that 'In the case of an artistic work the right is infringed by a person who shows in public a film including a visual image of a derogatory treatment of the work or issues to the public copies of such a film.'

additional requirements, although it must be noted that a *private* act of destruction may possibly be excluded.[76]

4. Conclusion

The preceding sections endeavoured to present intelligence gleaned from an analysis of the implementation of Art.6*bis* and s.80 CDPA 1988, and to utilise these findings to answer the queries set out at the start of this chapter. Essentially the chapter aims to demonstrate on a textual and doctrinal analysis of the relevant legislation surrounding moral rights, that firstly, the nature and minimum boundaries of moral rights as envisaged and generally accepted by members of the Berne Convention, including the UK, are such that 'destruction' may well be contemplated within its purview and secondly, that the exclusion of 'destruction' from s.80 CDPA is not as defensible as it seems.

A close analysis of the records of the Rome Conference and Brussels Conference proceedings reveal the varying views of the Berne countries. What has emerged is that a number of countries laid emphasis on the *integrity* of the author's work, without necessarily involving the author's reputation or even honour. The concern was the integrity, in other words, the purity and completeness of the author's vision and message as embodied within his work. While it is accepted that a change in this vision would likely affect its author's honour or reputation, this was not a necessary condition for many Berne countries. Additionally, it would appear that 'honour or reputation' was included to appease the common law countries, and that there was little evidence of substantive reason, either as matter of policy consideration or legal argument, for their inclusion. It could be argued, perhaps, that these terms reflected defamation laws in the common law countries. However, as highlighted earlier in this chapter as well as in chapter 2, defamation laws are not entirely successful in protecting authors in the way as intended by moral rights, and while reputation may possibly give a nod to UK defamation laws,[77] the inclusion of *honour* remains somewhat of a puzzle. If an overriding concern of moral rights was arguably to protect the *integrity* of the work *per se*, then arguably, the entire destruction of a work would destroy its integrity.

Furthermore, there was at the time of the Rome Conference, evidence of much faith in the ability of moral rights to safeguard cultural heritage. Indeed, the very acceptance today, in both civil law countries and common law countries, of the endurance of moral rights *beyond* the author's death, indicates a conception of moral rights which embraces a cultural heritage protection component. If so,

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[76] Marjut Salokannel, Alain Strowel and with Estelle Derclaye, 'Study contract concerning moral rights in the context of the exploitation of works through digital technology: Final Report' Study Contract nooETD/99/B5-3000/Eo <http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf.> 143.

[77] Davies and Garnett (n 9) 259-260.

then arguably, the destruction of a work would leave an irreparable void in the cultural heritage to which it belongs.

Finally, the close interrogation of the premise and wording of s.80 has revealed the following. Where the underlying premise of s.80 is concerned, the parliamentarians who debated the moral rights provisions were not only, not in entire agreement as to the concept of 'reputation', they were certainly concerned with two things: the contribution of moral rights to the protection of cultural life in the UK, and the injured feelings of the author. The concern expressed in the debates therefore was focused very much on the non-economic features of moral rights, and with exception of the UK government's representative, Lord Beaverbrook, the members of parliament involved appeared to emphasise the importance of these features. Lord Beaverbrook's response that reputation was not to be excluded from compensation because its loss can be equated to an economic loss is thus very revealing of the government's perception of copyright and moral rights. Prominence is given to the economic rather than the non-economic in copyright and moral rights. However, this does not really reflect the views of all the members who participated in the debates. It shall be seen later in chapter 5 that because of the economic emphasis however in the UK's perception and application of its copyright law, little attention is given to honour and in turn, little attention is paid to what creators truly require where the protection of their creations is concerned, a point which has been raised and discussed in chapter 2.

As regards the argument that the definition of 'treatment' in s.80 excludes destruction, it has been countered that there is little reason to accept this view. Destruction is arguably the ultimate form of 'mutilation', and there is little logic to treat 'destruction' of a work more favourably than acts such as 'addition to, deletion from, alteration or adaptation' which comprise the definition of 'treatment' in s.80. HHJ Fysh, a High Court IP specialist judge has already ventured as such. If so, then there is no reason to exclude 'destruction' from the ambit of 'treatment'.

Finally, the argument that the public communication requirements in subsections (3), (4) and (6) would exclude destruction fails on two grounds. Firstly, these requirements are foreign to Art.6*bis* Berne Convention and it could be argued that the UK has therefore failed to implement the Berne Convention correctly and faithfully.[78] Secondly, regardless of the validity of these additional requirements, it has been shown that even if these requirements may exclude acts of private destruction, they arguably do not exclude public destruction of works, and hence present no real obstacle to recognising 'destruction' as an act to which creators may object.

[78] Adeney (n 14) 412.

Chapter 5 - Honour in UK Copyright Law is not 'A Trim Reckoning' – its Impact on the Integrity Right and the Destruction of Works of Art

> 'What is honour? A word. What is in that word honour? What is that honour? Air. A trim reckoning!'
>
> William Shakespeare, *Henry the Fourth* Part I (V, ii, 132)

1. Introduction

Falstaff in *Henry the Fourth* views honour as a mere word, 'air', 'a trim reckoning', a trifling with no concrete or substantial meaning. The character dismisses 'honour' and its abstract notions – ('Doth he feel it? No. Doth he hear it? No.') - as having no use whatsoever in real life. Falstaff's speech on 'honour' is revelatory of at least one aspect of the concept of honour – its elusiveness. Nowhere does the meaning of honour elude us more than the reference made to it in s.80 of the UK Copyright Designs and Patents Act 1988 (CDPA). In chapter 4, the general wording of s.80 was examined in light of parliamentary debates surrounding its enactment. In this chapter, the specific reference to 'honour' is closely examined.

The present wording of s.80 is owed to the UK's implementation of Art.6*bis* (1) of the Berne Convention, which 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 *honour* (author's emphasis) or reputation.

The reference to honour in Art.6*bis* has been viewed as an unnecessary appendage in the common law, leading to at least one common law jurisdiction precluding any reference to honour altogether in its moral rights legislation.[1] The omission of 'honour' from the WIPO Performance and Phonograms Treaty too has led one common law academic to observe that the concept was obsolete.[2] According to Adeney, 'honour' is commonly regarded as adding nothing to the concept of 'reputation' and the term 'remains unused and undefined in the United Kingdom.'[3]

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1 Copyright and Related Rights Act 2000 (Ireland), s 109 (1).

2 Patricia Loughlan, 'The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?' (2001) 12 Australian Intellectual Property Journal 189. Loughlan also refers to Falstaff's speech on 'honour'.

3 Elizabeth Adeney, 'The moral right of integrity: the past and future of "honour"' (2005) 2 Intellectual Property Quarterly 111.

The concept of honour is relatively unknown in the common law, except for recent interest in cases involving honour killings, in discussions on the concept of reputation as used in the law of defamation,[4] and its inclusion in s.80 CDPA. However, despite its inclusion in s.80, it has curiously been overlooked by law academics, save for a handful of articles, mostly penned by antipodean academics in their analysis of amendments to the Australian Copyright Act,[5] and discussions in UK practitioner and specialist texts.[6] Much of what has been written about honour however appears to focus on the role it plays in imbuing the moral rights provisions with subjectivity, rather than engaging in an in-depth study of its meaning and in what circumstances it would be prejudiced, in contrast to circumstances where reputation is being prejudiced. Furthermore, judges in the few UK cases on the integrity right appear to treat 'honour' as synonymous with 'reputation', generally neglecting to give full consideration to the concept of 'honour' itself.[7]

It is peculiar that such a specific criterion prescribed in the legislation has been given such scant attention and application. This chapter thus aims to shed further light on the meaning of honour as it is positioned within s.80, from the perspectives of Roman Law, in particular its formulation of *iniuria,* and of anthropological studies on honour. It is hoped that fresh insights into the concept of honour will help to clarify the boundaries of the integrity right, in particular, the question of whether destruction of a work amounts to a breach of the integrity right as it reads as present.

At present, the conventional view is that as destruction leaves nothing of the original work behind, there can be nothing left that can affect the author's reputation, unlike a work which has been maltreated or deformed in some way, which does leave behind a misrepresentation of the author's work.[8] However, even if destruction does not affect the author's reputation, it is arguable that it can

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4 Lawrence McNamara, *Reputation and Defamation* (OUP Oxford 2007), 42-56; Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' 74 California Law Review 691.

5 Loughlan (n 2); Dean Ellionson and Eliezer Symonds, 'Australian Legislative Protection of Copyright Authors' Honour' (2001) 25 Melbourne University Law Review 623; Elizabeth Adeney, 'Defining the shape of Australia's moral rights: a review of the new laws' (Intellectual Property Quarterly) (2001) 4 291; Elizabeth Adeney, 'Authors' rights in works of public sculpture: a German/Australian comparison' (2003) 33 International Review of Intellectual Property and Competition Law 164; Dennis Lim, 'Prejudice to Honour or Reputation in Copyright Law' (2007) 33 Monash University Law Review. See also Adeney, 'The moral right of integrity: the past and future of "honour"' (n 3) for a detailed analysis of French and German legal sources regarding the concept of 'honour'.

6 Jonathan Griffiths, 'Not such a 'Timid Thing': the UK's Integrity Right and Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP Oxford 2005) paras 9.40-9.50; Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) paras 14.69-14.75; Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) paras 8037 to - 8-041.

7 Griffiths (n 6) para 9.43.

8 Destruction is not specifically provided for under Art.6*bis* of the Berne Convention. However, a Resolution was passed at the Brussels Revision Conference which encouraged countries to adopt moral

impact upon his honour. It is contended that there has been disproportionate emphasis or reliance on 'reputation' where the integrity right is concerned, and that equal weight should be afforded 'honour'.

One of the main reasons why 'honour' has not been referred to or applied as much as 'reputation' lies in the uncertainty surrounding its meaning,[9] while that of reputation has been well established, particularly within the law of defamation. In the few instances 'honour' is defined or applied however, it is usually defined as 'what a person thinks of himself.'[10] If so, this has a strongly subjective element, which poses the risk of allowing unreasonable claims by hypersensitive artists. A re-interpretation of 'honour' is offered which will allow for a more objective approach, thus avoiding the aforementioned difficulty regarding oversensitive artists. Essentially, it is suggested that prejudice to honour amounts to an insult, and that the destruction of an author's work clearly amounts to an insult to the author, and hence prejudicial to the honour of the author. It will be shown, from examining the influence Roman Law had on the early development of the common law, and from applying the theoretical insights of Frank Henderson Stewart, an eminent anthropologist,[11] that the concept of 'insult' as a viable cause of action is not as alien to the common law as is presumed, and hence it would not be too much of a stretch to accept that the common law is capable of recognising affronts to honour, and that it is not an obsolete concept.

If prejudice to honour amounts to an insult, the question is whether the destruction of a work amounts to an insult to its author and is prejudicial to his honour. The answer is arguably in the affirmative, taking into account, the depth of feeling an author possesses for his creations, and the investment of the author's energy, creativity and personality into the creation of the work. The author not only utilises his work to communicate a personal message, it also symbolises his personality. His desire to maintain the integrity of his work is understandable.[12] Destruction of a work is therefore akin

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rights which could protect against the destruction of works. For arguments against destruction, see Edward Damich, 'The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors' (1988) 23 Georgia Law Review 1, 18; P Anand, 'The Concept of Moral Rights Under Indian Copyright Law' (1993) 27 Copyright World 35; Irini A Stamatoudi, 'Moral Rights of Authors in England: the Missing Emphasis on the Role of Creators' (1997) 4 Intellectual Property Quarterly 478, 482-483; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011), 45; WR Cornish, D Llewelyn and TF Aplin, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (8th edn, Sweet & Maxwell, Limited 2013) 522.

9 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 287.

10 ibid 288.

11 Professor Stewart is currently Professor of Islamic and Middle Eastern Studies at the Hebrew University of Jerusalem. His book, *Honor*, borne out of conducting ethnographic studies on Bedouin tribes, argues that the concept of 'honour' is essentially a right to respect. See Frank Henderson Stewart, *Honor* (University of Chicago Press 1994).

12 Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010).

to destroying not only the message the author wishes to convey but also something which is an embodiment of his personality. The act of destruction demonstrates utter disregard and contempt for the work, and hence utter disregard and contempt for the author's message and personality. Destruction of a cherished work surely insults and dishonours its author.

Furthermore, as mentioned above, while much has been made of the subjectivity or objectivity of the moral rights provisions in judicial pronouncements and academic studies on the integrity right, it is submitted that, as there can be no ambiguity whatsoever as to the effect that destruction wreaks upon a work, any destruction of any work would amount to prejudice to an author's honour without the need for evaluating the subjectivity or objectivity of the treatment meted out to the work.

Any study of the word 'honour' will be fraught with considerable difficulty, as it is a concept which is not easily discernible. It has been described as a word 'rich in connotations, but poor in denotation'.[13] Elsewhere, a study on the history of 'honour' refers to the 'virtual disappearance' of the word 'honour' in vocabularies of English and other European languages.[14] It is ultimately contended that by giving full countenance to the word 'honour', the destruction of an author's creation does amount to an infringement of the integrity right.

2. Method, Sources and Structure

It is necessary at this juncture to outline and explain briefly the reasoning behind the method and choice of sources employed in formulating the argument set out in this chapter, relying heavily as it does on uncommon sources, such as anthropological studies on honour, insult laws in Germany, early Anglo-Saxon and Norman laws, and the Roman law concept of *iniuria*.

The aim here is to seek out authoritative sources for alternative and workable meanings of the concept of 'honour'. As there is a paucity of legal material on the concept, it is necessary to draw inspiration from a variety of sources from without the modern common law. The first of these sources are studies carried out by anthropologists, who are renowned for their extensive research into the meaning of honour. The seminal work on this area is *Honor and Shame*,[15] a collection of essays edited by Pitt-Rivers, which represent the first systematic studies ever conducted on the concept of honour,

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13 Charles Stewart, 'Honour and Shame' in J Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (2nd edn, Elsevier 2015).

14 James Bowman, *Honor - A History* (Encounter Books 2006).

15 JG Peristiany (ed) *Honour and Shame: The Values of Mediterranean Society* (University of Chicago Press 1966).

most of which were based on ethnographic fieldwork undertaken in the Mediterranean.[16] The choice of the Mediterranean as a focus of scholarly research for anthropologists was not, as it may be thought, a purely and uniquely academic and reasoned decision, but the practical result of tumultuous world affairs which occurred during the same period in which this particular group of scholars were active. The Second World War and the upheaval it caused in many countries for decades to come ensured that many regions were inaccessible to anthropologists.[17] Decolonisation of many African states also meant that those areas were out of bounds.[18] Thus, for practical purposes, the Mediterranean was the geographical area of choice, particularly for scholars writing in English.[19] It was in this area of the world that the first and most rigorous study on the concept of honour was undertaken, and also where the majority of anthropological research studies on 'honour' has taken place.[20] Hence, in any study of 'honour', it would be necessary to refer to the work of Pitt-Rivers in the first instance, and draw out general and universal themes from their findings, despite the fact that their work was centred in the Mediterranean and not within an Anglicized or even Northern European culture or setting, which might appear to be more relevant to the present focus. It is contended that the features of Mediterranean honour as discovered and described by the anthropologists are more universal in application than it would appear. A recent comparative study conducted in Spain and the Netherlands concluded that Mediterranean notions of honour were present in Dutch culture and society, and vice versa.[21]

Pitt-Rivers' thesis will be briefly considered before going on to consider Stewart's work on 'honour', which is no less esteemed. His work, which proposed that honour is a right to respect or not to be insulted, was heavily influenced by German jurists and German insult laws. It is of course not maintained that simply because the work of German lawyers happened to influence Stewart in formulating his particular take on 'honour', it should similarly be applicable in English common law. Taking a cue from Lord Reed, who said that 'foreign law may ... be treated as an authority, as an

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16 See Patrica M Rodriguez Mosquera, Antony SR Manstead and Agneta H Fischer, 'Honor in the Mediterranean and Northern Europe' (2002) 33 Journal of Cross-Cultural Psychology 16 for a brief outline of the research conducted by anthropologists on 'honour' in the Mediterranean.

17 Dionigi Albera, 'The Mediterranean as an anthropological laboratory' [1999] Seccion de Antropologia Social 215; Christian Giordano, 'The Anthropology of Mediterranean Societies' in U. Kockel, M. Nick Craith and J. Frykman (eds), *A Companion to the Anthropology of Europe* (Wiley-Blackwell 2012).

18 Sandra Busatta, 'Honour and Shame in the Mediterranean' (2006) 2 Antrocom 75.

19 Albera (n17), 215. The question as to whether there is an anthropology *of* the Mediterranean as a subspecialty is itself a much complex and heavily argued issue within the field of anthropology: see David Gilmore, 'Anthropology of the Mediterranean Area' (1982) 11 Annual Review of Anthropology 175; and Giordano (n 16), for discussions of this issue, which is outside the scope of this article.

20 Mosquera, Manstead and Fischer (n 16) 16.

21 ibid., 33.

empirical fact, or as a source of ideas...',[22] it is suggested that Stewart's and German ideas on honour are sources of ideas, from which inspiration may be taken in order to enlighten us on the meaning of 'honour'. Such use of foreign law will, as advised by Lord Reed, 'assist the judge to elucidate the issues under domestic law, and to identify possible options for their resolution'.[23] The value of learning and seeking inspiration from other legal systems is encapsulated in what Gordley has written about studying foreign law, that '...the jurists in all these so-called [legal] 'systems' were struggling with common problems, guided by similar concepts ... not expressed clearly in their national legal systems', and that '...we can learn much by seeing how others have faced similar problems'.[24]

Finally, on the basis that 'honour' may be interpreted as a right to *respect* or right not to be *insulted*, this chapter will go on to examine the Roman law concept of *iniuria* i.e. disrespect, insult or outrage, and draw from it insights which would assist in framing a workable approach to interpreting 'honour' as it is placed within moral rights law. The use of Roman law to assist modern day common lawyers is not uncommon at all despite its obvious antiquity. A recent paper analysed the use of Roman law by the House of Lords in three relatively recent and important decisions, and argued that the influence of Roman law on the development of English common law is pervasive and of considerable value.[25] The same paper posits that the value of Roman law (or indeed any foreign law) rests in the fact that legal problems are both universal and perennial.[26] It is hoped that just as *iniuria* has proved valuable in informing the development of the common law of obligations, it will prove equally helpful in elucidating the concept of 'honour' in moral rights law.

3. Honour and Destruction in s.80 CDPA and the Berne Convention

It is firstly necessary to examine the current legal landscape in which the concept of 'honour' resides, before we look beyond the law for inspiration.

The original proposed wording of Art.6*bis* put forward at the 1928 Rome Conference to revise the Berne Convention referred to acts 'which (are) prejudicial to moral interests'. The phrase raised grave concerns among the common law delegates who felt that the words were too vague to give any useful guidance or instruction. The wording was eventually amended to refer to acts 'which would be

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22 Robert Reed, 'Foreign precedents and judicial reasoning: the American debate and British practice' (2008) 124 Law Quarterly Review 253, 265.

23 ibid., 268.

24 James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2007) 3.

25 James Lee, '*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law' (2009) 5 Roman Legal Tradition 24.

26 ibid., 38.

prejudicial to his honour or reputation',[27] which apparently was accepted without demurrer by the UK, and sealed its acceptance of Art.6*bis* notwithstanding its initial hostility to the proposal.

In addition to the in-depth discussion in chapter 4 of the conference debates regarding the wording of Art.*6bis* and parliamentary debates on s.80, a few preliminary observations may be made here on the inclusion of 'honour or reputation' in both Art.6*bis* and s.80. Although the phrase 'moral interests' in the original wording of Art.*6bis* was deemed too vague, the inclusion of 'honour' has not served to remove ambiguity either, as its meaning is hardly consistent or settled. In contrast, reputation has a more established or familiar definition,[28] owing especially to its application in defamation law. This may also explain why judicial considerations of the integrity right appear to have focused on reputation rather than honour. For instance, in *Tidy v Trustees of the Natural History Museum*,[29] in which the plaintiff's cartoons were reproduced in a reduced size and colourised, Rattee J could not conclude that there was prejudice to honour or reputation in the absence of any evidence from the public as to how the coloured reproduction would affect the plaintiff's *reputation*.[30] This point regarding the need for evidence was raised in *Confetti Records v Warner Music*,[31] in which the defendants had superimposed a rap, which referred to violence and drug-taking, onto the claimant's track. As there was no evidence offered of prejudice to the claimant's honour or reputation, Levinson J could not conclude that there was a breach of s.80.

While HHJ Fysh, in *Harrison v Harrison*, a case concerning copyright infringement of a guide book to care homes, neither distinguished between honour and reputation nor explained the concepts in any detail, he made a similar point, referring to *Confetti Records*, saying that it was not easy to assess honour and reputation of which there had to be *evidence*. HHJ Fysh specifically referred to *professional* honour or reputation, although no further explanation is given for this

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27 Piola Caselli, the Italian delegate, reported that the representatives of the common law tradition had called for greater precision than "moral interests". See General Report of the Drafting Committee, 204.

28 Loughlan (n 2) 189-190. See Bently and Sherman (n 9) 287-88 who state that 'the notion of reputation used in this context would be similar to that which is employed in defamation law'; Jon Holyoak and Paul Torresmans, *Intellectual Property Law* (7th edn, Oxford University Press 2013) 260; and Griffiths (n 6) para 9.41.

29 *Tidy v Natural History Museum* [1996] 39 IPR 501. See Bina Cunningham, 'Moral rights' (1996) 18 European Intellectual Property Review D81.

30 It should be remembered that *Tidy* was an action for summary judgment and hence there was little scope for more in-depth discussion of the issue.

31 *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (t/a East West Records)* EWHC (2003) ECDR, 1274 (Ch) [157].

restriction.[32] As *evidence* of *professional* honour or reputation would generally come in the form of public opinion, again this echoes the test for reputation in defamation law.

Academic writers have also focused more on reputation. Although the authors in *Copinger & Skone James* attempt to distinguish between reputation (by defining it as 'what is generally said or believed about the person') and honour (by defining it as 'associated with reputation and good name,...respect and position'), it is submitted that since their definitions of both concepts utilize very similar terms, they have not succeeded in making the distinction.[33] Furthermore, they list examples of libel cases to serve as guidance and assert that a claim under s.80 would require evidence that members of the public are likely to think less of the author, which echoes the test in defamation law, and which relates to 'reputation' rather than to 'honour'.[34] Indeed, the authors do assert at the start of their discussion that the requirement for prejudice to honour or reputation bears 'close resemblance to existing personal rights under the law of defamation and passing-off'.[35] The word 'reputation' is also used on its own several times in the relevant passages on this issue, without reference to 'honour'. HHJ Overend, in discussing the meaning of 'honour and reputation' in *Pasterfield v Denham*,[36] referred to Laddie, Prescott and Vitoria, who explained that the concept in the Act is 'akin to libel',[37] while Cornish, writing on the introduction of moral rights in the CDPA, thought that the reference to 'honour or reputation' had only a marginal advance, if any, on the concept of defamation.[38]

Notwithstanding the ambiguity of the concept of honour, the fact remains that 'honour' is specifically included in not only an international treaty but also in the national legislation. Academic and judicial disregard for the same is therefore questionable. If honour is to be disregarded, there must be good reason for doing so. At present, there is little rationale for this treatment.

Another explanation for the scant attention paid to honour lies in treating 'honour' as synonymous with 'reputation'. The interpretation of 'honour and reputation' favoured by judges and academics alike seem to favour the definition of reputation as it is established in libel law. The possible reason for such interpretation lies in the wording of s.80, i.e. 'prejudicial to the honour or

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32 *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* [2010], ECDR, 3 (PCC) (n34) [64].

33 Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2017) in Part II, para 11-50.

34 ibid.

35 ibid.

36 *Pasterfield v Denham and Another* [1999] FSR 168, 181.

37 Prescott and Vitoria Laddie, *The Modern Law of Copyright and Designs* (2nd edn, 1995) 1016, para 27.18.

38 W R Cornish, 'Moral rights under the 1988 Act' (1989) 11 European Intellectual Property Review 449.

reputation of the author or director'. It mirrors the English version of Art.6*bis* but is subtly different to that of the French version of Art.6*bis* i.e. 'prejudicial *to his* honour or *to his* reputation'. While it is possible for 'honour' and 'reputation' to be treated interchangeably in the English version and the UK legislation, there is no such ambiguity in the French version.[39] If there is a divergence in interpretation, the question is which text should take precedence. While the Paris text of the Berne Convention provides that both the English and French versions of the Berne Convention are authoritative,[40] Art.37(1)(c) provides that, in differences of interpretation, the French version shall prevail, which renders the French version of the Berne Convention as the final and most authoritative version of the Berne Convention.[41] Therefore, if preference is given to the French version in this regard, then it is clear that 'honour' and 'reputation' have different meanings and that they play different roles. According to Adeney, the fact that the delegates at the 1948 Brussels Conference in considering a revision of Art.6*bis* opted to retain both 'honour' and 'reputation' clearly indicated that they viewed 'reputation' and 'honour' as distinctly separate concepts, and that honour supplemented reputation.[42]

The question that remains is what exactly is the definition of 'honour'? As stated above, there is a myriad of definitions of honour, and scholars in different fields have expounded conflicting theories on the concept of honour. While it would not be possible to seek out a definitive conception of honour, for present purposes, a more constructive approach would be to seek out a theory of honour which would be of most assistance to common law lawyers, particularly those interested in the concept as applied within moral rights

4. Tracing the Meaning of 'Honour': the Anthropological View

It must be cautioned that even within the field of anthropology, where the concept has been given more coverage and attention than it has been given in the legal field, the concept is nevertheless subject to numerous disagreements among anthropologists.

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39 Adeney, 'The moral right of integrity: the past and future of "honour"' (n 3).

40 Article 37(1)(a) of the Paris Text of the Berne Convention states that 'This Act shall be signed in a single copy in the French and English languages...' while Article 33(1) Vienna Convention on the Law of Treaties states that where a treaty has been authenticated in two or more languages, the text in each language is equally authoritative unless the treaty provides that in the case of divergence, one of the languages will prevail, thus providing that both the French and English versions are the authentic and authoritative versions of the Berne Convention unless there is a divergence in interpretation.

41 Martin Sentfleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 114.

42 See discussion of the delegates' views on 'honour' at the Brussels Revision Conference in 1948 in Adeney, 'The moral right of integrity: the past and future of "honour"' (n 3) 124.

Anthropologists have researched into the concept in great depth, by participating in ethnographic research of various communities in the Mediterranean in particular. Indeed, 'anthropologists now seem to be considered *the* experts on the subject [i.e. 'honour']'.[43] Not all variations of the concept as defined by anthropologists will be relevant to moral rights law, being as they are, concentrated on issues related to social phenomena such as battlefield bravery, shame in adultery, honour killings and duels. However, it is possible to tease out the central and general themes which may be of assistance to lawyers. This is by no means the first and only attempt to make reference to anthropology in ascertaining the meaning of honour; John Beckerman, for instance, refers briefly to the work of anthropologists in his essay on honour and trespass,[44] although not in any depth.

Julian Pitt-Rivers, the renowned anthropologist, is regarded as 'the leading authority on honour',[45] and considered as 'anthropology's chief explicator on honour and shame'.[46] As such, it is necessary to engage in the first instance with what he had to say on the subject, before proceeding to consider other notions of 'honour', in particular the definition expounded by Stewart, which as will be argued, is central to the thesis developed in this chapter. Pitt-Rivers' seminal essay, *Honour and Social Status*,[47] was a study of Andalusian *pueblo*, a series of towns or villages in Spain. He discovered different variations on the meaning of honour as it manifested in these communities, ranging from the loss of honour as a result of cuckoldry, preservation of honour through the preservation of a woman's virtue and the differences in the systems of honour as understood between the upper and lower strata of society. His essay was not only an observation of these different manifestations of honour, but it also provided, in its first part, a brief description of honour as understood in Western European society generally. Indeed, through his study, he concludes that 'not only what is honourable but what honour *is* [has] varied within Europe from one period to another, from one region to another and above all from one class to another.'[48] Notwithstanding his observation of honour as a shifting and variable concept, he does, at the start of his essay, drill down the basic themes of honour, which is defined thus: 'Honour is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognised by society, his right to pride.' In this

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43 Stewart (n 11) ix.

44 John S. Beckerman, 'Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass' in Morris S. Arnold and others (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (The University of North Carolina Press 1981).

45 Stewart (n 11) 1.

46 Susan Tax Freeman, 'Julian A Pitt-Rivers (1919-2001)' (2004) 106 American Anthropologist 216.

47 Julian Pitt-Rivers, 'Honour and Social Status' in Jean G. Peristiany (ed), *Honour and Shame: the Values of Mediterranean Society* (University of Chicago Press 1966).

48 ibid.

definition, apart from references to the subject's perception or estimation of his own value, honour does take on features which are more familiar to the concept of reputation. The question is whether Pitt-Rivers' definition is, being as it is formulated by someone who is regarded as a leading authority on honour, the final word on the matter?

Whilst Pitt-Rivers' reputation as a leading exponent of the concept of honour is undisputed, there is criticism to be made about his approach to studying the concept, in particular, his declaration that very little has been said on the subject,[49] apart from medieval and chivalric references to honour.[50] As fellow anthropologist Stewart points out in *Honor,* much sophisticated work on the concept has been undertaken by jurists, in particular, German jurists in the nineteenth and twentieth centuries, whose works appear to have been ignored by Pitt-Rivers.[51] Hence, it would appear that Pitt-Rivers' definition, authoritative as it may be, is not absolute. Stewart presents an alternative theory which, influenced as it is by legal writings, may be of considerable assistance to common law lawyers who are interested in the concept of honour.

Essentially, Stewart's concept of honour is that it is a right to respect or as having a certain worth.[52] By viewing honour as such, it accounts for insults, which he says the Pitts-River account does not. As mentioned above, Pitt-Rivers' two pronged definition of honour involves self-evaluation as well as valuation by society, in other words, there is an inner quality of honour as well as an outer one. He was not the only one to have explained honour as such. Schopenhauer, in *The Wisdom of Life*, declares honour as 'on its objective side, other people's opinion of what we are worth; on its subjective side, it is the respect we pay to this opinion.' Stewart attacks this formulation of honour, what he calls the 'bipartite' theory of honour. He says that it does not account for the meting out of insults, which is still an offence in much of Europe.[53] He cites the example of being called a 'swine'. Such name calling, under the bipartite formulation, would neither damage the inner quality of honour, nor the outer quality of honour, especially if not made in public. However, such name calling is clearly an insult, which amounts to an offence. His solution, to recognise honour as a *right*, essentially

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49 Julian Pitt-Rivers, 'La Maladie de l'honneur' in Marie Gautheron (ed), *L'honneur: image de soi ou don de soi un ideal equivoque* (Editions Autrement 1991).

50 Of which, Falstaff's speech in *Henry the Fourth* Part 1 is an example.

51 Pitt-Rivers in turn has critically reviewed *Honor,* saying that Stewart did not seem interested in the different senses of the word as used in the Mediterranean, and has not discussed in detail various studies conducted by other anthropologists on the Bedouin. Essentially, without actually addressing Stewart's main thesis that honour is a right to respect, Pitt-Rivers criticises *Honor* as not doing what it says on the tin. Julian Pitt-Rivers, 'Review of Frank Henderson Stewart's *Honor*' [EHESS] (1997) 37 L'Homme 215.

52 Stewart (n 11) 21.

53 International PEN's Writers in Prison Committee, *Insult Laws in the European Union, A Silent Threat* (2007).

a right (or *claim*) to respect,[54] would account for insults, in other words we have a right not to be insulted. While honour may be a right or claim by the individual to respect, the world has a duty to treat the bearer of honour with respect.[55]

The utility of the concept of honour as a right to the fields of anthropology and ethnology is that it is a feature which is widely shared among different cultures.[56] Where the law is concerned, by framing the otherwise nebulous concept of honour as a right, it appeals naturally to lawyers, and could serve to clarify honour's meaning and utility when calls for its application are made, as is in the case of Art.6*bis* and s.80. It is also appealing for lawyers to apply Stewart's conception of honour as a right, as his thesis was influenced profoundly by German legal literature of the nineteenth and early twentieth centuries.[57]

Stewart's model of honour thus owes its formulation to German juristic literature on German insult laws. As recent as the 1950s and 1960s, the German courts defined honour as a right. According to Stewart, a German Federal Court defined honour as 'the right of a human being that their personality be respected'. [58] Stewart very briefly traces the lineage of this right in German law back to Kant's axiom which declared that '[e]very man has a legitimate claim to respect from his fellow man',[59] and discussed this claim or right to respect in close connection to the concept of honour.[60]

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54 Stewart (n 11) 146-7.

55 ibid., 21.

56 Stanley Brandes, 'Review of Honor by Frank Henderson Stewart' (1996) 23 American Ethnologist 151. The Stewart model has not only been acclaimed in several academic reviews, but also regarded favourably compared with the bipartite theory of honour: see Matthew T Racine, 'Service and Honor in Sixteenth-Century Portugese North Africa: Yahya-u-Tacfuft and Portugese Noble Culture' (2001) 32 The Sixteenth Century Journal 67. It has been relied heavily in at least one study on a case of honour killing: see Antonio Sorge, 'Review of In Honor of Fadime: Shame and Murder by Unni Wikan' (2008) 50 Anthropologica 435.

57 Stewart praises the writings of German jurists as 'the most intensive and sophisticated discussion of honor in any European language', see Stewart (n 11) 1, and devotes an appendix on the development of honour as a right in Germany. Reviewers of his book have noted the influence of German legal literature on his work: Talal Asad, 'Book review of Honor by Frank Henderson Stewart' (1996) 116 Journal of the American Oriental Society 308; Walter P. Zenner, 'Book review of Honor by Frank Henderson Stewart' (1999) 6 Islamic Law and Society 119

58 Stewart (n 11) 151.

59 *The Metaphysics of Morals.* Kant, in referring to the right to respect, was however talking about his concept of *dignity* as opposed to what he perceived as the concept of 'honour' which was respect based on social status, rather than dignity which was to him, respect based on the inherent worth of a person. See R.J. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press 1989) 197; Rachel Bayefsky, 'Dignity, Honour and Human Rights: Kant's Perspective' (2013) 41 Political Theory 809, 811.

60 Stewart (n 11) 152.

There is therefore a school of thought, rooted in philosophy, law and through Stewart, anthropology, which has actively advanced the idea that honour is simply a right to respect. Indeed, a paper published in 2001 on 'honour' in the Australian Copyright Act also puts forward this claim, although on different basis, by simply referring to the definition of the word 'honour' in the *New Shorter Oxford English Dictionary*,[61] and to the Australian Attorney-General's speech on the amendments to the Australian Copyright Act.[62] Interestingly, although it is mentioned earlier that according to Laddie, Prescott and Vitoria 'honour and reputation' is 'akin to libel', they also make the point that 'any treatment of a work which tends to trivialise it and to diminish the *respect* (emphasis author's) in which either the work or the author is held runs the risk of a successful action being brought.'[63]

Respect in turn is defined as either the 'deferential regard or esteem felt or shown towards a person' when used as a noun,[64] or as a verb, 'to bear in mind, think of, consider'.[65] It is surely uncontroversial to assert that, more often than not, the destruction of an artist's creation neither reflects deep admiration or esteem of the artist on the one hand, nor due regard for his feelings or wishes on the other. Indeed, destruction of the work clearly amounts to an insult or contempt for the author of the work.[66]

5. The Right to Respect or Right not to be Insulted in early English common law

While there is a case for defining honour as a right to respect, the difficulty for common law lawyers lies in recognising the existence of such a right in the common law. The closest cause of action to a right or claim to respect is defamation, which is well established in the common law, and which explains the tendency among common law judges and academics to refer solely to reputation when dealing with s.80. However, there is a reason why the Berne Convention referred to both honour and reputation, instead of simply one or the other, or why the authoritative French wording of Art. 6*bis*

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61 'Honour' is defined as 'high respect, esteem, deferential admiration; an expression of this;...' and when used as a verb, as to 'pay respect or do honour to by some outward action; ...regard with honour, respect highly' in the New Shorter Oxford English Dictionary cited in Ellionson and Symonds (n 5) 625.

62 The Attorney-General in his Second Reading Speech stated that the moral rights provisions acknowledge 'the great importance of *respect* for the integrity of creative endeavour', cited in ibid., 625.

63 Prescott and Vitoria Laddie, *The Modern Law of Copyright and Designs* (4th edn, Butterworths 2011) 1017.

64 OED online .

65 OED online .

66 It is acknowledged that occasionally, works of art may be destroyed to bring attention to laudable issues, and it may argued that such acts are not necessarily contemptuous of the works or artists themselves. For instance, a museum director once destroyed several works in protest against funding cuts, although it should be noted, with the consent of their creators. See John Hooper, 'Naples Museum Director begins burning art to protest at lack of funding' (2012) <http://www.theguardian.com/world/2012/apr/18/naples-casoria-museum-burning-art-protest>.

made a distinct demarcation between honour and reputation. If the inclusion of honour was regarded as tautologous, it would neither have been included in the first formulation of Art.6*bis* in 1928 nor retained in subsequent revisions to the Berne Convention. Hence, it is arguable at least that the intention of the drafting committee in 1928 as well as that of the delegates to subsequent conferences on the Berne Convention must have been to introduce two distinct terms, and therefore, honour is not and should not be treated the same as reputation.

It will be shown that honour, defined as the right to respect, has played at least an historical role within English common law, and that it is not a completely alien concept. The general position however is that 'Anglo-American law today is extremely chary of redressing injuries to feelings, honor, or reputation'.[67] Generally, an action lies only if there is loss or damage to some interest which can be adequately compensated in monetary terms. Even the law of defamation is based on the economic loss to the claimant as a result of injury to his reputation, rather than the affront caused by the libel to personal dignity.[68] The question is why the common law has developed this aversion to recognising injuries to feelings or honour,[69] and whether this is truly the position in the common law.

What is clear is that legal historians have unveiled evidence of the recognition of such rights or claims at certain points in the course of England's history. Beckerman, in particular, has observed that while the common law does appear to have ignored insults or affronts to honour altogether, at some stage in its history, honour played a more central role.[70] For instance, he notes that it is well established that Anglo-Saxon laws paid more attention to the injured feelings or wounded honour of the victim rather than to the actual conduct of the wrongdoer.[71] Moreover, the satisfaction of honour remained an important part of the settlement of any dispute from the Norman Conquest until at least the thirteenth century.[72] While pleas in the royal courts in the thirteenth century rarely included claims for dishonour, they appeared more frequently in those brought before the local courts.[73] The claims for dishonour were in relation to a wide range of wrongs (including breach of contract, defamation

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67 Beckerman (n 44).

68 ibid.; Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press 2002) 7; C Strange, R Cribb and CE Forth, *Honour, Violence and Emotions in History* (Bloomsbury Publishing 2014) 195.

69 Thomas Benedict Lambert, 'Protection, Feud and Royal Power: Violence and its Regulation in English Law c.850-c.1250' (DPhil thesis, Durham University 2009) puts forward the view, derived from Beckerman, that because the royal jurisdiction of the medieval courts was based on the idea of an affront to the honour of the king, everyone else's honour was disregarded.

70 ibid.

71 Beckerman W.S. Holdsworth and others, *A History of English Law* (Methuen & Company 1909) 51

72 Beckerman (n 44) 160 and 167; Beverley-Smith (n 68) 141.

73 Beckerman, (n 44), 173.

and assault for example) and were awarded damages separate from those claimed for the actual wrong.[74] Further, in a few cases, the amount claimed for dishonour far exceeded that claimed for the actual wrong, thus indicating that the crux of such claims concerned the dishonour itself, similar to claims brought for *iniuria* under Roman law, i.e. the insult caused by the wrong.[75]

6. *Iniuria* in Roman Law

Iniuria, translated as 'insult' or 'outrage' may be defined as 'any contumelious disregard of another's rights or personality',[76] as opposed to economic loss. Whilst originally the concept focused on physical assaults, it widened to include specific wrongs loosely similar to sexual harassment and defamation, and eventually was grounded by an unifying principle of *contumelia* or contempt. [77] Essentially, by the classical period (from 1st century CE), the wide variety of wrongs that were brought under the umbrella of *iniuria,* were related by the contempt shown to the victim.[78]

> *Iniuria* is so called from that which happens *non iure* (i.e. unlawfully)*;* for everything which does not come about *iure* is said to occur *iniuria.* This is general. But specifically, *iniuria is said to be contumelia*.[79]

Contumelia, was equated in Justinian's *Institutes* to the Greek *hubris,*[80] which in turn has been referred to by Peter Birks as 'a kind of arrogance or pride',[81] or simply contempt in English. The delict interfered with one's right to an equality of respect,[82] or is simply 'disrespect'.[83] The contemptuous act is exercised without taking into account the interests or feelings of the victim.[84] While it was a condition of *iniuria* that there must be an intent to insult, c*ontumelia* could also be

74 ibid., 174-175.

75 ibid., 176.

76 B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1972) 216.

77 Eric Descheemaeker and Helen Scott, 'Iniuria and the Common Law' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law,* vol 9 (Hart Publishing 2013).

78 ibid., 8-11

79 D 47.10.1 Ulpian, 56 Ad edictum.

80 Justinian, *Instituties,* 4.4pr.

81 Peter Birks, 'Harassment and Hubris: the Right to an Equality of Respect' (1997) 32 Irish Jurist 1, 8.

82 David Ibbetson, 'Iniuria, Roman and English' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law,* vol 9 (Hart Publishing 2013), 40; Birks (n 81) 1.

83 Ibbetson (n 82) 40.

84 Descheemaeker and Scott (n 77) 11.

presumed from the intentional commission of the act, although this was a rebuttable presumption.[85] It should also be noted that in relation to pre-classical (second and third period BCE) *iniuria*, special edicts were pronounced to impose liability in new previously unrecognised situations.[86] It would appear that for two of the special edicts issued, only acts which were *contra bonos mores* i.e. those contrary to the social mores of the prevailing standards, attracted liability.[87] Further, a special edict which dealt with *infamia* or 'shaming' required the subjective intent of the offender in order to attract liability.[88] This was to deal with seemingly lawful acts which are intended to cause offence to the victim of such acts, as 'some shades of intent could turn lawful conduct unlawful'.[89]

Another condition for the operation of an action based on *iniuria* was that the victim must have expressed his dismay or anger as soon as he was apprised of the facts pertaining to the offence.[90] It was insufficient to show he was the victim; he must react to the offence. The idea behind this rule is not clear and is subject to several possible theories, [91] detailed discussion of which is beyond the scope of this chapter.

The role that *iniuria* plays in the common law has been explored to a great extent by scholars in Roman law, as well as scholars of laws pertaining to those jurisdictions which have evolved laws rooted in Roman law, famously, Scotland and South Africa.[92] Peter Birks, in his lecture *Harassment and Hubris*,[93] thought that 'the common law is much nearer than is often thought to a full recognition of the Roman tort,...'. The scholars in these fields have found that analysing the common law through the lens of the Roman tort to be instructive, for instance, it can be seen through this lens that the availability of enhanced or aggravated damages reflects the common law's recognition that insulting behaviour or attitude deserved to be penalised.[94]

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85 Helen Scott, 'Contumelia and the South African Law of Defamation' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (Hart Publishing 2013) 127-128.

86 Descheemaeker and Scott (n 77) 4.

87 ibid., 5.

88 ibid., 6 -7.

89 Birks (n 81) 13.

90 D.47.10.11.1.

91 See Paul Mitchell, 'Dissimulatio' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (2013) for an in-depth discussion of these theories.

92 The influence and heritage of Roman law is explored in depth in *Iniuria* and the Common Law (ed. by Eric Descheemaeker and Helen Scott), a volume comprising a series of essays by scholars in these areas of law.

93 Birks (n81) 4. See also Scott (n 85) 123.

94 Ibbetson (n 82) 45; Birks (n 81) 44; WW Buckland, ADMNB McNair and FH Lawson, *Roman Law & Common Law: A Comparison in Outline* (University Press 1952) 382-383.

It is not intended to present the various arguments and lines of evidence which showcase the extent to which features of *iniuria* appear within the common law. There is already a body of scholarship which has made the point.[95] The recognition of *iniuria* like principles within the common law enables the recognition of sub-interests such as privacy for example, which hitherto have never enjoyed full protection or recognition in the common law.[96] Lawyers and judges in the common law need not exercise their creative powers in stretching the scope of established categories of tort in order to encompass cases which, although clearly involving the commission of a wrong of some type, do not however tick all the boxes of any of the established torts.[97]

General concepts therefore such as *contumelia*, the right to respect, or affronts to honour, have not been entirely alien to the common law. These themes, originally formulated and rooted in Roman law, have manifested themselves in various guises in the common law. Just as studying and understanding how *iniuria* operated assists in helping the common law of tort to evolve, likewise, it furnishes us, for our present purposes, at least some guidance as to how 'honour', as it is provided for under s.80, may be applied.

7. Revised interpretation of honour, and its effect on the destruction of works

a. The revised interpretation

Honour, thus, can be seen to mean the right to respect, not only as a mere definition in a dictionary, but also in the fields of anthropology and the law. This is, despite its many variations, its consistent key characteristic. Further, as stated above, *iniuria*, which is arguably a source of personality offences in modern law, appeared to focus on the offender's act, rather than the victim's actual feelings. What this means is that for an action to be established in *iniuria*, although it was necessary that the victim felt belittled or angered or offended in some way, and that he made known his feelings,[98] it was also sufficient and it was not necessary to examine his feelings any further than that in order to ascertain if they were reasonably held. The delict instead focuses on the intention of the offender so that even if he had committed a strictly lawful act, this could attract liability if he had acted with contempt towards his victim.

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95 Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (1st edn, Hart Publishing Ltd 2013).

96 Birks (n 81) 44-45.

97 See for example cases such as *Tolley v Fry* [1931] AC 333 and *Huth v Huth* [191] 3 KB 32, analysed in Ibbetson (n 82) 38-39; Buckland, McNair and Lawson (n 94) 383.

98 *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (t/a East West Records)* (n 31) [157].

Thus, instead of interpreting 'honour' as 'what a person thinks of himself',[99] we can interpret honour in s.80 as underscoring the *author's right to be treated with respect*, in relation to how his work is treated by third parties.[100] While the victim's actual feelings are obviously important as they constitute the injury which has been suffered, by focusing more on the offending nature of the act itself and also requiring an objective inquiry into the intent of the offender, i.e. by asking if the offender's act was clearly meant to be *offensive,* it lessens the subjectivity element in s.80. Simply put, instead of having to ask if the victim *actually feels* offended by the act in question and whether it was reasonable for him to have felt so, it would only be necessary to ask if the defendant's act is objectively insulting according to prevailing norms, i.e. *contra bonos mores*, an approach which may also be borrowed from pre-classical *iniuria.*

As Stewart has noted, calling someone a swine is *obviously* offensive, and the victim of the name calling should have the right not to be offended as such. Obvious offence is, for instance, also conveyed by intentionally spitting in another's face, although it may not necessarily be so by the actual hitting of another, even though the extent of physical injury meted out by hitting would be greater than that caused by spitting.[101] This is because there may be some very good and inoffensive reason for hitting another for example, in self-defence or in jest perhaps, but it is difficult to think of an inoffensive reason for deliberately spitting in another's face however. Spitting in another's face is *obviously* meant to be offensive. Such an approach would not only assist in addressing concerns in allowing the unreasonable claims of oversensitive writers and artists,[102] but would also capture acts which are objectively offensive but not necessarily detrimental to reputation. For example, a parody of a work would rarely be mistaken by the public as the work of the original author, and hence not affect his reputation.[103] Aside from the fact that the original author might *feel* offended by the parody, it is clear that a parody is generally *obviously intended* to generate mirth at the expense of the original work and its author, and at best, poke gentle fun at them. There is an obvious element of offence meant in such a situation.[104]

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99 Bently and Sherman (n 9) 288.

100 Ellionson and Symonds (n 5) discuss the context in which 'honour' may be prejudiced. WIPO advises that the right to object to derogatory acts which are prejudicial to honour or reputation is sometimes referred to as 'the right to respect' and that it is an elastic term. See WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (1978).

101 Both acts are of course likely to amount to battery in tort or crime.

102 Deming Liu, 'English copyright law makes the poor "snowman" poorer' (2013) 35 European Intellectual Property Review 674, 680.

103 Bently and Sherman (n 9) 288.

104 It is difficult to define parody with precision. It has been suggested by US Judge Posner that there are two types, 'weapon parody' and 'target parody', where the latter targets the underlying work and/or its author while the former is generally a satire, which targets someone or something other than the work or

Colourisation of films too is an issue which may be addressed by this. If done skilfully, and in today's sophisticated film studios and computer laboratories this is usually the case,[105] it is unlikely that the audience would think any less of the original film maker, and hence his reputation would most likely remain intact. There are economic reasons why broadcasting companies colourise films and television programs. The main reason is that it is increasingly difficult to syndicate black and white films, and by colourising them, there is scope for airing them to a much wider audience. However, there has been much opposition to this process,[106] not only for films made in the non-colour era, but also in the period when coloured film technology was readily available. Particularly when colourisation was an option at the time the film was made, and the film was consciously filmed in black and white, the colourisation would be objectively offensive to the film director as it has not only altered the integrity of his work, it has altered the director's artistic vision, and questioned his choice of artistic medium. According to Woody Allen, who has chosen to create some films in black and white, '[t]o change someone's work without any regard to his wishes shows a total *contempt* for film, for the director and for the public'.[107] The film director's reputation with film audiences may well remain intact especially if the colourisation was performed skilfully and tastefully, or if the audience is made aware that the colourisation was effected by a third party, but not only would the director be likely to feel offended, the colourisation of his black and white artistic vision is objectively offensive and therefore prejudicial to his honour.

Further, by looking at the intention of the *offender*, seemingly lawful conduct may become unlawful, as we have already seen above in the discussion on *iniuria*. It can be seen that this aspect of the delict in particular, if applied to moral rights, would play a significant role. For instance, *prima facie*, the owner of an artwork has private property rights over that artwork and ostensibly has the right to do whatever he wishes with it. Should he choose to maltreat or even destroy it however, he would be perfectly within his legal rights to do so.[108] The maltreatment/destruction is therefore a

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author. See R. Posner, 'When is Parody Fair?' (1992) 21 Journal of Legal Studies 67. Arguably, a 'weapon parody' which does not target the work or author might probably not be offensive to the author.

105 The Associated Press, 'Stooges DVD revives Colorization Debate' (8 September 2004) <http://www.today.com/id/5651949/ns/today-today_entertainment/t/stooges-dvd-revives-colorization-debate/#.U-yEt_ldXmc>. Bob Simmons, a technical specialist with Sony Columbia Tri-Star, said that the greater range of colours available using digital processes gave the films a more natural appearance, while props used in making the original films are carefully researched and if available, sought out in order to ascertain their actual colours.

106 'Colorization of Black-and-White Movies' (*Senate Judiciary Subcommittee on Technology and the Law*, 1987) <http://www.c-span.org/video/?56772-1/colorization-blackandwhite-movies>. Woody Allen, Milos Forman and Sidney Pollack were among witnesses who appeared before the US Senate Judiciary Subcommittee to present their views on the colourisation of black and white films.

107 Jack Mathews, 'Film Directors see Red over Ted Turner's Movie Tinting' (1986) <http://articles.latimes.com/1986-09-12/entertainment/ca-12040_1_ted-turner>.

108 This issue is not as simple as that. There is an inherent tension between private property rights over artworks and moral rights of the artist. An in-depth discussion of this issue with regard to the right to

lawful act. However, in maltreating/destroying the artwork without due regard for the feelings of its author, the owner has acted contemptuously, and such an act could conceivably be an *iniuria.*

It has to be pointed out here that care must be taken in automatically drawing this conclusion. There is an inevitable tension between the owner's property rights over an artwork and the moral rights of the artist. It is recognised that there are situations in which the owner's reasons for destroying the artwork are not only understandable, but also good and valid, and more importantly they reasonably override considerations of any regard for the artist, and hence not necessarily constitute an *iniuria*. Indeed, Paul in D.47.10.33 seemed to regard *contra bonos mores* as an essential element for liability in *iniuria*:

> Where something is done in the public interest according to sound morals, even though it is to the disrespect of someone, nevertheless, because the magistrate does it not with a mind to doing *iniuria* but to assert public maiestas, he is not liable to an action iniuriarum.

While the text is a little confusing because the reference to the magistrate is not explained, nevertheless, it is clear that according to Paul, the absence of *contra bonos mores,* excluded liability in *iniuria.*[109]

For instance, if the owner either merely takes a dislike to the artwork or rejects it on some ideological ground, it is an *understandable* reason for destroying it, but it is not necessarily a good and valid reason to simply destroy the artwork without more, or indeed, a sound public interest reason. Indeed, if the reason for destroying the work is based on ideological grounds, this amounts to an outright rebuff of the artist's vision. Destroying an artwork under such circumstances demonstrates utter disregard for the artist's feelings and hence is contumelious. There are many examples of this, ranging from the destruction by Lady Churchill of Sutherland's portrait of Winston Churchill (which is discussed below), to the destruction of Diego Rivera's mural, *Man at Crossroads* at the behest of its commissioner, the Rockefellers.[110] Another example is the insidious practice of cutting up artworks into pieces, mainly for profit, as the separate sales of individual pieces may add up to more than the asking price for the artwork in its entirety. Such a travesty occurred in 1986 when a Picasso linocut print was cut up into 500 separate pieces by an Australian mail order company.[111]

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destroy property can be found in Lior Jacob Strahilevitz, 'The Right to Destroy' (2005) 114 Yale Law Journal 781.

109 Ibbetson (n 82) 43.

110 'Rockefeller Centers Ousts Rivera and Boards Up Mural' (10 May 1933) <http://xroads.virginia.edu/~MA04/hess/RockRivera/newspapers/NYHerald_05_10_1933.html>.

111 Nicholas Forrest, 'Picasso Gets the Chop!!' (2008) <http://www.artmarketblog.com/2008/04/17/picasso-gets-the-chop-artmarketblogcom/>.

On the other hand, an example of a good and valid reason which could legitimately override any concern for the artist would be public health and safety. In 2010, for health and safety reasons, security staff at the Royal College of Art destroyed a student artwork which consisted of a stairway erected between the college's building and a fish and chip shop next door. Although sympathetic towards the student artist's plight, the college rector emphasised that the safety of students and visitors would not be put at risk for the sake of maintaining the work.[112] However, health and safety reasons have been raised in the past on spurious grounds, primarily as a smokescreen for the true sentiments behind the destruction of artworks. Jacob Epstein's nude statues on the British Medical Association's headquarters sparked intense controversy from the moment they were unveiled. For a period of almost thirty years, a continuous campaign was waged from different quarters against the statues. When finally part of one statue fell onto the street below, this gave the then owner of the building a reason to destroy the works. Mundy, art historian and Head of Collection Research at the Tate Modern, laments that '...what had been a grand public statement by one of the greatest modernist sculptors...was lost, notionally on the dubious, and somewhat inglorious grounds of 'health and safety'.'[113]

Nowhere is the tension between property rights, public interest and moral rights more apparent than in legal dispute which raged over Richard Serra's *Tilted Arc*, discussed in chapter 3. To recapitulate, *Tilted Arc* was a monolithic steel wall which traversed Federal Plaza in New York. Office workers from the surrounding buildings were infuriated with the structure, and petitioned its removal. The federal agency which commissioned the sculpture held a public hearing, at which almost two hundred artists and experts gave testimony in the sculpture's favour. The panel, after hearing views from the public as well as those of the art world, chose to remove the sculpture. A furious Serra then sued the agency, claiming a breach of his moral rights. The court dismissed his claim, ruling that it was the property of the agency and therefore it had the right to dispose of the work. According to Serra, the legal outcome '[affirmed] the government's commitment to private property over the interests of art or free expression.'[114]

The above discussion demonstrates the inherent tension between property rights and moral rights, an issue which deserves a more in-depth discussion and which will be explored further in chapter 7. This section merely makes the point that while the owner who destroys an artwork in his possession may simply be exercising his legal rights, unless there are good, valid and overriding

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112 Louise Jury, 'Artist's Degree Work Destroyed over Safety Fear' (2010) <http://www.standard.co.uk/news/artists-degree-work-destroyed-over-safety-fear-6483321.html> .

113 Jennifer Mundy, *Lost Art* (Tate Publishing 2013) 87.

114 Richard Serra, 'Art and Censorship' (1991) 17 Chicago Journals 574, 574.

reasons for the destruction, it amounts to a contumelious disregard for the artist. A further point may also be made that the owner of a work of art is its guardian, responsible for its posterity.[115]

Further, as discussed above in the introduction, the product of a creative process practised in the fine arts is the embodiment of its author's personality, and hence callous destruction of the product would amount to callous disregard for the personality of its author and is *prima facie* insulting. Any maltreatment or the destruction of the artwork may therefore raise at least a *presumption* of contempt towards the artist, attracting liability. It should be remembered that only a rebuttable presumption is raised, so that in a few instances, such an act could possibly be deemed inoffensive. An example would be when an artist, *with the full consent* of another artist, destroys the work of the second artist. Exactly such a situation occurred when Robert Rauschenberg, with Willem de Kooning's permission, erased one of de Kooning's works, in order to create a 'new' work. In an interview, Rauschenberg explained that he '...erased the de Kooning *not* out of any negative response.'[116] This arguably was not a situation where the destroyer clearly intended to offend the author of the destroyed work.

It is important at this juncture to briefly contrast the aforementioned examples of parodies and the colourisation of films with the act of destruction generally. It could be argued that parodies and the colourisation of films are arguably creative works in their own right. Much skill and creativity goes into the creation of a good and humorous parody, and above all, they also play a valuable role as a form of criticism of the work on which they are based, and as such it has been argued that the law should recognise protection for such forms of work. [117] Again, much skill and creativity goes into the selection of the appropriate hues and contrasts in producing a sympathetic colourised version of a black and white film, and colourised versions will make black and white films more palatable and accessible to modern audiences today. Arguably there are possible public interests in these activities. There is therefore an argument that caution should be exercised in imposing restrictions on activities which are arguably creative and socially beneficial, and that an author's honour may not necessarily override such public interests. Destruction on the other hand leaves nothing in its wake. Apart from the Rauschenberg episode, there is nothing creative about destroying a work of art, and generally, one

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115 Julius S Held, 'Alteration and Mutilation of Works of Art' (1963) 62 The South Atlantic Quarterly 4, 26.

116 Vincent Katz, 'A Genteel Iconoclasm - Robert Rauschenberg' (*Tate etc*, 2006) <http://www.tate.org.uk/context-comment/articles/genteel-iconoclasm>.

117 Much has been written on the impact of copyright and moral rights on parodies. See for example, Geri J. Yonover, 'The Precarious Balance: Moral Rights, Parody, and Fair Use' (1996) 14 Cardozo Arts and Entertainment Law Journal 79; Maree Sainsbury, 'Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights' (2007) 18 Australian Intellectual Property Journal 149; Tania Cheng, 'The Power of Potter: Copyright Law and its Influence on Sequels and Parodies' (2013) 49 Forum for Modern Language Studies 1.

is hard pressed to find a public interest in the destruction of a creative work.[118] A detailed discussion of the relative merits of parodies, colourisation and 'destruction as art' is beyond the scope of this section and it suffices to remind ourselves that, in the absence of a clear statutory exception, and bearing in mind the above arguments, the courts may exercise restraint in deeming creative acts such as parodies and colourisation as treatments prejudicial to the honour or reputation of the original authors.

b. Honour v Reputation – the effect on destruction of works

Honour, in contrast to reputation, is not concerned with public knowledge of the act which interferes with his work. As stated above, reputation is, unlike honour, essentially economic in character. The ruination of an author's public image or his reputation will in turn impinge upon his future income. Thus, this is why the courts, in discussing cases involving the author's integrity right, have been so concerned with the final 'product' after the alleged maltreatment by the defendant. Does the work, after being subject to the defendant's treatment, have the capacity to prejudice the author's reputation? In other words, would the public, upon seeing the end result, have a markedly negative perception of the author and his works? The answer is never clear as some treatments may not only simply have little or no effect on the public's perception of the author but may even enhance the author's reputation. For example, substantial editing of a written work in which fundamental errors of fact or simply bad grammar are corrected, would possibly amount to a substantial treatment of the original work under s.80, but would arguably not prejudice the author's reputation. Where destruction of a work is concerned however, the consequence of such an act is unmistakable. The end result of an act of destruction is the same, no matter what the subject-matter involved is – the work is simply no more and need not be subject to the same level of scrutiny by the courts.

However, as already stated above, destruction leaves nothing behind which can affect the author's reputation, and as such, there is a considerable body of academic and judicial opinion that destruction does not amount to a breach of the integrity right.[119] This is for example reflected in the following statement by Roeder,

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[118] Although health and safety has been raised earlier in this article as a sound justification for destruction, and is arguably a public interest, it has also made the point that on occasion such reasons are questionable, for instance, when Jacob Epstein's nude statues were demolished on such basis. It has been thought that health and safety reasons are very often raised to obscure the true intentions behind difficult decisions in many situations, not just in the destruction of art. See Claire Dunlop, *Health and Safety Myth-Busters Challenge Panel: Case Analysis* ((Report) (December 2014) University of Exeter, 2014).

[119] See (n 8) above. Arguments against allowing objections to be raised against the destruction of works are discussed above.

> 'To deform [the creator's] work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for a work he has not done; the destruction of the work does not have this result.' [120]

Further, the House Report related to the enactment of the US Visual Artist's Rights Act (VARA) in 1990 noted that

> 'Some Berne members do not include destruction of a work within the right of integrity because theoretically, once the work no longer exists, there can be no effect on an artist's honor or reputation.' [121]

In *Carter v Helmsley-Spear, Inc.*, a US case in which the plaintiffs invoked VARA, the Second Circuit remarked that '...destruction is seen as less harmful than the continued display of deformed or mutilated works that misrepresent the artist.'[122]

The idea behind the sentiments articulated above is that something else other than the author's original work is represented as his, which is *communicated or conveyed to the public* and hence harms the public's perception of him and his work. Similarly, harm to reputation in defamation occurs only when the libellous words are *published*. Until then, there is no harm. It should also be remembered at this juncture that additional requirements in s.80, subsections (3), (4) and (6) discussed earlier in chapter 4 emphasise the requirement for public knowledge of the treatment meted out to the work. It makes the author 'subject to criticism' by the public according to Roeder above, in other words, subject to a negative evaluation by the public, which is, simply put, a slight on his reputation. The maltreated, mutilated or deformed work influences or works on the mind of the public and hence has an effect on the author's reputation, and it is thought that continued display of the mutilated work causes more harm than simply destroying it entirely. By contrast, evidently after destruction, there is nothing left that can be *communicated or conveyed to the public,* and therefore nothing that can affect *what the public thinks of the author*. It can be seen that the focus is on the public's perception, in other words, the effect on the author's reputation.

It is therefore manifest that what various commentators had in mind, when they opined that destruction leaves nothing behind which can harm the author, is reputation. As already mentioned above, in analysing cases involving the right of integrity, academic texts and judicial opinions emphasise the effect of the treatment of a work on the *reputation* of the author, and any academic or

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120 Martin A. Roeder, 'The Doctrine of Moral Right: a study in the Law of Artists, Authors and Creators' (1940) 53 Harvard Law Review 554, 565.

121 H.R. REP No. 514, 16.

122 *Carter v Helmsley-Spear, Inc.* 71 F.3d 77 (2d Circuit) 81-82.

judicial attempts at defining the honour limb of s.80 simply echo definitions of the concept of reputation, instead of attempting to distinguish honour from reputation. Honour appears to have been left on the wayside to all intents and purposes.

While reputation may not be affected by destruction, it is submitted that honour may be prejudiced by such an act. *Contumelia* which has been defined as the act of treating the victim contemptuously, or without regard to his feelings or interests would similarly describe the situation here. The person who destroys a work of art has not taken into account the feelings of the work's author, or if he has, he has simply dismissed them as unimportant before proceeding to destroy the work. The destroyer may have good reason to want to destroy the work. For instance, the Churchills famously had an intense dislike of Winston Churchill's portrait painted by Graham Sutherland,[123] and had it destroyed. Although Sutherland was magnanimous in saying that he was not 'unduly distressed', as he might well be, he strongly denounced the act as 'without question an act of vandalism', strong terms indeed, thus revealing the true depths of his feelings about the matter.[124] Even if Sutherland himself was not really distressed, the very act of destroying the portrait was a display of the contempt the Churchills had for the portrait, and even Sutherland himself. Putting aside difficult and ambivalent issues regarding property ownership,[125] the ethics of destroying artworks and the potential loss of cultural heritage,[126] it is at least clear that the effect such an act would have on the artist is profoundly upsetting, which is best described in the following statement by Roy Strong, director of the Victoria and Albert Museum, '...an artist tears something out of himself when he paints a portrait and to burn it is like burning a chunk of Sutherland'.[127] This statement is not as incredible as it sounds, especially if we understand the author's work to be 'an embodiment of the author's personal meaning and message',[128] or even something akin to an offspring of the author's,[129] and therefore it would be obvious and natural to most that the destruction of the author's work is obviously deeply

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123 Churchill apparently had said that the portrait made him look half-witted, and that he looked as if he was perched on the lavatory. See Mundy (n 113) 100; Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 38.

124 AP, 'Churchill's Wife Destroyed Portrait' *Observer-Reporter* (Pennsylvania, 12 January 1978) 33 <http://news.google.com/newspapers?id=OvddAAAAIBAJ&sjid=j18NAAAAIBAJ&pg=1359%2C1485569> (last accessed 5 August 2014.)

125 David Sylvester said: 'I do not think we have the right to feel we own the works of art we have, any more than the spouse we have. Therefore we should not kill them off just because we do not like them.' Sax (n 114) 39.

126 ibid., 38-41.

127 ibid 39; Mundy (n 113) 101-102.

128 Kwall (n 12) xiii.

129 ibid., xiv and 2.

offensive and wounding at worst, insensitive and tactless at best, redolent of the features of *contumelia*.

Whilst Sutherland's honour may have been acutely prejudiced by the destruction of the Churchill portrait, his *reputation* appears not to have been affected much by the incident, apart from some short term notoriety in the popular press.[130] His standing, however, as an important artist, remained generally unsullied. A few years after the presentation of the portrait, Sutherland was awarded the Order of Merit,[131] and even though his style of painting gradually became unfashionable in some quarters, his works have been regularly exhibited long after his death in 1980.[132] When asked if the Churchill controversy would have the effect of clouding Sutherland's memories, Sir Kenneth Clark, in an interview held in 1980, replied firmly in the negative.[133] Even if destruction had been recognised at the time as a breach of the integrity right,[134] Sutherland may have found it difficult to establish his claim as there was evidence that his reputation was not unduly affected by the destruction, even though the requirement is that the treatment is *prejudicial*, not that it *has prejudiced* the reputation of the author. However, as we have seen above, destruction of an artwork is clearly an act which is insulting to the artist, and as such, prejudice to honour could have been a basis on which Sutherland could have made his claim.

It is not to say that the reputation of an artist can *never* be affected by destruction of one or more of his artwork. In fact, it is abundantly evident that, despite the absence of something tangible which may affect public opinion, the destruction of an artist's work can also affect his reputation profoundly. First of all, the destruction of an artwork would reduce the corpus of the artist's life work,

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130 'The artist Winston Churchill loved to hate', Oh My News, International Art & Life, <http://english.ohmynews.com/articleview/article_view.asp?at_code=278128>

131 'Graham Sutherland OM', <http://www.tate.org.uk/art/artists/graham-sutherland-om-2014>.

132 See Laura Cumming, 'Graham Sutherland: An Unfinished World - Review' *The Observer* <http://www.theguardian.com/artanddesign/2011/dec/18/graham-sutherland-unfinished-world-review > for a review of an exhibition of eighty of Sutherland's works, held from 10 December 2011 to 18 March 2012 at Modern Art Oxford.

133 Unidentified Interviewer, Interview with Art Historian Sir Kenneth Clark, *Death of Graham Sutherland* (LBC/IRN 1980) <http://bufvc.ac.uk/tvandradio/lbc/index.php/segment/0001700462015>.

134 Dworkin states that even if the Sutherland incident had occurred after the enactment of CDPA, he could have done nothing. See Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Commonlaw Countries' (1994) 19 Columbia Journal of Law & the Arts 229, 250.

as well as possibly his financial standing,[135] hence giving the *prima facie* impression that the artist has a smaller repertoire than he has actually produced.[136] According to Stamtoudi,

> In other words, the destruction of a work may diminish the professional image and standing of the author by eliminating one of his creations. Especially in cases where the reputation of an author depends on a limited number of creations, the destruction of even one of them may substantially affect his status.[137]

Secondly, the knowledge that an artwork has been deliberately destroyed would surely at least raise questions in the public's mind regarding the worth of the artwork, especially if the destruction had been carried out by a notable personage, particularly one who is a patron of the arts or with some substantial background in the arts. To the public, there must have been some reason that the work was not worth preserving. That said, even if it is true that an artist's reputation can never be affected by the destruction of one of his artworks, which is disputed as argued above, the artist's honour has surely been prejudiced at least.

By re-interpreting honour as a right to respect, UK moral rights law is in a position to give full countenance to not only the legal rights of artists, but more importantly to the *respect* which they seek and in most cases, of which they are deserving. It is not always the case that monetary rewards incentivise creative enterprise among writers and artists; respect is equally, if not more, important to such authors. Such a viewpoint has been expounded robustly in Kwall's *The Soul of Creativity*. [138] According to her work, by commodifying creative works and focusing solely on the economic incentives, the law has lost sight of what is truly important to the writers and artists in society. Ong, in discussing why moral rights matter,[139] also expressed his concerns for the growing interest in emphasizing the economic efficiency and value maximization of moral rights.[140] He questioned an

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135 It should also be noted that destruction may well affect an artist's finances in the long term as once his work is destroyed, he would no longer receive the potential royalties from resale of that work. Under the Artist's Resale Right, an EU right introduced into the UK in 2006, an artist may receive a royalty each time his work is sold in the art market through a gallery, auction house or art dealer.

136 Rajan (n 8) 46. It was held in *Seghal v The Union of India HC (Ind)* FSR that by reducing the author's body of work, his reputation will be prejudiced. The authors in Copinger and Skone James however do not believe that this line of reasoning will be followed in the UK, although they give no explanation as to why this should be so. See Caddick, Davies and Harbottle (n 33) para 11-52 fn 244.

137 Stamatoudi (n 8) 483.

138 Kwall (n 12)

139 Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 Columbia Journal of Law & the Arts 297.

140 ibid., 312.

innovative study by Hannsmann and Santilli,[141] which engaged in an economic analysis of moral rights, pointing out that their thesis assumed that the integrity right protected reputational interests, thus unduly elevating the pecuniary interests of the author, while marginalising the non-pecuniary ones.[142] Re-interpreting honour in s.80 would assist in recognising the respect which should be accorded to UK's authors, and also enable UK copyright law to focus beyond merely the economic rights of authors.

In this respect, there is a further lesson to be learnt from the Romans. There is evidence that the Romans recognised the non-economic character of honour on the one hand, and conversely, the economic character of reputation on the other. According to Pound, three general forms of *iniuria* were recognised*:* real or physical injury, symbolic injuries such as affronts to honour, and pecuniary interests, which included injuries to reputation.[143] Thus, a distinction was made between injuries such as affronts to honour and injuries such as damage to reputation, the latter being of an economic character. As already mentioned above, injury to a professional person's reputation can result in harm to his financial standing, in that he not only stands to lose his current clients or customers, he may also lose potential clients or customers.[144] The damage to one's honour however cannot be as easily quantified in monetary terms, but is nevertheless just as palpable an injury which should not be ignored.

8. Conclusion

Honour is a very different creature from reputation. Interpreted as a right to respect, it need not require a public display of the act in question, and furthermore would encompass the entire destruction of works, which at the moment is not recognised as treatment which is prejudicial to honour or reputation under moral rights. While the victim's feelings are relevant and important, the court need not base their judgment wholly on them, which is arguably undesirable as unreasonable claims by hypersensitive artists might be allowed. However, if the focus is trained on the act itself, in order to ascertain if it is objectively offensive, then this would ameliorate the risk of allowing unreasonable claims by hypersensitive artists. Where destruction is concerned, it has been argued above that, unlike mutilations or other modifications, the effect of destruction on a work is unambiguous, and the *prima facie* intent behind the act is, at least, disrespect or a complete disregard for the honour of the artist. The argument that destruction is at least *prima facie* insulting or

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141 Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' [The University of Chicago Press for The University of Chicago Law School] (1997) 26 The Journal of Legal Studies 95.

142 Ong (n 139) 307.

143 Roscoe Pound, 'Interests of Personality' (1915) 28 Harvard Law Review 445 at 449-50.

144 Beverley-Smith (n 68) 11.

contemptuous to the author, has been noted by William Patry, 'One could argue however that destruction of a work shows the *utmost contempt* for the artist's honour or reputation'.[145] Despite the reference to both honour and reputation, Patry makes the point that destruction is *clearly* a contemptuous act. Hence, destruction constitutes a clear prejudice to the honour of the author, even if his reputation remains unaffected.

[145] WF Patry, *Copyright Law and Practice* (Bureau of National Affairs 1994) 1044, fn.128.

Chapter 6 - Can a Work of Art be Destroyed under Copyright Law – an analysis of the legal definition of 'artistic work'

> *Art is not, as the metaphysicians say, the manifestation of some mysterious idea of beauty or God; it is not, as the aesthetical physiologists say, a game in which man lets off his excess of stored-up energy; it is not the expression of man's emotions by external signs; it is not the production of pleasing objects; and, above all, it is not pleasure; but it is a means of union among men, joining them together in the same feelings, and indispensable for the life and progress toward well-being of individuals and of humanity.*
>
> Leo Tolstoy, *What is Art?*[1]

1. Introduction

This chapter continues with the task initiated in chapter 4, which was a doctrinal analysis of the Copyright Designs and Patents Act 1988 (CDPA). Whilst chapters 4 and 5 subjected s.80 to rigorous scrutiny, this chapter is concerned not only with s.80 but also with the definition of 'work', specifically 'artistic work', for copyright purposes. This chapter will focus on the question as to whether, according to copyright principles, a work in abstract can be destroyed, as opposed to any particular tangible incarnation of it, whether original or copy. To date, legal scholarship on this question has answered it in the negative i.e. that the protectable work for copyright purposes being the *abstract* content of a book, musical composition or painting may not be destroyed even when the physical receptacle of the content is destroyed. It then follows that because a copyright work cannot be destroyed, artists may not claim against the destruction of their work, even if the physical substrate of their painting or sculpture is destroyed.

In querying this perception, this chapter will survey the legal scholarship on this issue, and test its conclusions against established theories of art ontology. Reference will also be made to empirical research carried out previously by psychologists and philosophers, which test the hypothesis that ordinary practices and beliefs in the art world reflect those propounded by philosophers of art.

By employing art philosophy and by extracting the findings of empirical research previously undertaken in this area, it is intended that this chapter will shed more light on the reality surrounding the destruction of artworks, and question whether copyright law's assumptions about artworks still hold true. The philosophical debates and research demonstrate that there are significant doubts that either lay people or art experts/philosophers regard the singular arts such as paintings and non-cast sculptures in the same light as literature and music. Why then should copyright law treat all works,

[1] Leo Tolstoy, *What is Art?* (Aylmer Maude tr, Thomas Y Crowell & Co. 1899) 51.

whether literature, music or sculptures, in the same manner?[2] Ultimately this chapter makes the case that the way copyright law currently perceives and treats artistic works, especially the destruction of such works, undermines the goals of copyright law and moral rights doctrine.

a. The relationship between copyright definition of work and the integrity right

The CDPA specifies eight categories of works subject to copyright protection.[3] These works are subdivided generally into authorial works, i.e. literary, dramatic, musical and artistic works, and entrepreneurial works, i.e. sound recordings, films, broadcasts and typographical arrangements. For the purposes of copyright law and moral rights, it is generally accepted that the protectable essence of authorial works like novels, poems, symphonies etc lies in their *intangible content*, not their physical embodiment.[4] Copyright arises and attaches to a work the instant it is created and fixed in a material form.[5] It has therefore been argued that for the purposes of copyright, the work then remains in existence even if its physical embodiment is destroyed.[6] This principle apparently applies in relation to *all* types of works, textual works such as literary and musical works, and also artistic works. It is based on the accepted principle that it is the creative content, i.e. words, plots, descriptions, characters etc of a novel which constitute the protectable core, not the printed paper or electronic-ink. Similarly, it is argued that the picture is the protectable aspect of an artwork, not its physical embodiment, e.g. the canvas and pigments of a painting. It follows that the destruction of the first edition of a book or the original painting or any of their copies would still leave the *content* intact. Furthermore, through their copies, their protectable content would remain accessible indefinitely, and the relevant work cannot be destroyed.[7] This undermines any claim that a creator might have against the destruction of the work under the integrity right, for if it cannot be destroyed, there can be no breach.[8] It is this conclusion i.e. that a 'work', including artistic works, cannot be destroyed, which this chapter seeks to challenge.

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2 Fiona MacMillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier and Stina Teilmann (eds), *Art and Law: The Copyright Debate* (DJOF Publishing 2005) 50-51.

3 s.1(1) CDPA.

4 Jonathan Griffiths, 'Dematerialisation, Pragmatism and the European Copyright Revolution' (2013) 33 Oxford Journal of Legal Studies 767.

5 Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2017) 2-05.

6 ibid., 3-183.

7 Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016).

8 ibid., 8-024.

b. Framework of chapter

To ascertain if copyright works may be destroyed, this chapter must examine the ontological status of copyright works, which copyright scholars accept as being unstable.[9] Griffiths explains that English copyright law has evolved over time to embrace the abstract nature of the copyright work.[10] However, Sherman recognises that '[b]y focusing on the intangible, at the expense of the tangible, we lose sight of the material dimension of the work and the way that this interacts with the intangible',[11] and argues that the copyright work cannot be seen in either purely intangible terms or purely material ones.[12]

Until the enactment of the Copyright Act 1911, UK copyright statutes had provided legal protection to specific types of works e.g. the Statute of Anne covered 'books', while the Sculpture Copyright Act 1814 covered 'sculptures'. The 1911 Act introduced the abstract concept of 'work', which was an all-encompassing notion that covered all creative forms; no distinction was to be made between books, paintings, engravings or sculptures.

The flexibility in focusing on an abstract notion of work is useful in modern times. We cannot rely on the approach of early copyright law, which was to refer to specific subject-matters (e.g. books, paintings) as such an approach can hardly account for the increasing variety in media today. However, an overarching abstract definition of 'work', although affording us the flexibility we require, leaves us needing clearer guidance on what constitutes a 'work'. Unlike in 'real' property law, there are no bright-line rules to assist us,[13] and perhaps we cannot expect any as, even in pre-modern copyright law days, there were problems with defining the protectable subject-matter.[14]

What contemporary copyright scholars are in agreement about is that although the modernist approach in treating 'works' as an abstract concept was the correct progression in the evolution of copyright law,[15] we still cannot answer the question of what 'work' means with any degree of certainty, and that legal scholarship on this area of law is relatively unexplored.[16] This state of affairs

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9 Justine Pila, 'Copyright and Its Categories of Original Works' (2010) 30 Oxford Journal of Legal Studies 229; Brad Sherman, 'What is a Copyright Work?' (2011) 12 Theoretical Inquiries in Law 99.

10 Griffiths (n 4).

11 Sherman (n 9).

12 ibid., 104.

13 George Wei, 'Certainty of Subject-Matter in the Development of Intellectual Property: "Please Sir, I Want Some More"!' (2009) Singapore Journal of Legal Studies 474.

14 Michal Shur-Ofry, 'Baby Shoes and the Copyright Work: A Comment on Brad Sherman's What is a Copyright Work?' (2011) 12 Theoretical Inquiries in Law 1, 3.

15 Griffiths (n 4)

16 ibid., fn 60.

is concerning as, according to Wei, 'the stronger and more extensive the rights, the tougher the remedies, the greater the need for certainty and predictability as to what is protected.'[17]

This chapter does not propose to question the entire scholarship surrounding the concept of 'work' in copyright law, which either deal separately with the various delimiting factors such as the originality or 'skill and labour' requirement,[18] idea/expression dichotomy,[19] fair use doctrine,[20] and questions regarding miniscule works,[21] or short phrases/titles/slogans, [22] or more generally with all the various principles, guidelines and rules which the courts have at their disposal in ascertaining the boundaries of the copyright work. [23] Rather, it highlights a particular problem with treating artistic works, such as paintings and sculptures, in the same manner as textual or notational works such as novels, poems and symphonies. This is, that by making the same assumptions about artistic works and other types of works, copyright law is in danger of ignoring firstly how art philosophers and other interested participants involved with art, treat works of art, and secondly, the everyday realities of how ordinary people actually perceive and treat creative works, whether literary, musical, dramatic or artistic. Because such assumptions have a *real* effect on artworks, and people heavily involved with art, such as artists, art collectors, historians and curators, it is important that we remember that copyright is an intellectual property right which is 'created by law and regulated by law',[24] and that further, the subject-matters protected by copyright are in turn described by those authoritative in copyright law,[25] but who are not experts in art. Such assumptions should not be immune to constant questioning, scepticism and criticism.

It is proposed that artistic works are fundamentally different in nature to textual works, and that it is unsound to treat them in an identical fashion under copyright law, especially where destruction is concerned. This is reflected in the way we ordinarily treat works like music and literature as contrasted with the way in which we treat works like paintings and sculptures. It will be argued later in this chapter that *people identify the latter with their original physical embodiment* and

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17 Wei (n 13) 502.

18 Griffiths (n 4).

19 Eleonora Rosati, *The Idea/Expression Dichotomy at Crossroads* (LAP Lambert Academic Publishing 2010); Richard H. Jones, 'The Myth of the Idea/Expression Dichotomy in Copyright Law' (1990) 10 Pace Law Review 551.

20 David Nimmer, '"Fairest of Them All" and Other Fairy Tales of Fair Use' (2003) 66 Law and Contemporary Problems 263.

21 Justin Hughes, 'Size Matters (Or Should) in Copyright Law' (2005) 74 Fordham Law Review 575

22 Wei (n 13) 491-502.

23 ibid.; Griffiths (n 4); Sherman (n 9).

24 Alexandra George, *Constructing Intellectual Property* (Cambridge University Press 2014) 9.

25 ibid., 10.

feel an incalculable loss when the original physical work is destroyed. To all concerned, it is simply lost forever and no one would think that the art work is not destroyed. People do not however ordinarily identify the original manuscript on which Mozart wrote his 40th Symphony with the 40th Symphony itself. There is no such depth of profound loss if the original handwritten manuscript for Mozart's 40th symphony is lost. There is of course a great sense of dismay but that is *only because of the provenance* accorded to the manuscript. While there is also provenance associated with original art works, this accounts for only part of the reason why people feel distressed when an art work is destroyed.

Otherwise, Mozart's 40th Symphony is still performed and enjoyed in numerous concert halls throughout the world, and is recorded in the numerous copies of its musical score. One may argue that we should treat all works alike, and could likewise consider that Mozart's 40th Symphony may be completely destroyed in the event the very last copy of its manuscript or recording of the last performance of the symphony is destroyed, and when all memories of the symphony have completely faded. It must be appreciated however, in the present digital age in which reproduction techniques are exceptional, such a consequence is highly improbable. The above views are supported by the results of the empirical research discussed further below.

It is intended to take issue with the concept of work as applied to artistic works, primarily on the premise that the *physical matter* i.e. the paint and canvas and other materials, takes on a fundamental and *necessary* role in the creation of an artistic work. It is argued that the purely immaterial element cannot function, on its own, as the entire artistic work, and that contrary to the view that a copyright work cannot be destroyed, destruction of the material will simultaneously destroy its immaterial content. It will also be argued that although an artistic work can be destroyed, copyright *protection* is not necessarily extinguished upon its destruction. This is because of two principles of copyright law: firstly, *copyright protection* arises the moment a work is created, and secondly, permanence of form is not a requirement for *copyright protection* to continue to subsist. Further, s.153(3) of the CDPA states that once qualifying requirements are met, 'copyright does not cease to subsist by reason of any subsequent event.'

Therefore, two questions are posed in dealing with the definition of 'work' where artistic works are concerned, firstly whether the material aspect i.e. the medium, of a work of art is a fundamental and essential element of the same, and secondly, whether art can be destroyed. Both are issues subject to considerable scrutiny by art philosophers. A discussion of the ontology of art is therefore an important contribution to the present debate, where issues regarding the law and those regarding art intersect. The ensuing discussion is not purely a discussion of metaphysics for its sake, but a matter of how the purposes of copyright protection and moral rights doctrine in relation to art may be best served through a more nuanced perception of what an artwork is.

Finally, the point must be made that, even if the *legal* concept of an artistic work is that it is an *immaterial* concept, the *reality* is that an original artwork is a *wholly unique entity*, consisting of *both* the immaterial subject-matter and the material support which encapsulates the subject-matter, which once destroyed, is utterly irreplaceable. Due to the unique nature of artworks such as paintings and sculptures, their very destruction constitute an irretrievable loss of an unique piece, a fate that rarely befalls the other forms, such as literary and musical works, which are purely abstract works independent of the paper on which they are created, and of which multiple copies are invariably made, especially in the age of digital technology. It is obvious that the effect of destruction of even the first edition of a literary work is nowhere near as devastating and irrevocable as that of an original artistic work, hence the reason for focusing on artworks, as their requirement for a solution is far more pressing.

c. Reference to the ontology of art – can a work of art be destroyed?

The question of whether a work of art can be destroyed is a question which features in any query investigating the *nature* of art works. The query is not so much a question as to what conditions a work must fulfil in order to be classified as an artistic work (for e.g. it meets some standard of Beauty, or standard of craftsmanship), than a focus on asking *what type of entity* is a work of art. In other words, we ask if a work of art is perhaps a purely physical object, a feat of imagination, or a sensory experience for both artist and spectator? Destruction enters into the equation in that if a work of art is a purely physical object, then clearly it can be destroyed, but not if it is an abstract entity. These questions have been debated by aesthetic philosophers, including Wollheim, Collingwood, Margolis and Thomasson, and it is from the works of these philosophers that inspiration is sought in order to address the issue in copyright law.

These same questions do also crop up in copyright law, but they have not been debated to the same depth in legal circles. That is not to say that legal scholarship has completely denied the metaphysical nature of such enquiries in copyright law. Indeed, recognition of the need for metaphysics is reflected in a well known dictum by US Judge Story, who opined that copyright [and patents] '...approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent'.[26]

While in general judges and academics have certainly debated in much depth and detail, the criteria which must be met by a work before it can be considered as an artistic work for copyright

[26] *Folsom v. Marsh* (C.C.D.Mass. 1841) (No. 4,901).

purposes,[27] they have not considered the issue of destruction to the same extent, which is unfortunate as the issue is important particularly in considering whether an artist has a right to object to the destruction of his work. The following section will deal with the legal perspective on artistic works, before proceeding to a consideration of the key texts on the ontology of art by aesthetic philosophers.

2. Legal Perspective

The law and the arts have crossed paths in countless instances, ranging from issues relating to copyright, obscenity, customs and duties, and taxes.[28] Problems in aesthetics have therefore necessarily been the subject of considerable judicial deliberation, although unfortunately without the assistance of or reference to any of the established aesthetic theories or expert opinion.[29] The courts' reluctance to enlist the help of experts in the field is explained by Lord Simon in *Hensher*,[30]

> ...the court will endeavour not to be tied to a particular metaphysics of art, partly because courts are not naturally fitted to such matters and partly because Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics...

A few law academics on the other hand have increasingly taken up with art theorists in their discussions on art. Karlen refers briefly to the work of Collingwood, Margolis and Goodman in his general discussion on aesthetic theory in relation to legal problems involving art.[31] Pila, in writing on the categorisation of copyright works,[32] relies on the work of Kendall Walton,[33] and Wolterstorff,[34] while also making brief references to art philosophers such as Thomasson, Dickie and Levinson. Very recently, Alexandra George has explored metaphysical issues relating to intellectual property in

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27 *Lucasfim Ltd & Ors v Ainsworth & Anor* [2009] EWCA Civ 1328 (Court of Appeal (Civil Division)); Pila (n 9); Griffiths (n 4); Sherman (n 9); Daniel McClean, 'Piracy and authorship in contemporary art and the artistic commonwealth' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge University Press 2010); Anne Barron, 'Copyright, Art and Objecthood' in Daniel McClean (ed), *Dear Images; Art, Copyright and Culture* (Ridinghouse 2002).

28 Peter Karlen, 'Legal Aesthetics' (1979) 19 British Journal of Aesthetics 195, 196.

29 ibid., 209; Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998), chapter 2; Christine Haight Farley, 'Imagining the Law' in Austin Sarat, Matthew Anderson and Cathrine O. Frank (eds), *Law and the Humanities An Introduction* (Cambridge University Press 2014), 307-310; Costas Douzinas and Lynda Nead (eds), *Law and the Image: the Authority of Art and the Aesthetics of Law* (University of Chicago Press 1999) Introduction 1-18.

30 *Hensher v Restawhile* [1976] AC 64, 94-95.

31 Peter H Karlen, 'What is art -sketch for a legal definition' (1978) 94 Law Quarterly Review 383.

32 Pila (n 9).

33 Kendall L Walton, 'Categories of Art' (1970) 79 The Philosophical Review 334.

34 Justine Pila, *The Subject Matter of Intellectual Property* (Oxford University Press 2017), 181.

Constructing Intellectual Property.[35] Although not a lawyer, Darren Hicks, a philosophy professor, has written on aesthetic issues which arise in copyright law, observing that 'while copyright law assumes some metaphysical basis to its objects, this basis tends to go largely uninvestigated',[36] contending further that 'copyright law does, or should, grow from an understanding of these objects',[37] a view strongly advocated in this chapter.

The engagement of law academics with the question of *destruction* specifically has however generally been incidental, arising primarily from discussions relating to two perspectives. Firstly, when law academics (Derclaye, Pila, Garnett and Davies) consider the broader question of the requirement for fixation or permanence of copyright protected works, where those academics have questioned the *nature* of these works. Legal academic debate here readily accepts that destruction of the material form of a work does not destroy the 'copyright work' itself. Secondly, and closely related to the above legal query, other legal academics (Liu, Waisman) have focused more pointedly on the material or physical aspects of artistic works, generally concluding that the physical material is a separate and distinct feature, which when destroyed, does not destroy the work of art. In arriving at the above conclusions, legal academics in general appear to accept rather too eagerly that destroying the physical work, even if it is a 'singular' work i.e. works of which there is only one instance, like a painting or sculpture, does not destroy the work of art itself, notwithstanding that this is a stance which has been debated at length by art philosophers and which has not been as readily accepted by them.

The legal debates will be considered in the following sections, the underlying premise being that their conclusions on destruction thus far have been both premature and unsatisfactory.

a. The Requirement for Fixation or Permanence?

The question of whether an artistic work may be destroyed is linked to numerous debates which have centred on the requirement of fixation, i.e. that the work is recorded in a material form, which is a long established principle of copyright law.[38] In copyright cases pre-dating the CDPA, where the fixation requirement appears in s.3(2), the fixation principle has been expressed generally in terms of the necessity for certainty, firstly of existence of the work itself, and secondly, for ascertaining the

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35 George (n 24).

36 Darren Hudson Hick, 'Toward an Ontology of Authored Works' (2011) 51 British Journal of Aesthetics 185.

37 ibid., 186.

38 Caddick, Davies and Harbottle (n 5) 3-179.

boundaries of the work claimed.[39] s.3(2) CDPA, which refers to fixation only in relation to literary, dramatic and musical works, simply states that copyright does not subsist in these works unless and until it is 'recorded in writing or otherwise', and is also deemed to arise at the time the work is *made*. The Act merely goes on to define 'writing',[40] but does not give any further guidance beyond this.

Artistic works are presumably not subject to the same requirement as they exist ordinarily in a physical material form, and not in an ephemeral state.[41] It is somewhat ironic that while the absence of any reference in s.3(2) to artistic works reflects the CDPA's ostensible acceptance of artistic works as naturally existing in physical or material forms, the persistent view of copyright legal scholarship is that copyright protects intangible works and that includes artistic works.

The issue of destruction arises where debates on the fixation requirement have centred on the question of whether the fixation itself must also be in a permanent form. This requirement for permanence was raised initially by Lawton LJ in *Merchandising v Harpbond*,[42] in which the pop star Adam Ant claimed copyright protection of his stage make-up. This requirement was applied again in the Australian case of *Komesaroff v Mickle,*[43] involving 'sand-pictures', works consisting of glass containers filled with air bubbles, different coloured sands and liquids, which create different images every time the container is moved. The permanence requirement was also applied in *Creation Records Ltd News Group Newspapers Ltd*,[44] which involved a temporary assemblage of *object trouves.*

However, notwithstanding the above court decisions, *Copinger & Skone James* categorically confirms that permanence is *not* a requirement,[45] and indeed nowhere does it say in the CDPA that fixation ought to be permanent.[46] It appears that, notwithstanding the abovementioned cases, the courts in other cases have not been so certain, of either the necessity for artistic works to be fixed or that the fixation should be permanent.[47] Derclaye, on having studied relevant cases and legal

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39 *Tate v Fulbrook* [1908] 1 KB 821; *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700; Hector MacQueen and others, *Contemporary Intellectual Property Law and Policy* (2nd edn, OUP 2010).

40 s.178 CDPA.

41 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 92.

42 *Merchandising v Harpbond* [1983] FSR 32.

43 *Komesaroff v Mickle* [1988] RPC 204.

44 *Creation Records Ltd News Group Newspapers Ltd* [1997] EMLR 445.

45 Caddick, Davies and Harbottle (n 5) 3-182.

46 Estelle Derclaye, 'Debunking some of UK copyright law's longstanding myths and misunderstandings' (2013) Intellectual Property Quarterly 1, 13.

47 Laddie J, in *Metix v Maughan* [1997] FSR 719, notes that such a requirement would exclude works like ice sculptures; Caddick, Davies and Harbottle (n 5) 3-182; Derclaye (n 46); Simon Stokes, 'Categorising art in copyright law' (2001) 12 Entertainment Law Review 179.

commentary on this issue, has also concluded that permanence is not a requirement,[48] but that, despite the absence of any reference to artistic works in s.3(2), fixation may well be a requirement for artistic works to the extent that the work for copyright purpose at least has to be *static* or *accessible* to some extent.[49] Stokes, who has similarly referred to and analysed several of the same cases referred to by Derclaye, concludes that the current position is unclear.[50]

While it appears from case-law and academic opinions that permanence is not a requirement and that fixation *may* be a requirement for artistic works, underlying the debates surrounding the fixation of works and the issue of permanence lies the question of the fundamental *nature* of the works which are protectable under copyright law. In other words, what is the nature of artistic works? More specifically, is its physical or material form an integral part of an artistic work? Where literary and musical works are concerned, it is trite to state that it is clearly the novel or symphony that is protected not its printed material. But it is unclear if the same proposition extends equally to the visual arts. However, while the creative content of a novel can clearly be distinguished from its material fixation, i.e. the physical printed material, it does not also follow that a painting is not constituted of paint and canvas materials. It is proposed that a painting or a sculpture is constituted of its physical material, and therefore if the physical painting or sculpture was destroyed, the painting or sculpture is clearly and certainly destroyed.

This is in contrast to the position taken by Davies and Garnett, who state (in relation to all types of copyright works, including artistic works), 'First, it should be borne in mind that the integrity right is related to a copyright work, and a copyright work cannot itself be destroyed: it remains in existence even if the original embodiment or fixation of it is destroyed.'[51] The underlying reason for this bold statement appears in *Copinger & Skone James on Copyright*,[52] in which the authors emphasise that copyright law's requirement for a material form should not be confused with a requirement that such form be permanent as the relevant work which is protected by copyright is an entirely separate entity from its physical material embodiment.[53] The authors in *Copinger & Skone James* then conclude that 'destruction of the material form in which the work was fixed does not

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48 Derclaye (n 46); As indeed, the question of permanence itself is questionable as nothing can really ever be said to be truly permanent, a view expressed in MacQueen and others (n 39) at 78.

49 Derclaye (n 46) 12-17.

50 Stokes (n 47) 185.

51 Davies and Garnett (n 7) 8-024.

52 It is noted that Gillian Davies, author of *Moral Rights*, is also a co-author of *Copinger & Skone James on Copyright*.

53 Caddick, Davies and Harbottle (n 5) 3-183.

destroy the work itself, nor the copyright which came into existence upon its being fixed'.[54] Hence it would follow that destruction cannot breach the integrity right as the work cannot be destroyed.

In order to address the position articulated in *Copinger and Skone James*, it is firstly suggested that there is a difference between the *protectable work* for copyright purposes and the *copyright protection* afforded to works. In other words, artistic works which can be protected under copyright law can be destroyed and further, just because a copyright-protectable work is destroyed, it does not also necessarily mean that the *protection* that is afforded to the work by copyright is also destroyed. Academic debate on the issues of fixation, permanence, nature of copyright works and their destruction conflates the work which is protected under copyright with the protection itself. It is further argued that, as noted above, there is a difference between literary and musical works on the one hand and artistic works on the other. Generally, it is argued that literary and musical works are works which cannot be destroyed because of their abstract nature; the notation on printed paper merely *represents* them, and destroying the printed notation does not harm the work itself. It is further argued that this is not true of artistic works.

The question as to what happens to the copyright of a work when it is destroyed has been raised by legal academics,[55] but it has not received much in-depth attention, even though it is not a question which has yet been afforded a definitive answer, hence there is very little literature on this issue. When this issue is raised however, it does appear that two different but related creatures are discussed: the 'copyright work' or simply the 'copyright' in the work. It is not always clear as to what exactly is at the heart of the issue, as academics have either asked if a copyright work may be destroyed, or as to what happens to copyright if a work is destroyed, and on occasion, as mentioned above, the two are conflated in discussions.

This is important for the interpretation of the integrity right as legal academics have argued that because a 'copyright work' cannot be destroyed, an artist cannot object to the destruction of his painting or sculpture, because the 'copyright work' in his painting or sculpture survives the act of violence and continues to exist. However, it appears that the same academics have simply made the assumption that the work cannot be destroyed *simply because* copyright protects the creative content or core of a work. It is not at all certain that this is the logical conclusion, simply based on what *copyright* protects or chooses to protect. In other words, copyright law, according to these academics, appears to dictate its own ontology of art works, not on any logic or reason but by *simply* and *only* stating that *because* it protects the creative content of a work, be it literary, musical, dramatic or artistic, then even if the very last and only manifestation of the work is destroyed, the *work* in

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54 ibid., 3-184.

55 Justine Pila, 'An Intentional View of the Copyright Work' (2008) 71 Modern Law Review 535, 542; Davies and Garnett (n 7) 8-024; Caddick, Davies and Harbottle (n5) 3-183.

question is not. To judge from the wide literature on this matter generated by art philosophers, to adopt such a simplistic position fails to grasp the depth and nuance to the question comprehended by other disciplines.

While the legal assumption *may* ring true for works like novels or symphonies where the printed paper or CD media are obviously simply *receptacles*, there are ample valid arguments which stress that the paint strokes on a canvas or the carved marble are not simply receptacles, but *are actually the art works themselves*, or are at least significant parts of the art works. The legal assumption cannot hold true for *all* works. Copyright law appears to simply assume and accept that *all* works under its purview are *abstract* entities, without fully explaining why. It is contended here that copyright law should not regard *all* works in the same manner. Literary, dramatic and musical works are fundamentally different from artistic works and should be treated differently.

Pila, in discussing the requirement for the material fixation of copyright works, raised the issue of destruction, saying that 'strictly speaking, if a work is constituted by its material form, destruction of that form will destroy the work, and consequently destroy its copyright as well',[56] and hesitantly adds, 'this, however, *seems* not to be so', relying on *Lucas v Williams*,[57] which clarified that the existence of the material form of the work was a question of evidence, and that its absence would not necessarily defeat a claim of infringement. In a subsequent article,[58] Pila points out that s.153(3) CDPA resolves this conundrum neatly as it provides that if all of the qualification requirements of the act are satisfied, then 'copyright does not cease to subsist by reason of any subsequent event'. Two issues may be raised in relation to Pila's brief discussion of *Lucas* and s.153(3).

Firstly, it is not certain that the destruction of a work will necessarily or consequently destroy copyright in any case, with or without relying on s.153(3). s.153(3) simply confirms the nature of copyright, and all its fundamental principles i.e. when all the conditions are met, *copyright protection* arises and there is no reason why it should not continue to exist until its expiry, notwithstanding the destruction of a singularly unique painting or the one and only manuscript of a piano concerto. If a work has been created according to the accepted principles of copyright law i.e. it is a literary, musical, dramatic or artistic work, and it has been fixed in some material form, and it meets all the formal qualification requirements (e.g. nationality of author or place of creation etc), then copyright

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56 Pila, 'An Intentional View of the Copyright Work'(n 55) 542.

57 *Lucas v Williams* (1892) 2 QB 113 (CA).

58 Pila, 'Copyright and Its Categories of Original Works' (n 9) 237 fn 65. In most jurisdictions, copyright statutes generally state that copyright subsists for the statutory period once an eligible work is fixed. To my knowledge, nowhere in any copyright statute is it suggested that copyright protection may expire prematurely.

protection arises. Why should *copyright protection* necessarily cease if the work has been destroyed or no longer exist in a physical form?

Secondly, Pila is correct to say that the main practical role fixation plays is that of evidence, and that is the main import of *Lucas v Williams*. However, Pila relies on *Lucas* for the proposition that 'artistic works are distinct from their material fixation, in which case paint ought *not* to be essential for the *existence* of a painting.'[59] It is submitted that it is not clear that *Lucas* goes so far as to make this proposition or that such a proposition may necessarily be implied. The judgement merely noted that just because a physical copy of a painting was not available, it did not mean that *infringement* could not be proved. In *Lucas*, as long as there was some other available evidence, in that case oral evidence by a witness who claimed to have seen the original painting, then that was sufficient evidence for an infringement claim. *Lucas* makes an important point on the law of evidence,[60] but it is submitted, no more than that. It is quite another thing to say that paint and canvas are not essential for a painting, which is the point under discussion in this chapter. Indeed, Karlen asks a similar question to that posed by Pila but couches it clearly in terms of evidence solely: '..what happens when the original is lost or destroyed? Does the artist lose all protection, or is something like the Best Evidence rule imposed...?'[61]

The question that Pila asked is related but essentially different to that raised by Garnett and Davies, who, without making reference to s.153(3), contend authoritatively that a copyright *work* cannot itself be destroyed and 'it remains in existence even if the original embodiment or fixation of it is destroyed', on the basis that 'a copyright work and the first physical embodiment of it are not the same things.'[62] As already pointed out, this point can be appreciated, particularly for literary and musical works where the destruction of the first manuscript of a novel or a symphony would not destroy the novel or symphony itself. The protectable core of the novel or symphony lies arguably in their content, not in the printed strokes of their manuscripts or copies thereof. However, and Garnett and Davies admit as much, it is difficult to say the same of artistic works which exist as unique singular works because of their aesthetic value, although they still maintain that the point nevertheless applies to artistic works without further explanation.[63]

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59 Pila, 'An Intentional View of the Copyright Work'(n 55) 542.

60 It is cited in textbooks on evidence e.g. A. Keane and P. McKeown, *The Modern Law of Evidence* (Oxford University Press 2014) 575.

61 Karlen (n 31) 392.

62 Davies and Garnett (n 7) 8-023.

63 ibid.

To summarise, Garnett and Davies refer to 'work', while both Pila and s.153(3) refer more specifically to simply 'copyright'. The judges in *Lucas v Williams* did not refer to the *work*, but were making a point about *infringement*, i.e. copyright protection of the work, saying that copyright can still be infringed even in the absence of the work itself. What appears to be asserted according to s.153(3) and *Lucas*, read together, is that *copyright protection* remains whatever happens to the work itself. It does not necessarily mean that the 'copyright work' remains in existence, whatever 'copyright work' means.

The next question that arises is whether artistic works are truly distinct from their physical form, which is considered next.

b. Is the physical embodiment of an artistic work material to its existence?

Other legal academics have focused more on the apparent distinction between the artistic work and its physical existence. Waisman, in discussing the integrity right, reiterates and extends the view held by Garnett and Davies, that the work protected by copyright and its physical embodiment are not the same thing,[64] and that an artistic work, once created, remains in existence at least conceptually and in the public's perception, despite the destruction of its physical state.[65] Liu argues that even where it is difficult to distinguish between a work and its physical embodiment, especially in the case of sculptures, it is nevertheless still possible to draw a distinction,[66] and hence destruction of the physical embodiment does not destroy the work itself.

The arguments by Liu and Waisman, while persuasive, fail to consider the idea that the physical structure of an artwork is an integral part, and that both its physical and conceptual aspects are inseparable,[67] which is *prima facie* almost certainly the case for sculptures at least,[68] and arguably the case for paintings. They also fail to appreciate that the original creation will be lost to future generations who would benefit from encountering the work in its original entirety not only on the basis that the original has incalculable social or historical value, but also that the experience of encountering the original work cannot be replicated in encounters with mere copies.

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64 Agustin Waisman, 'Rethinking the moral right to integrity' (2008) 3 Intellectual Property Quarterly 268.

65 ibid., 272-73.

66 Deming Liu, 'English copyright law makes the poor "snowman" poorer' (2013) 35 European Intellectual Property Review 674, 680.

67 Terry Barrett, *Criticizing Art: Understanding the Contemporary* (Second edn, Mayfield Publishing Company 2000), 63; Arnold Isenberg, 'Perception, Meaning and the Subject-Matter of Art' (1944) 41 The Journal of Philosophy 561; David F. Bowers, 'The Role of Subject-Matter in Art' (1939) 36 The Journal of Philosophy 617.

68 Liu (n 66) 680.

It is intended to take issue with these arguments primarily on the basis that the *physical matter* i.e. the paint and canvas and other materials, takes on a fundamental and *necessary* role in the creation of an artistic work, and forms the copyright protectable creative content. The purely immaterial element cannot function, on its own, as the entire artistic work. Prints and postcards merely depict the *subject matter* of an oil painting but are ineffective in representing the nuances conveyed by the roughness and texture of the individual brushstrokes. Ultimately, it is maintained that the *conceptual* and *physical* aspects of an artistic work should not be treated separately, and that destruction of the original physical support does destroy the artistic work for the purposes of moral rights.

In support of his argument that the material and immaterial of art are completely separate, Liu quotes from Iris Murdoch and Bindman, an art historian . In the quote,[69] Murdoch opines that a work of art is not a material object, although in the same quoted passage, she does accept that, at least to some extent, the relation between material object and the art object seems close, especially so for sculptures. The statement does not *conclude* that the material and art are incontrovertibly distinct and separate. It may therefore be argued that the relationship between material and art is close or at least remain open to question.

It should, however, be noted that shortly after the quoted passage, Murdoch goes on to say that,

> The accessible existence of art, its ability to hang luminously in human minds at certain times, depends traditionally upon an external being, a fairly precise and fixed sensory notation or 'body', an authority to which the client intermittently submits himself. If this notation is or becomes unavailable the work of art is lost: the picture is burnt, no reproduction does it justice....[70]

In the quote relied upon by Liu, Bindman observed that there was a tendency among Neoclassical artists to 'disdain material as being of lesser importance than the idea'.[71] His statement essentially described the neoclassical sculptors who regarded material as secondary to the idea behind a sculpture. It is noted that the statement is made in relation *specifically* to neoclassical sculptors. At first glance therefore, it can be said that this chosen statement of Bindman's, is not necessarily of universal application.

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69 Iris Murdoch, *Metaphysics as a Guide to Morals* (Chatto & Windus 1992) 2.

70 ibid., 3.

71 Liu (n 66) 680.

Liu poses the example of creating the same sculpture in different materials: wood, bronze and marble. In other words, the posture of the figure and all other details are exactly the same in all three products. They differ only in relation to the material used. Liu says that the *same statue may be made in any of these materials*. The destruction of the wooden sculpture, he argues, will not destroy the *work of sculpture, only the physical wooden embodiment of the sculpture is destroyed*. The same goes for the sculpture in bronze or marble. Read together with the quotes from Murdoch and Bindman, Liu's argument is that the material is not important. It is submitted that there are two closely related arguments which may be raised against Liu's conclusion. Firstly, it is clear that *there are* fundamental differences between the natural properties or 'make-up' of wood, bronze and marble, hence it is arguable that these differences would result in different characteristics in the sculptures, making each sculpture a unique work of art, even if the composition is exactly the same for all three. In other words, the sculptures in wood, bronze and marble are all *different* works of art. John Rood, a specialist in wood sculptures, illustrated the difference by way of an example.

> '... what would you do if you wished to make a figure of Daniel Boone? Would you choose bronze or stone as your material? Do you think either would be as suitable as wood? Obviously not.'[72]

Further, according to Rood, the difference does not stop there. There is even a difference between the different types of wood and sculptors would choose from the different varieties of oak, walnut, cherry, apple, cedar etc.

Secondly, it is contended that the physical medium is important in terms of the artistic choice made by the artist, and it plays a fundamental part in the artwork. The artist's choice of wood, bronze or marble is not random, but purposive. This view is endorsed by Alec Miller, a master sculptor active during the Arts and Crafts movement at the turn of the 20th century, who explained, '...wood as a medium for portraiture has many conspicuous qualities. It has a warmth and richness of surface beside which marble and stone seem cold and unsympathetic.'[73] The natural characteristics of each material contribute meaningfully to the resulting artwork.

Thus the importance of the medium cannot be dismissed lightly. For instance, John Dilworth, in his article 'Medium, Subject-Matter and Representation', discusses the relationship between an art medium and ideas, and generally theorises that the medium plays a functional role in the artwork, as

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72 John Rood, *Sculpture in Wood* (University of Minnesota Press 1950) 21.

73 Alec Miller, 'Sculpture in Wood' (1930) 21 The American Magazine of Art 329, 333.

an expression of the artist's *commentary* on the subject-matter.[74] It may be distinct from the subject-matter of a painting, but it is no less important, and it is an integral part of the work of art as a whole.

The importance of medium can also be discerned from the language employed in Professor James Elkins' book *What Painting Is*, [75] in which he discusses the act of painting, and the 'kinds of thought that are taken to be embedded in paint itself.'[76] He exhorts that every painting captures '...a certain resistance of paint, a prodding gesture of the brush,..',[77] and that paint 'records the most delicate gesture and the most tense.'[78] Elkins explains that

> Paint is a cast made of the painter's movements, a portrait of the painter's body and thoughts.... Painting is an unspoken and largely uncognized dialogue, where paint speaks silently in masses and colors and the artist responds in moods. All those meanings are intact in the paintings that hang in museums: they preserve the memory of the tired bodies that made them, the quick jabs, the exhausted truces, the careful nourishing gestures.[79]

The medium is thus not necessarily devoid of meaning, or a role in an artwork, whether it serves as commentary on the subject-matter or as a reflection of the painter's moods and thoughts. A painter's choice of watercolour or oil or acrylic for a painting is not made randomly. The thick and slick surface of an oil painting differs considerably from the thin and washed out appearance of a watercolour. The choice of medium is made to evoke a certain aesthetic experience on the part of the beholder. According to John Dewey, '...each art has its own medium and that medium is especially fitted for one kind communication. Each medium says something that cannot be uttered as well or as completely in any other tongue.'[80] The physical manifestations of these different mediums play an integral part of the work as a whole.

Furthermore, the *impact* on the viewer of simply the sheer size of some great artworks, Monet's large-scale *Water Lilies* series, for instance, cannot be reproduced in art books, prints or catalogues – nothing can reproduce the unique artistic experience of being in the *actual presence* of the originals. In relation to art that is destroyed, as quoted above and to reiterate it here, Murdoch has

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74 John Dilworth, 'Medium, Subject Matter, and Representation' (2003) 14 The Southern Journal of Philosophy 45.

75 James Elkins, *What Painting Is* (Routledge 2004).

76 ibid., 5.

77 ibid., 2.

78 ibid., 5.

79 ibid., 5.

80 John Dewey, *Art as Experience* (Putnam 1934).

said that 'no reproduction does it justice'. As will be discussed below, several art philosophers also argue that the original art work offers an artistic experience which simply cannot be replicated by a copy, no matter how good a copy.

Walter Benjamin, in his famous essay *The Work of Art in the Age of Mechanical Reproduction* which chronicles the effect of technological reproduction on the aesthetic experience,[81] recognised that with the advent of film and photography, the 'aura' of original artworks is whittled away in the reproduction of millions of copies circulated to the masses.[82] 'Aura' according to Benjamin is that intangible atmosphere or impression that surrounds a revered artwork which commands respect and awe. Being utterly unique, the original artwork thus becomes detached and distant from its audience who fear its loss or destruction, hence generating and encouraging its aura. No reproduction, no matter how perfect a copy, may possess the aura of the original. For Benjamin, as a Marxist intellectual, the possibility of issuing millions of copies of artworks was a desirable effect on society, for reproductions had the ability to break down the detached authority possessed by original, unique works, be it a masterpiece painting or a towering cathedral, and hence widely accessible to the masses. However, the political connection made by Benjamin is not at issue here, rather, the point is that he understood that the *original* work possesses an aura which copies do not. [83]

Turning to Waisman's arguments as outlined above, they are based on the simple proposition that if we accept that the destruction of a reproduction clearly does not destroy the artistic work, likewise we should accept that destruction of the original canvas which houses the work should not destroy the work itself. He uses the example of mass produced postcard reproductions of paintings, saying that there should be no difference between the destruction of a postcard copy of Picasso's *Guernica* and the actual original canvas, because 'the work as original expression exists independently from the material support that embodies it; that is precisely why works protected by copyright are a form of intellectual property.'[84] He observes that destroying the postcard would not destroy *Guernica* but however goes on to argue that if the destruction of the postcard does not destroy *Guernica*, why should the destruction of the original canvas do so? He develops this point by also citing the example of a U2 fan who breaks her CD of U2's songs, and points out that obviously breaking the CD does not destroy U2's works.[85]

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81 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (J.A. Underwood tr, Penguin 2008).

82 ibid.,7.

83 McClean also refers to Benjamin's famous theory on the aura of original works in McClean (n 27) 311, 319

84 Waisman (n 64) 271.

85 ibid., 272.

There are several problems with Waisman's argument and the examples he has used in support. The first is that he has not actually explained why there is no difference between the destruction of a postcard and that of the original canvas. Indeed, he simply says '...there are no reasons why the conclusion should be different if the destroyed support is not a postcard but the canvas painted by the author's hand.'[86] While Waisman has not only ignored the vast body of literature which question the aesthetic value of copies and debate the ontology of art, he has also ignored the *reality* of such a scenario. While we would be indifferent to the thought of someone ripping up his postcard copy of *Guernica*, we would be rather horrified at the thought of the original *Guernica* meeting the same fate. It is a reality that cannot be ignored and must be confronted in any discussion of the law which affects creators and their works of art. In response to Waisman's statement, obviously there are reasons why the conclusion should be different, which reasons he has not explored in any depth.

Indeed, it appears that Waisman's only reasoning is that 'the work as original expression exists independently from the material support that embodies it; that is precisely why works protect by copyright are a form of intellectual property.' Waisman does not explain how he rationalises that a work exists independently from its material support except to say that this is why such works are a form of intellectual property. Again, as we have seen above in discussing the approach of other law academics on this issue, there is a propensity to draw such conclusions merely on the basis of what intellectual property law, or more particularly, copyright law protects or seeks to protect, rather than a more exhaustive and objective enquiry into the issue. The issue of whether the destruction of the original canvas destroys the work of art itself is a query which is not unique to the law, and is one which has to be comprehended not only at a metaphysical level but also as an appreciation of how we ordinarily regard works of art in reality.

Further, there are many reasons why the U2 CD example does not lend support to Waisman's point that destroying an original canvas does not destroy the work itself. A CD is a recording, which is the result of a technological process operated by a sound engineer. The production of a CD is not even a step in the process of creating any of U2's songs. It is not an *essential* step in the *creation* at all. In this regard, the CD is purely and clearly a mere receptacle or device for the performance of U2 songs. In contrast, the canvas on which Picasso worked was *necessary* in expressing *Guernica*. There is at least a case for arguing that the canvas is an integral part of the work and that destroying the canvas would destroy the work, whereas none discernibly exists for the CD. This example in fact serves to highlight the fundamental difference between the nature of works such as music and literature, which are presented in mere receptacles such as CDs, and that of works like paintings and sculptures, whose physical embodiments are an integral part of their being.

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[86] ibid., 271

The question as to whether copies have the same aesthetic value as the original has vexed art philosophers. In essence, the question is dependent on how aesthetic value is assessed, and whether the aesthetic value of an artwork survives its destruction in the form of mass-produced copies. This will be considered further below when discussing the views of art philosophers. It is contended that there is a difference between destroying a postcard and destroying the original. At the very least, considering the sheer importance, value and *indispensability* of the original physical embodiment to the artwork, it is arguable that to destroy the original physical embodiment of a work of art would destroy the work itself.

Waisman goes on to explain that 'the previous example [i.e. the hypothetical destruction of *Guernica*] shows that at least one of the ways of altering the physical support, destruction, does not fully extend to a work and thereby cannot be considered an alteration of a work.'[87] Turning to this point that destruction does not amount to alteration of the work, Waisman's statement was made in the context of his main contention, which is that the infringement of the integrity right lies not so much in the altering or modifying act in question itself than in the *effect* of the act carried out.[88] His article endeavours to prove that if the purpose of the integrity right is to be correctly realised, not all modifications can be considered an infringement. In fulfilment of this endeavour, he proposes a set of criteria by which all modifications may be assessed. The key criterion appears to be the instant a particular modification of a work has *also* created a modified perception in the beholder's mind. In other words, just because a work has been tinkered with is not good enough to constitute infringement. The point is whether the tinkering has also created a different perception in the public's mind.[89] This criterion fulfils the additional requirement that an infringing modification to the creation harms the *reputation* of the creator.[90] As the creator's reputation is dependent on how the public perceives his work, then Waisman's proposal that we have to ascertain if the perception of the beholder is also necessarily altered by the act in question would certainly serve this additional requirement. Therefore, to Waisman, since destruction of the physical support or embodiment of a work of art would not alter the perception that the public *already possesses* of the work, it may not harm the reputation of the creator, and hence does not amount to infringement of the integrity right.

Waisman's point regarding destruction firstly presupposes that the perception of the original work has been widely held in the public's eye at large, and secondly, ignores the points already made above i.e. that we ordinarily accept the physical embodiment as part and parcel of the work of art. It

87 ibid., 271.

88 ibid., 269.

89 ibid., 272-273.

90 ibid., 274.

also places much emphasis on the additional requirement of reputation. It is contended that first of all, reputation *can* be harmed by destruction. One reason is that, according to art historian, Albert Elsen, '...even a lost work's survival by the best reproduction diminishes the artist's reputation because the serious judgment of quality depends on confrontation with the work itself.'[91] Secondly, even if it is thought that reputation may not be harmed by destruction, there still remains the additional requirement of *honour,* which may be harmed by destruction, as discussed in chapter 5.[92]

3. The perspective from art philosophy

a. Ontology of art theories

As identified above, questions concerning the ontology of art which have vexed philosophers are highly relevant to the questions concerning art's status in the realm of copyright law. Amie Thomasson has identified practical reasons for caring about such issues, observing that such theories of art have implications for the practical problems experienced in various activities, such as curation and restoration, or in trading or collecting art.[93] It is contended that the problems she has identified also involve issues of law, such as the problem of the extent to which a painting is considered altered or destroyed, if at all, by restoration, which not only involves ontological issues but also moral rights doctrine. Another is the problem of establishing the conditions which determine if a new song is the same as an old one, which involves not only ontological issues but also copyright infringement issues.[94]

As such, this chapter advocates that copyright law may benefit from considering art theory in depth, and in this particular instance, theories concerning the ontological status of art. However, this chapter similarly cautions that the question is an extraordinarily difficult one, one which has attracted an astonishing variety of different theories. Bearing this in mind, this chapter briefly surveys the major competing theories, before extracting the theory or theories which will serve the purposes of copyright law best.

Theorists fall into roughly two camps when concerned with the ontology of art. While some contend that *all* works of art are purely abstract entities or activities, others make a distinction between works like music, literature and drama on the one hand, and singular pieces like paintings and non-cast sculptures. This chapter aligns itself primarily with the latter view, and ultimately will

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91 Albert Elsen, 'Why Do We Care About Art' (1976) 27 Hastings Law Journal 951, 955.

92 This is the position argued in chapter 5.

93 Amie L. Thomasson, 'Debates about the Ontology of Art: What are We Doing Here?' (2006) Philosophy Compass 245.

94 ibid.

depend on Thomasson's observation that the problem with current theories is that they conflict with common sense views of art.[95]

Chief among the proponents that works of art are purely abstract entities is RG Collingwood, who argued that works of art are not physical entities at all, but are purely the imaginative experience of the artist.[96] To him, the canvas with its pigments and sounds which emit from the orchestra are merely the means by which artists reconstruct their imaginary experience. As such, since essentially the work of art exists only in the mind of its artist, it cannot be destroyed. Likewise, presumably if it is purely abstract, the work cannot be bought or sold, performed or read either, which are the sort of activities that we ordinarily indulge in.

Similarly, Gregory Currie claims that all works are abstract entities, each capable of multiple instances.[97] The canvas or the musical score are not works of art, but instead the work is the *action* taken in producing the canvas or the musical score. His account directly counters that of Wollheim who theorises that, paintings and non-cast sculptures are physical entities while works of literature and music are types, of which their copies or performances are tokens.[98] Currie rejects the view that 'singular' works of art such as paintings and non-cast sculptures are aesthetically privileged by arguing that their reproductions, if molecule for molecule *exactly* the same as that of the original, are just as aesthetically valuable.[99] As such, according to Currie, paintings and sculptures are not 'singular' works as is commonly perceived, and that although we treat them as such, it is possible that we are mistaken about this.

Levinson, in his review of Currie's work,[100] argues against the contention that works of art are mere *action types,* saying that appreciators of artworks, appreciate the end result, not just the work or activity that has gone into the production of the work. We appreciate or experience art as the physical object or sensory experience that they clearly are. '...in art we primarily appreciate the *product* [author's emphasis], viewed in its context of production; we don't primarily appreciate the activity of

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95 Amie L. Thomasson, 'The Ontology of Art' in Peter Kivy (ed), *The Blackwell Guide to Aesthetics* 78, 79

96 R.G. Collingwood, *The Principles of Art* (Oxford University Press 1958).

97 Gregory Currie, *An Ontology of Art* (Macmillan 1989).

98 Andy Hamilton, 'Review of An Ontology of Art by Gregory Currie' (1990) 40 The Philosophical Quarterly 538.

99 Gregory Currie, 'The Authentic and the Aesthetic' (1985) 22 American Philosophical Quarterly 153. This view has also been expounded by others. See e.g. Arthur Koestler, *The Act of Creation* (Hutchinson 1964); Alfred Lessing, 'What is Wrong with a Forgery' (1965) 23 Journal of Aesthetics and Art Criticism 461.

100 Jerrold Levinson, 'Review of Gregory Currie's An Ontology of Art' (1992) 52 Philosophy and Phenomenological Research 215.

production, as readable from the product.'[101] Levinson is not saying that we do not appreciate the activity that has gone into a work, but rather he is saying that Currie has got it back to front. We appreciate the product first and foremost.

That Levinson is conscious that appreciators also appreciate the activity behind a work is borne out in his argument against Currie's view that true copies are just as aesthetically valuable as the original, saying that mechanical copies are not substitutes for the original as they do not convey the artist's unique achievement. The actual manner of production of a work of art plays a vital and important role in how we appreciate that work of art. According to Levinson, 'the original canvas is a unique repository of the painter's achievement; indiscernible canvases produced otherwise are not. An original painting puts one in more intimate contact with the artist's manual action than a copy produced from it even by a counterfactually reliable method can do.'[102]

Some philosophers, such as Lessing and Koestler,[103] argue that if a copy is in every respect perceptibly identical to the original, then the copy is not *aesthetically* less valuable than the original. However, it may be countered that the highly skilled forger, or technologically advanced copying machine is merely displaying *technical skill* in reproducing the original, not creativity. Jenkins argues that one i.e. the copy, is merely a display of technical skill, while the other, i.e. the original, is an example of creation.[104] Alternatively, it may be argued that even though there is no difference in the *aesthetic value* of a copy, there is still a difference in the *artistic value*. Gough argues that as the aesthetic value '[embodies] all matters perceptual, [it is] logically distinct from the *concept of art*' and that what makes a work artistically valuable is quite different from what makes it aesthetically valuable.[105]

Dutton argues that we celebrate *original* works because we celebrate what the artist can do, his achievements, skill and creativity.[106] Armed with the extra knowledge that the work in front of us is a copy or forgery changes our perception and appraisal of the work, not because of snobbery or elitism, as claimed by Lessing,[107] but because we admire extraordinary displays of *creative* skill, not

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101 ibid., 217.

102 ibid., 218.

103 Koestler (n 99).

104 Jennifer Jenkins, 'Where Beauty Lies - Fakes and Forgeries' The Philosopher <http://www.the-philosopher.co.uk/p/blog-page.html>.

105 Martin Gough, 'The Aesthetic, Authenticity and the Artistically Valuable' The Philosopher <http://www.the-philosopher.co.uk/p/blog-page.html > (last accessed 16 March 2018).

106 Denis Dutton, 'Artistic Crimes' (1979) 19 The British Journal of Aesthetics 302.

107 As suggested by Lessing (n 99).

mere technically flawless reproductive skills, which give us an elevated sense of pleasure.[108] Thus the original painting or work of art cannot be substituted by its copy, no matter how technologically perfect a copy, which in turn suggests the *singularity* in the nature of such works.

Instead of attempting to put forward a unified theory on the ontology of art, accounting for all of the different arts, Wollheim and Wolterstorff have sought to distinguish between paintings and non-cast sculptures on the one hand and the other arts, such as music and literature, on the other.[109] Essentially paintings and sculptures are physical entities while literature and music are not, and therefore can outlast the destruction of any of their copies or performance.

Thomasson takes issue with all of these theories, reminding us of how we ordinarily conceive the arts. She observes that where paintings and sculptures are concerned in particular, people ordinarily treat them as individual entities and *identify them with the originals*, not their copies.[110] These original entities are bought, sold, and moved physically, and are also capable of being destroyed.[111] In contrast, works of music and literature are conceived differently, that they survive the destruction of their original manuscript, but subject to Thomasson's caveat that it survives only as long as a copy of it remains.[112] The main point is that Thomasson has correctly observed a divergence in how different types of works of art are treated and that therefore there is a possibility that they may not all be of the same ontological type at all.[113] Further, she observes that all the major theories on the ontology of art have serious conflicts with our commonsense and ordinary beliefs and practice of the arts.[114] Her conclusion is that 'consistency with such beliefs and practices is the main criterion of success for a theory of the ontology of works of art.'[115] According to Thomasson, any theory which purports to describe the arts, but also violates or conflicts drastically with our everyday beliefs and practices, may not actually be describing our works of art at all.

Where paintings and sculptures are concerned, Thomasson, *taking into account our everyday practices and beliefs*, argue that they are essentially physical objects but ones which come into existence through human intention. They are not purely 'imaginary objects or abstracta, they are

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108 Denis Dutton, *The Art Instinct* (Oxford University Press 2009) 188-193.

109 Richard Wollheim, *Art and its Objects* (2nd edn, Cambridge University Press 1980); Nicholas Wolterstorff, *Works and Worlds of Art* (Clarendon Press 1980).

110 Thomasson, 'The Ontology of Art' (n 95) 78.

111 ibid., 79.

112 ibid., 79, 89.

113 ibid., 79.

114 ibid., 79-80, 84-90.

115 ibid., 88.

perceptible, are materially constituted by certain physical objects, and *may be destroyed if their constituting base is* [author's emphasis].'[116]

The fact that Thomasson, in making the above meaningful observation, had taken into account our *everyday practices and beliefs*, suggests that her approach, more so than those of the other major philosophers, is eminently apposite for the purposes of copyright law. It has to be remembered that it is also Thomasson who understands that the ontology of art has a profound bearing and application in our everyday engagement with the arts, not least, the engagement too of the law with the arts.[117]

b. Empirical research

As mentioned above, there is empirical research which bear relevance to the issues discussed here. One was carried out by a philosopher and psychologist jointly at the University of Texas with the aim of ascertaining if the views of ordinary lay persons in relation to their experience of art works and the destruction of art aligned with the major theories of art philosophy.[118] In this project, two experiments were conducted, the first, with a sample of 62 lay people, sought to ascertain if people believed that the original artwork was privileged, while the second utilising a sample of 32 lay people, sought to ascertain the extent to which people believe that an artwork still exists after it has been destroyed.[119] Hypothetical scenarios were posed in relation to the different types of art: visual, literary and musical, to which the reactions of the participants were recorded.

The results of both experiments demonstrated that people do believe that original visual artworks hold a privileged status, in that in comparison with other types of works, visual art forms were more often thought to be destroyed only if its original form was destroyed,[120] and that while the participants were clearly willing (almost 100% of those polled) to accept that literary and musical forms continue to exist post destruction of their original manuscripts, considerably fewer people (50-

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116 ibid., 89.

117 Thomasson, 'Debates about the Ontology of Art: What are We Doing Here?' (n 95).

118 Jessecae K Marsh and Darren H Hick, *Beliefs about experiencing and destroying art* (Cognitive Science Society 2014).

119 The participants were recruited through Amazon Mechanical Turk, an online jobs/labour platform, which was originally conceived to recruit casual workers to undertake tasks which would be difficult or impossible for computers to perform. It has been used increasingly for the purposes of academic surveys/empirical research: Winter Mason and Siddharth Suri, 'Conducting Behavioural Research on Amazon's Mechanical Turk' (2012) 44 Behaviour Research Methods 1.

120 Marsh and Hick, (n 118) 973.

60%) were willing to accept that a visual artwork still existed after its original has been destroyed.[121] This appears to be in line with what is believed to be ordinary and everyday artistic practice.

However, it should also be noted that the results of the experiments have also thrown up a slight anomaly with one of the hypothetical scenarios involving the *Mona Lisa*, where slightly more than half of the participants were willing to accept that the work *Mona Lisa* would still exist post destruction of its original.[122] While the results of the experiments do not actually explain the reasons for this slight anomaly, the authors speculate that perhaps where *famous* visual art works are concerned, people may believe that they are some type of 'public shared experience.'[123] It is contended that the *Mona Lisa* example may possibly be explained away and also should be treated with caution. Firstly, only a handful of artworks, perhaps for example *The Scream*, *Last Supper* or *Night Watch*, might possibly enjoy such iconic status. The vast majority of Kandinsky's works for example may possibly not, despite being one of the world's most notable artists. It is interesting to note that the other visual art example used in the experiments was Michelangelo's *David*, which one would expect to be as much an icon as the *Mona Lisa*, did not appear to have been regarded in the same way as the *Mona Lisa*. As such, it is arguable that, if the researchers' reasoning was accurate, only an incredibly iconic artwork is capable of possibly creating a 'public shared experience', i.e. a work so famous and its image so ubiquitous that hardly anyone can deny any knowledge of its existence, at least in the developed world. Such exalted status is conferred on a very precious few and is not applicable to the vast majority of artworks. Even *David* was not regarded in the same light, which suggests that the responses regarding the *Mona Lisa* in particular was utterly unique. Notwithstanding the anomaly surrounding the *Mona Lisa*, the dominant conclusion of the experiments remains that original visual artworks, as opposed to literary and musical works, are privileged and are deemed no longer existing should their original form be destroyed.

The other research project, undertaken by members of the Department of Psychology at Yale University, endeavoured to evaluate ordinary people's assessment or valuation of original art works.[124] Essentially, their research sought to identify the psychological processes which motivate their valuations. Five separate experiments were conducted, demonstrating that duplicates of artworks were deemed to be of considerably less value than their originals, as compared with the perceived, if any, drop in value of duplicate non-artistic, everyday artefacts (such as a chair or car). It is thought that beliefs in the difference in time and effort needed to create artworks and artefacts (i.e. it takes a

121 ibid., 974.

122 ibid., 975.

123 ibid.

124 George E. Newman and Paul Bloom, 'Art and authenticity: The importance of originals in judgments of value' (2012) 141 Journal of Experimental Psychology 558.

considerably long time and much skill and effort to produce an artwork, but not an artefact) as well as the understanding that artefacts were mass produced unlike artworks, were key factors underlying the conclusions at which the participants arrived. This in turn underscored the intuition that originals are particularly important or valuable where artworks are concerned.

The researchers then sought to ascertain why this should necessarily be the case. Their final experiments were therefore carried out with this aim in mind, testing two separate hypotheses: firstly, people view artworks as the result of a 'unique creative performance' a la Dutton, and secondly, people value the degree of physical contact that the artist had with his original work, something the researchers dubbed as 'contagion', and which is absent from its duplicates. The results of the final experiments support the validity of the hypotheses tested, which in turn endorse Dutton's theory that original paintings and sculptures are the end results of creative performance of creative artists whom we admire, and as we admire such creativity and such artists, we in turn treat their original works as uniquely singular works.

4. Summary and Conclusion

The initial question posed was whether the integrity right encompasses a right to object to destruction. In seeking answers to this question, it has been necessary to ascertain the question as to whether an artistic work is destroyed when its physical embodiment is destroyed, which has been the aim of this chapter. Current conventional copyright scholarship suggests that the artistic work, at least for copyright protection purposes, is not so destroyed even though its physical embodiment is. Hence, according to Garnett and Davies in *Moral Rights*,[125] this prima facie undermines any basis for having a right to object to destruction. This approach however goes against the grain of our ordinary and conventional beliefs and practices: if the painting which is exhibited in the Louvre and known to the world as the Mona Lisa is burned to ashes, we are unlikely to accept that the work still exists. Further, copyright scholars appear to have conflated *copyright protection* with that of the *work that is protected by copyright*. The CDPA simply states that an eligible work qualifies for copyright protection upon meeting certain requirements and that copyright shall not cease to subsist by reason of any subsequent event. Copyright law is otherwise silent on the *existence* of works which are protected by copyright. The fact that an original work is destroyed brings nothing to bear on whether its copyright can be *enforced*. Further, other copyright scholars have argued that the physical embodiment of an artistic work is immaterial, and that therefore its destruction does not affect the existence of the artistic work. This chapter has argued, in reliance on the views of artists and art scholars alike, that the physical medium of a work is a vitally important and integral part of its whole.

[125] Davies and Garnett (n 7) 8-024.

More fundamentally, copyright scholars appear to have very readily accepted, without more, the continued existence of artistic works in the event of their destruction, a query of metaphysics which requires much more in-depth debate. Their stance reflects the stance of some of the major philosophers in the arena, Collingwood and Currie for instance, who have theorised that all works of art, including singular ones like paintings and sculptures, are essentially abstract entities. However, in contrast, Wolterstorff and Wollheim have established elementary differences between music and literature on the one hand, and paintings and sculptures on the other, essentially viewing the latter as *physical* entities, which are capable of being destroyed. The point is that the major philosophers engaged in this ontological debate on the arts have themselves struggled with question of the nature of art, and it behoves copyright scholars to similarly engage in such debate or at least take cognizance of these theories.

However, the most crucial point of this thesis is that ultimately there is a difference between the purpose of the law and that of philosophy. Although the premise of this chapter is to urge a more exhaustive, less superficial approach on the part of copyright lawyers to the question of artistic works and its existence, and to be receptive to established theories in metaphysics, it must always be borne in mind that the law bears upon real life problems and issues. It has a real influence and effect on art, artists and other players in the art world. The task then for copyright lawyers is to seek out theoretical underpinnings which do not detract too far from our commonsense beliefs and practices. In this regard, the observation by Thomasson that theories which conflict too violently with our commonsense beliefs and practices must necessarily fail in their goal of describing the arts accurately and completely is instructive for copyright lawyers. Among the theories which she has identified as diverging too far from our ordinary beliefs are those which envisage the singular arts as purely abstract entities which cannot be destroyed. Copyright law's apparent treatment of artistic works, especially those of a singular nature, as abstract works which cannot be destroyed is at variance with how we ordinarily treat such works. Furthermore, this point is substantiated by the results of the empirical research discussed above.

This chapter has made the point that it is not only instructive but also imperative that copyright lawyers look to beyond the law for inspiration and other viewpoints which are relevant to the difficult issues they face. The issue in the present chapter is whether a work of art can be destroyed, which in turn will affect the issue as to whether or not artists should have the right to object to the destruction of their work. This in turn calls into question the underlying ethos of copyright law and moral rights doctrine. By merely accepting that the work of art is divorced from its canvas or marble block, and that it therefore cannot be destroyed, copyright law not only ignores the reality of our ordinary practices as argued above, but also, it fails to give proper consideration to what the singular nature of certain works of art ultimately represents. Wasiman has implied that there is no difference in the burning of a postcard and that of the original canvas. Currie argues that there is no

difference in aesthetic value between that of an exact copy and that of the original, hence underlining his main contention that all arts, including paintings and sculptures, are abstract entities which cannot be destroyed. However, it was Dutton who has argued passionately that the reason we react differently to mere copies or forgeries is because we regard the original work as something quite special and unique, and that it has a human origin which a copy does not, and hence has an aesthetic value which no copy will ever have. Although Dutton's thesis was in relation to the problem of forgeries and copies, the point he makes about how we appreciate works of art is also relevant here: 'Every work of art is an artefact, the product of human skills and techniques'.[126] Further, in articulating exactly that which the original possesses but a forgery or copy lacks, Jenkins says,

> There is another more cognitive meaning of originality involving creativity which involves an unique idea and the execution of that idea. This is a working out of a solution to a particular problem that belongs only to that person at that particular time in the sense that only they can do it, and is a creative act.[127]

Dutton and Jenkins have each identified the goal of copyright law and its related doctrine of moral rights. The law serves to acknowledge and protect the product of human creativity, endeavours and achievement. The original canvas of *Guernica*, which is the unique product of Picasso's skills and techniques, is the work *Guernica* which we all admire today. We cannot divorce the canvas from *Guernica* nor the marble block from *David*. Destroying either canvas or marble will destroy precious works of art. Perhaps it is time that the law recognises and more importantly, protects against such losses.

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126 Dutton, 'Artistic Crimes' (n 106).

127 Jenkins (n 104).

Chapter 7 - A Work Of Art Is Not Just A Barrel Of Pork* – The Relationship Between Private Property Rights, Moral Rights Doctrine And The Preservation Of Cultural Heritage

> *'Works of art are the property of mankind and ownership carries with it the obligation to preserve them. He who neglects this duty and directly or indirectly contributes to their damage or ruin invites the reproach of barbarism and will be punished with the contempt of all educated people, now and in future ages.'*
>
> Attributed to JW von Goethe[1]

1. Introduction

On 15 May 1990, at Christie's in New York, Japanese paper tycoon Ryoei Saito, purchased Van Gogh's *Portrait of Dr Gachet* for US$82.5 million, and two days later made another bid for and won Renoir's *Au Moulin de la Galette*, this time at Sotheby's for US$78.1 million.[2] At the time, Saito made headline news as not only was the combined sum of US$160 million an astonishing amount of money even for paintings as celebrated as these two, the sale price for *Dr Gachet* had set the world record for the highest sum ever paid to date for a work of art. Saito made headlines again a year later when he announced that he wished to have the two paintings cremated with him on his death, so as to save on inheritance tax, sending shockwaves throughout the art world.[3] Such was the public's horrified reaction that Saito backtracked and claimed that he had only been joking.[4] Since Saito's death in 1996 however, while the Renoir has been accounted for,[5] the whereabouts of *Dr Gachet* remains a mystery.[6]

The principal issue which arises in the above scenario and instantly springs to mind is the question of whether the owner of a work of art, particularly one which is so celebrated and revered, should have the right to destroy it. The right to destroy is an ancient right, encapsulated in Roman law

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* See n 122.

1 Quoted in Julius S Held, 'Alteration and Mutilation of Works of Art' (1963) 62 The South Atlantic Quarterly 4, 26.

2 Terry McCarthy, 'The Last of the Big Spender: Ryoei Saito last week: under arrest and in deep trouble, a far cry from his coup at Christie's' *The Independent* (16 November 1993).

3 Yumiko Ono and Marcus W. Brauchli, 'Shogun of Shuzuoka: Japanese Tycoon who Dazzled Art World Hits a Rough Patch' *The Wall Street Journal* (28 May 1991).

4 'Art Collector: 'Burial' Plans a Jest' *Los Angeles Times* (15 May 1991).

5 M. Guides, *Art + Paris Impressionists & Post-Impressionists: The Ultimate Guide to Artists, Paintings and Places in Paris and Normandy* (Museyon 2011) 39.

6 David Osborne, 'Lost Van Gogh feared cremated with owner' *The Independent* (27 July 1999).

as *ius abutendi*, a right of full dominion over property, including the right to abuse or destroy the same.[7] The principle reflects the recognition of a sacrosanct right to private property with which third parties should not interfere, and is a principle which is ensconced within the liberal conception of property rights in Anglo-American law.[8] Numerous legal scholars have described the scope of private property rights, and leading scholars such as Honore and Roscoe Pound have certainly acknowledged that private property rights include the right to destroy.[9] However, the question is whether works of art constitute a special category of property which should be exempted from the application of *ius abutendi*.[10]

This is not only a question of private property rights but also a bigger ethical question as to whether the world at large has a moral interest in preventing the destruction of such masterpieces, or indeed in the general disposal of such works, even though these works are in private ownership. The tension is obvious: private property rights are generally accepted to be absolute, and they include the right to destroy. However, works such as the Van Gogh and Renoir can be seen to be part of our common cultural heritage and hence it is arguable that they deserve special protection, even against sacrosanct private property rights. The most passionate and articulate advocate for such special protection is Joseph Sax, who in *Playing Darts with a Rembrandt* acknowledges the tension, saying that 'the very idea that things can be both private goods serving private needs, and at the same time objects in which the public has a crucial stake, can be difficult to grasp'.[11] However, he argues that even though a Rembrandt owned by a private individual does not belong to us in the first place, and that its destruction would not actually deprive us of anything, nevertheless it is a 'symbolic loss that can occur to others even though the thing destroyed was not theirs'.[12] In his book, Sax makes an impassioned plea for special consideration of culturally valuable or important items. This chapter focuses on this very tension, from the particular angle of moral rights.

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7 J.G. Sprankling, *International Property Law* (OUP Oxford 2014), 293; B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1972), 154; Lior Jacob Strahilevitz, 'The Right to Destroy' (2005) 114 Yale Law Journal 781, 785; Edward J McCaffery, 'Must we have the Right to Waste?' in Steven Munzer (ed), *New Essays in the Legal and Philosophical Theory of Property* (Cambridge University Press 2001); Roscoe Pound, 'The Law of Property and Recent Juristic Thought' [American Bar Association] (1939) 25 American Bar Association Journal 993, 997.

8 Pound (n 7) 994, 996-97.

9 A.M. Honore, 'Ownership' in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (1961); Pound (n 7) 997.

10 Sprankling (n 7) 298.

11 Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 6.

12 ibid., 2.

Thus far, this thesis has examined the several reasons which have been put forward for not recognising the right.[13] This chapter focuses on another of these reasons: the potential prevalence of a private property right to destroy over the creator's moral right to object to destruction, or at least the tension between the artist's moral rights and the owner's property rights over an artistic work.[14] It would seem that the integrity right, in its traditionally accepted scope, would in *principle* prevail over private property rights to alter, mutilate or to otherwise transform a work in a derogatory fashion. However, even so, there is a bias in favour of private property rights when deciding cases involving such conflict.[15]

Although France and Germany recognise relatively robust moral rights, to the extent that there is no requirement to show that the treatment of a work affects the creator's honour or reputation,[16] in practice, the courts have always conducted an exercise in balancing the conflicting interests of the parties involved: the private property interests of the owner on the one hand, and the moral rights of creator on the other, and in such balancing exercises, private property rights have generally prevailed.[17] This general approach reflects the views of French jurists regarding private property rights i.e. that the private property rights of individuals should not be readily compromised even in the pursuit of a public good, except in exceptional cases.[18] There is thus no bright line rule that the integrity right takes precedence over private property rights and cases in France and Germany have generally resolved conflicts on an ad hoc basis with no clear set of guidelines.[19] Considering that

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13 Chapters 4, 5 and 6.

14 Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 41; Russell J. DaSilva, 'Artists' Rights in France and the US' (1981) 28 Bulletin Copyright Society of USA 1, 19; Francesca Garson, 'Before that artist came along, it was just a bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork' (2002) 11 Cornell Journal of Law and Public Policy 203, 204.

15 Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 201, 205.

16 ibid., 212; Andre Lucas, 'Moral Right in France: towards a pragmatic approach?' (ALAI) in respect of the position in France. In Germany, the prejudice is to not limited to honour or reputation but is to any legitimate intellectual or personal interest of the author in the work: Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) para. 14-006. This is unlike the position in the UK or in the US under the provisions of VARA 1990.

17 Teilmann-Lock (n 15) 201; Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006), para. 8.95-97, para. 9.104-105; See Davies and Garnett (n 16) for the position in France at para. 13-015; the position in Germany at para13-021.

18 See Maree Sainsbury, *Moral Rights and their application in Australia* (The Federation Press 2003), 25, quoting from Montesquieu, Marcade and Laurent; See *Sudre v Commune de Baixas*, Conseil d'Etat, 3 April 1936, D., III, 57 where the court prevented a local authority from destroying a sculptor's work on the basis that it was in the public interest for the local authority to take care of the work.

19 Cyrill P. Rigamonti, 'Deconstructing Moral Rights' (2006) 47 Harvard International Law Journal 353, 353, 366. See old German case where it was held that the owner may not modify a work of art in his possession, but may destroy it: '*Felseneiland mit Sirenen*' [Rock Island with Sirens], Imperial Court, 8 June 1912, RGZ 79, 397.

even though the ambit of the integrity right in its most minimalist form clearly encompasses at least a right to object to alteration, or mutilation short of destruction, but that such right still plays second fiddle to private property rights in jurisdictions which traditionally favour moral rights, it would then appear that a right to object to destruction, the acceptance of which is still uncertain, would certainly fare badly.

The concern with moral rights trampling over private property rights is also evident in the US' chequered history of their copyright regime and its interaction with moral rights doctrine, prior to their eventual adoption of their Visual Artists Rights Act 1990 (VARA). Perkins, in a discussion of *Crimi v Rutgers Presbyterian Church in the City of New York*,[20] argued that

> ...to require that the defendant retains a work of art, which he does not want, or as the only alternative, require him to remove it, or pay damages to the artist, would be in direct conflict with the American view that a person can do with his property what he wishes.[21]

While some American cases pre-VARA support Perkins' view and that of the court in *Crimi*, i.e. that the American courts were reluctant to recognise the existence of moral rights doctrine in American jurisprudence,[22] other cases in the same era had recognised the need to redress such injuries nevertheless, through creative application of other legal principles and theories, such as libel laws and fraud.[23] This indicates at least that, pre-VARA, the American courts did acknowledge the injuries sustained by artists, which had to be redressed in some fashion.

In the debates that surrounded the enactment of VARA, it was felt that the enforcement of moral rights would 'contradict common law property notions of free alienability and absolute ownership against the world'.[24] It has also been argued that because the rights provided under VARA conflict with those of property owners, the constitutional legitimacy of VARA is questionable.[25] The US Courts have also been conservative in their interpretation of VARA, in deference to private

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20 *Crimi v Rutgers Presbyterian Church in the City of New York* 89 (NYS 2d 813) (Sup Ct 1949).

21 Charles Harvard Perkins, 'Literary Property - Artist's Right to Prevent Destruction of his Work after Sale' (1951) Washington University Law Review 124, 131.

22 A list of these cases are referred to in Mary Lee, 'Moral Right Doctrine: Protection of the Artist's Interest in his Creation after Sale' (1950) 2 Alabama Law Review 267, fn 28.

23 ibid., 272-79; Robert Sherman, 'The Visual Artists Rights Act of 1990: American Artists Burned Again' (1996) 17 Cardozo Law Review 373, 393.

24 Garson (n 14) 214.

25 Adrian Zuckerman and Annemarie Sedore, 'Do US Property Concepts Prevent VARA from Implementing the Berne Convention' (2004) 26 Dublin University Law Journal 172, 195-96.

property rights.[26] Similarly, the UK's grudging implementation of moral rights has been described as 'cynical, or at least half-hearted.'[27] The rather restrictive and hesitant drafting of the UK's moral rights provisions was in most part influenced by the economic interests of certain groups rather than the interests of authors.[28]

This chapter identifies several problems in this state of affairs. Firstly, mutilation or alteration of works of art is rectifiable and restorable, but destruction of the same is not. Hence it is inconsistent and ironic that, in principle, an artist's objections to the mutilation/alteration of his work may possibly override the property rights of the work's owner, but not his objections against destruction. Secondly, the Saito example throws into sharp relief the distressing consequences of allowing property rights to prevail over the moral rights of authors. While Saito may not actually have destroyed the paintings as he had threatened, nevertheless it was clear that it was within his legal right to do so. The possibility of such masterpieces facing destruction is unthinkable. The Saito example highlights the issue in an extreme form: two renowned masterpieces with their fate in the hands of a wilful owner. While a Van Gogh will likely invoke an extreme reaction from the world, would an unknown piece be met with similar opprobrium? The point however, about lesser known pieces, is that they may well be the masterpieces of the future, and hence be an indispensable element of our future generations' common cultural heritage.

There are numerous other instances in which works of art have been destroyed by their owners with impunity, some of which have been highlighted in earlier chapters. These include the destruction of Sutherland's portrait of Churchill in the UK, [29] the mutilation of a Picasso Lithograph in Australia,[30] and the destruction of Rivera's mural *Man at Crossroads.*[31] Apart from the fact that these examples comprise valuable works of art, they also only form the mere tip of an immense iceberg comprising innumerable maimed and destroyed works of art in our cultural history, thus demonstrating the importance and urgency of the issues raised in this chapter.

2. Outline of issues and central arguments

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26 Virginia M. Cascio, 'Hardly a walk in the park: courts' hostile treatment of site-specific works under VARA' (2009) 20 DePaul Journal of Art Technology and Intellectual Property Law 167.

27 Jane C. Ginsburg, 'Moral rights in a common law system' (1990) 1 Entertainment Law Review 121, 129.

28 Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Commonlaw Countries' (1994) 19 Columbia Journal of Law & the Arts 229, 245, 257.

29 Jennifer Mundy, *Lost Art* (Tate Publishing 2013), 100; Sax (n 11) 38.

30 Nicholas Forrest, 'Picasso Gets the Chop!!' (2008) <http://www.artmarketblog.com/2008/04/17/picasso-gets-the-chop-artmarketblogcom/>.

31 'Rockefeller Centers Ousts Rivera and Boards Up Mural' (10 May 1933) <http://xroads.virginia.edu/~MA04/hess/RockRivera/newspapers/NYHerald_05_10_1933.html> .

The central issue is the question of whether private property rights remain a valid objection against the recognition of a right against destruction in moral rights doctrine, with particular emphasis on artworks. It will be argued primarily that there are cogent reasons why works of art fall within a special category of private property, which is not subject to the usual rules of property. Following on from Sax's plea for an exception to the absolute private property principle in favour of culturally important items, this chapter will argue that such an exception *should* be recognised, based on the idea that art is a *common good*.

This chapter will closely examine the concept of *ius abutendi*, as a strand of liberal property theory, before considering the application of this concept to art ownership. Underlining any rebuff to *ius abutendi* involves the acceptance that the arts comprise a special category of property, deserving an exception to the application of *ius abutendi*. This argument will be made on the basis of the following four observations: firstly, that *ius abutendi* is not *always* applicable; secondly, that art is a common good and therefore it is in the public interest to preserve and protect art; thirdly, closely related to the common good argument, it is argued that stewardship is the more appropriate form of holding where cultural works are concerned; and finally, there is scope for arguing that cultural works possess a 'special aura of worth',[32] therefore requiring and deserving some form of protection.

In confronting the above issues, this chapter will draw heavily upon the scholarship of academics such as Sax, Merryman and Elsen, all being unremitting supporters of the idea that the preservation of the arts is indubitably in the public interest, together with a consideration of the principles key to the development of the concept of stewardship in property law, as well as the concept of the *common good* as developed by Thomas Aquinas. This chapter will also engage with key arguments raised by art philosophers such as Tormey, Young, Sparshott and Goldblatt, who have deliberated over the question of whether art objects themselves have rights, including the right not to be destroyed.

The key point is that if the arts are indeed a common good and that it deserves special recognition, treatment and *protection*, thus trumping private property rights, then for moral rights doctrine to disregard the right to object to destruction is utterly incompatible with this stand. It has been argued in earlier chapters that the question of whether moral rights doctrine offers the creator a right to object to destruction is dependent on how the doctrine is perceived. On the one hand, some academics argue that moral rights doctrine has a role in protecting cultural heritage and that, in the public interest of protecting cultural heritage, it should therefore encompass such a right.[33] On the other, others are adamant that it is merely a bundle of individual or personality rights belonging to a

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32 Richard Brilliant, 'Do Art Objects Have Rights?' (1991) 73 The Art Bulletin 534.

33 Patrick Masiyakurima, 'The Trouble with Moral Rights' [Wiley on behalf of the Modern Law Review] (2005) 68 The Modern Law Review 411, 424; Rajan (n 14) 5.

creator, and hence is concerned with only protecting the creator, not his work. Even so, what is moral rights doctrine's rationale for protecting the creator? The underlying justification lies in the public interest as well.

Moral rights complement and supplement the rights afforded by the copyright regime, which are fundamentally economic rights belonging to the creator, the impetus for which is driven by the public interest in 'the production of new work...in order to enrich and diversify the whole culture'.[34] Moral rights, the integrity right in particular, recognise and protect the intrinsic value, as opposed to the purely monetary value, of a work to its creator. They reflect the deeply meaningful relationship that a creator has with his work, and as such, it makes sense that the creator would want to protect, nurture and preserve his work, and not to see it maimed or destroyed.[35] By recognising this aspect, and not just the commercial aspects of a creator's relationship with his work, the integrity right sends a powerful message that the country's artists, writers and other creators are highly valued and cherished, and it is in the public interest to send such a message.[36] By protecting and preserving creative works, it also fulfils the public interest in ensuring that quality authentic and original works are maintained for not only the current generation but also future generations.[37]

A more robust recognition of a right against destruction would ensure that no work ever fall victim to the caprices of the Saitos in the world. In the process, this chapter argues that the role of moral rights doctrine lies in the public interest to protect creators, and it can only do so if it also values the creator's right to object to the destruction of his work.

3. Private property rights and *ius abudenti*

This section addresses the question of whether works of art are just like any other entity which might be the subject of private property or they constitute a special category of private property which deserves special consideration. If works of art constitute ordinary private property, are they however exempted from the draconian effects of the application of *ius abudenti*? If so, on what basis are works of art so exempted?

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34 Davies and Garnett (n 16) para 2-002.

35 Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010).

36 Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 Columbia Journal of Law & the Arts 297, 302.

37 P. Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014) 51.

The liberal theory of property is the current dominant theory in the West,[38] which has been propounded by theorists such as Locke, Bentham and Austin through to Nozick and Rawls. Private property rights in themselves have been justified as far back as Aristotle, who in rejecting Plato's ideals of communal property as being unworkable, explained that 'where everyone has his own sphere of interest, there will not be the same ground for quarrels, and the amount of interest will increase, because each man will feel he is applying himself to what is his own',[39] which anticipates the utilitarian justification for the liberal theory of property. The key justification for Aristotle is that having private property over things ensures that the thing is cared for.[40]

The classical utilitarians justified private property ownership by the measure of human happiness such ownership brings. According to JS Mill, '...the feeling of security of possession and enjoyment, which could not ... be had without private ownership, is of the very greatest importance as an element of human happiness',[41] while Bentham defines property as an 'established *expectation* of advantage' in the thing that is owned. Austin describes property holding in more specific terms: '...any right which gives the entitled party an *indefinite* power or *liberty* of using or disposing of the subject', which reflects the wholly autonomous characteristic of the individual, in that he is utterly free to do what he will with the thing that he owns. In other words, there is an expectation on his part in enjoying every advantage that he can take from the ownership of his property, fulfilling Bentham's vision of property. Presumably then, this indefinite liberty to use or dispose of the subject includes the right to destroy.

Ius abudenti, while having roots in Roman law, is reflected in traditional Anglo-American conception of property rights, which generally recognises the principle of full liberal ownership. In 1766, Blackstone's Commentaries on the Laws of England described property ownership as thus:

> That sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.

Essentially, a property owner possesses the thing owned so fully and completely that he is at liberty to do whatever he wishes with it, as described by Austin and Bentham above. JS Mill was of the opinion that it was 'just and expedient to exercise absolute control – the *ius utendi et abutendi* –

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38 Ross Zucker, 'The Underlying Logic of Liberal Property Theory' in *Democratic Distributive Justice* (Cambridge University Press 2003) 27.

39 Gregory S. Alexander and Eduardo M. Penalver, *An Introduction to Property Theory* (Cambridge University Press 2012) 17.

40 McCaffery (n 7) 78.

41 J.S. Mill quoted in Charles Norton, Letter to Chauncey Wright, 13 September 1870 referred to in Edward H. Madden, 'Charles Eliot Norton on Art and Morals' (1957) 18 Journal of the History of Ideas 430, 432.

over movable wealth'.[42] *Ius abudenti* thus reflects the *ultimate* act a property owner may inflict on his property: complete destruction. If a property owner may destroy his property with impunity, then he clearly has the right to do less dramatic things to his property.

Honore, in his essay *Ownership*, famously lists eleven necessary incidents of ownership under the liberal concept, one of which is no. 5 in the list, the Right to the Capital, which he describes as 'the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it'.[43] The question as to the extent of an absolute right to waste or destroy is questioned very briefly by Honore, following his description of the right to the capital: 'the latter liberty [i.e. to waste or destroy] *need not be regarded as unrestricted*', and he goes on to observe 'but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership'.[44] On the one hand he acknowledges that such a right to waste or destroy may be restricted, yet on the other, that this does not accord with his liberal conception of ownership.[45]

The main point is that Honore does acknowledge that the right to destroy *may well have* restrictions. The questions as to what these restrictions are and why we should have them, considering that we are supposed to have full liberal ownership of our property, are unfortunately not dwelled upon by Honore, as he merely says that 'most people do not wilfully destroy permanent assets' anyway.[46] Similarly, Epstein thinks that the risk of people destroying their physical assets is small.[47] However, their assumption that most people do not wilfully destroy their assets, while based on perhaps a fairly reasonable observation of ordinary people in general, has not taken into account the numerous incidents involving the maiming, destruction or neglect of works of art throughout history, many of which involve masterpieces by renowned artists.[48] Even though it is well known that many artworks by established artists, certainly those by renowned masters, not only command considerable value but also, in many cases, appreciate in value, this has not prevented the owners of art works, whether private individuals or museums, from destroying or neglecting their charges. As such, it is

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42 ibid.

43 Honore (n 9) 372.

44 ibid.

45 This tentative view by Honore is noted by McCaffery in McCaffery (n 7) 80.

46 McCaffery explains Honore's views on the basis that Honore deemed the fact of waste to be unimportant: ibid., 80.

47 Richard Epstein, 'Justice across the Generations' (1989) 67 Texas Law Review 1465, 1487.

48 Note, 'Protecting the Public Interest in Art' (1981) Yale Law Journal 121, fns 1- 2.

clear that market forces and an appreciation of the value of such works do not always prevent injury to art works.[49]

Strahilevitz argues that we should have the liberty to destroy, if only to give full countenance to our ownership of our property, which in turn underscores our sense of security and liberty with our very own lives,[50] and indeed benefit society generally, in that the freedom to destroy values our right to privacy, encourages innovation and risk-taking.[51] He writes that judicial treatment of our right to destroy, certainly in the US courts at least, has been inconsistent, as for example, the courts allow the destruction of organs and foetuses, notwithstanding their value to scientific research and to patients in need of transplants,[52] but disallow in some cases, the destruction of houses and personal items.[53] He points out that destruction may also be an expressive act, for example, the person toppling the statue of a dictator is expressing his anger at the repression signified by the statue, and thus is an expressive act. To prevent this destructive act would be to curtail the destructor's freedom of expression.[54]

However, Strahilevitz recognises that destruction achieves little on balance – the act is final and how is the creator of the destroyed work able to respond to the message deployed by the act of destruction?[55] 'Destroying a unique irreplaceable piece of property is...closer to heckling than to responding to what he [i.e. the creator of the property] has to say'.[56] Throughout his article, Strahilevitz takes issue with Sax's position but in the end analysis, even though he is a strong advocate of the right to destroy, he is still hesitant about its wholesale application to situations involving valuable, 'unique and irreplaceable' works.

There is therefore a substantial case for restricting the right to destroy in situations involving unique and irreplaceable works such as works of art. It is unfortunate that Honore and Epstein do not confront the consequences of destruction in more depth, but instead simply brush it aside on the basis that the risk, although real, is small, primarily on the basis that people would not destroy valuable works. However, their observation does not bear up considering the number of not only art works, but

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49 An observation by the authors of 'Protecting the Public Interest in Art' ibid.

50 Strahilevitz (n 7).

51 ibid., 786.

52 ibid., 803-07.

53 ibid., 796-800.

54 ibid., 824; also a view taken by Amy M. Adler, 'Against Moral Rights' [California Law Review, Inc.] (2009) 97 California Law Review 263.

55 Strahilevitz (n 7) 827.

56 ibid., 827.

also other valuable creative works,[57] which have been destroyed throughout history. Although Strahilevitz makes a cogent case for the right to destroy, even he falters where valuable and unique works are concerned. McCaffery questions the wisdom and necessity of having such a right as *ius abutendi*, labelling it 'an embarrassment' as it gives the owner the right to destroy valuable resources without justification.[58]

In any event, there is precedent for the curtailing of property rights in modern property law. It has long be recognised that property rights are not absolute as illustrated by the following examples: the ownership of listed buildings; land ownership subject to laws such as nuisance and the Rylands v Fletcher rule; real covenants etc. Clearly, property rights may, in the right circumstances, be restrained in the public interest. Therefore, if the purpose of moral rights is to serve the public interest, then likewise, they pose a valid reason for the curtailment of property rights in certain circumstances at least.[59]

In the following sections, an argument will be made for the value of the arts to society, and why the arts should be regarded as a common good or a public interest. Further, if the arts are truly in the public interest or are a common good, then an argument will be made for the stewardship of the arts.

4. Ownership of art: conflicting rights and responsibilities

Eminent art historian, Julius Held, explained away the various acts of mutilation and destruction meted out to art works over the centuries as the 'widespread conviction that works of art owned by a private person are his undisputed property and that he can do with them exactly as he pleases'.[60] As such, Held exhorted that the legal relationship of art to private ownership needed to be clearly defined.

Sax has heeded this clarion call and taken up the mantle as an advocate for the imposition of responsibilities and obligations upon the owners of not only fine art, but also other important cultural treasures, such as personal letters by historical or important figures or presidential papers. In *Playing Darts*, he not only advocates a bar on destruction, but also calls for access, not necessarily full and unqualified, to works of historical, scientific or cultural importance.

In *Playing Dart's* section on the fine arts, among the examples discussed were the Rockefellers' destruction of *Man at the Crossroads*, and Sutherland's portrait of Churchill, discussed

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57 Sax has identified a variety of culturally valuable works which have been destroyed in history: Sax (n 7).

58 McCaffery (n 7) 81; Sprankling (n 7).

59 Sainsbury (n 18) 27.

60 Held (n 1) 26.

in chapters 3 and 5 respectively. Both are admittedly difficult situations because the first involved the artist's commissioning patron, while the second involved an unflattering portrait of an important figure. The conflicting rights of the parties involved are plain to see, and differ from the more unlikely scenario of an eccentric billionaire disposing of his Renoir. While the latter may argue that his personal property rights are sacred, the other parties have other rights which go beyond mere proprietary rights. The Rockefellers were understandably perturbed with the communist propaganda emanating from the mural, and hence did not want to be associated with it. As commissioning patron of the mural, the suggestion was that the Rockefellers were behind the communist sentiments portrayed within. As for Churchill, he was repulsed by the way he was portrayed, basically as an old man in his twilight years, no longer the great wartime leader that he once was. The conflict here is the right of the important subject who wishes to manage the way he is portrayed publicly with that of the artist's own vision of the subject. However, notwithstanding the understandable responses of the Rockefellers and Churchill, other less devastating solutions could have been explored for e.g. the mural could have been moved or at least recorded by photography,[61] and Churchill's portrait either kept in storage or returned to Sutherland.

Apart from Strahilevitz, other scholars have also disagreed with Sax on his call for a legal ban on destruction, arguing that there are many social deterrents against destruction in place. Hall notes at least two:[62] firstly, the prohibitive financial loss inflicted by the destruction of a work of art, especially if it is by an important artist,[63] and secondly, the public outcry at such an act,[64] in addition to Honore's argument that most people would not wilfully destroy their possessions anyway. This is basically why academics have dismissed any problems which might arise from the wilful destruction of property.

It is submitted that this is only a perception, and simply a *reasonable expectation* of how *reasonable* people are likely to behave. The problem is that it is equally likely that there are a considerable number of unreasonable or simply unpredictable people who are in possession of important or valuable items. Just because it is *perceived* that *reasonable* people are *unlikely* to destroy their possessions, including culturally important ones, it is no reason not to consider a legal solution to the problem. There are, after all, a number of cases involving the destruction of important works by *reasonable* parties, whether based on seemingly reasonable grounds (e.g. the removal of Richard

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61 Another of Rivera's murals has recently been moved. See Michael Barba, 'Historic Diego Rivera mural ready to move at CCSH' *San Francisco Examiner* (San Francisco, 16 April 2017) <http://www.sfexaminer.com/historic-diego-rivera-mural-ready-move-ccsf/>.

62 Jason Y. Hall, 'Who "Owns" a Cultural Treasure? Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures by Joseph L. Sax' (2000) 98 Michigan Law Review 1863.

63 ibid., 1865.

64 ibid., 1865.

Serra's *Tilted Arc*,[65] or the demolition of 5Pointz[66]) or personal ones (e.g. the burning of Sutherland's portrait of Churchill or the destruction of Rivera's mural). Further, a legal solution is also required mainly because of the loss to society in the event a work of art is destroyed. Indeed, is this not reflected in the second of Hall's two social deterrents: the public outcry. However, it is doubted that a public outcry would necessarily be an effective deterrent to one who is determined to destroy anyway. Further, a public outcry surely reflects the depth of feeling on the part of society when something like this happens, and hence suggests that this is, at least, a serious problem which requires a solution.

Sax's solution is that there should be 'qualified ownership founded on the recognition that some objects are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community's rightful stake in them'.[67] One question is what objects are considered to be 'constituent of a community', and why. Are works of art 'constituent of a community' and hence require *special consideration*? Although Sax does not explicitly make reference to the concept of *common good*, it is arguably what he had in mind when framing his argument in *Playing Darts*. Sax was after all, an environmental lawyer, passionate about public rights to natural resources. In arguing that natural resources, such as land and water, are a public trust, requiring special protection, he drew inspiration from Roman law and English common law, and argued against expansive private rights at the expense of public interest. His foray into cultural material is argued along the same vein, that art and goods of cultural importance should be subject to a kind of public trust, entrusted to guardianship, stewardship and similar notions.

The next section continues with a discussion of the notion of the public interest/common good as it applies to the arts, drawing from a diverse variety of sources, ranging from Aristotle and Aquinas to contemporary property theorists.

5. The value of the arts to society – is it a public interest/common good deserving of stewardship

In a recent interview, Dr Werner Jerke, a renowned collector of Polish contemporary works, echoed Goethe's sentiments:

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65 Richard Serra, 'Art and Censorship' (1991) 17 Critical Inquiry 574.

66 Susanna Frederick Fischer, 'Who's the Vandal? The Recent Controversy Over the Destruction of 5Pointz and How Much Protection Does Moral Right Law Give to Authorised Aerosal Art?' (2015) 14 The John Marshall Review of Intellectual Property Law 326, 326.

67 Sax (n 11) 197.

> In my opinion, if someone is an owner of a piece of art, it's not only his property. The masterpiece belongs to society in general and I'm only lucky to keep it for a moment.[68]

A work of art thus 'belongs to society in general' and is the 'property of mankind' in the words of Jerke and Goethe respectively. The ethos behind these exhortations reflects the idea that artworks are of such important benefit and value to humanity that the few individuals in possession of them only hold them in trust for the rest of society and future generations. In other words, art owners should act as stewards, rather than as outright owners in possession of all the property rights which private ownership normally entails. This section explores the general idea of the common good or public interest, as well as the concept of stewardship, before moving on to consider if art and culture are indeed a common good.

a. Stewardship based on the Public Interest/the Common Good

The aim here is to formulate and justify an argument for the stewardship of art works on the basis that they are in the public interest and/or a common good. The questions are firstly why stewardship is a more appropriate form of holding for certain types of property, secondly, what are the common features of such properties, and thirdly, whether art and other cultural property fall within such categories of property, hence qualifying for stewardship.

In terms of legal regulation over property, discussions of the concepts of stewardship and the public interest have traditionally centred primarily on their application to natural resources. Further, until recently, legal debates over property ownership have been dominated by rights and entitlements discourse.[69] However, in tandem with a growing and acute awareness of urgent environmental and sustainability issues, in recent academic work on property rights, in particular those over land, the stewardship model of property has begun to emerge as the dominant theory, over the liberal or absolute property rights model in general.[70] One reason is the recognition that land ownership, is subject to such a range of constraints that it is incompatible with notions of private property rights, which embraces full and unencumbered rights of control, exclusion and alienation. Another reason is the recognition that certain resources are not only scarce but lie also within a community's interests to be maintained not only for the community but also future generations.[71] Further, there has been a growing recognition that indigenous cultural heritage and land deserve special recognition on the

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68 Dr Werner Jerke, *"The Art is a Common Good Which Belongs to the Society No Matter Who Is Its Actual Owner" - A Converation with the German Collector Werner Jerke* (Contemporary Lynx 2013).

69 D.S. Cowan, L.F. O'Mahony and N. Cobb, *Great Debates in Property Law* (Palgrave Macmillan 2012) 121.

70 Helena R. Howe, 'Copyright limitations and the Stewardship Model of Property' (2011) 2 Intellectual Property Quarterly 183.

71 J. Rawls, *A Theory of Justice (ORIG EDN)* (Harvard University Press 1971).

basis that they belong to 'peoples' rather than individual persons, and hence are more appropriately the subject of stewardship rather than liberal property rights, which narrowly conceived, focuses on strong individual rights and entitlements.[72]

According to Lucy and Mitchell,[73] stewardship with its connotations of duties and obligations, is wholly incompatible with private property rights. They reject any suggestion that land ownership is a combination of private property rights and stewardship. What they suggest is that private property is 'conceptually and normatively inappropriate' in accounting for the ownership of land,[74] and that stewardship instead, fully and accurately accounts for any possession of land. In other words, stewardship provides a more accurate description of the *actuality* of the rights and obligations to which land owners are usually subject, for example, statutory constraints such as planning restrictions or common law ones such as those imposed by the law of nuisance or the Rylands v Fletcher rule.[75] This, however, was not the sole aim of their thesis; Lucy and Mitchell make it clear that, by recognising land ownership as a form of stewardship rather than the 'do with it as we please'[76] form of private property, it helps to bridge the expectations of land owners and their actual experience.[77]

The ownership of art, similarly, is already encumbered with certain legal constraints in actuality. For example, unless copyright ownership has also been transferred along with the property in the art work itself, the art owner may not make any copies of his property. Even more intrusive where the art owner is concerned, are the moral right of attribution, whereby the artist must be identified whenever his work is exhibited,[78] and the *droit de suite*, whereby the artist is entitled to receive a portion of the price for which his work is resold.[79] These constraints are undoubtedly beyond those exhorted by the general ancient maxim, *sic utere tuo ut alienum non laedas* (use your own property as not to injure that of another);[80] they actually impose certain positive obligations on the

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72 Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, 'In Defense of Property' (2009) 118 Yale Law Journal 1022 ; Jessica C. Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer 2014).

73 William N.R. Lucy and Catherine Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55 Cambridge Law Journal 566.

74 ibid., 566-70.

75 ibid., 571-72.

76 ibid., 570.

77 ibid., 598.

78 For example, in the UK this is provided in the UK Copyright Designs and Patents Act 1988, s. 77.

79 Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

80 Victor John Yannacone, 'Property and Stewardship - Private Property Plus Public Interest Equals Social Property' (1978) 23 South Dakota Law Review 71, 91; Described in no. 9 of Honore's List in Honore (n 9).

part of the art owner. Not only must an art owner ensure that the artist is fully and properly identified each time he exhibits his property, he must also relinquish part of his total takings in the event he sells on his property.

Similar to the aims of Lucy and Mitchell's article, the aims of this chapter are firstly to articulate a clearer and more appropriate understanding of the legal nature of art ownership, so as to bridge the expectations of art owners and their experience, and secondly, to also counter the 'widespread conviction that works of art owned by a private person are his undisputed property and that he can do with them exactly as he pleases' as lamented by Professor Held.

Lucy and Mitchell, however, reject the idea that public interest accounts for the range of duties and obligations that accompany the ownership of land, on the basis that public interest is too vague to define. This is where this chapter and their article diverge. While it is conceded that the concept of public interest is rather amorphous and difficult to grasp,[81] nevertheless, it is contended that this in itself should not preclude the role it plays in property ownership. Barnes, like Lucy and Mitchell, in examining the ownership of natural resources such as the ocean or fisheries,[82] argues that stewardship is an alternative regime for property holding, although unlike them, he argues that the public interest plays a profound role in the formulation of stewardship as a form of property holding. Underpinning his argument is the recognition that property ownership is a social institution, serving public interests. He counters the arguments raised by Lucy and Mitchell by arguing that, although the notion of public interest is at first view a difficult one to pin down, and indeed there appears to be little scholarly agreement as to the precise content of public interest,[83] nevertheless it is possible to construct a coherent framework in which we can determine whether or not certain claims are in the public interest.[84] In relation to natural resources, Barnes argues that they comprise what he terms as 'first order interests', [85] i.e. according to him, public interests which meet the physical needs of a community essential for their survival.[86] Although he barely refers to other types of subject matter beyond natural resources, he does acknowledge the existence of other community interests, the

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81 Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANY Press 2017), 3-7.

82 Richard Barnes, *Property Rights and Natural Resources* (Hart 2009).

83 ibid., 69.

84 ibid., 69.

85 ibid., 161.

86 ibid., 89.

securing of which stewardship may have a role to play, which includes a community's aesthetic interests or cultural values,[87] thus underpinning the arguments set out in this chapter.

Giblin and Weatherall also recognise the difficulty in characterising 'public interest' but generally accepts that it is about 'recognising that we have an overall shared set of interests as a society beyond individual self-interest'.[88] This point was made in relation to their argument that the public interest plays an indispensable role in any attempts at defining or redefining the role(s) of copyright.[89] They quote Ringer, former Register of the US Copyright Office, who defines the public interest as 'the aggregate of the fundamental goals that the society seeks to achieve for all of its members', among which goals include the preservation of culture.[90]

Drawing from Barnes' scholarship, this chapter argues that the public interest is sufficiently defined and capable of underlining the features of stewardship, and that it includes a community's aesthetic interests or cultural values. Further, it wishes to draw from property scholarship, such notions and principles of stewardship which have been applied to land holding, but which also may be readily transferable and applied to the arts and cultural heritage, as well as the idea that there is undoubtedly a public interest in the arts.

The idea of the common good, in particular, how it should be treated, also assists in informing the discussions central to this chapter. Essentially, it will be seen that the notions of common good will explain how best art owners should act in respect of their art collections vis-a-vis the community in which they reside. It is necessary to clarify the meaning of the common good, a term which is generally used interchangeably with public interest.[91] There is, as conceded above, little scholarly agreement on the precise meaning of either public interest,[92] or common good.[93] That the terms may be regarded as synonymous with each other is certainly accepted by Etzioni, who describes the common good as those 'that serve all members of a given community and its institutions, and...that serve no identifiable particular group, ...[and] members of generations not yet born',[94] an approach adopted by this chapter. Although there are subtle variations of the common good, ranging from the common good as historically developed by Plato and Aristotle and later in Christian theology, notably

87 ibid., 161 fn 179.

88 Giblin and Weatherall (n 81).

89 ibid., 18

90 ibid., 6-7

91 A. Etzioni, *The Common Good* (Wiley 2014).

92 Barnes (n 82) 69.

93 Etzioni (n 91).

94 ibid.

by Aquinas, and in economics, law and political theory, the common feature is that recognition of the common good is not only good for the community at large, but is also good for each and every member of that community, including property owners themselves.

This chapter is underpinned by the teachings of Aristotle, Aquinas and Etzioni on the common good in the following way. Firstly, it should be understood that the manner of property holding advocated by Aristotle is important in fulfilling an important goal: that of living a fulfilling, proper and moral life ultimately. Aristotle argued that man is a social and political being, who has to live harmoniously within the community, in relation to his fellow citizens.[95] In order for a person therefore to flourish and live a rich and complex life, he has to engage in virtuous activities which enable him to live harmoniously with his fellow citizens, contributing to the ultimate goal of a fulfilling, proper and moral life. Where property is concerned therefore, private ownership can contribute to human flourishing if it is also exercised with *generosity*. In other words, private ownership gives a person power over a thing, but if he chooses not to exercise that power, and instead generously shares his possession willingly with others, he is acting with virtue, which contributes to his well-being and allows him to flourish in turn. In the context of this chapter, it is in the interests of the art owner and the community in which he resides, to generously 'share' his collection of art works with his fellow members of the community. Only then will he flourish according to Aristotelian ideals.

Aquinas, in developing his common good theory, saw no contradiction between private interests and public interests, and proposed that the common good may be achieved without necessarily alienating individual or private goods.[96] While Aquinas's views are set within a theological framework, and that as a matter of theology, he may not have *sanctioned* private property,[97] he nevertheless *justified* it on the basis that possessions will be more carefully looked after and that property affairs will be administered in a more orderly fashion,[98] which reflects the views of Aristotle. Further, he saw private property as being 'useful to the achievement of the common good'.[99] Essentially, Aquinas thought that property should be privately owned and managed but also *readily shared for the public good*.[100]

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95 Aristotle, Nicomachean Ethics, trans. Ostwald (1962) IX.9 1169b17-19.

96 M.M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (Cambridge University Press 2006) 3.

97 Anton Hermann Chroust and Robert J. Affeldt, 'The Problem of Private Property According to St. Thomas Acquinas' (1950) 34 Marquette Law Review 151,181.

98 St. Thomas Aquinas, Summa Theologica, Second Part of the Second Part, Question no. 66, Article no. 2.

99 Chroust and Affeldt (n 97) 181.

100 ibid., 123.

Hence, if we accept that a work of art is a common good, the owner of such a culturally important work can enjoy private ownership and possession of the same but also has a *duty to ensure that the public benefits* from it too, which in turn means a duty to protect and preserve art works in their charge.

b. Are the Arts a Common Good/in the Public Interest?

The public interest is a notion which, as already mentioned above, is difficult to define, and arguably vague according to Lucy and Mitchell. Even an article entitled 'The Public Interest in the Arts' published in the Yale Law Journal in 1981,[101] neither specifies what this public interest is, nor why there should be a public interest in the arts, but nevertheless proceeds on the assumption that there is a public interest in the arts. However, as discussed above, Barnes has formulated a stable framework in which to measure the extent to which a good is in the public interest, which includes aesthetic interests and cultural values.

Although the notion of the public interest or common good may be vague, the notion that there is a public interest in the arts is widely accepted. For instance, the argument that the arts, or at least cultural values, are held as a good of the very highest order, can be found in teachings of the Christian church, which is a source of common good theory. Sison and Fontrodona have, by referring to Puelles' commentary on church social teachings, identified cultural values, defined as 'technical, artistic, intellectual, ethical and spiritual goods' as being important for 'authentic human flourishing'.[102] Although cultural values may not present themselves with the same urgency as material well-being or peace and concord, they are nevertheless deemed to be superior to these needs as they appeal to the higher aspirations of man.[103] Material well-being and peace and concord are all needs only because they allow people to participate in cultural activities.

Merryman argues passionately that there is an intrinsic quality in the arts which we all value, empirical evidence of which lie in the very fact that there are thousands of museums and galleries, thousands of dealers, millions of visitors to museums and concert attendees, multitudes of university departments devoted to the arts, public organisations representing the arts, laws in place for the protection of cultural heritage, and many other entities which exist to protect, serve, and facilitate the generation, display and performance of the arts.[104] He supports his argument by referring to the establishment of moral rights law and identifies a dual purpose in these laws: one to protect the

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101 Note, Yale Law Journal, (n 48).

102 Alejo Jose G Sison and Joan Fontrodona, 'The Common Good of the Firm in the Aristotelian-Thomistic Tradition' (2012) 2 Business Ethics Quarterly 211.

103 ibid.

104 John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 California Law Review 339.

individual artist against alteration or destruction of his work and another to protect the *public* against alteration or destruction of their culture.[105]

More importantly, Merryman points out that the regard for cultural objects is universal. He argues that, although certain objects or works are treated with reverence only within the culture to which they belong, and not particularly by others outside their culture, nevertheless we can all appreciate the 'human component' in all cultural objects, and understand its profound value to cultures to which these objects belong, and thus in this way, we all value all cultural objects, whether or not they belong to our particular cultural landscape.[106]

Along these same lines, Elsen argues 'art is a powerful force for uniting a society'[107] and quotes from the 1954 Hague Convention that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each person makes its contribution to the culture of the world.'[108] Stephen Ladas, in 1938, recognised that the 'maintenance and preservation of a work of art is invested with the public interest in culture and development of the arts.'[109]

We return to Merryman, for he is the one who provides us with the most comprehensive case for recognising the public interest in the arts or that the arts are a common good. He argues that there is 'truth and certainty' in the authentic original objects and that to destroy or alter them would be to tamper with such 'truth' to which we are entitled.[110] He also sees a 'morality' in cultural objects,[111] as well as a repository of 'cultural memory'.[112] Cultural objects evoke emotions and possess 'pathos' and as they have the capacity to outlive us, they represent 'humanity's mark on eternity'.[113] Finally, cultural objects help us create an 'identity', and also encourage our participation in a 'common human enterprise', as artists create a painting to be seen by others, or a pot to be used by others.[114]

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105 ibid., 344.

106 ibid., 342-43.

107 Albert Elsen, 'Why Do We Care About Art' (1976) 27 Hastings Law Journal 951, 952.

108 ibid., 953.

109 Stephen Ladas, *International Protection of Literary and Artistic Property* (Macmillan 1938) 603.

110 Merryman (n 104) 346.

111 ibid., 346.

112 ibid., 347.

113 ibid., 348.

114 ibid., 349.

6. What rights, if any, do works of art themselves possess?

Another angle from which the debates surrounding the right to object to destruction may proceed is the following viewpoint taken by certain philosophers in the US, i.e. that artworks possess rights. The range of potential rights discussed, vary from the right to be interpreted correctly,[115] and the right not to be modified,[116] to the right to be restored,[117] all of which bear some relation to the integrity right. If there is any possibility that artworks themselves arguably possess rights, including a right not to be destroyed, then firstly, this emphasises the unique properties of art works as opposed to those of more ordinary possessions, and secondly, it follows that art works, being unique items which bear their own rights, should be more properly subject to stewardship, rather than the whims of private property ownership.

The most controversial and prominent advocate of the argument that art works bear rights is Alan Tormey, who in *Aesthetic Rights*, posits that 'art works are bearers of a special class of rights'. In a nutshell, his conclusion is based on an observation of how human beings regard art, and of the 'aesthetic pain' experienced in the event a work of art is maltreated. It follows that, as all rational beings are *obliged* to prevent such pain, and that artworks *impose* this particular obligation, such artworks in turn bear rights. Tormey professes that he is not interested in the *justification* for such rights, but only in asserting that art works *de facto* have such rights. He brushes aside any objection that insensate beings may have rights by simply referring to obvious examples, such as corporations and nations, which are generally accepted to have rights. He understands that the most fundamental objection to his thesis lies in the fact that the aesthetic pain experienced through a maltreatment of a work is felt by interested parties, such as the artist, performer, art-lover or collector, and therefore, such aesthetic rights, as there may be, belong to them, not the work itself. However, he counters this by reiterating that 'it is the work itself that is affronted, distorted, defamed, maligned, insulted or done violence to – not the artist, the performer, or the public, even though their interests may suffer...'.

Tormey's thesis has been objected to by other philosophers. Young, asks whether it is always wrong to destroy art works, taking issue with Tormey's contention that artworks bear rights.[118] Young claims that artworks themselves do not suffer from the abuse of art and therefore cannot bear rights. Goldblatt, questions Tormey's refusal to engage with the justification of such rights, claiming that only the justification of obligations can ensure that such obligations *ought* to be fulfilled, and that it is

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115 Edmund Burke Feldman, 'On the Rights of Artworks and Other Ethical Issues in Art Education' (1998) 32 Journal of Aesthetic Education 81.

116 David E.W. Fenner, 'Why Modifying (Some) Works of Art is Wrong' (2006) 43 American Philosophical Quarterly 329.

117 Yuriko Saito, 'Why Restore Works of Art' (1985) 44 The Journal of Aesthetics and Art Criticism 141.

118 James Young, 'Destroying Works of Art' (1989) 47 The Journal of Aesthetics and Art Criticism 367.

no use to only establish *de facto* rights. Like Young, Goldblatt contends that if it is only art lovers and similarly interested people who feel 'aesthetic pain' when art is abused, then they are the ones who are entitled to such rights.

Notwithstanding the numerous criticisms, the thesis introduced by Tormey is a stand which has been accepted to some extent by other philosophers, who may not necessarily have advocated fundamental rights akin to that of human rights, but have called for certain key rights, such as the right not to be modified or even a right to be restored. Tormey's thesis only takes such calls a step further.

Furthermore, although Goldblatt and Young say that as only artists and art lovers are the ones who feel 'aesthetic pain', and that they should be the bearers of such rights, not the artworks, it is contended that people often feel or experience pain *on behalf of* another who has borne the injury. In other words, they feel 'aesthetic pain' because it *reflects* the injury wrought on the cherished artwork – that does not make the injury suffered by the artwork any less real. Richard Brilliant, editor of *Art Bulletin*, in drawing a comparison with our dumb animal companions, argues that 'abused animals can reveal their distress with loud cries but art objects are voiceless. Just as animals require human champions to voice their right to 'proper' treatment, so art objects deserve champions'.[119]

It is not proposed to offer a normative basis on which to formulate rights for artworks, but it is only intended to bring attention to a body of work which has explored this issue, and to suggest that, in any serious contemplation of moral rights and the ownership of art, the possibility that artworks may bear fundamental rights should not be dismissed so easily.

7. Conclusion

We have seen that there is a strong case for treating art and other cultural works as a common good, not in the sense as a good which commonly belongs to all in a Marxist sense, but as a common good more along the lines developed by Aquinas, i.e. a good *for* all members of a community. According to Aquinas, private property was completely acceptable, save that such holding of property also entails a duty to manage them for the good of the community at large. Aquinas's common good is closely aligned to the public interest, and indeed there can be little doubt that cultural works are in the public interest; they not only represent the 'truth' for mankind as Merryman contends, but they are essential for 'authentic human flourishing', an important aim of any subject matter which vies as a common good in the Aristotelian or Thomistic sense.

[119] Brilliant (n 32).

There is an appreciation that art works, as opposed to ordinary objects, are different entities deserving of special treatment.[120] Pre-VARA, when American courts were generally opposed to the recognition of moral rights, there was nevertheless judicial appreciation of the fact that perhaps cultural works were different and needed special protection. Justice Seabury articulated such a view by saying that the sale of an artistic work was quite different from the sale of a barrel of pork, in that while the pork seller is not interested in whatever happens to his barrel after he has disposed of it, an artist is not only interested in what happens to his work after sale, but is indeed entitled to see that it is dealt with in a manner which is acceptable to him.[121]

The perception that works of art possess special qualities, which qualify them for special protection in the public interest, is supported by the possibility that artworks themselves bear rights. It then follows that, if such works are in the public interest or a common good, they have to be treated differently to other more prosaic types of property, and are more properly the subject of stewardship than outright property ownership. This, in turn, means that owners of art works are more properly stewards of these works, rather than outright property owners with absolute rights over them, including the right to maim or destroy them.

In accepting that the ownership of art is more properly stewardship, with all its connotations of preserving and maintaining such works for the present community and future generations, then it seems incongruous that moral rights doctrine should fail to recognise the creator's ability to object to the destruction of his works. It is incongruous because moral rights doctrine ultimately serves the public interest too, not just individual creators. It is argued that, if art owners are stewards, then, in contemplating the tension between the integrity right and the owner's rights in the art work, the courts should tread carefully in usurping any of the artist's rights, including, and perhaps *especially*, any possible right to object to the destruction of his work. By recognising the artist's right to object to the 'ultimate form of mutilation', moral rights doctrine thus ensures that artists are encouraged to create in the knowledge that the law is on their side, and that it serves to protect their creations. This, in turn, sends a powerful message to those who possess art, that art is to be cherished, nurtured and protected, and that they are stewards, not owners, of our cultural heritage.

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120 Empirical research carried out by Spellman and Schauer investigated the attitudes of ordinary lay persons towards hypothetical scenarios involving people mutilating or destroying the art or ordinary objects in their possession. While all participants agreed that an owner had the absolute right to do what he wishes with ordinary objects in his possession (such as a car), they expressed feelings that there was something special about art which justified preventing owners from mutilating or destroying them: Barbara A Spellman and Frederick Schauer, 'Artists' Moral Rights and the Psychology of Ownership' (2009) 83 Tulane Law Review 661.

121 Referred to in the title to this chapter: Judgment in *Clemens v Press Pub. Co.*, 122 N.Y. Supp. 206, at 207-08, referred to in Lee (n 22) 277.

Part III: Evaluating the different approaches and influences of selected legal regimes

Chapter 8 - The Fine Arts In A Fine City: A Case-Study On Singapore's Weak Moral Rights

'Poetry is a luxury we cannot afford.'

Lee Kuan Yew, Address to the University of Singapore, 1968[1]

1. Introduction

The title to this chapter is a play on words, 'fine city' being a familiar jocular reference to Singapore as a city famed for levying fines against a wide variety of petty offences,[2] and also as a fine city in the superlative sense, having famously achieved astounding economic success in a relatively short period of time since independence.[3] Apart from economic success, Singapore has other ambitions, of being recognised as a global cultural hub,[4] or a 'Renaissance City',[5] as opposed to its erstwhile reputation as a 'sterile cultural desert'.[6] In this sense, Singapore hopes to be identified as a fine city that offers its residents and visitors a vibrant and rich cultural experience, ranging from international arts and film festivals, concerts and performances to art galleries and museums. Once economic success had been achieved, Singapore's leaders proceeded to initiate an ambitious programme to ensure similar success and recognition for artistic and cultural endeavours.

Against this backdrop, this chapter will focus on Singapore's conspicuously weak moral rights. In contrast to many countries of the Commonwealth which have inherited their copyright

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1 C.J.W. Wee, *The Asian Modern: Culture, Capitalist Development, Singapore* (NUS Press 2007) 6.

2 John Aglionby, 'Singapore's fine culture keeps people in line' *The Guardian* (2 November 2002). The offences range from the selling of chewing gum, littering, public dancing, skateboarding to smoking in public and jaywalking.

3 George Baylon Radics, 'Singapore: A 'Fine' City: British Colonial Sentencing Policies and its Lasting Effects on the Singapore Corporal State' (2014) 12 Santa Clara Journal of International Law 57.

4 *Singapore: Global City for the Arts* (1985).

5 Singapore Ministry of Information and the Arts, *Renaissance City Report : Culture and the Arts in Renaissance Singapore* (2000).

6 Naomi Lindt, 'Expanding the Cultural Realm in Singapore' *The New York Times* (2011); CK Goh, *Speech by Senior Minister Goh Chok Tong at the NTU Students' Union Ministerial Forum held at the Nanyang Technological University (NTU) on 29 october 2010* (2010); K.F. Lian and C.K. Tong, *Social Policy in Post-Industrial Singapore* (Brill 2008) 231; Lauren Sherman, *World's Culture Capitals* (2009).

regime from the UK, and which are contracting parties to the Berne Convention,[7] Singapore presently recognises only the right to object to false attribution. The integrity right, generally regarded as the *core* moral right,[8] does not appear in any form at all in Singapore's Copyright Act (Chapter 63). The question that arises is why Singapore has adopted such a stance, particularly in light of its lofty ambitions to be an artistic and cultural centre, not only in Southeast Asia, but also the world.

While it does not mean that the lack of moral rights necessarily suggests that a country is completely uninterested in its artists, the recognition of such rights is nevertheless a reflection of a country's strong regard for its artistic community. Conversely, the paucity of moral rights in Singapore raises questions about the extent of its regard for its artistic heritage. A study of the reasons behind this phenomenon is enlightening. The reasons for Singapore's lack of substantive moral rights may be attributed to wholly unique circumstances, such as Confucianism, or a stringent censorship policy in a semi-authoritarian society, which are not applicable to the UK's situation. Hence it may be posited that while it may be uniquely reasonable for Singapore to eschew moral rights, the UK does not possess similarly unusual or unique circumstances which may account for its own set of weak moral rights.

It will also be shown that weak moral rights in Singapore may also be attributable or at least linked to a cultural policy that favours the more commercially lucrative creative sector over the fine arts. While this may be, to some extent, understandable although not necessarily laudable in a country like Singapore, it is *prima facie* questionable in one like the UK, owing to its very different history and cultural background. A brief explanation of this difference follows.

Until very recently, Singapore was dubbed a 'cultural desert'. It has a relatively short history, having only been founded in 1819 by the British, and only gaining full independence in 1965.[9] Upon attaining independence, Singapore focused on survival initially, and later turned its attention to achieving economic success.[10] Only in very recent years has Singapore channelled its energies into cultivating the arts and cultural industries, as such activities were initially deemed as unaffordable luxuries by the late former Prime Minister Lee Kuan Yew.[11] Its status as a cultural exporter was in a

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7 Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 25016), chapter 29.

8 Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 Columbia Journal of Law & the Arts 297, 298.

9 The Federation of Malaya, of which Singapore was part, gained independence from the British in 1959, and Singapore itself broke away from the Federation in 1965.

10 Kuan Yew Lee, *From Third World to First. The Singapore Story:1965-2000* (Harper Collins 2000), chapter 4.

11 See quote above beneath the chapter title (n 1); David Pilling, 'Pragmatic Singapore can afford a little poetry' *Financial Times* (5 August 2015).

relatively fledgling state at the beginning of the 21st century, [12] but has developed rapidly, and there is a clear ambition to encourage even greater cultural production.[13] Singapore has always adopted a pragmatic view in everything it has pursued,[14] and thus it is not surprising that it still expects that the arts are not only able to pay their own way, but that they should also generate profit,[15] a mindset discussed in more depth below.

The UK by contrast has a much longer, richer and more complex history, during which time it has famously produced numerous men of letters, artists and musicians. It boasts of creative icons from across all fields, from literary greats such as Chaucer, Shakespeare, Austen, Dickens and Tolkien, to musical geniuses, Elgar, Britton, and Tippett, and artists Constable, Gainsborough, Patrick Caulfield and Francis Bacon. Global popular culture is also dominated by the British, by rock/pop artistes such as the Beatles, The Rolling Stones, Queen, and very recently, Ed Sheeran.[16] Other cultural exports include Banksy, Andrew Lloyd Webber and television programmes/films from *Monty Python's Flying Circus* to *Harry Potter*. It is as much an exporter of creative works as it is an importer, probably more so, and has been dubbed a 'cultural superpower'.[17] It is reasonable to assume that its artists are cherished and valued, or if they are not, then arguably, they should be.

In light of the above, unlike the position with Singapore, it is inexplicable that there has always been a deep seated reluctance to adopt moral rights more wholeheartedly in the UK.[18] Perhaps an explanation may lie in the neoliberal ethos that has been dominant in the UK, since the adoption of neo-liberalism as the main guiding principle, according to which the Thatcher government formulated

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12 Toh Mun-Heng, Adrian Choo and Terence Ho, *Economic Contributions of Singapore's Creative Industries* (Ministry of Information, Communication and the Arts 2003).

13 Shu Fen Goh, 'Building Singapore's Creative Industry' *Today* (Singapore, 26 May 2016).

14 Kenneth Paul Tan, 'The Ideology of Pragmatism: Neo-liberal Globalisation and Political Authoritarianism in Singapore' (2012) 42 Journal of Contemporary Asia 67; Elliot Brennan, 'Lee Kuan Yew: Singapore's great pragmatist' (*ABC News*, 2015) <http://www.abc.net.au/news/2015-03-23/brennan-lee-kuan-yew:-singapores-great-pragmatist/6340834> ; Carlton Tan, 'Lee Kuan Yew leaves a legacy of authoritarian pragmatism' *The Guardian* (23 March 2015).

15 Can-Seng Ooi, 'Political Pragmatism and the creative economy: Singapore as a City for the Arts' (2010) 16 International Journal of Cultural Policy 403; Can-Seng Ooi, 'Soft Authoritarianism, Political Pragmatism and Cultural Policies: Singapore as a City for the Arts' (Government Encounters Workshop); T C Chang, 'Renaissance Revisited: Singapore as a 'Global City for the Arts'' (2000) 24 International Journal of Urban and Regional Research 818.

16 According to IFPI, Ed Sheeran's *Divide* album was 2017 best-selling album, certified multi-platinum in 36 countries: Jem Aswad, 'Ed Sheeran Named Best-Selling Global Recording Artist of 2017' (2018) <http://variety.com/2018/music/news/ed-sheeran-named-best-selling-global-recording-artist-of-2017-1202710314/>.

17 Oivind Bratburg and Kristin M. Haugevik, 'Editorial: A taste of cultural Britain' (2011) 6 British Politics Review 2.

18 Discussed in Chapter 4.

its policies.[19] Neo-liberalism may also account for the situation in Singapore; indeed it has been heralded as a poster-boy for neo-liberal governance.[20] Neo-liberalism has been criticised as an incoherent term which defies a consistent definition and lacks any analytic value,[21] but yet is widely accepted as the 'dominant and pervasive economic policy agenda of our times.'[22] It is essentially an economic theory, which advocates free markets, free trade and competition, which is actively and vigorously promoted and secured by the state through robust institutional structures and laws, such as strong private property rights.[23] But the influence and impact of neo-liberalism does not stop at economic policies; it is *the* currently dominant ideology which has the potential to dictate the policies of every stratum of society, including cultural policy. Both in the UK and Singapore, neo-liberalism may arguably have resulted in highly instrumental cultural policies with economic growth envisaged as the end goal.[24]

In any case, Singapore still retains a yearning to dispel its 'cultural desert' image and the UK currently nurtures worries about remaining a dominant cultural capital in Europe and the rest of the world post Brexit.[25] It is evident that both countries share an ambition in maintaining a global reputation as cultural powerhouses. As has been argued in the previous chapters, moral rights perform an essential role in encouraging the creation and dissemination of new artistic and cultural works, and therefore, both countries would be well advised to pursue a policy of strengthening this body of rights and ensuring that it aligns with the needs and desires of its artists. It will be argued below in this

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19 David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007) 2.

20 Singapore's economy is ranked as the 2nd freest in the 2018 Index of Economic Freedom. <https://www.heritage.org/index/country/singapore> ; Ryan Bohl, 'Dubai, Singapore and the Future of Neoliberalism' (*Geopolitics Made Super*, 2017) <https://geopoliticsmadesuper.com/2017/02/01/dubai-singapore-and-the-future-of-neoliberalism/> ; Tan; Eugene Dili Liow, 'The Neoliberal-Developmental State: Singapore as Case-Study' (2011) 38 Critical Sociology 241; Cheryl Narumi Naruse and Weihsin Gui, 'Singapore and the Intersections of Neoliberal Globalisation and Postcoloniality' (2016) 18 International Journal of Postcolonial Studies 473; Soek-Fang Sim, 'Social Engineering the World's Freest Economy: Neo-liberal capitalism and Neo-liberal Governmentality in Singapore' (2005) Rhizomes: Cultural Studies in Emerging Knowledge.

21 Stephen Metcalf, 'Neoliberalism: the idea that swallowed the world' *The Guardian* (18 August 2017) <https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>.

22 Rajesh Venugopal, 'Neoliberalism as concept' (2015) 44 Economy and Society 165.

23 Harvey (n 19) 2.

24 Tony Blair, *Prime Minister's Speech on the Arts* (2007) Tate Modern, 6 March 2007; David Hesmondhalgh and others, 'Were New Labour's Cultural Policies Neo-Liberal?' (2014) International Journal of Cultural Policy 1; Jim McGuigan, 'Neo-Liberalism, Culture and Policy' (2005) 11 International Journal of Cultural Policy 229; K.P. Tan, *Governing Global-City Singapore: Legacies and Futures After Lee Kuan Yew* (Taylor & Francis 2016).

25 Tom Campbell, 'Can post-Brexit London surivive as Europe's cultural and financial capital?' *The Guardian* (23 January 2017); Rosie Collier, 'What will Brexit mean for arts and culture in the UK' *The New Statesman* (11 July 2016); Graham Sheffield, *The Art of Brexit* (2017); Patrick Brill aka Bob and Roberta Smith, 'Brexit will spell the end of British art as we know it' *The Guardian* (12 May 2017).

chapter that Singapore's emphasis of the economic rights over moral rights in its copyright regime is a reflection of its bias towards the more lucrative and commercial of its artistic and cultural industries, which has arguably resulted and will continue to result in a declining artistic and cultural scene, particularly that of the fine arts. The UK should heed this lesson.

2. Answering the Question: Framework of Chapter

Perhaps part of the answer to the question posed lies in Singapore's cultural policies, evolved over time since independence, and discernible from government commissioned reports and ministerial speeches. While the language emerging from such sources proclaims a desire to transform Singapore into a city which is 'creative, vibrant and imbued with a keen sense of aesthetics',[26] or a 'centre for cross-cultural artistic creation in Asia',[27] upon closer examination, it would appear that a key driver for such transformation lies primarily in the potential economic benefits which may accrue from cultural and artistic activities.

In other words, despite the rhetoric, Singapore's cultural policy has clearly eschewed an 'arts for arts' sake' mentality in favour of an instrumentalist approach in its supports of the arts and culture. As argued by Ooi, by subsuming the fine arts within the all encompassing umbrella of *creative industries,* which also covers commercially lucrative activities such as digital media and popular entertainment, Singapore's cultural policy runs into danger of suppressing the fine arts.[28] This is not to say that Singapore's instrumentalist approach is particularly unique; many governments, in facing the constant pressure to justify their support for the arts in times of economic downturn, resort to articulating the pragmatic and tangible aims of art and culture in their cultural policies.[29] However, what this means is that the fine arts are a poor cousin to their more commercial and profitable relations, and such a stance may go some way to explaining Singapore's questionable lack of moral rights.

Other answers may be found by examining parliamentary reports and local law academic literature, which *prima facie* indicate a curious lack of interest in moral rights doctrine. These sources reveal that the authorities were, at the outset, more concerned with ensuring that the copyright regime was sufficiently robust to support Singapore's fast growing economy in the 1980s, advance the

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26 Ministry of Information and the Arts (n 5) 5.

27 Economic Strategies Committee, *Making Singapore a Leading Global City* (Singapore Ministry of Finance 2010) 70.

28 Can-Seng Ooi, 'Subjugated in the Creative Industries: The Fine Arts in Singapore' (2011) 3 Journal of Current Cultural Research 119.

29 John Holden, *Capturing Cultural Value: How culture has become a tool of government policy* (2004) 15.

growth of its technology sector,[30] and to protect Singapore's trading interests with the US.[31] Although there was a parallel interest in encouraging the arts, mostly out of nationalist fervour, there was no corresponding concern about safeguarding the rights of artists.

It has also been argued by local academics that Singapore's culture may account for the absence of moral rights in its copyright regime.[32] Where culture is concerned, if we accept, at this juncture, 'culture' to mean the shared ideas, values, patterns of behaviour, practices, or customs of a particular social group,[33] then it can be argued that Singapore is a Confucian state i.e. it is governed based on Confucian principles and that Singaporeans, whether Chinese or non-Chinese, are generally influenced by Confucian ideals and values.[34] Some legal commentators argue that moral rights doctrine is alien to Confucianism, and thus inappropriate in Singaporean jurisprudence.[35] However, this chapter will argue that, while perhaps *copyright* is possibly 'alien' to Confucianism, moral rights doctrine is arguably harmonious with Confucian values.

There is another possible reason for the lacuna. It is no secret that Singapore's governing style may be described as soft-authoritarian,[36] and can sometimes be repressive. The arts in Singapore, have on occasion been heavily censored by the authorities,[37] as well as being defensively prone to bouts of rigorous self-censorship.[38] As moral rights have the potential to be used as a tool to combat censorship, it is perhaps unsurprising that they presently remain unrecognised in Singapore. Recent

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30 George Wei, 'A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore' (2012) 24 Singapore Academy of Law Journal 867, 868.

31 ibid., 870.

32 Lake Tee Khaw, Pek San Tay and W.L. Ng-Loy, 'Protection of Reputation in the Trade Mark and Copyright Laws of Malaysia and Singapore' in Andrew T. Kenyon, Megan Richardson and Wee Loon Ng-Loy (eds), *The Law of Reputation and Brands in the Asia Pacific* (Cambridge University Press 2012).

33 Based on one of the definitions listed in the OED online: 'The distinctive ideas, customs, social behaviour, products, or way of life of a particular nation society, people or period' in Oxford English Dictionary, *"culture, n."* (Oxford University Press).

34 B.H. Chua and Murdoch University. Asia Research Centre, *Communitarian Ideology and Democracy in Singapore* (Routledge 1995); Habibullah Khan, *Social Policy in Singapore: A Confucian Model?* (The International Bank for Reconstruction and Development 2001), 20; Charlene Tan, '"Our Shared Vales" in Singapore: A Confucian Perspective' (2012) 62 Educational Theory 449, 454-455; Yeow Tong Chia, 'The elusive goal of nation building: Asian/Confucian values and citizenship education in Singapore during the 1980s' (2011) 59 British Journal of Educational Studies 383.

35 Khaw, Tay and Ng-Loy (n 32)

36 Ooi, 'Soft Authoritarianism, Political Pragmatism and Cultural Policies: Singapore as a City for the Arts'(n 15).

37 Jeffrey Tan, 'Cultural Policy in Singapore: Government Funding and the Management of Artistic Dissent' (The 1st BUU International Arts and Design Conference and Workshop 2011) 31-35.

38 Beng Huat Chua, 'Culture and the Arts: Intrusion in Political Space' in Kwen Fee Lian and Chee Kiong Tong (eds), *Social Policy in Post Industrial Singapore* (BRILL 2008) 239.

incidents (discussed below) illustrate how both the arts are censored in Singapore and how moral rights may impede censorship.[39]

This chapter thus raises several questions concerning moral rights in Singapore. The primary thesis is that Singapore's copyright policy is influenced by its cultural policy, which explains its anachronistic lack of substantial moral rights. Basically, if Singapore has ambitions to be a truly artistic and cultural powerhouse, then this ambition should be reflected in, and backed up by, strong laws and regulations. If that is the case, it is argued that Singapore's current position, as regards its lack of moral rights and its clearly instrumentalist cultural policy, reflects an overtly utilitarian and commercial copyright regime, which would benefit from a more holistic approach that recognises the non-monetary incentives which drive creators. This would send a more robust message that Singapore cares deeply about its heritage and its artists.

At present, the message is ambiguous, at least in the eyes of the artistic community in Singapore. There have been incidents in the past where public art works have been removed or even destroyed without the knowledge of their creators.[40] While it remains contentious whether the destruction or removal of public or site-specific art is an element of the integrity right - the key question addressed in this thesis - the seemingly nonchalant manner in which these artworks were removed or destroyed is indicative of the indifference of art owners, and the relevant authorities, towards artists and art works. The Singapore art community has become increasingly vocal about the perceived lack of respect for local artworks, even as foreign artists and artworks are feted.[41]

The chapter will firstly examine Singapore's copyright regime to ascertain the intent and disposition of its lawmakers and law academics towards moral rights, in particular, the prevailing view that Confucianism is antagonistic towards moral rights. The issues raised within this discussion will be illuminated by reported quotes and opinions of local artists that reveal the extent of their frustration at the lack of moral rights, and examples of incidents involving the destruction/removal or generally dismissive treatment of local art works.

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[39] Lee Jian Xuan, 'Sex Objects Removed from the Show', *Straits Times* (16 February 2016) <http://www.straitstimes.com/lifestyle/arts/sex-objects-removed-from-art-show>

[40] These incidents have been previously documented on an online database, publicart.sg, by Peter Schoppert between 2001 and 2015. The data has now been transferred to Singapore's Public Art Trust. For more information about the original database, see <http://www.nusantara.com/PublicArtSG/> and also <https://www.hastac.org/blogs/elysianives/2011/09/25/singapore-public-art-open-database>. .

[41] Singapore artists have voiced their concern online over what they perceive as a lack of respect for them and their art. See for example: Suzz, 'Singapore artists call for respect and protection for their artistic practices' (Artitude, 2015) <http://www.artitute.com/2015/06/12/singapore-artists-call-for-respect/> .

After a brief discussion of the notion that copyright policy is generally influenced by or at least explained by cultural policy, this chapter will examine Singapore's cultural policy through an analysis of various governmental reports and political speeches and documentation, informed by sociological studies undertaken on Singapore's cultural landscape, to ascertain the extent to which instrumentalist aims and objectives, rather than aesthetic ones, underpin its cultural policy. It will be suggested that Singapore's cultural policy was influenced in part by the UK's own cultural policy formulated under the leadership of New Labour in the 1990s, which lends an interesting perspective considering those countries' hugely different cultural and historical backgrounds.

Ultimately, two possible conclusions may be drawn. Firstly, despite Singapore's cultural and artistic ambitions, its emphasis on 'creative industries' in cultural policy i.e. pursuing economic and instrumentalist aims, has the inadvertent and paradoxical effect of diminishing the status of the fine arts if these do not further these aims. This is reflected in significant anecdotal evidence that Singaporean creators perceive a lack of support for, and disinterest in local artistic heritage, which explains why moral rights doctrine is given short shrift in its copyright regime. Secondly, the absence of moral rights in Singapore's copyright regime, is not only at odds with other commonwealth jurisdictions but discordant with Singapore's aspirations to be perceived as a cultural capital.

3. Whither Moral Rights in Singapore?

This section explores two ostensible reasons for the lack of moral rights in Singapore: Confucianism and censorship policy, with the multiple aims of questioning and contesting the soundness of the former and of exploring the extent of the influence of the latter on moral rights. A third reason, considered later in the chapter is the utilitarian cultural policy adopted in Singapore, which reinforces a utilitarian copyright policy that favours economic rights over the more personal rights afforded by moral rights doctrine.

a. Confucianism and Moral Rights Doctrine

Moral rights doctrine has garnered curiously little attention from the legal profession in Singapore. Attention has been focused instead on the robustness of the Copyright Act of 1987. This, according to Ng-Loy, was enacted in response to two principal needs: that of the rapidly developing software industry which sough IP protection, and the demands by the US for greater IP protection in exchange for more favourable trading relations.[42] Wei further noted that, while trading privileges with the US was a factor, Singapore in the 1980s had reached a development position where embracing IP laws made political and economic sense, securing her position in the international trade and finance

[42] Wee Loon Ng-Loy, 'Singapore' in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia : law, economics, history and politics* (Springer 2009) 237-38.

community and encouraging research and development, as well as creativity and entrepreneurial activity, at home.[43]

The emphasis thus focused on the economic well-being of Singapore and how copyright might serve that well-being, with moral rights doctrine incidental to that perspective. Moral rights doctrine neither featured in the parliamentary debates on the copyright bill nor in the Report of the Select Committee on the Singapore Copyright Bill,[44] and local academic commentators have rarely engaged with the role of moral rights in any depth. Indeed, disinterest in moral rights continues today: the 2016 public consultation paper on proposed changes to the Singapore Copyright regime refers only briefly to the attribution right, and makes no mention of the integrity right at all.[45]

From academic perspective, Wei, in his survey of the development of copyright law in Singapore, refers only cursorily to moral rights doctrine, or the lack thereof, simply noting that the question whether Singapore should give greater recognition to moral rights is a major issue deserving of further study.[46] Elsewhere, he notes that some countries are not keen on moral rights as they have the potential to 'interfere with commercial exploitation'.[47] While not actually naming Singapore as such a country, his claim can be interpreted as a partial explanation of the absence of moral rights in Singapore. Seng makes a similar point, discussed below. Ong has examined the general question of why moral rights matter, although not within Singapore's specific circumstances.[48] Susanna Leong devotes a whole chapter to moral rights in her book on Singapore's intellectual property laws, but this is primarily a general description of moral rights doctrine as it is applied in other jurisdictions, rather than a rigorous investigation into the question identified by Wei.[49] However, she does suggest that a stronger set of moral rights would be 'a sign of Singapore's commitment to building a strong local artistic community'.[50]

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43 Wei (n 30) 870.

44 Select Committee, *Report of the Select Committee on the Copyright Bill [Bill No. 8/86]* (1986). The only reference to moral rights can be found in Professor Wei's submission on page A158.

45 Ministry of Law and Intellectual Property Office of Singapore, *Public Consultation on Proposed Changes to Singapore Copyright Regime* (23 August 2016).

46 Wei, (n 30) 899.

47 George Wei, 'Comparison of the TRIPS provisions with the current intellectual property laws of Singapore' (1997) 1 Singapore Journal of International and Comparative Law 154, 171.

48 Ong (n 8).

49 S.H.S. Leong and Singapore Academy of Law, *Intellectual Property Law of Singapore* (Academy Pub. 2013), chapter 12.

50 ibid., 302.

In contrast to Leong's suggestion, Seng, when asked to suggest proposed legal reforms to the copyright regime in Singapore, chose to reiterate that Singapore was not obliged to implement Art.*6bis*. He further cautioned against the recognition of moral rights doctrine, on the basis that it might 'cramp the development of a multimedia works industry'.[51] His appraisal of moral rights was dismissive in general: 'In view of the *uncertainty of the scope of such rights*, their *unclear utility* and the pending technological developments in electronic rights management, it may be pertinent to shelve the implementation of such rights [emphasis mine].'[52]

Although the questions as to why Singapore does not recognise moral rights and whether it should, have not been explored in any depth, it appears that, with the possible exception of Seng, the leading IP academics in Singapore believe that the recognition of moral rights merits further in-depth study.

A local study has however advanced an explanation as to why moral rights are not recognised in Singapore. In *The Law of Reputation and Brands in the Asia Pacific*, the authors of the chapter on Singapore and Malaysia, Khaw, Tay and Ng-Loy, consider the roles that Islam and Confucianism play in relation to moral rights in Malaysia and Singapore respectively.[53] Where Singapore is concerned, they start from the premise that moral rights doctrine is absent in Singapore owing to a concern that the inalienable and perpetual nature of the rights may hamper commercial activity.[54] They then consider the question as to whether Confucianism, on which the Singapore government's leadership style is based,[55] accounts for the lack of moral rights, in that 'the very notion of authors having rights over their works is alien in Confucianism.'[56]

The proposition that Confucianism accounts for the apparent resistance of Asian countries to the implementation of intellectual property rights is not new.[57] The foremost study of this

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51 Daniel Seng, *Some Proposals for Reform in the Area of Intellectual Property Rights Arising from the Electronic Commerce Hotbed Annex H* (Electronic Commerce Hotbed (ECH) Policy Committee: Legal, Regulatory and Enforcement Study Group: Final Report, 1997).

52 ibid.

53 Khaw, Tay and Ng-Loy (n 32).

54 ibid., 102-103.

55 ibid; Jonathan Ocko, 'Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context' (2013) 8 Yale Journal of Law & the Humanities 559, 563.

56 Khaw, Tay and Ng-Loy (n 32) 103.

57 Daniel Burkitt, 'Copyrighting culture - the history and cultural specificity of the Western model of copyright' (2001) 2 Intellectual Property Quarterly 146, 175; Ilhyung Lee, 'Culturally-based Copyright Systems?: The US and Korea in Conflict' (2001) 79 Washington University Law Review; P.K. Yu, *The second coming of intellectual property rights in China* (Benjamin N. Cardozo School of Law, Yeshiva University 2002); Peter K. Yu, 'The Confucian Challenge to Intellectual Property Reforms' (2012) 4 The WIPO Journal 1; John Alan Lehman, 'Intellectual Property Rights and Chinese Tradition Section:

phenomenon is *To Steal A Book is an Elegant Offence* by William Alford,[58] who emphasised the Chinese preoccupation with the past and quotes the following saying from the *Analects of Confucius*, 'I transmit rather than create; I believe in and love the Ancients'.[59] The same quote is also referred to in *The Law of Reputation and Brands*.[60] The underlying claim is that the concepts of originality and authorship are incompatible with Confucianism.[61] Under Confucianism, it is argued, as a transmitter utilising and developing the wisdom of those who have gone before, rather than a creator in their own right, no single individual may be regarded as the originator or author of a work. This means that the work therefore cannot be the property of any one person (copyright), that it cannot be attributed to a named individual (paternity right) and that any changes made to it would not harm anyone's reputation or honour (integrity right).[62] Furthermore, Alford's book title implies that Confucianism does not recognise copying as an offence.[63] Apart from this apparent Confucian rejection of both originality and the notion that copying is unethical, another contributing factor is the idea that knowledge and intellectual creations are more properly public goods, which are subject to collective or social ownership, not private property rights.[64] All these features of Confucian ethics are said to account for, among other things, China's weak IP enforcement record, rife piracy in Asian countries, and, of course, the lack of moral rights in Singapore according to *The Law of Reputation and Brands*.

However, attractive as the Confucian theory may be, it has been subject to stringent criticism. Shao for instance, cautions against a less than secure interpretation of Chinese history and Confucian principles in formulating this now rather hackneyed rationale of China's engagement with intellectual property.[65] He argues that intellectual property experts, including Alford, who are not experts in Chinese history and culture, have propagated misleading views, and thus implies that this popular theory is built on questionable foundations. Shao, in an earlier paper, had surveyed actual historical

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Philosophical Foundations' (2006) 69 Journal of Business Ethics 1; Peter Yu, 'Intellectual Property and Confucianism' in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests and Intersections* (Cambridge University Press 2015); Guan Hong Tang, 'China' in Gillian Davies and Kevin Garnett QC (eds), *Moral Rights* (Sweet & Maxwell 2010).

58 W.P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press 1995).

59 ibid., chapter 2.

60 Khaw, Tay and Ng-Loy (n 32) 118.

61 ibid., 118.

62 ibid., 118.

63 Wei Shi, 'The Paradox of Confucian Determinism: Tracking the Root Causes of Intellectual Property Rights Problem in China' [2008] The John Marshall Review of Intellectual Property Law 454.

64 Lee (n 57) 1121, 1124; Burkitt (n 57) 180-81.

65 Ken Shao, 'Chinese Culture and Intellectual Property: Let's Realise We Have Been Misguided' (2012) 4 The WIPO Journal 103.

incidences in Chinese history in order to demonstrate that copyright principles were not entirely alien to Chinese culture.[66] Shi also questions the inability of the Confucianism theory to account for the lower rates of piracy in Japan and Korea (both countries being strongly influenced by Confucianism) as compared to China.[67] Indeed, Alford himself has cautioned against cultural factors or explanations being conclusory.[68] Cultural factors are not irrelevant; on the contrary they may be highly relevant,[69] but they must be viewed with prudence. The moral here is that where one is particularly enthused by a supposedly explanatory theory, one should be all the more careful to ensure that enthusiasm has not caused one to overlook, overemphasise or misinterpret the evidence.

There are problems therefore with the point made in *The Law of Reputation and Brands*, which relies wholesale on the proposition that Confucianism accounts for the lack of moral rights in Singapore. While this proposition has its proponents, more recent and measure analysis of the evidence for it suggests that it is a theory which cannot be accepted indiscriminately. It is unfortunate that the proposition was given rather slim coverage in *The Law of Reputation and Brands*, with minimal scholarly scrutiny.[70] It is submitted that, contrary to this proposition, there is ample scope for arguing that moral rights doctrine may be wholly acceptable to Confucian ethics and Chinese culture. This is premised on two fundamental elements of Chinese culture which have their roots in Confucianism: the concept of 'face', or *mianzi,* and the reverential and elevated status of scholars, poets and other intellectual creators in Chinese culture.

An in-depth study of the effects of either *mianzi* or the deep reverence for intellectuals in Chinese culture is outside the scope of this thesis. However, a brief overview of these factors will suffice to reiterate the point that firstly, Confucianism does not account entirely for the absence of moral rights, secondly, that Confucian principles may actually work in harmony with moral rights doctrine, and thirdly, that the thesis in *The Law of Reputation and Brands,* in failing to take into account these extra factors, has arrived at a conclusion which is, at best, premature.

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66 Ken Shao, 'An Alien of Copyright? A Reconsideration of the Chinese Historical Episodes of Copyright' (2005) 4 Intellectual Property Quarterly 400.

67 Shi (n 63) 457. At 458, Shi also claims that the adage, 'To Steal A Book is an Elegant Offence' was misattributed to Confucius.

68 Alford (n 58) 6. See Peter K. Yu, 'The Sweet and Sour Story of Chinese Intellectual Property Rights' in Graham Dutfield and Uma Suthersanen (eds), *Technology, Progress and Prosperity: A History of Intellectual Property and Development* (Palgrave Macmillan 2014).

69 J.E. Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing, Incorporated 2009) 78-80; R.J. Coombe, S. Fish and F. Jameson, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press 1998).

70 Khaw, Tay and Ng-Loy (n 32) 118.

The concept of *mianzi* appears to cover a spectrum of qualities, encompassing self-respect, pride, dignity, confidence, image, respectability and status.[71] Cheng explains that 'to lose *mianzi* means...that one's honour is not honoured or one's honour is not recognised',[72] and that *face* 'presents the identity as well as the individuality of a person', which echoes the underlying principles of moral rights doctrine, with its focus on the creator's personality. One may also recall that the integrity right in particular refers to prejudice to honour or reputation as defined in Art.6*bis*. Hansen, in drawing similar parallels 'between a violation that causes loss of 'face' with a violation that impinges upon a creator's moral rights', argues that on this basis, emphasising an artist's honour could lead to a more effective enforcement regime in China.[73] In modern day China, while there has been considerable resistance to the adoption of economic rights, the adoption of moral rights has been unproblematic, primarily because the idea of protecting reputation and honour resonated well with Chinese culture.[74]

The other cultural factor is the deep reverence and elevated status for intellectuals and intellectual activities or pursuits.[75] While this factor has been used to explain away the incompatibility between Confucianism and copyright, it can also be used however to explain further parallels between moral rights doctrine and Confucianism, in addition to those already mentioned above. The anti-copyright argument hinges on the disdain that Confucianism traditionally heaps upon profit-making ventures as opposed to purely intellectual pursuits.[76] Generally, profit-making pursuits were seen as inferior to intellectual ones, and hence any scholar who sought a monetary return on his scholarship, akin to the economic rights afforded by copyright, was frowned upon. Further, as intellectual pursuits and education were considered to be so important, it was also believed that the fruits of intellectual efforts should be shared freely for the benefit of society. Finally, as the act of copying was considered

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71 Qiumin Dong and Yu Feng L Lee, 'The Chinese concept of Face: A perspective for Business communicators' (2007) Journal of Business and Society 401, 402.

72 Chung-ying Cheng, 'The Concept of Face and its Confucian Roots' (1986) 13 Journal of Chinese Philosophy 329, 335.

73 Heidi Hansen Kalscheur, 'About "Face": Using Moral Rights to Increase Copyright Enforcement in China' (2012) 39 Hastings Constitutional Law Quarterly 513.

74 ibid., 527; Tang (n 57) 24-008.

75 Lee (n 57) 1125.

76 Betty Yung, 'Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective' (2009) 87 Journal of Business Ethics 45, 50; Richard E Vaughan, 'Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian and Islamic Comparison' (1996) 2 ILSA Journal of International and Comparative Law 307, 342; Lehman (n 57) 6.

to be a legitimate act of scholarship and learning,[77] the copying of an earlier work was not only in itself desirable, it was also a way of honouring the author of the copied work.[78]

These arguments, which explain anti-copyright sentiments, clearly reflect not only the regard that Confucianism has for learning but also the high esteem in which intellectuals and their works are held. Therefore, as moral rights aim to preserve not only a creator's honour or reputation, but also the integrity of the creator's work itself, it can be argued that, unlike the economic attributes of copyright, moral rights doctrine dovetails neatly with these fundamental Confucian principles. While the authors in *The Law of Reputation* may be correct to say that 'the very notion of authors having rights over their works is alien in Confucianism,' it is only really so perhaps with respect to the *economic* rights conferred by copyright but not really the case with rights associated with moral rights doctrine.

b. Censorship in Singapore – conflict between Moral Rights and Public Sentiment

In 2011 at the Singapore Biennale, an international contemporary art exhibition held in Singapore since 2006, Simon Fujiwara's *Welcome to the Hotel Munber (2010)* was exhibited at the Singapore Art Museum (SMA). *Munber* was a re-creation of a hotel bar owned by the artist's parents in the 1970s, under Franco's dictatorship. Apart from the usual paraphernalia found in a typical hotel bar such as glasses and napkins, the displayed artefacts included objects which alluded suggestively to male genitalia, e.g. sausages impaled on skewers etc, as well as homosexual erotic magazines. The purpose was to examine the brutal oppression and censorship suffered by the gay community under Franco's regime. On the exhibition's opening, the magazines were removed by the SMA on the basis that pornography was illegal in Singapore, thus also ironically displaying the very same bigotry which was being attacked by the work i.e. censorship of homoerotic pornography.[79] Upon learning of this, Fujiwara requested the immediate closure of the exhibit.

In removing the magazines, the SMA altered the piece and then exhibited the piece in its altered state without having consulted Fujiwara. Apart from a possible breach of the false attribution right,[80] which is recognised in Singapore, the alteration arguably amounted to a breach of the integrity right, which is unrecognised. The removal of the magazines was at least a modification of the work within Art.6*bis* Berne Convention. Art.6*bis* also requires 'prejudice to honour or reputation'. While

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77 Lee (n 57) 1127.

78 ibid., 1128.

79 Susie Lingham, *Art and Censorship in Singapore: Catch 22?* (ArtAsiaPacific 2011).

80 As the work has been altered, it is no longer Fujiwara's original work, and therefore by continuing to display the work in its altered state in Fujiwara's name, SMA has arguably falsely attributed a completely different work to Fujiwara under s.189 (a) Copyright Act 1987 (Singapore).

this requirement has been transposed into UK law [81] it is not a requirement in French law for example,[82] and hence is not by any means a universal and necessary requirement of the integrity right. If imposed however, how should such a requirement be applied in this situation? Fujiwara's view was that by removing the erotica, the work was rendered 'meaningless, almost a tribute to Franco in the end.'[83] According to UK case-law, the fact that the artist himself feels aggrieved is not sufficient.[84] That Fujiwara was clearly affronted, as he had demanded the immediate closure of the exhibit, may not in itself be sufficient under UK law to amount to a breach of the integrity right.[85]

The work was clearly diminished by the removal of an integral element i.e. the pornographic magazines; its message and vision utterly disrupted. Fujiwara is a highly accomplished award-winning artist whose works combine deeply personal and autobiographical elements with historical and socio-political events and issues.[86] In *Munber,* the homoeroticism prevalent throughout the piece was deeply connected to Fujiwara's own personal life and psyche, being gay himself. The work's stark message of censorship and oppression of gay pornographic material, would be lost if the erotic material within his work was removed. The historical and socio-political message, a practice for which Fujiwara is known, would also be missing from the work. Its audience would be left to ponder only about the eroticism of the work but not its socio-political message. It is arguable that the subtraction of these elements, critical to the artist's vision, would weaken the piece – making it a less meaningful and shallower work - meaning Fujiwara's honour or reputation as an artist would be prejudiced, and therefore the alteration of his work was arguably a breach of his integrity right. Apart from damages, the key remedy for a breach of moral rights is an injunction to prevent or correct the act to which the author objects. In Fujiwara's case, he could demand that the pornographic material be reinstated. Should he succeed, this would surely obstruct SMA's efforts to censor his work.

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81 s.80(2)(b) Copyright Designs and Patents Act 1988 (United Kingdom).

82 Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 201, 205.

83 Yi-Sheng Ng, 'Simon Fujiwara: Censored at the Singapore Biennale 2011' (*Fridae,* 2011) <http://www.fridae.asia/gay-news/2011/03/25/10744.simon-fujiwara-censored-at-the-singapore-biennale-2011>

84 *Pasterfield v Denham and Another* [1999] FSR 168.

85 While the scope of the integrity right in the UK is not clear, academic literature suggests that the assessment of derogatory treatment which is prejudicial to honour or reputation is an objective one: S. Stokes, *Art and Copyright* (Bloomsbury Publishing 2012) para 4.2.5.

86 The Falmouth Convention, Fujiwara's bio: <http://www.thefalmouthconvention.com/simon-fujiwara> ; Pavel Pys, 'Artist's profile: Fujiwara', This is Tomorrow-Contemporary Art Magazine, <http://thisistomorrow.info/articles/artist-profile-simon-fujiwara> .

Although not widely explored, the potential of moral rights doctrine in serving as a shield against censorship has been raised before.[87] More often, however, academics have focused on the possible ill effects of moral rights as creators may invoke moral rights in order to prevent others from making use of their works, thus stifling creativity as a whole.[88] Indeed this is exactly what Seng cautioned against when invited to present his views on reforming intellectual property laws in Singapore.[89] However, a few have recognised the converse, in that moral rights doctrine may serve to protect an artist's freedom of expression.[90] Richard Serra, for instance, has written about his experiences regarding the notorious dismantling of his work *Tilted Arc* in 1989,[91] which he regarded as censorship and suggested that if applicable, Art.6*bis* would have assisted in saving *Tilted Arc*.

Adler has highlighted *Tilted Arc* as an example to illustrate the point that artists would always want to create and preserve works which the public wish to see destroyed, and therefore the wishes of artists may not always accord with public sentiment,[92] which was an argument against the recognition of moral rights as the doctrine would allow artists to ride roughshod over public feelings. Likewise, in Fujiwara's case and other censorship cases in Singapore,[93] the main rationale for altering or removing a work is that the work in question is at odds with the general sentiments of the Singapore public.[94] In Fujiwara's case, not only was the public display of pornographic material illegal in Singapore,[95] the inclusion of such material was also considered to be too controversial for the palates of the typical

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87 Maree Sainsbury, *Moral Rights and their application in Australia* (The Federation Press 2003), 5; Susan Rabin, 'Moral Rights and the Realistic Limits of Artistic Control' (2010) 14 Golden Gate University Law Review 447, 453.

88 Amy M. Adler, 'Against Moral Rights' [California Law Review, Inc.] (2009) 97 California Law Review 263; Geri J. Yonover, 'The Precarious Balance: Moral Rights, Parody, and Fair Use' (1996) 14 Cardozo Arts and Entertainment Law Journal 79; WF Patry, *Copyright Law and Practice* (Bureau of National Affairs 1994) 1049.

89 Seng (n 51).

90 Rabin (n 87); Aaron Clark, 'Not All Edits Are Created Equal: The Edited Movie Industry's Impact on Moral Rights and Derivative Works Doctrine' (2005) 22 Santa Clara High Technology Law Journal 51; Methaya Sirichit, 'Censorship by Intermediary and Moral Rights: Strengthening Author's Control Over Online Expressions Through the Right of Respect and Integrity' (2015)1 Journal of Law, Technology and Public Policy 54.

91 Richard Serra, 'Art and Censorship' (1991) 17 Critical Inquiry 574.

92 Adler (n 81) 274.

93 See for example, '*Queer Objects: An Archive for the Future*' by Loo Jihan (Lee Jian Xuan, 'Sex Objects Removed from Art Show' *The Straits Times* (Singapore, 16 February 2016)); '*Talaq*' by Elangovan (Mohan Srilal, 'Culture Singapore: Controversial Play Tests Artistic Freedom' *Inter Press Services* (7 November 2000)).

94 K.P. Tan, *Renaissance Singapore? Economy, Culture, and Politics: Economy, Culture, and Politics* (SINGAPORE University Press 2007) 71.

95 s.292 Singapore Penal Code.

Singaporean museum attendee.[96] In exercising his moral rights, if they had existed, Fujiwara's insistence on preserving the magazines would have hindered the SMA's censorship of his work, resulting in possibly jarring the perceived fragile feelings of Singaporeans.

More recently, when Zihan Loo's installation of 81 objects with LGBT connotations, entitled *Queer Objects: An Archive for the Future,* was exhibited at Singapore's Institute of Contemporary Arts (ICA), two of the objects were removed by the director of the ICA.[97] In this instance, the ICA had consulted with the artist prior to the removal of the objects. Again, the removal of the objects was on the basis of avoiding offence. In this case, the artist relented. However, as in Fujiwara's situation, Loo could arguably have relied on the integrity right, if applicable in Singapore, to insist on the reinstatement of the objects, which would have thwarted the ICA's attempts at censorship, although this may also have incurred the risk of having the entire exhibit shut down and removed.

Adler, however, misses the point. The destruction of *Tilted Arc* was not clearly and necessarily a benefit to the public at large. Likewise, the alteration of *Munber,* was not clearly and necessarily a benefit to museum visitors in Singapore. There are many important issues at play here. For instance, the dismantling of *Tilted Arc* or the modification of *Munber*, were clearly violations of the right to freedom of expression on the part of the artist. Just because the public dislikes the content of an expression, does that automatically give it the right to destroy that expression?[98]

The spectre of censorship is Singapore's art and culture industry's perennial sword of Damocles, and it is not one likely to disappear in the near future.[99] According to Lee, Singaporean artists 'feel emasculated by a censorship code marked by ambiguity and fluidity'.[100] The tensions faced by local artists in maintaining artistic integrity while being careful not to disrupt social harmony, were clearly articulated in a forum on censorship held at the National University of Singapore in 2003 entitled *Social Harmony: You Can't Please Everyone!* There, artists recognised that sometimes in order for one to be both a true *artist* and a true *citizen*, it was necessary to be 'irresponsible for the sake of

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96 Corrie Tan, 'Museum Censors Explicit Art Work' *The Straits Times* (Singapore, 28 March 2011).

97 Jian Xuan Lee, 'Sex Objects Removed from Art Show' *The Straits Times* (Singapore, 16 February 2016) <http://www.straitstimes.com/lifestyle/arts/sex-objects-removed-from-art-show>.

98 Serra (n 91).

99 T. Lee, *The Media, Cultural Control and Government in Singapore* (Taylor & Francis 2010) 27-28; David Birch, 'Film and Cinema in Singapore: Cultural Policy as Control' in Albert Moran (ed), *Film Policy: International, National, and Regional Perspectives* (Routledge 1996); Can-Seng Ooi, 'Reimagining Singapore as a creative nation: The politics of place branding' (2008) 4 Place Branding and Public Diplomacy 287, 296-297; Chua (n 34) 238-242.

100 Lee (n 99) 27.

truth' but that this stance may invoke the ire of the censors.[101] Faced with such an uneasy and uncertain situation, Singaporeans working in the artistic and cultural sectors would be comforted by the availability of moral rights in affording them some form of a shield against the unpredictable threat of censorship which interferes with their art. Conversely, it is equally understandable why the recognition of moral rights doctrine might be disagreeable to censors in Singapore.

4. A Lack of Respect and a Palpable Need for Moral Rights in Singapore

This section highlights examples of incidents in which local artists and artworks have been subjected to questionable treatment. The examples serve to illustrate situations in which the doctrine might assist artists and also to impart some understanding of the general environment and culture in which artists in Singapore operate, and the typical attitudes which they face, as well as their own concerns about the situation.

We have already encountered *Hotel Munber* and *Queer Objects*, both of which are examples of situations where the moral rights, had they existed in Singapore, could have been invoked by the artists concerned. Other incidents involve works which have been copied by public authorities. An example is a work produced in 2015 by Sport Singapore (a statutory board of the Singapore Ministry of Culture Community and Youth) entitled *Ping Pong Hustle*, which bore an uncanny resemblance to *Ping Pong Go Round*,[102] a well-publicised work by a Cultural Medallion recipient, Lee Wen.[103] When confronted with the allegation that they may have copied Lee Wen's work and prompted for an explanation, Sport Singapore immediately removed *Hustle*, claiming that they had not been aware of Lee Wen's work and as a gesture of goodwill, offered to compensate him.[104] The claim that they had been unaware of the work was greeted with scepticism among members of the local arts community as the work had been touring the world since 1998, and had been exhibited at the Singapore Art Museum in 2012.[105] Furthermore, Lee Wen claimed that he had submitted a proposal in 2014 to the

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101 Sasitharan in Ruth Bereson, 'Renaissance or Regurgitation? Arts Policy in Singapore 1957-2003' (2003) 1 Asia Pacific Journal of Arts & Cultural Management 1, 9.

102 'Ping-Pong Go Round', <http://leewen.republicofdaydreams.com/ping-pong-go-round.html>.

103 The Cultural Medallion is a prestigious award which recognises individuals for their excellence in and contribution to the arts in Singapore. <https://www.nac.gov.sg/singaporeartsscene/culturalMedallion/overview.html>.

104 Today, 'Sport Singapore to pay artist Lee Wen over SEA Games ping-pong installation' *Today* (Singapore, 13 June 2015).

105 Corrie Tan and Benson Ang, 'Horse shoe-shaped ping-pong table by SEA Games organiser simiilar to artwork by artist Lee Wen' *The Straits Times* (Singapore, 5 June 2015) <http://www.straitstimes.com/lifestyle/arts/horse-shoe-shaped-ping-pong-table-by-sea-games-organiser-similar-to-artwork-by-artist>

Ministry to exhibit the work in front of the Singapore Sports Hub.[106] However, copyright issues aside, the most instructive aspect of this incident was the expression of indignation by fellow artists. More than 200 artists signed an open letter calling for a discourse on intellectual property rights and artistic practices, and expressing their concern about the seeming lack of respect for local artists and their work in Singapore.[107]

Similar issues were involved in a dispute between the Singapore Tourist Board (STB) and a local design firm, DoodleRoom. DoodleRoom had designed the covers of the Singapore Art Week Guide for the STB in 2013 and later discovered that the same cover had been recycled for the 2014 edition without either payment for the later use or even acknowledgment. The STB responded that the subsequent use was in accordance with industry norms, and they had full contractual rights to reuse or modify the same work.[108] Aware that their actions may have ruffled feathers among the creative community, STB also emphasised that they fully respected intellectual property rights as well as the development of local creative talent.[109] Regardless of the legality of the situation, local artists were unimpressed with the STB, particularly in light of the fact that the guidebooks were to be used in conjunction with Singapore Art Week, an event celebrating Singapore as a cultural hub for the arts.[110]

The fairly widespread practice of removing or destroying commissioned public art sculptures in Singapore is also illustrative of the seemingly dismissive manner in which public art is treated by their proprietors.[111] Swee Lin Tay, general manager of Sculpture Square, a non profit organisation which promotes the arts in Singapore, describes the general fate of public art in Singapore as 'easy come easy go'.[112] An examination of an online database of public art in Singapore, which was maintained between 2001 and 2015, indicates that at least 30 artworks have been relocated, modified or destroyed.[113] Although relocation may not fall squarely within the integrity right, it is possible to

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106 Alvin Tan, 'Call for discourse on IP, artistic practices' *Today* (Singapore) <http://www.todayonline.com/voices/call-discourse-ip-artistic-practices?singlepage=true>.

107 ibid; Suzz (n 41),

108 Elizabeth Low, 'STB gets in agency spat over "recycling" ideas' (2014) <http://www.marketing-interactive.com/stb-gets-agency-spat-recycling-ideas/>.

109 Singapore Tourism Board, 'STB Media Statement: Response to DoodleRoom's Facebook Post' (2014) <http://www.ttwasia.com/news/article/stb-media-statement-response-doodlerooms-facebook-post/> (last accessed 21 March 2018).

110 Yi-Sheng Ng, *On Creativity, Copyright & State-funded festivals* (2015) <https://sifa.sg/2015/sifa/blog/On-creativity-copyright-state-funded-festivals/>.

111 David Chew, 'Where art thou?' *Today* (Singapore, 19 April 2007).

112 ibid.

113 PublicArt.sg was an online database maintained by Peter Schoppert between 2001 and 2015. It is still available in a different format at <http://www.nusantara.com/PublicArtSG/>. A description of the original database can be found in a blogpost by Elysian McNiff at <https://www.hastac.org/blogs/elysianives/2011/09/25/singapore-public-art-open-database>.

argue that in relation to *site-specific* works at least, the mere relocation would modify or even destroy the work. For instance, Serra maintained that because *Tilted Arc* was created especially for Federal Plaza, relocation would be utterly meaningless and the sculpture would be as good as completely destroyed.[114] Ooi attributes this dismissive attitude to a pervasive perception in Singapore of visual art as being nothing more than decorative ornaments.[115] It is also fair to say however that despite the best intentions, owing to the lack of space for storage and the unfavourable climate, art work is often destroyed if it is not sold or otherwise disposed.[116]

The responses of the local artists who have been affected by such practice reveal varying attitudes, ranging from the resigned and stoical to the indignant. Ramon Orlina, who created *Wings of Victory* for a popular shopping centre, was distraught to discover that it had been removed without his knowledge. He has not been able to discover anything further about its fate and it is presumed destroyed. His recollection of the owners' attitude to the removal is telling: '...they said we own everything in the building and we paid for the work, so we can do whatever we want with it.'[117] Milenko Prvacki, whose wife has had one of her works destroyed previously,[118] echoed a similar sentiment, 'Because they own the works, they do what they want, including destroying the works when they can be stored or relocated.'[119]

Prominent local sculptor, Tan Teng Kee, has had at least two of his works relocated,[120] which arguably amounts to a modification in their meaning or expression. His response to these acts was as follows: 'As sculptors we have no choice: those who own property in Singapore don't know the value

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114 Eric M. Brooks, '"Tilted" Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention' [California Law Review, Inc.] (1989) 77 California Law Review 1431, 1432.

115 Ooi, 'Subjugated in the Creative Industries: The Fine Arts in Singapore' (n 28) 131.

116 Yasmine Ostendorf, *Creative Responses to Sustainability: Cultural initiatives engaging with social and environmental issues* (2015) 19-20.

117 Chew, (n 111).

118 Delia Prvacki created six stoneware water features at the Singapore Power Building in 2001. She discovered in 2007 that four of them had been removed, presumably destroyed. See ibid.

119 Lijie Huang, 'Art here, there and everywhere' *The Straits Times* (Singapore, 27 March 2014) <http://news.asiaone.com/news/singapore/art-here-there-and-everywhere?nopaging=1>.

120 *Musical Fountain* (1974) originally created for Plaza Singapura but installed at Marina City Park. According to Schoppert's public art database, the present location is unknown. *Endless Flow* (1980) was originally intended for OCBC headquarters but relocated to Bras Basah Park.

of sculpture, and when they want to develop their property, something has to give way.'[121] Further, he thinks it is '...plain rude not to inform an artist even if the work is only meant to be moved.'[122]

These examples demonstrate firstly the rather lackadaisical attitude on the part of those who commission and own art in Singapore, and secondly the frustration felt increasingly by local artists who are bereft of moral rights which may serve to counter such treatment of their works. Such incidents reflect badly on Singapore's ambitions and cultural policy on becoming a global cultural hub, which will be examined in the next section.

5. Cultural Policy in Singapore

This section is divided into two parts. The first explores in general the relationship between copyright policy and creators/creativity as well as the interrelationship between copyright policy and cultural policy, arguing that copyright policy not only reflects the current cultural policy but it also serves as an instrument or tool of a nation's cultural policy. The two are inextricably linked. The general hypothesis made here is that copyright legislation which clearly favours the economic rights of copyright but ignores moral rights, which is the case in Singapore, reflects a cultural policy which is overtly instrumentalist and economic. It is also argued that such a stance is at odds with not only its overarching aims but is also incommensurable with the needs and desires of creators. The second part examines Singapore's cultural policy to demonstrate its manifestly economic approach instead of an artistic or cultural one, an approach which both reflects, and is reflected in, its copyright regime.

a. Copyright, Creativity and Cultural Policy

This section focuses on cultural policy, as opposed to Singapore's culture, of which Confucianism may be said to describe. The concepts of 'culture' and 'cultural policy' are interrelated, in that cultural policy provides a framework for regulating the outputs of culture. Both concepts are however in themselves highly variable and contested.[123]

Culture is a notoriously elusive concept, which may be described as pertaining to the norms, behaviour patterns, customs etc of a social group, which is a sociologist's perception of culture,[124] and which was relevant to the discussion of Confucianism. It depends on the point of view adopted, because to an anthropologist, since culture would constitute the 'way of life' of a particular social

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121 T.K. Sabapathy, *Sculpture in Singapore* (National Museum Art Gallery 1991) cited in *Public Art in Singapore*, a website dedicated to Singapore public art, maintained by Peter Schoppert at <http://www.nusantara.com/pasta/home/theartwo/endlessf.html>, (n 113).

122 Chew, (n 111).

123 Clive Gray, 'Analysing Cultural Policy: incorrigibly plural or ontologically incompatible?' (2010) 16 International Journal of Cultural Policy 215, 218.

124 Roger Scruton, *Culture Counts: Faith and Feeling in a World Besieged* (Encounter Books 2007) 1.

group, then all products are cultural products, including furniture, food, drink, clothing and other functional items.[125] A much narrower definition is 'the creation and creator of elites' to include art, music and literature.[126] It can be seen however, that there is commonality between these viewpoints: these disparate elements, be it norms or customs, furniture or food, music or literature, comprise a form of 'social glue' and 'a common framework of understandings for the members of society to organise and interact around'.[127] For the purposes of this chapter, the discussion of cultural policy and copyright here is concerned more with the expressive output of culture, which in this case would encompass the less functional but more aesthetic or artistic expressions such as music, art, literature, drama etc. While cultural policy regulates the production and dissemination of such expressions, copyright provides the legal framework for such production and dissemination.[128]

That there is a close relationship between copyright law and culture or cultural policy seems a universally accepted notion. These are but a sample of various academic statements which have been expressed about the relationship between copyright law and culture/cultural policy: 'Copyright is cultural law'.[129] 'Culture and Intellectual Property are connected.'[130] 'The decision to protect intellectual property, and the nature and scope of such protection reflects the value that a particular culture places upon the creative act.'[131] 'Copyright law is an essential instrument of national cultural and information policy.'[132] 'Copyright has been fundamental to the cultural industries....'[133] Copyright laws 'are a component of local cultural...policies. As such they express each sovereign nation's aspirations for its citizens: exposure to works of authorship and participation in their country's cultural patrimony.'[134] The difficulty lies in extracting the meaning behind these statements. In effect they raise further questions: Why is copyright also deemed cultural law? In what way is culture and

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125 David Hesmondhalgh, *The Cultural Industries* (Sage Publications 2013) 16; Scruton (n 124) 1; Clive Gray, 'Managing Cultural Policy' (2009) 87 Public Administration 574, 576.

126 Scruton (n 124) 1-2.

127 Gray, 'Analysing Cultural Policy: incorrigibly plural or ontologically incompatible?' (n 123) 221.

128 S.W. Halpern and P. Johnson, *Harmonising Copyright Law and Dealing with Dissonance: A Framework for Convergence of US and EU law* (Edward Elgar Publishing Limited 2014) 24.

129 Mira T. Sundara Rajan and Mira T. Sundara Rajan, 'At the frontiers of law-making: copyright and the protection of culture in India' (2012) 4 The WIPO Journal 111.

130 Shubha Ghosh, 'Cultivating Intellectual Property' (2012) 4 The WIPO Journal 28.

131 A.A. D'Amato and D.E. Long, *International Intellectual Property Anthology* (Anderson Publishing Company 1996) 111.

132 Graeme B. Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 University of Pennsylvania Law Review 469, 471.

133 Hesmondhalgh (n 125) 158.

134 Jane Ginsburg, 'International Copyright: From a 'Bundle' of National Copyright Law to a Supranational Code?' (2000) 47 Journal of the Copyright Society of USA 265 in Halpern and Johnson (n 128) 22.

intellectual property connected? How does copyright operate as an instrument of cultural policy and why is it fundamental to cultural industries?

In order to ascertain a link between Singapore's apparently economically biased cultural policy with its utilitarian copyright policy, it is important to first examine the aims of copyright law. The examination here is brief as the aims have already been addressed above in chapter 2 and in abundance in academic literature. The more important question is, in view of copyright's perceived relationship with the creative and cultural industries, whether such aims coincide with what creators truly want and expect from the law, where their creations are concerned. Further, copyright's increasing importance and role in the establishment of the creative industries, which include creative but essentially commercial activities such as advertising, suggests a growing emphasis on the economic rather than cultural value of cultural products. It is thus questioned as to whether copyright's emphasis on the economic rather than the intrinsic, fails to acknowledge the true value and importance of cultural products and their creators.

The common law copyright model - Singapore's legal system is founded on the common law - is primarily concerned with encouraging the production of new works,[135] as reflected in the title to the Statute of Anne, 'An Act for the Encouragement of Learning'. The US Copyright Clause echoes similar aims: '...to promote the progress of science and useful arts...' which was to be achieved through the dissemination of knowledge.[136] This utilitarian justification is supported by the view that works of authorship are commodities, mere consumer goods,[137] produced in exchange for economic rewards. This stance, discussed in depth in chapter 2 above, explains the overt reliance on economic rewards in the copyright system, while dismissing intrinsic ones, such as the protection afforded by moral rights. However, there are arguably inconsistencies in rationalising the copyright system in this manner. If the goal is to disseminate new works for the benefit of the public, then it is counterproductive for misleading or inaccurate works to be communicated to the public,[138] and it would seem difficult to reconcile the lofty goal of creating new works, of 'enhancing the common store of culture',[139] with the failure to protect works against destruction.

Chapter 2 examines how social psychologists have demonstrated the intrinsic motivations that underlie creative acts. Kwall also devotes a chapter detailing examples of how artists and writers are

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135 Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2014) 32.

136 Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010) 57.

137 ibid., 24. See chapter 2.

138 D'Amato and Long (n 131) 78.

139 P. Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014) (n 29) 11.

motivated by factors other than money.[140] It is argued that copyright, with its undue emphasis on the economic, does not account for these intrinsic factors and is at odds with how creative works are produced. If creators are not necessarily motivated by money, then what is it exactly that creators want from copyright? Kenyon and Wright's empirical research revealed that there were other types of benefits which were considered to be more valuable to some artists than economic returns, such as the preservation of their works.[141]

If copyright does not serve creators or encourage creativity as effectively as it should, the question is why then it is seen as an essential instrument or tool of cultural policy. The aim of any cultural policy is to encourage the arts and culture to flourish in order to have a more knowledgeable and creative society. Rajan summarises the multi-pronged role of copyright in the formulation and operation of cultural policy as follows: firstly, it helps to commercialise cultural products, secondly it aims to encourage the production of artistic and intellectual work and thirdly, it sets out a legal framework for the expressions of art and artists in society.[142] The key theme that runs through these roles is that of commercialisation: copyright encourages artists to produce by granting them an exclusive right to produce copies of their expressions, which are then disseminated for monetary returns. Third parties who make copies without permission, usually to either avoid paying for authorised copies, or to sell them on for money, fall foul of the legal framework provided by copyright law. Artists benefit financially by commercialising their artistic expressions and the public benefits from the increased production of such expressions.

Therefore copyright is seen to serve as an economic incentive to artists and other creators in order to fulfil cultural policy aims. However, we have seen above the weaknesses in such rationale as economic incentives do not always fulfil an artist's needs, apart from providing them with a living. Kawashima argues that the reason why copyright is seen to be effective as a tool of cultural policy is because the copyright system serves particular types of creative industries, such as the media and entertainment industry and the software industry, particularly well.[143] This is because, apart from visual art works, the subject matters protectable under copyright law, such as music, books, films, designs etc are reproducible in large quantities without loss of quality, each copy generating a not insignificant source of income for the rights-holder, which in most cases would be the sound

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140 Kwall (n 136) chapter 2.

141 Andrew T Kenyon and Robin Wright, 'Whose Conflict? Copyright, Creators and Cultural Institutions' (2010) 33 UNSW Law Journal 286.

142 Mira T Sundara Rajan, 'The Implications of International Copyright Law for Cultural Diversity' in Tony Bennett (ed), *Differing Diversities: Transversal Study on the theme of Cultural Policy and Cultural Diversity Part 569* (Council of Europe 2001).

143 Nobuko Kawashima, 'Copyright as an incentive system for creativity? The case of contemporary visual arts' in Kerry Thomas and Janet Chan (eds), *Handbook of Research on Creativity* (Edward Elgar 2015).

recording producer or the publisher as the case may be. The copyright system by granting exclusive rights for the reproduction and distribution of works serves this particular business model well. However, such exclusive rights are meaningless for visual artists who typically only produce one-off pieces, not copies for sale. Similarly, to Suggs,[144] Kawashima questions the utility of copyright as an economic incentive where the visual arts are concerned. The use of copyright therefore, as a tool in enforcing or supporting cultural policy, thus is narrowly focused, clearly in favour of the more commercialised and mass market industries, as opposed to the visual arts. Visual artists do not live by bread alone, but their lives are all the more richer and productive simply by being able to create their art. The preservation of their precious creations, not their commercialisation, matters to them.

b. Singapore Cultural Policy

It has already been argued above that the forms and depth of intellectual property protection recognised in a country reflect the country's cultural policy.[145] What then does the lack of moral rights in Singapore's copyright system tell us about its cultural policy? It would seem to suggest an overtly utilitarian policy, with an emphasis on the more commercialised sectors of the creative industries. Certainly a number of sociologists, who have studied Singapore's cultural scene in depth, have described it in such terms.

The hegemony of the economic over the artistic in Singapore's cultural policy has been evident since the period immediately post-independence to the present day. This was observed and chronicled by Bereson in her study of ministerial speeches, government reports and policy papers issued between 1957 and 2003.[146] While the initial objectives of Singapore's cultural policy, formulated whilst a newly independent city state, were clearly related to nation-building, they very soon transformed into economic goals. By 1963, in the State of Singapore Annual Report, this was already evident, in that it specifically mentioned economic objectives, alongside nation building.[147] Also included in the study were the speeches of government officials who did not necessarily hail from the cultural or arts related ministries. Bereson demonstrates that the aims of Singapore's cultural policies over the years have been developed and moulded by all government sectors, ranging from the finance ministry to foreign affairs, not just its ministry of culture or arts. What this informs us is that there have always been underlying motives to Singapore cultural policies, which have not always placed the arts at the forefront. Occasionally this approach has been expressed bluntly; according to

144 Robert E. Suggs, 'A Functional Approach to Copyright Policy' (2015) 83 University of Cincinnati Law Review 1293.

145 D'Amato and Long (n 131) 75.

146 Bereson (n 101).

147 ibid., 2.

Mr Lee Khoon Choy, Minister of State for Culture in 1966, 'the days of Art for Art's Sake are over', in preference of society building through the arts.[148]

According to Bereson, in the late 1980s and early 1990s, there were clear instrumental aims: the attraction of foreign investment, increased tourism, enticement of foreign skilled professionals to live in Singapore, the retention of highly educated and skilled Singaporeans and the creation of wealth through the development of knowledge driven industries. [149] Furthermore, although money has been invested in constructing the supporting infrastructure, such as the building of the Esplanade by the Bay, a state of the art cultural performance complex, Bereson questions just how much this has actually translated into an increased production of quality artistic work and performances in Singapore.[150] There still persists an emphasis on economic returns which is reflected in how the Esplanade itself has been managed: there is undue prominence given to the retail shops and eateries in the complex in comparison to its performing spaces.[151]

Bereson's views are echoed by numerous other sociologists such as Chong,[152] Chua,[153] Kong,[154] and Ooi,[155] although all base their views on other evidence derived from different sources. For instance, apart from government speeches and reports, Ooi has pointed to the adoption of the concept of 'creative industries' in Singapore's cultural policy as evidence of the undue emphasis on the economic over the artistic. Although the origins of 'creative industries' is not entirely certain, [156] the most widely adopted definition was originally coined by the UK's Department for Culture Media & Sport (DCMS) in its Creative Industries Mapping Document of 1998, later retained by the later Creative Industries Mapping Document of 2001: 'those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property'. The documents go on to identify the specific

148 Terence Chong, 'Bureaucratic Imaginations in the Global City: Arts and Culture in Singapore' in Hye-Kyung Lee and Lorraine Lim (eds), *Cultural Policies in East Asia: Dynamics between the State, Arts and Creative Industries* (Palgrave Macmillan UK 2014) <http://dx.doi.org/10.1057/9781137327772_2>

149 Bereson (n 101), 5-8.

150 ibid., 10.

151 ibid., 10.

152 Terence Chong, 'Singapore's cultural policy and its consequences' (2005) 37 Critical Asian Studies 553; Chong (n 148).

153 Chua (n 34).

154 Lily Kong, 'Cultural Policy in Singapore: Negotiating Economic and Socio-Cultural Agendas' (2000) 31 Geoforum 409; Lily Kong, 'Ambitions of a Global City: Arts, Culture and Creative Economy in 'Post-Crisis' Singapore' (2012) 18 International Journal of Cultural Policy 279.

155 Ooi, 'Subjugated in the Creative Industries: The Fine Arts in Singapore' (n 28).

156 J. Hartley and others, *Key Concepts in Creative Industries* (SAGE Publications 2012), 124.

industries covered by this definition, which include advertising, crafts, design, designer fashion, software etc. While the range of industries is diverse, each with little in common with the others selected, what is evident is that some are clearly economically more lucrative than the others. As Ooi has pointed out, rock concerts are more likely to generate jobs and wealth compared to the fine arts.[157]

By being subsumed within the definition of 'creative industries', the fine arts are pressured into competing on an economic footing with their more commercialised cousins. Ooi believes that by so doing, the cultural policy shifts from cultural development goals to economic development ones.[158] Singapore has embraced and put into practice the UK definition, and there is clear evidence of Singapore's cultural policy favouring the mass-market and commercial industries. While the digital media industry has been allocated funding in the region of S$1 billion for the period between 2006 and 2015, the arts were allocated up to just S$99 million between 2003 and 2009,[159] apparently because the digital media industry was deemed to be far more lucrative than the fine arts industry. The fine arts in Singapore are constantly subjected to quantifiable measurements e.g. ticket sales, visitor numbers etc in order to ascertain their value and worth. Such measurements however disregard the innate value of the arts.[160]

6. Summary and Conclusion

Essentially, this chapter has attempted to explain why moral rights remain to be recognised fully in Singapore, a country which prides itself not only on its robust intellectual property regime, but also on its reputation of being a global cultural centre. As moral rights play a vital role in both protecting the rights of artists as well as in encouraging them to create more works, the extent of recognition afforded to moral rights in a country's copyright regime reflects the extent to which the country values creativity. According to Rajan, 'through moral rights doctrine, copyright law also achieves a non-commercial purely legal method of valuing creativity'.[161] As such, one would expect Singapore, with its cultural ambitions, to have robust moral rights.

In attempting to address the query posed, this chapter has firstly identified possible reasons for the lack of moral rights doctrine, namely the Confucian style of governance in Singapore, as well as its censorship policy. While the Confucian theory raised by local law academics is rejected, it is

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157 Ooi, 'Subjugated in the Creative Industries: The Fine Arts in Singapore' (n 28) 120.

158 ibid., 120.

159 ibid., 126.

160 ibid., 133.

161 Mira Sundara Rajan, 'Intellectual Property Law and Political Transformation: Post-Socialist Reform in Central and Eastern Europe' in Guido Westkamp (ed), *Emerging Issues in Intellectual Property Law: Trade Technology and Market Freedom* (Edward Elgar 2007) 203-221, 220.

plausible that Singapore's robust censorship policy has played more of a role than is commonly appreciated in rejecting moral rights doctrine. Further, lack of moral rights impacts heavily upon Singapore's artistic community, and their absence in its clearly utilitarian copyright regime may be attributed to a cultural policy which is heavily economic in outlook and which favours the more commercial creative industries to the fine arts. This position does not reflect well upon Singapore's ambitions to be a cultural powerhouse and indeed casts doubts upon the extent to which it truly values its artistic heritage and its artists.

There are myriad reasons why Singapore's copyright regime lacks robust moral rights, despite its cultural ambitions. The absence of strong moral rights threatens to demoralise its artistic community; they have lamented at their helplessness in the face of destruction. There are lessons to be learnt here. The UK's position is vastly different from that of Singapore's. It neither draws on Confucian ideologies nor does it have unduly harsh censorship policies which may account for a lack of strong moral rights. However, it does possess a rich cultural heritage and it is home to great artists, who will stand to benefit from more vigorous moral rights.

Chapter 9 - Lessons from the U.S., Australia, and India

Australia's implementation of moral rights is a model for the enactment of the doctrine.

Mira T. Sundara Rajan, Moral Rights: Principles, Practice and New Technology, p. 151

The Visual Artists Rights Act is a somewhat embarrassing nod toward droit moral: a minimal grant of rights of attribution and integrity long recognized in civil law copyright systems.... is severely limited in scope, marred by some of the ugliest drafting ever,... and astonishingly, ridden with formalities,... Still, it is better than nothing...

William Patry, 'No VARA Trophy', *The Patry Copyright Blog*, 28 June 2006

...[the] right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resources of a nation. Through the telescope of section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.

Pradeep Nandrajog, J., Amar Nath Sehgal vs Union Of India and Another, 21 February, 2005

1. Introduction

This chapter focuses on the moral rights legislation and case-law of three common law countries, the US, Australia and India, which also include anti-destruction provisions, thus extending the rights of artists beyond those provided under Art.6*bis* and s.80 CDPA. The aims of this chapter are to critically analyse the relevant legislative provisions and case-law in these countries in so far as they relate to or impact upon the issue of destruction, and to evaluate their effectiveness in dealing with issues surrounding the destruction of art works. The lessons learned from such a study would be instructive in ascertaining the best practice for the United Kingdom.

A further aim of this chapter is to emphasise the point that, in line with the US, Australia and India, as well as other countries which similarly value their cultural heritage and which have also accommodated anti-destruction rights, the UK is well-advised to recognise similar rights. The examples of the US and Australia are chosen as it is arguable that they share a legal landscape which is not completely alien from that of the UK.[1] This understanding, taken together with the fact that the

[1] Michael Kirby, 'The High Court of Australia and the Supreme Court of the United States - A Centenary Reflection' (2003) 3 Western Australian Law Review 172; Prue Vines, *Law and Justice in Australia* (3rd edn, Oxford University Press ANZ 2013); Marion Charret Del-Bove and Laurence Francoz-Terminal,

Berne Convention underpins the copyright regimes of all three jurisdictions, underscores the argument that, if the US and Australia are able to find merit in establishing anti-destruction rights, the UK should at least begin to think seriously about the recognition of such rights.

While India's ancient culture is different from that of the UK, they share a 200-year history and a mutual fascination for each nation's culture.[2] The rationale behind India's regard for moral rights lies in its deep reverence for its artistic and cultural achievements. Likewise, the UK has a long and proud cultural and artistic tradition. The rationale adopted by the Indian judiciary may therefore strike a chord with the legal authorities in the UK.

2. The United States: Visual Artists Rights Act

a. Background

The moral rights enshrined in Art.6*bis* of the Berne Convention were recognised at federal level in the US by the signing of the Visual Artists Rights Act (VARA) in 1990.[3] VARA provides authors of works of the visual arts, the rights of attribution and integrity, including a right to object to the destruction of their works. The relevant provision is worded as follows:

> (A) To prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
> (B) To prevent any destruction of a work of recognised stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[4]

Prior to the enactment of VARA, the concept of moral rights was acknowledged in the American courts by applying a variety of established principles from other areas of law in dealing with cases which raised moral rights issues. These principles, derived from the laws of copyright, unfair competition, defamation, privacy and contract,[5] together with the passing of state laws which

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'How Common is the Common Law? Some Differences and Similarities in British and American Superior Court Decisions' (2015) 28 Alicante Journal of English Studies 59.

2 The British fascination with India and its culture is evidenced in literature e.g. Kipling's *Kim*, EM Forster's *A Passage to India,* Paul Scott's *Jewel in the Crown* etc and in film, e.g. The Best Exotic Marigold Hotel (2011). That the fascination has often been mutual was even evident in Mohandas Gandhi's enthusiastic reception of an English education both in his homeland and in London as a young law student, and his early admiration for English civilisation and culture: see Stephen Hay, 'Between Two Worlds: Gandhi's First Impression of British Culture' (1969) 3 Modern Asian Studies 305.

3 VARA was signed on 1 December 1990 but only effective from 1 June 1991.

4 17 U.S.C. §113(d) See Appendix D.

5 *Carter v Helmsley-Spear, Inc*. 71 F.3d 77 (2d Cir. 1995); Martin A. Roeder, 'The Doctrine of Moral Right: a study in the Law of Artists, Authors and Creators' (1940) 53 Harvard Law Review 554, 565-67.

provided for moral rights to some extent,[6] formed the basis of the US government's belief that this combination of existing statutory and common laws fulfilled the US' necessary compliance with Art. 6*bis*.[7] The WIPO Director General at the time also confirmed that the US need not amend its laws to adhere to Art.6*bis*.[8] It may be recalled that this was also the position assumed by the UK government in 1928 when moral rights was first introduced at the Rome Conference.

However, several commentators have argued that these laws did not represent an adequate adherence to Art.6*bis* in any substantive or meaningful way.[9] The reasons for the US' initial refusal to amend its copyright law so as to incorporate or codify moral rights, and thus satisfy Art.6*bis* in a clearer fashion, were essentially two-fold. Firstly, principal copyright stakeholders, such as film studios and publishers were wary of any recognition of rights beyond the economic ones that they controlled,[10] and secondly, the concept of moral rights was deemed too foreign to the US' property and copyright law, which are focused on protecting the economic interests in a copyright work.[11] The US' utilitarian view of intellectual property stems from the US constitution's clause which grants Congress the power to 'promote the progress of science and the useful arts'.[12] The aim of copyright is to further this course by ensuring that information and creative works are disseminated and utilised

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6 The states which have enacted moral rights statutes are: California, Connecticut, Georgia, Louisiana, Maine, Massachusetts, Montana, New Jersey, New Mexico, New York, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, and Utah.

7 William Strauss, *Study No. 4: The Moral Right of the Author* (Studies Prepared for the SubCommittee on Patents, Trademarks and Copyright of the Committee on the Judiciary, United States Senate, 1959); Jane C. Ginsburg and John M. Kernochan, 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' (1988) 13 Columbia Journal of Law & the Arts 1; Melville B. Nimmer, 'Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law' (1966) 19 Stanford Law Review 499; June M. Besek and Brad A. Greenberg, 'United States Response to Questionnaire Concerning Moral Rights in the 21st Century' (ALAI 2014) 1-2; Robert Sherman, 'The Visual Artists Rights Act of 1990: American Artists Burned Again' (1996) 17 Cardozo Law Review 373, 374-75.

8 Dr Arpad Bogsch, Letter to Irwin Karp (16 June 1987) cited in *Study on the Moral Rights of Attribution and Integrity*, Notice of Inquiry, 82 Federal Register 13 (13 January 2017) 7870-7875

9 Edward J. Damich, 'Moral Rights in the United States and Article 6*bis* of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention' (1986) 10 Columbia Journal of Law & the Arts 655; Deborah Ross, 'Comment: The United States Joins the Berne Convention: New Obligations for Authors' Moral Right?' (1990) 68 North Carolina Law Review 363, 364 ('...the United States claims full adherence to Berne but lacks the legal structure to support the full array of rights provided by the Convention'); Graeme Dinwoodie, 'Recent United States Copyright Reforms: Congress Catches the Spirit of Berne' (2011) 2 Fordham Intellectual Property Media and Entertainment Law Journal 7, 14-15.

10 Roy S. Kaufman, 'The Berne Convention and American Protection of Artists' Moral Rights: Requirements, Limits and Misconceptions' 15 Columbia Journal of Law & the Arts 417.

11 Ross (n 9) 367; Muriel Josselin, 'The concept of the contract for the exploitation of author's rights: a comparative-law approach' (1992) 26 Copyright Bulletin 6, 9; Robert C. Bird, 'Moral Rights: Diagnosis and Rehabilitation' (2009) 46 American Business Law Journal 407.

12 Article 1, Section 8, Clause 8, U.S. Constitution.

easily and freely. Moral rights are deemed incompatible with this because they may hamper the furtherance of this aim.[13]

Despite the US' initial belief that its patchwork of statutory and common laws were an adequate approximation of Art.6*bis* rights, and perhaps because of the doubts expressed strenuously by commentators in the field as well as other Berne members, VARA was enacted shortly after the US accession to Berne,[14] which enhanced the US' compliance with Berne and assisted in assuaging doubters.[15] The perceived aims of VARA can be discerned from its legislative history.[16] For instance, according to Representative Kastenmeier, apart from protecting the honour and reputations of visual artists, an additional goal was to protect the works of art themselves, because 'society is the ultimate loser when these works are modified or destroyed',[17] while Representative Markey stated that it was 'paramount to the very integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist'.[18] Despite the grand ambitions underlying VARA, it is in the opinion of many that VARA has not lived up to its initial promise.[19] Apart from flaws in the legislation itself, the judiciary has also applied the Act in a conservative and restrictive manner,

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13 Mark Schultz, Panelist, 'Symposium on Authors, Attribution and Integrity: Examining Moral Rights in the United States, Symposium Transcript,' (2016) 8 Journal of International Commercial Law 1, 10-12.

14 The Berne Convention Implementation Act of 1988 came into force on 1 March 1989, making the US a party to the Berne Convention.

15 Jane C. Ginsburg, 'Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act 1990' (1990) 14 Columbia Journal of Law & the Arts 477.

16 Reference will be made to the *Congressional Record of the Proceedings and Debates of the 101st Congress, 2d Session* (hereinafter 'Congressional Record'); and *the Visual Artists Rights Act of 1989: hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 101st Congress, 1st Session, on H.R. 2690* October 18, 1989 (hereinafter 'Hearing before the Subcommittee').

17 Statement of Representative Robert Kastenmeier, House Report on the Visual Artists Rights Act of 1990, HR REP No. 101-514, Congressional Record (n 16) Page 12608.

18 Statement of Representative Ed Markey, House Report on the Visual Artists Rights Act of 1990, HR REP No. 101-514, Congressional Record (n 16) Page 12609.

19 Edward J. Damich, 'A comparison of state and federal moral rights protection: are artists better off after VARA?' (1993) 15 Hastings Communications & Entertainment Law Journal 953; Peter H. Karlen, 'What's Wrong with Vara' (1993) 15 Hastings Communications & Entertainment Law Journal 905; David E. Shipley, 'The Empty Promise of VARA: the Restrictive Application of a Narrow Statute' (2014) 83 Mississippi Law Journal 985; Jacqueline Lipton, 'Moral Rights and Supernatural Ficton: Authorial Dignity and the New Moral Rights Agendas' (2011) 21 Fordham Intellectual Property Media and Entertainment Law Journal 537; Adrian Zukerman and Annemarie Sedore, 'Do US property concepts prevent VARA from implementing the Berne Convention?' (2004) 26 Dublin University Law Journal 172; Virginia M. Cascio, 'Hardly a walk in the park: courts' hostile treatment of site-specific works under VARA' (2009) 20 DePaul Journal of Art Technology and Intellectual Property Law 167; Roberta Rosenthal Kwall, 'How Fine Art Fares Post VARA' (1997) 1 Marquette Intellectual Property Law Review 1.

manifestly reluctant to allow the VARA rights to prevail over the rights of defendants.[20] A paper published in 2014 states that as at 2014, in light of case-law to date, it was now 'reasonable to conclude that VARA has not come close to fulfilling [the US's] obligations under Article 6*bis*'.[21]

Certainly, the process by which VARA was passed into law leaves one with little confidence in its effectiveness and robustness. There was relatively little debate or discussion and it would appear that the passing of VARA was accidental, in that it was inserted as part of a major bill, the Judicial Improvements Act of 1990, which authorised eighty-five judgeships.[22] Because the senators who would otherwise have opposed VARA were anxious to pass these judgeships, they gave their full approval to the entire bill, in the process also approving VARA with little opposition.[23] As a result, the somewhat hasty enactment of VARA led to some legislative deficiencies.

Criticisms have been aimed particularly at, *inter alia*, VARA's narrow focus on the fine arts to the exclusion of other copyright work (and the narrowness of the types of work which are considered to be 'fine art' under the Act), the limited duration of rights under the Act, the definition of 'recognised stature', and its relationship with state moral rights legislation, among other issues.[24] For the purposes of this thesis, the most relevant criticisms are the narrowness in the Act's acceptance of the types of fine art works and the definition of 'recognised stature'. These will be dealt with in turn below.

However, before we embark on a robust criticism of VARA, we should not forget that VARA explicitly provides artists with something that the Berne Convention does not: protection against destruction.[25]

b. Definition of 'works of visual art' and exceptions under VARA

VARA does not offer protection to all types of authorial works, only 'works of visual art',[26] which in turn is limited to only paintings, drawings, prints, sculptures and 'photographs... which are produced

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20 Shipley (n 19) 989; Zukerman and Sedore (n 19).

21 Shipley (n 19) 988.

22 Christopher J. Robinson, 'The "Recognised Stature" Standard in the Visual Artists Rights Act' (2000) 68 Fordham Law Review 1935.

23 Kwall (n 19) 4.

24 See Karlen (n 19) for a detailed clause by clause analysis of VARA.

25 Daniel Gervais, Panelist, 'Symposium on Authors, Attribution and Integrity: Examining Moral Rights in the United States, Symposium Transcript,' (2016) 8 Journal of International Commercial Law 1, 14; Peter Yu, Panelist, 'Symposium on Authors, Attribution and Integrity: Examining Moral Rights in the United States, Symposium Transcript,' (2016) 8 Journal of International Commercial Law 1, 35.

26 17 US Code §101 definition of 'works of visual art', (para 1) See Appendix G.

for exhibition purposes'.[27] Furthermore these are restricted to either one-off unique works or limited editions of 200 copies maximum which are signed and consecutively numbered.[28] VARA excludes works which are otherwise typically protected under copyright law, such as films, books or advertisements. Applied art and works made for hire i.e. works made by employees in the course of employment as well as works specially commissioned for use as a contribution to a collective work, are also excluded from protection. In interpreting and applying the definition section, the courts are expected to use common sense and generally accepted standards of the artistic community.[29]

The definition of VARA protected works is restricted to only *certain types of visual art*, and is not in any way synonymous with the definition of 'pictorial, graphic, and sculptural works' set out in the US Copyright Act,[30] which covers works which qualify for copyright protection and is of much wider scope. The reasoning for this very narrow application for VARA has been debated in the HR. Representative Moorhead identified that the Act's purpose of preserving and protecting visual art had to be achieved without 'interfering, directly or indirectly, with the ability of US copyright owners and users to further the constitutional goal of ensuring public access to a broad, diverse array of creative works'.[31] He proceeded to detail the various restrictions and exclusions on the types of visual art which may be protected under the Act, before concluding that these provisions serve to 'insulate US copyright-intensive industries from liability' under the Act, which will 'in no way impede the ability of these industries to produce and disseminate US created works or undercut America's pre-eminent copyright status both here and abroad'.[32]

Representative Fish also voiced his concerns and initial scepticism of moral rights, saying that they would 'create havoc' if changes deemed necessary by copyright owners were capable of being vetoed by creators. However, he was mollified by Moorhead's reassurances, and observed that the Act would 'not impact on the important activities of the various copyright industries in the country,

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27 The limitation to exhibition purposes is clearly designed to exclude everyday snapshots.

28 17 US Code §101 definition of 'works of visual art', (para 2) See Appendix G.

29 Shipley (n 19) 991.

30 17 US Code §101: 'Pictorial, graphic and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.'

31 Representative Carlos Moorhead, House Report on the Visual Artists Rights Act of 1990, HR REP No. 101-514, Congressional Record (n 16) Page 12608.

32 ibid. page 12609.

several of which contribute a surplus to the US trade balance'.[33] Fish and Moorhead were voicing concerns that economically lucrative copyright industries should not be affected by the introduction of moral rights into federal law.

The outcome of the debates thus is a very narrow list of protected works and a substantial list of exceptions, aspects of which are considered below.

i. Interpretation of 'paintings, drawings, prints, sculptures and photographs'

While the range of works covered is narrow, it could be said that both the courts and the legislative drafters of VARA have at least displayed an awareness of the different media in which these works may exist. The legislative reports on VARA record that Congress had directed that the question of whether a work falls within the definition of a 'work of visual art' should not be dependent on the materials or medium utilised,[34] and that the courts should utilise 'common sense and generally accepted standards of the artistic community'.[35] Hence, for instance, arguably, paintings should not necessarily be confined to traditional paint on canvas,[36] and neither is a sculpture limited to a 'three-dimensional work made by an artist's hand',[37] or more restrictively, a 'composition [that] has been carved, modelled or made in any of the other ways in which a sculpture is made',[38] such definitions having been judicially formulated in the UK.

There are obvious problems with the UK definitions. For example, increasingly, sculptures are not created by hand. Today, the easy availability of metal, cement and plastic together with 21st century technology allow artists to utilise a variety of arms length methods, such as fabrication studios or 3-D printing in order to create their work. In the early 20th century, certain avant-garde artistic movements, such as Dadaism, Futurism and Cubism, attacked the conventional in art.[39] An art form which arose from these movements was Readymades, a term coined by Marcel Duchamp to describe art created out of manufactured objects, which are elevated to high art purely because they have been

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33 Representative Hamilton Fish, House Report on the Visual Artists Rights Act of 1990, HR REP No. 101-514, Congressional Record (n 16) Page 12610.

34 Shipley (n 19) 991; HR Rep No. 101-514 quoted in Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016) 1057-1058, para 32-017.

35 Davies and Garnett (n 34) 1057-1058, para 32-017.

36 Facial make-up was held not to be a painting as the face was not a surface on which a painting could subsist: *Merchandising v Harpbond* [1983] FSR 32.

37 Per Laddie J, *Metix v Maughan* [1997] FSR 718, 722.

38 Per Lloyd J, *Creation Records v News Group* [1997] EMLR 444, 449.

39 Cyril Barrett, 'The Scandal of Modern Art' (1962) 51 Studies: An Irish Quarterly Review 117; Donna M Kristiansen, 'What is Dada?' (1968) 20 Educational Theatre Journal 457. See Generally, Charles Harrison and Paul Wood (eds), *Art in Theory 1900-2000: An Anthology of Changing Ideas* (2nd edn, Blackwell Publishing 2005).

chosen to be art by the artist.[40] Such works cannot be said to have been 'created by hand by the artist'. Therefore the rather restrictive and traditional definitions of paintings and sculptures in copyright law have led to difficulties in allowing copyright protection of certain works in the UK in the modern age. In this respect, the definition of visual art under VARA, read in light of the US Congress's directive to disregard material or medium, appears reasonable. However, it will be seen below that the US courts are no less conventional than the UK judges have been in interpreting the meaning of these works.

The restriction to just 'paintings, drawings, prints, sculptures and photographs', together with prescribed exceptions (e.g. motion pictures, applied art etc), even if not confined to specific types of media or material, results in a traditional interpretation of the type of visual art covered under VARA. The restriction still potentially shuts out several forms of art which are highly creative but do not fit neatly within these categories, such as tattoos, or conceptual art. The potential for locking out alternative art works is also particularly heightened by the courts' conservative interpretations of VARA, which are considered below.

The highly specific and narrow inclusion of 'paintings, drawings, prints, sculptures and photographs' was examined by the Seventh Circuit in *Kelly v Chicago Parks District*,[41] a case concerning *Wildflower Works*, which consisted of football pitch sized wildflower gardens, which were subsequently reduced in size and altered in shape by the defendants without the consent of the artist. The district court had accepted that the work was both a painting and sculpture for VARA purposes, and this issue was not contested by the defendants. However, the Seventh Circuit was not so convinced. It reasoned that as the VARA visual art definition was so specific and clearly different from 'pictorial, graphic, and sculptural works' in the US Copyright Act which enjoy copyright protection, it must mean that the latter should be interpreted with a degree of flexibility while the former should be treated strictly, i.e. a visual art work must *really* be a painting, drawing, print, sculpture or photography, not merely analogously. In other words, the five specific terms listed in the definition of visual art under VARA were *limiting* factors.[42]

The court then considered dictionary meanings of 'painting' and 'sculpture'. Unfortunately, as this issue was not in contention, the Seventh Circuit did not deliver a definitive opinion as to whether *Wildflower Works* itself amounted to a painting or sculpture (instead, the court considered the issue of whether *Wildflower* met the originality standard for copyright protection). However, the court did suggest that it was highly unlikely for *Wildflower* to be considered as either: 'If a living garden

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40 Hugh Honour and John Fleming, *A World History of Art* (7th edn, Laurence King Publishing 1984), 800. An example is '*Fountain*', Marcel Duchamp, 1917.

41 *Chapman Kelley v Chicago Park District* Nos.08-3712 & 08-3712 (7th Cir Feb15, 2011).

42 ibid., 23.

like *Wildflower Works* really counts as both painting and sculpture, then these terms do no limiting work at all.'[43]

The implications of *Kelly* on the definition of visual art are profound. Notwithstanding Congress issued guidance that the definition should not be confined to particular media or materials, the judgement of the Seventh Circuit means that a very traditional notion of painting and sculpture still takes hold, thus potentially shutting out many modern works of art, which do not fit neatly within these categories. What this means is that, if an artist eschews canvas and uses an unconventional material as the base for his painting, it may qualify as a work of visual art, but only as long as it also meets our conventional understanding of 'painting'. The same goes for sculptures – while the use of unconventional materials does not matter, the resulting work must still be definable as a sculpture. However, if a work cannot meet the traditional definition as a painting or sculpture, it cannot qualify as visual art for VARA purposes.[44] This stance is therefore no better than it is in the UK, as mentioned above.

Indeed in the UK, there has been movement towards finding an 'artistic purpose' in a work as opposed to merely assessing a work's materials, medium or method of creation, or otherwise adopting a conventional interpretation of painting or sculpture.[45] Mann J in *Lucas v Ainsworth* opined that it is the 'underlying purpose that is important' and found that the Star Wars Stormtrooper helmet lacked artistic purpose and hence was not considered an artistic work.[46] Furthermore, in light of the European 'intellectual creation' test for establishing originality in copyright works,[47] the question as to whether a work is truly a painting or sculpture becomes less relevant in ascertaining whether it is an artistic work.[48] In this way, the UK approach to assessing artistic works appears more forward thinking than that in the US.

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43 ibid., 24.

44 The definition of 'works of visual art' has been construed narrowly in other cases. Puppets and costumes were not considered works of visual art in *Giegenhuber v Hystopolis Prod Inc*, No. 92C1055, 1992 WL 168836 (ND Ill, July 13, 1992) while a public sculpture park was not considered a 'sculpture' in *Phillips v Pembroke Real Estate*, 288 F.Supp.2d 89 (D Mass 2003) affirmed, 459 F.3d 128 (1st Cir 2006) (discussed below).

45 Justine Pila, 'An Intentional View of the Copyright Work' (2008) 71 Modern Law Review 535.

46 *Lucasfilm v Ainsworth* [2009] FSR (2) 103, 153-54.

47 *Infopaq International A/S v Danske Dagblades Forening* [2009] ER I-6569.

48 Estelle Derclaye, 'Assessing the impact and reception of the Court of Justice of the European Union case law on UK copyright law: what does the future hold?' (2014) Revue Internationale des droits d'auteur 5.

ii. Applied Art Exception

VARA has not only specified the types of artwork which qualify for protection but has also stipulated exceptions. One of these exceptions is 'applied art', which qualifies for copyright protection,[49] but has not been defined in VARA. Applied art is defined in the *Oxford Dictionary of Art* as 'the design or decoration of functional objects so as to make them aesthetically pleasing.'[50] They include objects created in the fields of industrial, graphic, fashion and interior design e.g. furniture or kitchenware. Generally, these are mass produced functional objects which are designed with aesthetics in mind but the functionality outweighs the aesthetic elements in terms of the purpose of the object. In contrast, visual art works, which are considered to be fine art, are created purely for the purpose of giving an aesthetic experience and intellectual stimulation.

The specific exclusion of applied art, as it is understood in such terms, is meaningful as it explains the underlying aims of VARA. When the exclusion is considered in conjunction with the various statements made in the legislative history on VARA, it is clear that the aim is to focus on the fine arts, particularly one-off or limited edition pieces which can be considered as part of the cultural heritage of the country.[51] Such works being created purely for artistic purposes with limited availability means that destruction has a particularly devastating consequence. The distinction made between applied art and the fine arts is understandable. While economic rights are clearly relevant to the applied arts, which are produced on an industrial scale, moral rights are less so. Further, the singular uniqueness of fine art pieces justify their protection under VARA whereas, arguably, the multiplicity of applied art objects have less need for such protection.

However, while the ordinary meaning of applied art tends to the mass produced everyday functional objects designed with aesthetics in mind, e.g. Murano glass jewellery, there too exist artistic works with functional aspects which may be categorised as applied art, but which, because of their innate artistic qualities, could also arguably deserve protection as much as the unique piece. Examples of such pieces are Picasso's ceramics, and the elite ceramic potters of Japan such as Nakajima Hiroshi. A careless interpretation may result in keeping such works outside the scope of VARA and thus potentially subject to abuse.

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49 The definition of 'pictorial, graphic and sculptural works' which qualify for copyright protection includes 'works of artistic craftsmanship' insofar as their form but not their mechanical or utilitarian aspects are concerned'. See 17 U.S.C. §101. For a discussion of the copyright protection of applied art, see Jane C. Ginsburg, 'Courts have twisted themselves into knots: U.S. copyright protection for applied art' (2016) 40 Columbia Journal of Law & the Arts 1.

50 Ian Chilvers, *The Oxford Dictionary of Art* (3rd edn, Oxford University Press 2004).

51 See chapter 1 (n 30).

In the absence of legislative guidance, the meaning of 'applied art' has been judicially formulated. In *Cheffins and Jones v Stewart*,[52] the US Court of Appeals, Ninth Circuit had to decide if *La Contessa*, a work consisting of a used school bus reconstructed as a replica of a 16th century Spanish Galleon, amounted to a 'work of visual art'. The point turned on whether the work was a work of 'applied art'. The court referred to the Second Circuit's judgment in *Carter v Helmsley-Spear, Inc*,[53] which involved a sculpture constructed from scrap metal, including parts of an old school bus, which were then affixed to a wall in the lobby of the defendant's building. The Second Circuit explained that 'applied art' referred to 'two and three dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects'. Although utilitarian objects were involved, the court held that the sculpture in *Carter* was not a work of applied art just because it was affixed to the floor, walls and ceiling. To hold otherwise would be to make the protection afforded by VARA meaningless, especially where visual art works are installed in buildings. The court however emphasised that VARA would not protect a utilitarian piece.

The Ninth Circuit in *Cheffins*, after considering the holdings in *Carter*, emphasised that the query should be whether the work in question was utilitarian in nature. On the facts, *La Contessa* began life as a utilitarian object, i.e. a bus, which was then visually and artistically transformed. However it still 'continued to serve a significant utilitarian function' even though it was no longer used as a school bus, because it continued to be used for transportation during festivals, even in its final highly elaborate artistic state.[54] On this basis, *La Contessa* was applied art, and could not be a work of visual art under VARA.

Judge McKeown, although concurring with the outcome of the majority judgement, was concerned that 'significant utilitarian function' was not sufficiently nuanced for the purposes of VARA. The danger of the majority's test was that any work which incorporates utilitarian elements would be left unprotected by VARA. She asked how significant should the utilitarian function be in order to deny it protection, citing several examples of works which are unquestionably works of art but which nevertheless can be said to retain utilitarian functions: the Bayeux tapestries, Tracey Emin's *My Bed*, Rodin's *Gates of Hell* and Picasso's stage curtain for the ballet *Le Tricorne*. McKeown stressed that to give full countenance to the underlying purpose of VARA, the courts should assess the work as a whole, and ascertain its primary purpose. The key to the query is whether the artistic purpose of the work is secondary to its functional purpose. The point is that any incidental utilitarian element to the work should not necessarily mean that it lay beyond the reach of VARA. Notwithstanding the finer distinctions of McKeown's test, however, McKeown still held *La Contessa*

52 *Cheffins v Stewart,* No. 12-16913 (9th Cir.2016).

53 *Carter v Helmsley-Spear, Inc* 71 F.3d 77 (2d Cir. 1995).

54 Opinion of Judge O'Scanlainn, Cheffins v Stewart, (n 52) 13.

to be applied art, primarily because it spent most of the year hidden under a tarpaulin, only to emerge during festival periods in order to ferry festival goers and to perform other functions.

The issue therefore, of whether a work is applied art or not, is crucial for the purposes of invoking protection under VARA. Critically, it should be noted that the parties in *Cheffins* were in agreement about two points: firstly, that *La Contessa* was indeed a sculpture and secondly, that it was a work of recognised stature, both of which are strict requirements for VARA's application. The work did meet these vital requirements, but failed under the exception clause. There are a few observations to be made on this. First of all, it is technically questionable as to whether a work can be both a sculpture as well as applied art. The US courts have thus far displayed a conventionality in their approach. If they remain true to this approach, then, they should not be able to categorise a work as *both* sculpture and applied art. While sculpture is specifically referred to as an accepted form under VARA, applied art is specifically referred to as an excluded form. Therefore the two must have been different in the eyes of the legislators. Furthermore, conventionally, sculpture is a form of the fine arts, which is defined in *The Concise Oxford Dictionary of Art Terms* as:

> 'Art created primarily for aesthetic reasons and not functional use (see Applied Art). Examples of fine art: painting, drawing, sculpture and printmaking'.[55]

Applied art, from the same dictionary, is defined as

> 'Art that is created for useful objects and remains subservient to the functions of those objects. The broad range of the applied arts includes ceramics, furniture, glass, leather, metalwork, textiles, arms and armour, clocks, and jewellery'.[56]

Secondly, while perhaps *La Contessa's* unique set of circumstances may have possibly justified the end result, the dangers of the majority 'applied art' test in particular, are apparent where art works consisting in part or entirely of utilitarian objects are concerned. It would seem that to be completely immune from rejection under the test, the work would have to completely disable its functionality e.g. the bus in *Carter* was completely disabled. Therefore, an item like Picasso's stage curtain for *Le Tricorne* may not be protected, as it was originally conceived and used as a stage curtain, it still remains a stage curtain, and nothing to stop it as functioning as one in future. Another example would be Picasso's ceramic pieces, which consist of vases, plates and jugs, clearly utilitarian

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55 'fine art.' **The Concise Oxford Dictionary of Art Terms**. **Oxford Art Online**. Oxford University Press, <http://www.oxfordartonline.com/subscriber/article/opr/t4/e716

56 'applied art.' **The Concise Oxford Dictionary of Art Terms**. **Oxford Art Online**. Oxford University Press, <http://www.oxfordartonline.com/subscriber/article/opr/t4/e89>.

pieces which retain a functional element, but which are highly prized for their artistic value.[57] Even under McKeown's test, when assessed as a whole, the Bayeux tapestries, Picasso's stage curtain and Picasso's ceramics are primarily draught-excluding fabric, ballet stage backdrops and crockery respectively, albeit designed to an extraordinarily high level of artistry, which transformed them into undeniable works of art.

The point is that such works are arguably the type of works which are contemplated by VARA as being deserving of its protection; they are not just merely artistically decorative products. If destroyed, their absence will be heartfelt and the cultural heritage to which they belong diminished. Karlen has suggested that if a work is intended to be a work of fine art, then a later or even simultaneous commercial or functional use should not preclude protection.[58] Indeed, the destruction of *La Contessa* was met with a sense of utter loss and dismay in the local community.[59] The lessons to be learnt is that precaution should be exercised in defining 'applied art' if purely functional works are to be excluded.

iii. Site Specific works

The question of whether the removal of site-specific works amounts to a breach of VARA appears unresolved. Although, the First Circuit in *Philips v Pembroke* (discussed below) ruled that VARA did not apply to site-specific works,[60] commentators have either opined that the legislation was interpreted wrongly because Congress was well aware of the issues surrounding site-specific works in its debates and therefore site-specific works should be protected under VARA,[61] or that the court had correctly interpreted VARA but that the law is wrong on this and should be changed to accommodate site-specific works.[62]

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57 In 2012, The Madoura Collection, consisting of 500 ceramic pieces by Picasso was auctioned at Christie's for £8 million. <http://www.christies.com/about-us/press-archive/details?PressReleaseID=5692&lid=1>.

58 Karlen (n 19) 910.

59 Steven T Jones, 'The Mystery of La Contessa' *Reno News & Review* (15 February 2007) <http://www.newsreview.com/reno/content?oid=281971> ; Scott Beale, 'La Contessa Burial at Sea' (*Laughing Squid*, 2007) <https://laughingsquid.com/la-contessa-burial-at-sea/>.

60 *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006) (see n 44).

61 Jessica Kennedy, 'In Defense of Site-Specific Art: The Visual Artists Rights Act's Pragmatism Gone Awry in the First Circuit' in Sherry Hull and David Tarler (eds), *Yearbook of Cultural Property Law 2009* (Left Coast Press 2009).

62 Lauren Ruth Spotts, 'Phllips has left VARA little protection for site-specific Artists' (2009) 16 Journal of Intellectual Property Law 297.

Site-specific works are, in the words of Richard Serra, 'determined by the topography of the site',[63] and are 'conceived for, dependent upon, and inseparable from their locations'.[64] Therefore, the question is what effect does relocation have on a site specific work? Serra is adamant that 'to remove the work is to destroy the work'.[65] Other artists are in agreement. Robert Barry said that each of his installations was 'made to suit the place in which it was installed. They cannot be moved without being destroyed',[66] while Sol LeWitt in an interview, referring to his *Wall Drawings*, said that '[l]ocation is part of it. It can't be moved without being destroyed'.[67] At a minimum, it could be said that relocation would give the work a new meaning, or transform it into something else altogether, which is wholly unintended by the artist.[68] Either interpretation of the effects of relocation of a site-specific work, if accepted, could arguably fall foul of VARA.

The issue with site-specific works and VARA is that site-specific works are neither explicitly included nor excluded in the legislation. However, there are important statutory limitations to the right of integrity which are relevant to site-specific works. Under VARA, changes to a work which are brought about either by normal degradation or are undertaken for the purposes of public presentation, including specifically a change in the placement of the work, are not considered destructions, distortions, mutilations, or modifications unless caused by gross negligence.[69] The question is whether a change in the placement of a site-specific work would amount to its destruction. If it is not considered destroyed, then such a change does not breach the integrity right. However, as will be seen below, the First Circuit in *Phillips* asked if it was *inevitable* that any change in the placement of a site-specific work would amount to destruction. If so, then the question is, why VARA would protect site-specific works in the first place, only to remove its protection in the form of the public presentation exception.

Briefly, Phillips was commissioned by Pembroke to re-design Eastport Park in Boston. Phillips' vision consisted of creating and situating numerous sculptures and rough stone walls in spiral or circular patterns as well as inserting stone paving for walkways. However, soon after completion,

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63 Clara Weyergraf-Serra and Martha Buskirk (eds), *The Destruction of Tilted Arc: Documents* (MIT Press 1991).

64 ibid., 12.

65 Letter from Richard Serra to Donald Thalacker, 1 January 1985 in ibid., 38.

66 Quoted in Miwon Kwon, *One Place After Another: Site-Specific Art and Locational Identity* (MIT 2002), 12.

67 Sol LeWitt in an interview with Patricia Norvell, R. Barry, A. Alberro and P. Norvell, *Recording Conceptual Art: Early Interviews with Barry, Huebler, Kaltenbach, LeWitt, Morris, Oppenheim, Siegelaub, Smithson, and Weiner by Patricia Norvell* (University of California Press 2001), 116.

68 N. Kaye, *Site-specific Art: Performance, Place and Documentation* (Routledge 2000) 2.

69 17 U.S.C. §106A(c).

maintenance problems with the walls and paving emerged, and the defendants decided to modify the park, which would entail including more plants as well as removing and relocating the sculptures. However, Phillips objected to this on the basis that all of the sculptures were site-specific. An alternative proposal to retain all of the walls and all but one of the sculptures, and to redesign the walkways, was similarly rejected by Phillips. Pembroke responded by removing all components to another site.

The district court decided that Pembroke could remove the various components of Phillips' work under the public presentation exception. In essence, the district court held that a site-specific art work, such as Phillips', was indeed protected under VARA, but that the public presentation exception allowed such work to be removed, as long as the removal does not alter, modify or destroy the work. Phillips' appealed, arguing that the exception only envisaged *non-permanent* changes in placing an art work. In his case, he argued that the removal/relocation of any or all of the sculptures or stonework amounted to a destruction of his work as a whole, was a permanent change, and hence was not caught by the exception.

Ironically, the First Circuit agreed with him that the relocation of part or the whole of a site-specific work amounted to a permanent change, indeed destruction. However, because of this understanding as to how relocation affects site-specific works, the court went on to say that VARA could not have intended to apply to site-specific works in the first place at all. In other words, the court opined that it was illogical that VARA intended to protect site-specific works but yet also include as an exception, the type of action i.e. changing the placement of a site-specific work, which would render it completely destroyed.

The ruling of the First Circuit thus has serious consequences for site-specific artists; they are simply not protected under VARA according to their logic. It can be argued that their logic is flawed, for it is conceivable that there are occasions in which a site-specific work may be protected under VARA and yet also be subject to the public presentation exception i.e. certain relocations would not amount to destruction. It was not necessary to rule that VARA had not intended to protect site-specific works at all. Indeed, it is questionable that this was ever the intention of the legislators, particularly in light of the aims of VARA. As can be seen from the language employed by its legislators, VARA is envisaged not only as a protector of artists and their creations, but also as a keeper of the country's cultural heritage. The First Circuit's ruling is arguably irreconcilable with the cultural heritage aims of VARA. Site-specific art is, after all, a major art form, which boasts numerous internationally acclaimed site-specific artists, including Serra (*Tilted Arc)*, LeWitt (*Wall Drawings*), Smithson (*Spiral Jetty*), Christo (*The Gates*) and Maya Lin (*Vietnam Veterans Memorial*), most of whom are based in the US. It is therefore arguably inconceivable that site-specific works were not intended to be covered under VARA.

The ambiguity in the language employed in VARA led to a US appeal court in blocking out an entire art form from VARA's protection. There are thus lessons to be learned in addressing site-specific works. This should be specifically addressed in any anti-destruction legislation for the sake of clarity.

c. Recognised Stature

Unlike the acts of distortion, mutilation and modification which are proscribed for works of visual art regardless of stature, the act of destruction is prohibited only where works of 'recognised stature' are concerned. Several issues arise in respect of this requirement.

First, it should be noted that 'recognised stature' is not a requirement under the Berne Convention. The inclusion of the restriction is presumably to prevent frivolous claims from being made.[70] While this aim is laudable, the lack of guidance on the phrase has led to inconsistent applications of the requirement.[71] During the House of Representatives subcommittee hearing on VARA, Professor Ginsburg argued that it had the potential of prolonging litigation, as the parties would doubtlessly battle it out by adducing extensive expert evidence, and the judges having to make sense of the different testimonies on offer.[72]

Nevertheless, a test for 'recognised stature' has been formulated in *Carter v Helmsley*. The test assumes a two-tier approach: first, the work is shown to have 'stature' and secondly, that this stature is 'recognised' by experts in the artistic community. Notably, the court's take on 'recognised stature' was that it represented the custodial aims of VARA, i.e. works which were valued by society should be protected. Hence, the court would hear from experts and others in the artistic community, or even simply the public in general. The court in *Carter* noted that there would be heavy reliance on the testimony of experts, which would appear to support Ginsburg's initial concerns about prolonging litigation. These pronouncements in *Carter* have been followed in subsequent cases, but with differing approaches.

One significant issue that has emerged from *Carter* and subsequent case-law, is the question of whether the court should assess the artistic merits of the work, or whether it should concern itself with the extent to which the work is recognised. As pointed out by Karlen, a work of recognised stature does not necessarily mean that it possesses aesthetic value, which raises the question as to what sort of work is truly deserving of protection: those which are truly artistically meritorious or

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70 *Carter v Helmsley-Spear, Inc*. 71 F.3d 77 (2d Cir. 1995) (n 53).

71 Robinson (n 22) 1962.

72 Prof JC Ginsburg, Hearing before the Subcommittee (n 16), HR Rep No. 101-514, 109.

those which have garnered fame and attention?[73] This point was raised when *Martin v City of Indianapolis* reached the Seventh Circuit.[74] Here, the plaintiff had only proffered documentary evidence of his 'recognised stature', in the form of newspaper articles and miscellaneous letters from art critics and academics. The writers of these documents were full of praise for the artistic merits of the works. Because the plaintiff had not brought witnesses to court, an issue was raised as to whether such documentary evidence was inadmissible hearsay as to establishing the *truth* of whether the plaintiff's works were any good. At the District Court and at the Seventh Circuit, the documents were held not to be hearsay as regards the fact as to whether the plaintiff's works were truly meritorious; this is because they were not offered for that purpose but instead were offered to simply establish that the writers concerned had *recognised* the plaintiff's works, which was admissible. This therefore appears to lay emphasis on the *recognition* that a work has received, rather than its innate qualities i.e. its worthiness of preservation.

The problem with the interpretation in *Martin* is that, works which possess artistic excellence but have either not attracted attention or have not been publicly displayed, would fail under this requirement for 'recognised stature'. Works which are deemed insignificant at the moment may well gain stature in the future.[75] New and emerging artists would be the least likely to fulfil this criterion, as would works which are deemed too difficult or controversial at the time to attract positive attention. Is a work of recognised stature because its artist is recognised or is it because it is itself recognised? On this point, Ginsburg had also argued during the subcommittee hearing that if a work has not been publicly displayed before being mutilated or destroyed, it would be difficult, if not impossible, for a work to have attained 'recognised stature'.[76] Indeed, this was the conclusion reached by the Second Circuit in *Pollara v Seymour,*[77] where the work in question was destroyed before it became available for public viewing. This appears to suggest that emphasis is placed on the work being 'recognised' rather than on assessing its innate artistic qualities.

There are difficulties thus with not only the definition of 'recognised stature' but also with evidencing 'recognised stature'. It is uncertain as to the type and standard of proof required, the number of expert opinions required, and the type of experts who may be allowed to give testimony. It would also be difficult to prove recognised stature in those works which have not acquired stature but may actually have the potential to achieve such stature in future.

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73 Karlen (n 19) 916.

74 *Martin v City of Indianapolis,* 982 F. Supp.625 (S.D. Ind. 1997).

75 Karlen (n 19) 916.

76 Prepared Statement of Prof JC Ginsburg, Hearing before the Subcommittee (n 16), HR Rep No. 101-514, 89

77 206 F.Supp.2d 333 (NDNY 2002).

Because 'recognised stature' is a phenomenon which fluctuates in time and is difficult to assess, it is possible that experts will likely err on the side of finding 'recognised stature', as will the judges, out of a fear of unwittingly allowing the destruction of a work which, although of doubtful stature at the time, may possibly acquire such stature later in the future.[78] Basically, if either expert or judge is in doubt, then both may err on the side of caution, to avoid any possibility of destroying a potential masterpiece. If this argument is true, it throws the utility of such a requirement into question. The reason for the requirement was to sift out trivial claims. However, the cautious application of the courts and experts would compel most owners to preserve the work, and in the process, incur substantial costs in respect of something which may never actually gain stature at all.[79]

While the rationale behind the requirement of 'recognised stature' is understandable, i.e. to prevent nuisance claims, the lack of definition or guidance in the legislation and the inconsistent approaches in the case-law, leaves it riddled with not only practical evidentiary problems but also substantive problems, such as whether the query should be aimed at a work's artistic qualities or at the extent of its fame. If VARA's aims of conserving cultural heritage are to be fulfilled, then there is an argument for focusing on a work's inherent qualities, rather than its fame or lack thereof. This is because a work's fame or its lack of recognition may be wholly undeserving and is subject to the fluctuating whims and trends in society. One only has to recall Van Gogh.[80] However, by focusing on the more objective criterion of artistic quality, there is more likelihood of correctly identifying a work which is deserving of preservation and which will stand the test of time.

d. Conclusions – the general impact of VARA

When VARA was enacted, the initial response of commentators in the field was generally positive. Karlen thought that the legislation was sophisticated, detailed and thorough, an opinion he subsequently revised in 1993, just two years after VARA's enactment.[81] Kwall, writing in 1997, regarded VARA as being a step in the right direction at least, a 'clear response to society's interest in protecting the personal rights of authors and preserving our cultural heritage' but was also ambivalent about its true impact and influence upon the visual arts community.[82]

Since these early academic opinions, we have had the benefit of several cases which have applied VARA. The general conclusion to be drawn is that the US judiciary have clearly attempted to

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78 Keshawn M. Harry, 'A Shattered Visage: The Fluctuation Problem with the Recognised Stature Provision in the Visual Artists Rights Act of 1990' (2001) 9 Journal of Intellectual Property Law 193.

79 See Judge Manion's dissenting judgement in *Martin v Indianapolis* (n 74)

80 *The Red Vineyard near Arles* is reputedly the only oil painting sold by Van Gogh during his lifetime.

81 Karlen (n 19)

82 Kwall (n 19)

give effect to the legislature's intent but in so doing, have approached the interpretation of VARA in a conservative and restrictive fashion by employing a literal interpretation in many instances, so much so to the extent that it could be questioned as to whether the true intent of VARA has actually been honoured. This can be seen for instance in the federal judiciary's approach to site-specific works. If the aim of VARA is to be a conservation tool for the fine arts and the country's cultural heritage as was clearly intended in the legislative history, the judiciary's rejection of site-specific works is incongruous with this particular aim. Certainly, the artist plaintiffs have generally not fared well in the case-law.[83]

Has there however been progress more recently? The latest case to invoke VARA involves *5Pointz*, the internationally renowned graffiti mecca situated in New York City, referred to briefly in chapter 1. *5Pointz* was a hub of artist studios operating out of a disused warehouse. The owners of the warehouse had also allowed the artist residents to cover the external walls with extensive striking graffiti murals. *5Pointz* subsequently gained a reputation as a significant artistic landmark in the graffiti community as well as a major tourist destination.[84] In 2013, the owners reclaimed their property, with plans for a major redevelopment into luxury residences. Not only did the artists launch an action under VARA for an injunction against demolition,[85] there were also widespread protests from the community as well as celebrity artists such as Banksy.[86] Owing to the time constraints of the preliminary hearing for a temporary injunction, the court could not investigate fully the issue of whether the *5Pointz* artworks were of 'recognised stature'.[87] The judge however reasoned that even if *5Pointz* was of 'recognised stature', there would not be irreparable damage, which was the standard to be met for an injunction. The underlying reasoning for this conclusion lay in the ephemeral nature of the murals in the first place.[88] The judge doubted that the artists could not be compensated by monetary damages for such loss, reasoning that as the works were available for free in the first place, their destruction would not lower their market value. Almost immediately after this decision was made, the entire building was whitewashed overnight on 19 November 2013, without prior consultation of the artists involved, thus denying them any chance of salvaging or otherwise

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83 Shipley (n 19) 1047.

84 Lindsay Bates, 'Bombing, Tagging, Writing: An Analysis of the Significance of Graffiti and Street Art' (University of Pennsylvania 2014) 110, 114.

85 *Jonathan Cohen et al. v. G & M Realty et al*., 2013 WL 6172732 (No. 13-CB-5612 (E.D.N.Y. 2013).

86 Amanda Holpuch, 'Banksy concludes New York art blitz with call to save 5Pointz graffiti space' *The Guardian* (21 October 2013) <https://www.theguardian.com/artanddesign/2013/oct/31/banksy-concludes-new-york-residency-graffiti> .

87 *Jonathan Cohen et al. v. G & M Realty et al*., 2013 (n 85) 24-25.

88 ibid., 25-26. Some works were painted over periodically to make room for newer pieces to ensure that each and every artist had a fair amount of exposure. See Bates (n 84) 112.

preserving or recording their work. The anger and sense of betrayal at the furtive and underhanded manner in which this was carried out was palpable.[89] VARA had clearly failed the artists at that point.

There is however hope that VARA may yet serve graffiti artists in general after all. On 31 March 2017, the Brooklyn Federal Court ruled that the plaintiffs may proceed to a jury trial to seek out damages as compensation.[90] The intensity of the media coverage on the numerous legal battles surrounding *5Pointz* over the last few years and its destruction arguably assisted in raising its profile and increased the chances of a substantial award of damages. On 12 February 2018, after a three week jury trial, after having found that a significant number of the artworks had achieved recognised stature, Judge Block awarded $6.7 million in damages to the artists.[91] A significant factor, taken into account when assessing damages, was the conduct of the defendant, which was variously described by the judge as 'unrepentant', 'recalcitrant', 'problematic' and 'wilful'. Judge Block was particularly unimpressed that the defendant had almost immediately ordered *5Pointz* destroyed upon hearing that the injunction had been denied, leaving the artists no time in which to record their works, and described his actions as one of 'pure pique and revenge', and 'the epitome of wilfulness'.[92]

It should be noted that Judge Block, in his latest decision, emphasised the deterrent effect of such a substantial award:

> 'Without a significant statutory damages award, the preservative goals of VARA cannot be met. If potential infringers believe that they can violate VARA at will and escape liability because plaintiffs are not able to provide a reliable financial valuation for their works, VARA will have no teeth'

However, an award of damages for the artists of *5Pointz* remains a Pyrrhic victory for them as artists and for the art world as a whole. *5Pointz* was a unique testament to an art form which is increasingly recognised as having significant social and cultural value.[93] Contrary to Judge Block's

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89 Cara Buckley and Marc Santora, 'Night Falls, and 5Pointz, a Graffiti Mecca, is Whited Out in Queens' *The New York Times* (19 November 2013) <http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html>.

90 *Cohen v. G&M Realty*, 13-CV-05612 (FB) (RLM) (E.D.N.Y. Mar. 31, 2017).

91 *Cohen v G&M Realty*, 13-CV-05612 (FB)(RLM) (E.D.N.Y. Feb.12, 2018); Enrico Bonadio, 'How 21 artists graffitied one man's property, made it famous, sued him when he knocked it down and won $6.7m' *The Independent* (London, 22 February 2018) Culture <http://www.independent.co.uk/arts-entertainment/art/5pointz-graffiti-artists-sued-property-knocked-down-frederic-block-meres-one-a8223031.html

92 *Cohen v G&M Realty* (n 91) 44-45.

93 Martin Irvine, 'The Work on the Street: Street Art and Visual Culture' in Barry Sandwell and Ian Heywood (eds), *The Handbook of Visual Culture* (Berg 2012); Alice Alves, 'Emerging issues of Street Art valuation as Cultural Heritage' (Lisbon Street-Art & Urban Creativity - International Conference July 2014); J.I. Ross, *Routledge Handbook of Graffiti and Street Art* (Taylor & Francis 2016).

opinion, the loss of *5Pointz* is irreversible and irreparable. Significantly, the fact that the court was amenable to awarding monetary compensation for the loss of *5Pointz* but was reluctant to prevent its destruction speaks volumes of the general position on moral rights in the US: there is evidently still an emphasis on the economic value of art, and a marked reluctance to recognise non-economic rights of artists,[94] which resulted in the irredeemable loss of a significant work of art and a piece of cultural heritage.

3. Australia Copyright Act 1968

a. Background

On 7 December 2000, Australia amended its Copyright Act 1968 to include moral rights.[95] s.195AI affords the author a right of integrity, which is 'the right not to have the work subjected to derogatory treatment.' In respect of artistic works, derogatory treatment means either

(a) The doing,..., of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
(b) An exhibition in public, of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or
(c) The doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.

Infringement takes place if a person subjects the work or authorises the work to be subjected to derogatory treatment.[96] The inclusion of authorisation as an infringing act is a point of difference from the U.K. CDPA, which does not recognise authorisation as a breach.

Furthermore, s.195AQ(4) provides that any person who reproduces, publishes, or communicates an artistic work which has been derogatorily treated will be in breach of the integrity right as well. This differs from the position in the UK which provides that infringement only occurs if there has been derogatory treatment of a work AND the work has been dealt with in specified circumstances akin to those described under s.195AQ(4) of the Australian Act.[97] In other words, derogatory treatment on its own cannot amount to a breach of the integrity right in the UK; there must also be some communication or publication of the derogatorily treated work. However, it appears

94 Mekhala Chaubal and Tatum Taylor, 'Lessons from 5Pointz: Toward Legal Protection of Collaborative, Evolving Heritage' (2015) 12 Future Anterior 76.

95 See Appendix E.

96 s.195AQ(2).

97 s.80(4) CDPA 1988.

possible that derogatory treatment on its own may amount to a breach in Australia. As explained in chapter 4, these additional requirements i.e. reproduction, publication and communication, in the UK CDPA make it difficult,[98] some say impossible,[99] for the right to prevent destruction from being recognised. This hurdle is absent in the Australian legislation.

Sundara Rajan has described Australia's implementation of moral rights, in employing a straightforward approach, as a model for the enactment of moral rights doctrine. In respect of the integrity right, Sundara Rajan specifically highlights certain positive attributes. Firstly, the Australian enactment specifically includes destruction of artistic works as a breach of the integrity right.[100] Secondly, it also refers to the manner in which an artistic work is exhibited; should it be prejudicial to the author's honour or reputation, it shall amount to a breach of the integrity right.[101] In these two aspects at least, the Australian legislation provides artists with considerably more protection than those afforded by the UK CDPA.

The history of moral rights implementation in Australia followed a path very similar to that trodden by the UK and US. Since its adherence to the Berne Convention in 1928, it resisted moral rights on much the same grounds as these other common law countries i.e. practical enforcement problems, foreignness of 'moral rights', few actual violations in reality, and economic impact on the copyright industries.[102] However, after having faced increasing criticism of its limited implementation of the Berne Convention, the Australian government was obliged to introduce moral rights into its copyright regime.[103] Apart from fulfilling its international obligations, there was also a palpable need for ensuring greater protection for Australia's creative community: 'At its most basic,

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98 Marjut Salokannel, Alain Strowel and with Estelle Derclaye, 'Study contract concerning moral rights in the context of the exploitation of works through digital technology: Final Report' Study Contract nooETD/99/B5-3000/Eo <http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf.> 143.

99 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2016) 288.

100 Section 195AK(a) Copyright Act 1968.

101 Section 195AK(b) Copyright Act 1968.

102 Peter Banki, 'The Moral Rights Debate in Australia' in Peter Banki and David Saunders (eds), *Moral Rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992); Jon A Baumgarten, 'On the Case Against Moral Rights' in Peter Banki and David Saunders (eds), *Moral Rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992); B Cottle, 'The Problem of Legislating to Protect Moral Rights' in Peter Banki and D. Saunders (eds), *Moral Rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992); Cate Banks, 'Lost in Translation: A History of Moral Rights in Australian Law 1928-2000 (Part One)' (2007) 11 Legal History 197.

103 Daryl Williams MP, Hansard HR Deb, 8/12/1999 p13026.

this bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them.'[104]

However, the government was also mindful of achieving a balance between the rights and needs of artists, and those of the copyright industries. This is evidenced by the constant reference to 'reasonableness' in the House debates,[105] as well as the inclusion of 'reasonableness' within the Copyright Act itself. s.195AS sets out a list of factors, discussed below, which the courts may take into account in order to ascertain if the defendant's act in subjecting the claimant's work to derogatory treatment was reasonable. In other words, a defendant's derogatory treatment may not amount to a breach if it was deemed reasonable.

b. Destruction of artistic works

Where destruction of artistic works is concerned, it is specifically listed as a form of derogatory treatment if prejudicial to the author's honour or reputation, and hence it avoids the interpretation problems inherent in s.80 of the UK CDPA i.e. the restrictive limitation of 'treatment' to just four acts: addition to, deletion from, alteration or adaptation, which *prima facie* suggests that destruction could not be considered as derogatory treatment, an issue which is discussed above in chapter 4. Hence, similar to VARA, destruction is unambiguously captured within the act.

There are limitations to the breach of the integrity right by destruction. First, as mentioned above, if the destruction is considered reasonable, it will not amount to a breach. s.195AS provides a non-exhaustive list of factors to be taken into account in order to ascertain reasonableness: nature of the work, purpose for which the work is used, the manner in which it is used, the context in which it is issued, industry practice, whether the work was made in the course of employment or under contract, whether it was necessary to avoid a breach of any law and the views of co-authors, if any. The purpose of this limitation is to ensure a balance between the interests of the author and those of other parties. However, as has been argued throughout this thesis, the destruction of a work of art represents an irretrievable loss, which amounts not only to a blow to the artist concerned, but also an injury to the cultural heritage to which the art once belonged. It is an act not to be taken lightly. As such, while reasonableness as a standard is more than adequate for the other potential infringing acts, such as mutilation or alteration, it is questionable if this appropriate for destruction. Destruction is an extreme irredeemable act, and hence should be measured by an arguably higher standard such as 'essential' or 'necessity' i.e. it was 'necessary in the circumstances' that the work in question had to be destroyed.

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104 Senator Patterson, Hansard, Senate Deb, 7/12/2000, p21066

105 Daryl Williams MP, Hansard HR Deb, 8/12/1999, p13026; Julie Bishop MP, Hansard HR Deb 30/10/2000 p21652, Daryl Williams MP, Hansard HR Deb 31/10/2000 p21714

A second limitation lies in s.195AT. Generally, the destruction of a movable artistic work will not infringe the integrity right if the destroyer of the work gives the author a reasonable opportunity to reacquire the work. However, the act is silent on how ownership of the work as a piece of physical property may be resolved.[106] Where the artistic work in question is fixed to a building which is subject to demolition and thus will itself be destroyed, its destruction will not amount to a breach if, after having made reasonable inquiries, the author cannot be located.[107] If the author has been located, he must be given notice of the demolition, and a three week opportunity in which to record the work or consult with the owner about the changes to the building which might result in the destruction of the work.[108] Similar provisions are made for site-specific works.[109] In addition, if the remover of a site-specific work complies with the author's request that any identification of him as author is removed from the work, the removal shall not amount to a breach of the integrity right.

Although the requirement to give the author an opportunity to remove or otherwise record his work is laudable, a criticism lies in the three-week timeframe in which the author has to record his work. Some sculptures are indeed difficult to capture by photography,[110] and as such, more time may be required in which an appropriate means of recording the work may be identified and effected. Another issue lies in the potentially considerable costs of removal and storage of the work which was destined for destruction. The Act is silent as to which party bears the responsibility for removing and storing the art work, and as already stated above, it is silent on the ownership of the physical property of the work in such event.

There have been very few cases involving moral rights in Australia and as such it is difficult to ascertain the actual extent of the legislation's impact on artists and how the judiciary will interpret the moral rights provisions. However, it is instructive to examine the few cases involving destruction of art works, even though they were all eventually settled out of court. Such cases are still useful in throwing some light on the impact of the Act.

One case involved a site-specific sculpture, entitled '*Distant Conversations*' which was situated within and outside the foyer of the Telstra building in Melbourne.[111] In 2009, Telstra contacted the sculptor informing him of their plan to remove the sculpture. As any attempt in

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106 Davies and Garnett (n 34) 659, para 24-027.

107 Section 195AT(2).

108 Section 195AT(2A).

109 Section 195AT(4A).

110 Echoed by Weltzin Blix in his testimony before the Subcommittee on VARA, Hearing before the Subcommittee, HR Rep No. 101-514 (n 16) 120.

111 Michael Meszaros, '*Distant Conversations'.*

removing the work would likely result in its destruction, the sculptor raised s.195AT of the Copyright Act 1968, which enabled him to negotiate the sculpture's removal with the owners of the building. The end result was that the work was eventually purchased for a nominal sum by a third party and its removal took place under the supervision of the sculptor.[112] Another recent case involving mosaics installed in Sydney Skygarden shopping centre was similarly resolved.[113] Armed with the backup of the moral rights provisions in the Copyright Act, the artist was placed in a better position to negotiate the safe removal and storage of his work.

Another much earlier case involved the maintenance and proper exhibition of a sculpture in Hornsby, New South Wales. Victor Cusack's sculpture, '*Man, Time and the Environment*' consisting of a working clock and other moving parts, was commissioned by the Hornsby Shire Council and unveiled in 1993.[114] In 2003, the sculpture was removed pending renovation of a nearby shopping centre. However, it was not re-installed according to Cusack's instructions, and it fell into disrepair and did not work for a number of years. As it was no longer working, the piece became locally referred to mockingly as *Man, and the Environment Out of Time.* This was naturally upsetting to Cusack who felt that his honour and reputation were damaged by the lack of care. Armed with legal advice about the recent enactment of moral rights however, Cusack was able to negotiate terms with Hornsby Shire Council from a strong position, which resulted in his sculpture being repaired to full working order.

c. Conclusions

The full impact of the amendments to Australia's Copyright Act 1968 remains to be seen. On its face, it would seem that the provisions have been drafted carefully and thoroughly, taking pains to ensure a balance is struck between the rights of artists and those of other parties involved. A few criticisms may be levied at the details of the provisions, such as for example, the three week timeframe in which the artist has to record his work.

On the whole, the mere existence of the provisions has resulted in positive outcomes for artists in Australia, as illustrated in the few cases described above. The mere availability of the moral rights provisions have enabled numerous artists to seek out favourable terms for their works, which is to be applauded. In the UK, where no such legal support exists, artists are left in a much more vulnerable and weaker bargaining position.

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112 Arts Law Centre of Australia, '*Michael Mesazaros' 'Distant Conversations"* <https://www.artslaw.com.au/case-studies/entry/michael-meszaros-distant-conversations/>

113 Arts Law Centre of Australia, '*The Moral (Rights) of the Story*', <https://www.artslaw.com.au/case-studies/entry/the-moral-rights-of-the-story/>.

114 Katherine Giles, Arts Law Centre of Australia, '*About Time: Moral Rights Victory for Victor',* <https://www.artslaw.com.au/articles/entry/about-time-moral-rights-victory-for-victor/>.

4. India Copyright Act 1957

a. Background

Section 57 of India's Copyright Act 1957 provides for moral rights. Currently, it provides that the author's integrity right exists independently of his copyright, and it is the right to 'restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.' An explanatory note clarifies that 'failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section'. The wording of s.57 thus closely resembles Art.6*bis* of the Berne Convention.

However, it has not always been so. s.57 has been amended considerably since its original enactment. The interesting thing about the old s.57 was that it was considerably broader in scope and afforded the author greater protection than its Art.6*bis* inspired incarnation. The original s.57 simply allowed a claim for 'any distortion, mutilation or other modification of the…work'. Such claim was not dependent upon a finding of prejudice to honour or reputation,[115] and thus was far less ambiguous where destruction is concerned. This is because, as has been discussed previously in this thesis, it is generally argued that once a work is destroyed, there would be nothing left which may affect the author's honour or reputation, and hence could not amount to a breach of the author's integrity right. As the original s.57 did not require such prejudice to be shown, then the mere destruction of a work would amount to a straightforward breach of the integrity right.[116]

Sundara Rajan has commented extensively on the mutation of the original s.57 to its current more restricted form, explaining that it sheds light particularly on the Indian government's policies and stance on cultural activities.[117] It is particularly informative from the point of view of this thesis, as it also illuminates the relationship between cultural heritage and moral rights, which is a crucial theme adopted by the thesis. Fundamentally, Sundara Rajan is of the opinion that India, like several other developing countries, embraces a particularly welcoming and expansive attitude to moral rights, unlike the more parsimonious approach taken by developed countries.[118] The key reason, posited by Sundara Rajan, was a passionate and urgent post colonial desire to exercise their hard fought

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115 Mira T Sundara Rajan, 'Moral Rights in Developing Countries: The Example of India - Part I' (2003) 8 Journal of Intellectual Property Rights 357, 366.

116 Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 175.

117 Rajan, 'Moral Rights in Developing Countries: The Example of India - Part I', 364; Rajan, *Moral Rights: Principles, Practice and New Technology* (n 115) 176-79.

118 Rajan, *Moral Rights: Principles, Practice and New Technology* (n 116) 160-61.

freedoms and recover their dignity.[119] In order to distinguish their countries and cultures from those of their colonial masters, there was a resurgence of interest and intense pride in their own cultural heritage. Moral rights thus provided these countries with a legal framework in which to protect and preserve their cultural heritage, which explains why the initial adoption of moral rights in such countries was invariably extensive, sometimes even exceeding the extent of protection found in the continental countries.[120]

Specifically, Sundara Rajan posits that India's own unique development of its moral rights regime may be attributed to certain factors: its colonial inheritance from the British, certain vestigial influences from Continental Europe due to colonisation by the French and Portuguese, and the inherent tensions brought about by India's dual position as both an importer and exporter of copyright works. Although India has undoubtedly inherited its common law tradition from the British, it has also been exposed to the legal and cultural influences of Continental Europe. Indeed the generous wording of the original s.57 is more broadly reminiscent of French law than the English where moral rights were concerned. s.57 was thought to have been modified in response to a High Court interim ruling delivered in 1992 in the seminal case of *Amar Nath Sehgal v Union of India*.[121]

b. Amar Nath Sehgal v Union of India

Sehgal was a prominent sculptor who was commissioned by the Indian government to create a mural to be installed in a major public building. After five years of toil, the mural was finally completed in 1962 and took pride of place in the building's main lobby to critical acclaim. However, in 1979, the mural was dismantled and placed in storage, and in the process suffered extensive damage and loss. Sehgal sought an injunction to prevent further harm, and the interim injunction granted in 1992, established two important principles, which were later confirmed and expanded in the Delhi High Court's final judgement of 2005. The two principles were that moral rights could recognise a right against the destruction of a work, and that the government had a duty of care towards artworks in its care.[122] Shortly after the delivery of the interim ruling, s.57 was amended in 1994 to include the reference to 'honour or reputation' and also the explanatory note which makes the failure to display a work immune from infringement.[123] It had become apparent to the government of the day that the extensive protection under the original section could open up the government to a greater likelihood

119 ibid., 161.

120 ibid., 160.

121 2005 (30) PTC 253.

122 Rajan, *Moral Rights: Principles, Practice and New Technology* (n 116) 175-76.

123 ibid., 176-177.

of liability for their possession and upkeep of cultural works.[124] There were possibly other reasons as well. India's accession to the Berne Convention meant that their moral rights would also be extended to foreign authors. As such access to foreign works could be hindered by India's uniquely generous set of moral rights, which in turn could prove deleterious to India's progress as a developing nation.[125] It was thus undesirable to have unduly strong moral rights. Furthermore, strong moral rights could also prove to be an obstacle to foreign investment in India's growing cultural industries, particularly Bollywood.[126] All of these reasons played a part in the eventual erosion of strong moral rights in India.

The High Court which delivered the final judgement in *Sehgal* virtually ignored the new amendments to s.57 however. It could have decided in one of two conventional ways: either the new s.57 was not applicable because *Sehgal* was brought to court prior to its amendment, or the new s.57 was applicable because it was in force at the time of the final judgement and therefore, there was no claim available for the destruction of the mural. However, Judge Nandrajog chose to read the Indian provisions on moral rights, specifically the new s.57, in light of the broader public policies at play here. In paragraphs 37 to 56 of his judgement, he made extensive references to the rich cultural heritage of India, the Indian Government's Five Year Plan for Art and Culture, as well as the numerous international conventions on cultural property to which India was a party. The essence of his decision was that a failure to prevent the destruction of a cultural treasure was not only at odds with the aims of these conventions, but would also undermine the cultural heritage of India. Therefore, he urged, in paragraph 56, that 'there would be urgent need to interpret s.57 of the Copyright Act 1957 in its wider amplitude to include destruction of a work of art'. Significantly, the judge accepted the argument, raised by Anand, counsel to Sehgal, that the destruction of his work would reduce his creative corpus, thus damaging his reputation in turn.

The High Court in *Sehgal* thus chose to look at the broader picture underlying India's copyright regime and its moral rights provisions. It clearly questioned the aims of moral rights and also clearly understood the needs of India's cultural heritage. In so doing, the High Court was able to articulate a legal principle which combined the two, showing how moral rights could and should serve the needs of a country's cultural heritage.

c. Conclusions

The High Court's final judgenment in *Sehgal* is inspiring for it clearly chose to place the country's cultural heritage needs at the heart of its interpretation of s.57. In so doing, it also called into question

[124] ibid., 172.

[125] ibid., 173.

[126] ibid., 173.

Art.6*bis* of the Berne Convention, after which its s.57 is modelled, and its minimal standards for the integrity right. Even if the aim of moral rights was simply to protect an author's honour or reputation, it is reasonable to accept that his honour or reputation could well be damaged by the destruction of his work, since it will result in a reduced pool of creations which may serve as proof of his artistry and skill. However, the Indian court had also recognised the wider implications of moral rights. The reason why moral rights aim to protect an author's honour or reputation is because it recognises that the artist's 'creativity and ingenuity is amongst the valuable cultural resources of a nation'.[127] The court correctly recognised that the issues are interlinked. Artists are protected because without them, there isn't a cultural heritage to speak of. Moral rights serve to protect artists, and in turn also protect their works, which are valuable cultural resources.

There is a further public interest reason, discussed above in chapter 2. There is a public interest in maintaining the true integrity of its cultural resources for the benefit of future generations. This was a point also raised by Justice Nandrajog in *Sehgal* when he quoted the following from Sundara Rajan's article: '…moral rights are closely linked to a public interest in the maintenance of historical truth and cultural knowledge'.[128]

The UK's former colony has displayed a refreshing and courageous willingness to see beyond the limitations of Art.6*bis* in order to preserve its valuable cultural heritage. While there have not been many cases to have litigated upon s.80 of the CDPA, and none on destruction of art specifically, there is some indication that the UK judges may also be just as willing to abide by the example of Judge Nadrajog. HHJ Fysh has already indicated such willingness in *Harrison v Harrison*,[129] discussed above in chapter 5. He saw no reason why the UK's equivalent provisions should be limited to covering acts short of destruction.

5. Conclusions: Lessons Learned from the US, Australia and India

The legal landscapes of the US, Australia and India, look familiar and different at the same time. All have derived the common law basis of their legal systems from the UK, and where copyright law is concerned, there is a clear lineage from the Statute of Anne. In the US and Australia, concerns regarding the foreignness of moral rights and its potential to disrupt the exercise of the copyright owner's economic rights are concerns also shared by the UK.[130] These jurisdictions have also

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127 *Amar Nath Seghal v Union of India (Uoi) And Anr* Delhi Law Times, para 38.

128 Mira Sundara Rajan, 'Moral rights and the protection of cultural heritage: Amar Nath Sehgal v Union of India' (2001) 10 International Journal of Cultural Property 79.

129 *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* [2010], ECDR, 3 (PCC).

130 See Chapter 4 above.

consistently displayed a greater emphasis and concern for the economic rights bound up in a copyright work, rather than the non-economic authorial rights. In this way, they have failed to also recognise that the copyright industries cannot exist without the original input of the individual author, and therefore his rights should also be given equal, if not greater, regard. However, it is clear that this understanding has gradually dawned upon the lawmakers in these countries. The enactment of VARA and the amendments to the Australian Copyright Act, flawed as they may be, indicate a willingness at least to confront the apparently conflicting interests of individual author and copyright owners or property owners.

More significantly, especially where unique original works of art is concerned, there is clearly a growing understanding in these jurisdictions that moral rights play a substantial role in the protection of cultural heritage, by protecting the non-economic needs of artists and also by recognising the irretrievable damage inflicted by destruction on both the artist and the country's cultural heritage. They have thus shown the way, by enacting innovative albeit flawed legislation, to this effect. By contrast, India still retains the restrictive wording of Art.6*bis*, but nevertheless has shown that it is possible to read into it, through judicial ingenuity, an underlying desire to protect cultural heritage and to protect valuable cultural property from utter destruction.

It is intended that this chapter's extensive analysis of the key legislative provisions and case law as well as their respective legislative histories, serve to fulfil the following objectives. Firstly, it is hoped that this exercise would help highlight key arguments in support of a right against destruction, and which have been readily accepted by the legislative bodies and judiciary in these jurisdictions. Secondly, the analysis has highlighted key potential loopholes and pitfalls which may befall the UK legislature and judiciary, should either be involved in the formulating or interpretation of new rights against destruction in the future. And finally, these countries have clearly revealed a willingness to adapt their copyright policies and laws when necessary to adopt more extensive moral rights, instead of adhering stubbornly to the utilitarian philosophy that underpins their copyright regimes, which favours economic rights over moral rights.

The lessons highlighted in this chapter have been invaluable in informing the construction and drafting of the proposed new section 80A referred to earlier in chapter 1 and set out in the concluding chapter. Particular concerns are addressed in the draft section as follows.

As discussed in this chapter, a blanket prohibition on all types of applied art without more, as is the case in VARA, is not sufficiently nuanced to avoid inclusion of works, which although utilitarian, are however of considerable artistic value, such as Picasso's ceramics. Section 80A(3)(ii) addresses this by indicating that applied art works are excluded from protection unless primarily intended to be an artistic work and its utilitarian features are secondary to its artistic purpose.

Under VARA, limited edition works are restricted to only 200 copies, which may be criticised as being rather ungenerous. This is addressed in the proposed section 80A which increases the number of limited edition copies to 850, a number which is based on recommendations made by the Fine Art Trade Guild in the UK.[131] Site-specific works are neither explicitly included nor excluded under VARA which has led to uncertainties surrounding the protection of such works. Section 80A addresses this by referring explicitly to site-specific works, which is defined in subsection (5) and also described in the accompanying explanatory notes, thus avoiding the problems arising from the lack of clarity in VARA.

Section 80A does not explicitly restrict the right against destruction to only works of 'recognised stature' as is in the case of VARA. As discussed in this chapter, the explicit requirement of 'stature' may only serve to protect works which have acquired fame or notoriety, rather than possessing some inherent artistic quality which makes the work deserving of protection. It is thus provided in section 80(6) that stature is simply one factor, alongside 'artistic quality' as a separate factor, which may be taken into account when determining whether or not it is reasonable to destroy an artistic work.

Finally, inspiration is taken from Australia's legislation, which attempts to strike a balance between authors and those who seek to destroy an artistic work for various reasons. Section 80A acknowledges that there may well be circumstances in which an artistic work may have to be destroyed and likewise, utilises a reasonableness standard to assess such circumstances. Subsection (8) also prescribes steps to be taken by both author and the person seeking destruction, which may not only assist in mitigating the loss which the author may suffer, but also in offering both parties a clear and fair process in which the removal or if inevitable, the destruction of a work, may take place.

[131] Fine Art Trade Guild, Guild Print Standards, https://www.fineart.co.uk/guild-print-standards-with-artsure.aspx

Chapter 10 - Conclusion

> *'This is a debate about the dignity with which society regards artists and the value society places on the integrity of artistic endeavours'*
>
> Sydney Pollack*

1. Introduction – the question asked and its importance

The question that led to the writing of this thesis was why UK moral rights do not include a right to object to the destruction of works. It seems an incongruous state of affairs when a cartoonist is able to bring a *prima facie* suit against the colourisation of his dinosaur cartoons,[1] or a garage band may claim for the superimposition of their track,[2] but an artist is unable to claim against the destruction of his work.

Four apparently straightforward reasons have been advanced to account for this omission: (1) the definition of treatment in s.80 CDPA 1988; (2) as destruction leaves nothing behind, the artist's reputation is not harmed; (3) the copyright work is intangible and hence cannot be destroyed; and (4) owners of the physical form of copyright works may do as they please with their property. One of the main tasks of the research undertaken was to investigate and probe the robustness of these traditional reasons which have previously been offered and accepted largely at face value and subjected to little or no critical scrutiny. By engaging with a selection of relevant but disparate sources and academic fields, ranging from art ontology to anthropological studies on *honour*, this research demonstrates that these reasons are not incontestable, and that a case can be made that a continued refusal to recognise a right against destruction is unsustainable.

In addition to rebutting those reasons, the research has also delved deeper into the main question, for it clearly raises further questions about the foundations of copyright law and moral rights as a whole. Why does the integrity right stop short of recognising claims against destruction? It makes little sense considering the brutality and finality of a destructive act. This is particularly so where the fine arts are concerned, as they typically exist in unique singular forms, or at least in limited editions. Why are artists, whose works would generally be recognised and protected by copyright law, left vulnerable and impotent in the face of destruction? Should such an outcome be countenanced by copyright law and moral rights doctrine?

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* Quoted in Berne Convention Implementation Act of 1987: Hearings before the Committee on the Judiciary, House of Representatives...June 17, July 23, September 16 and 30, 1987, February 9 and 10, 1988, Serial No. 50, 413 (as cited in P. Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014).

1 *Tidy v Trustees of the Natural History Museum* (1995) 39 IPR 501.

2 *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (t/a East West Records)* EWHC (2003) ECDR, 1274 (Ch).

If we accept that a primary aim of copyright law is to encourage the production of more creative works, then to allow the destruction of creative works is illogical and irreconcilable. This is because destruction of a copyright work nullifies not only other moral rights, such as the paternity right or *droit de suite*, but also the economic rights afforded by copyright, such as the reproduction right.[3] These rights all play a role in incentivising literary and artistic creation. For instance, royalties generated from exercising the reproduction right reward and encourage artists to create.[4] That the aim of copyright is to encourage creativity is reflected historically in the Preamble to the Statute of Anne which emphasised the 'encouragement of learning' and in the US Constitution, which states that the purpose of copyright is to 'promote the Progress of Science and the useful Arts'. Similarly, the preamble to the WIPO Copyright Treaty recognises the 'the outstanding significance of copyright protection as an *incentive* for literary and artistic creation'. The incentives, encouragements and rewards afforded in the manner of royalties through the reproduction right are however effectively neutralized once the original artistic work is destroyed.

The recognition of such a right against destruction is clearly not inconceivable, bearing in mind the many jurisdictions which do recognise the right. The examples of the copyright regimes in the US, Australia and India bear witness to the evolution and eventual acceptance of the right. In contrast, Singapore, like the UK, fails to recognise the right against destruction, indeed Singapore fails to recognise the integrity right altogether. The favoured treatment of profit generating creative industries over that of the fine arts in Singapore as described in chapter 8 serve to reflect the failings of a copyright policy that eschews substantive moral rights.

Finally, it may be asked why such a question should be addressed in the first place. The copyright works and copyright authors who stand to lose most from this gap in the law are those situated within the fine arts,[5] which almost invariably consist of works that are unique and irreplaceable once destroyed. Throughout the thesis, and in particular chapter 3, care has been taken in emphasising the importance of the fine arts in our lives, and the indispensable role they play in enriching our lives and those of future generations.

It is recognised that an artist's right against destruction would not be adequate to address acts of mass destruction, such as the Bonfire of the Vanities, or the Nazi bonfires, which are referred to in the title to the thesis and in chapter 3. It is not suggested that a modest right against destruction such as the one championed in this thesis will resolve such devastation. However, owing to the sheer

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3 J.H. Merryman, 'The Refrigerator of Bernard Buffet' in J.H. Merryman (ed), *Thinking About the Elgin Marbles - Critical Essays on Cultural Property Art and Law* (Kluwer Law International Ltd 2000), 316, 328.

4 Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009), 40.

5 As defined in chapter 1.

magnitude of these atrocities and their notoriety, they serve the purpose of accentuating the sense of profound loss and horror which we experience whenever a work of art is wantonly destroyed, hence the reference in the title and their discussion in chapter 3. These examples help to bring home the point made repeatedly in this thesis: that a loss of a work of art is a loss to humanity. A closing of the gap identified within our copyright regime is at least a small step in the right direction, which serves to protect our artists and preserves their works for the benefit of our children's children.

2. Thesis findings

Set out below is a summary of the key findings in the research, which address not only the main question - why do UK moral rights not include a right to object to destruction? - but also the following supplementary questions:

i. Are the aims of copyright law and moral rights doctrine undermined by the lacuna?
ii. Are the reasons for denying the recognition of such a right defensible?
iii. What should be considered best practice for the UK copyright system?

Supplementary Question i: are the aims of copyright law and moral rights doctrine undermined by the lacuna?

Finding (1) - The aims of copyright law and moral rights doctrine – fulfilling the public interest

The research focused on the interrelationship between copyright and moral rights. Much has already been written about this. However, the research examined this aspect from three particular angles, primarily in chapter 2. Firstly, in examining the historical development of copyright law in the UK, it was argued that the idea of moral rights was never as alien as has often been suggested. Secondly, in examining the UK copyright law's utilitarian approach, it could be argued that the public interest in the 'encouragement of learning' is not only served by the grant of economic rights, but also by the recognition of stronger authorial rights. Finally, from an examination of the interlinked roles of moral rights and copyright, particularly in relation to the part they play in fostering the arts, creativity and cultural heritage, it was concluded that moral rights play an indispensible role in helping copyright law achieve its overarching aim of encouraging learning.

Copyright and moral rights – a common beginning in the UK

Copyright law and moral rights have been traditionally presented as opposing forces, with copyright focused on bestowing economic benefits on authors while moral rights are focused on recognising the spiritual relationship between author and work. However, the roots of both can be

traced back to an understanding that the author possesses natural rights in his work. This was not only understood in the authorial rights countries such as France and Germany, but also in England in the 18th century, through *dicta* in early case-law and legal commentaries. The development in the common law of a utilitarian conception of author's rights led to an emphasis on granting economic rights in return for the production of new works for the benefit of the public. In contrast, the emphasis on the natural rights of the author in the civil law countries led to a strengthening of the moral rights that we know today. These developments have led to the commonly held belief that there is a clear distinction between copyright and moral rights, whereas recent scholarship has revealed that the delineation is not as strict as it appears.

Copyright and moral rights – complementary roles in upholding the public interest

In the UK, the public interest has been maintained as the underlying justification for its utilitarian approach to copyright, with a minimal moral rights regime. The public interest is conceived as lying in the proliferation of new works and the wide dissemination of such works. These objectives are to be attained by rewarding authors with economic benefits, which assist in an efficient exploitation and distribution of works. However this emphasis on economic benefits has led to a corresponding neglect of the original goals of UK copyright.

What has been forgotten in all this is an understanding of *how* and *why* people create. If law makers are to fulfil the public interest in encouraging learning, then they should seek to understand the process of creation. The research draws from not only commentaries on this aspect from legal academics such as Kwall and Merryman, but also commentaries from authors living at the time of the Statute of Anne. It is clear from such authors, some of whom were instrumental in the early debates surrounding the enactment of the Statute of Anne, that they were, first and foremost, profoundly concerned about the integrity of their works. These were their true concerns. Building on this, the research has also gathered together evidence of how and why the established great artists in literature, music and art come to create. The material is further bolstered by evidence from art philosophers and social psychologists.

Copyright, in focusing primarily on economic rights, does not take into account that which truly drives creative people. The belief that monetary benefits are essential for promoting creativity does not account for the multitude of creative works produced in times when copyright did not exist.[6] While artists make a living from producing artistic works, it seems clear from the evidence examined in chapter 2 and 3 that financial rewards are not the *true* drivers of creativity. Reference was made in chapter 2 to Mozart and his astounding levels of creativity as an example

[6] Richard A. Spinello and Maria Bottis, *A Defense of Intellectual Property Rights* (Edward Elgar Publishing 2009), 41.

of this. While Mozart gladly accepted commissions, indeed actively sought them out, some of his greatest works were the result of spontaneous creativity, and not as a result of a financial incentive. Examples include his final three symphonies, no. 39 in E-flat, no. 40 in G minor and no. 41 in C major ('the Jupiter'), which were written in the space of two months, and were reportedly neither published nor performed in his lifetime. They were not written for any commission,[7] particular occasion or purpose,[8] yet they were towering masterpieces. 'The Jupiter' in particular was once heralded to be 'the highest triumph of instrumental composition'.[9] These monumental works were the result purely of Mozart's creative impulses.[10]

Although it may be argued that without the offer of substantial commissions for some of his operas, Mozart might not have produced them, this may be countered by the argument that such commissions were necessary for practicalities, such as staging their performances and meeting his living expenses, but were not instrumental in encouraging or inspiring his innate creative instincts as such – commissions were a means to an end and not an end in themselves. A distinction between the *practical* necessity of economic returns from creative work and the natural creative urges which are crucial for the production of creative work should be recognised.

Something beyond monetary rewards clearly drives creativity. This is evidenced today in the so-called 'IP-negative spaces', i.e. creative industries which are excluded from IP protection but nevertheless thrive in the absence of IP.[11] Examples of such industries include haute cuisine,[12] graffiti art,[13] magic,[14] and stand-up comedy.[15] Clearly some of these industries are financially driven to an extent e.g. haute cuisine and stand-up comedy, but others are not e.g. graffiti art. However, even within the more economically driven industries, there is a sense that their creations are not mere products which are churned out indiscriminately. With respect to haute cuisine for instance, there is an abundance of literature on the art of cookery, ranging from 18th

7 John Suchet, *Mozart, the Man Revealed* (Elliott and Thompson Limited 2016), 228-229

8 Alfred Einstein, *Mozart, His Character. His Work* (Cassell and Company Limited 1946), 234.

9 As described by notable music publisher Vincent Novello, in agreement with Franz Xaver Mozart's assessment of the 'Jupiter' symphony. Elaine R. Sisman, *Mozart, The Jupiter Symphony* (Cambridge University Press 2009), xi.

10 Suchet, 229.

11 Kate Darling and Aaron Perzanowski, *Creativity without Law* (New York University Press 2017); Kay Raustiala and Christopher Sprigman, *The Knockoff Economy* (Oxford University Press 2012).

12 Emily Cunningham, 'Protecting Cuisine under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen? ' (2009) 9 Journal of High Technology Law 21.

13 Celia Lerman, 'Protecting Artistic Vandalism: Graffiti and Copyright Law' (2013) 2 NYU Journal of Intellectual Property and Entertainment Law 295.

14 Jacob Loshin, 'Secrets Revealed: Protecting Magicians' Intellectual Property without Law' in Christine A. Corcos (ed), *Law and Magic* (Carolina Academic Press 2010).

15 Dotan Oliar and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) Virginia Law Review 1787.

century writer-philosophers such as Brillat-Savarin,[16] to Elizabeth Telfer in the present day,[17] who all extol the aesthetic qualities of cuisine. According to DeSalis, the art of cookery has become a high art,[18] and she tells of a chef who was inspired by one of Donizetti's operas to create a sorbet.[19] Acclaimed chef Ferran Adria was recently celebrated in an international art exhibition entitled *Ferran Adria, Notes on Creativity.*[20] Innovation clearly drives Adria and he has claimed that his famous restaurant, el Bulli, despite charging astronomical prices, made little or even no money, saying that he had no interest in making money.[21] Studies of IP-negative industries reveal that 'the assumptions underlying the IP system largely ignore the range of powerful non-economic motivations that compel creative efforts.'[22]

In this way, in failing to accommodate the true motivations that lie behind creative work, copyright fails creators and ultimately the public interest it professes to uphold. Moral rights can play a role in closing this gap, for it recognises that which creators truly value.

There is a further way in which the public interest is upheld by the integrity right. If it is in the public interest to have access to new works for the encouragement of learning, it makes sense to ensure that the works to which the public has access are accurate, of high quality and can endure. This is because the quality of the public's learning depends in turn on the quality and accuracy of that from which they gather their knowledge. The longevity of creative works is also important as knowledge is cumulative, growing by building on pre-existing knowledge and works which have come before.[23] The loss of a creative work cuts off a potential source of knowledge and insight. This is not to argue that *every* source of knowledge and insight shall prove to be of everlasting value; indeed some sources of knowledge or insight may subsequently be found to be flawed. However, this does not mean that we should not attempt to preserve such sources. The understanding that knowledge and insight may be flawed should not after all come as a surprise, for human beings are not infallible. Even the rigorous research processes in the sciences are

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16 Jean Anthelme Brillat-Savarin, *The Physiology of Taste* (Charles Monselet tr, Liveright Publishing Corporation 1948).

17 Elizabeth Telfer, *Food for Thought* (Routledge 1996).

18 Mrs De Salis, *The Art of Cookery* (Hutchinson & Co. 1898), 1.

19 ibid., 51.

20 Ferran Aria, *Notes on Creativity*, Travelling Exhibition 25 Jan-28 Feb 2014 <http://www.drawingcenter.org/en/drawingcenter/5/exhibitions/9/upcoming/502/ferran-adria/>

21 John Carlin, 'If the world's greatest chef cooked for a living, he'd starve.' *The Observer* (December 11, 2006)

22 Darling and Perzanowski (n 11) 2.

23 The idea that knowledge is cumulative and that the pursuit of useless knowledge is invaluable is passionately championed in the classic essay entitled 'The Usefulness of Useless Knowledge' by Abraham Flexner, founding Director of the Institute for Advanced Study at Princeton University: Abraham Flexner, 'The Usefulness of Useless Knowledge' (1939) Harpers 4.

imperfect. Richard Horton, editor of *The Lancet* has lamented that 'much of the scientific literature, perhaps half, may simply be untrue'.[24] The point is, the converse may however be true; insights initially thought or even dismissed as useless may turn out to be useful in future.[25]

A work of art may not mean anything to anybody today, but tomorrow or in a hundred years, it may bring new insight to someone, thus adding to the body of knowledge. If it is destroyed today, the knowledge, insights, inspiration and other goods that it offers are lost forever. The integrity right thus serves to ensure the encouragement of learning. However, its effectiveness in achieving this aim is undermined by an inability to also protect against the destruction of works.

Supplementary Question ii: To what extent are the reasons for denying the recognition of such a right defensible?

Finding (2) - Doctrinal analysis of Art.6bis Berne Convention and s.80 CDPA

A close analysis of Art.6*bis* and s.80 CDPA was undertaken and discussed in chapter 4. The debates which took place on the various Berne Convention conferences as well as those in the UK Parliament in debates surrounding moral rights have also been closely scrutinised.

Finding 2.1

The first finding, after an analysis of the debates which took place at the Rome and Brussels conferences was that the right to object to the destruction of works may well have been accepted as part of the integrity right by the members of the Berne Convention, including the UK.

Finding 2.2

The second finding of significance was that at the time of the Rome debates on Art.6*bis*, several members had emphasised focusing on the *integrity* of the author's work, and that damage to the integrity of an author's work is not necessarily dependent on damage to the author's honour or reputation as well. Indeed, although it appears to be a prerequisite in the UK, this remains the position in some Berne countries today.[26]

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24 Richard Horton, 'Offline: What is medicine's 5 sigma?' (2015) 385 The Lancet 1380.

25 For instance, Faraday's discoveries in the fields of electricity and magnetism had no clear utility initially but were later found to be indispensable in the practical applications of these fields in modern life. See Flexner (n 23) 546. Even Galen's humorism or four temperaments doctrine, which has long been debunked in medical science, has nevertheless some influence in and relationship to Traditional Chinese Medicine, the practice of which is widespread today. See Hong Hai, 'Kuhn and the Two Cultures of Western and Chinese Medicine' (2009) 4 Journal of Cambridge Studies 10.

26 France and Belgium for instance.

Finding 2.3

The third finding was that there was evidence in the Rome debates of a belief in the role of moral rights in safeguarding cultural heritage. The very fact that moral rights endure beyond the author's death indicates a conception of moral rights that includes a role in the protection of cultural heritage. If so, a right against destruction fits in neatly with such a role, as evidenced for instance, in the debates surrounding VARA and in the underlying justification for an expansive interpretation of s.57 of the Indian Copyright Act 1957.

Finding 2.4

The fourth finding stems from an analysis of the Parliamentary debates which took place before the enactment of the CDPA. It revealed that apart from the government's representative, Lord Beaverbrook, the participating members were very concerned about the non-economic rights of authors. Lord Beaverbrook's response however was evidence of a government very much focused on the economic, rather than the non-economic rights afforded to the author.

Finding 2.5

The final finding based on an interrogation of s.80 CDPA is that the generally held view that the definition of 'treatment' excludes destruction is unfounded as is the argument that the additional public communication requirements (i.e. the integrity right is only breached if the derogatory treatment of the work is communicated in certain ways) would tend to exclude destructive acts.

Finding (3) - Destruction prejudices the author's 'Honour'

'Honour' as a subject has been paid little attention by scholars in the field of copyright law. It is a concept also generally ignored by UK judges, who prefer to address the other requirement in s.80 CDPA: reputation. This is because reputation is a familiar concept, rooted in the law of defamation. As such, because destruction leaves nothing behind that could ruin the author's reputation, it is generally argued that destruction cannot amount to a breach of the integrity right. However, how does destruction affect honour? It depends on how 'honour' is defined.

The research has subjected the concept to a rigorous analysis, never previously conducted in the field, and has drawn evidence of its meaning and possible applications from three key sources: anthropological studies on the concept of 'honour', the Roman concept of *iniuria* and early Anglo-Saxon laws involving the concept of honour. The conclusions which may be drawn from such research include that 'honour' may be conceived as a 'right to respect' or a 'right not to be insulted'. If so, then the destruction of a work would almost invariably prejudice 'honour' as the effect of destruction on a work is unambiguous, and there is rarely good reason for destroying

someone's work. The *prima facie* intent behind an act of destruction is generally disrespect or a disregard for the honour of the author.

Finding (4) - The conception of art in copyright law

The particular conception of the artistic work in copyright law makes it difficult to justify the recognition of a right against destruction. This is because the protectable essence of authorial works is the intangible content, not their physical embodiment. This means that the destruction of the physical embodiment will leave the work intact for copyright purposes; in other words, a work does not lose copyright simply because it has been destroyed. Therefore, it has been argued that where art works are concerned, the picture in a painting is the protectable work, not its physical support i.e. the canvas and pigments. Under copyright law, even if the canvas and paint have been destroyed, the work for the purposes of copyright is not also destroyed. It then follows that if copyright works cannot be destroyed, it is meaningless to have a right against destruction of works.

While this particular conception does not affect textual or notational works which generally exist in multiple copies such as poems, music or novels, it affects artistic works such as paintings and sculptures in a profound way. Such works are utterly dependent on their physical embodiment for their existence.

The argument put forward in chapter 6 is that art philosophers, artists and indeed ordinary people perceive and treat the physical support as *the* art work. The destruction of the physical support also destroys the art work. This is supported by research into the different views of art philosophers who have debated the ontology of art, as well as drawing from recent empirical research conducted by psychologists at the Universities of Texas and Yale. All point towards an understanding of art in the art world as well as by the ordinary public which is profoundly at odds with that conceptualised within the law of copyright. Copyright law possesses an understanding and theory of art which conflicts too violently with how art is ordinarily perceived, not only by art experts but by non-experts as well.

Finally, it may be asked: does it matter that the public is able to view the original work? Do they not benefit anyway from merely viewing a copy? It was argued in Chapter 6 that it does matter. Firstly, the sheer impact from viewing large scale masterpieces such as Renoir's *Waterlilies* murals or Jackson Pollock's *Mural* or more pertinently, large scale installations such as Serra's *Tilted Arc,* cannot be replicated on copies in prints or coffee table art books. Secondly, even if their works can be reproduced to size faithfully utilising the very same materials, the original possesses something that copies do not: 'aura'. Walter Benjamin recognised this, as does

art philosopher Dutton who argues that an original art work has a human origin which a copy will never have.

It may be argued that if there are no discernible technical or material differences between an original and its copy, then it follows that there are no aesthetic differences between the two, and hence it does not matter if the original is lost forever as long as there are good copies around. It may also be cynically argued that the only reason why the authenticity of art works is so rigorously assessed is because collectors and investors are concerned about the monetary value of their Rembrandts and Picassos, which would drop significantly if they are found to be fakes.

However, it is argued that an original art work means so much more than simply a commodity whose value depends on its authenticity, and that the loss of the original is a profound loss, notwithstanding the existence of good copies. The empirical research conducted by experimental psychologists at Yale, referred to in chapter 6, arrived at two plausible explanations for why we cherish originals: firstly, we appreciate the original creative performance behind the creation of the work, and secondly, we believe that it is imbued with a special quality – an aura – through its original connection with its creator.[27]

Originals are important because when we confront the original directly, we confront something that has come into being through an original creative process or performance – we appreciate the creativity, innovation, blood, sweat and tears that went into the conception of the original work. We appreciate our good fortune in being able to encounter the end product of such an extraordinary process. Dutton argues that 'all art, … incorporates at some level the idea of performance' of virtuosity, skill and creativity,[28] and that we are deeply appreciative of the herculean efforts in achieving the end-result of a performance. A copy, especially one that is achieved through automated or mechanical means, is not representative of the effort or virtuosic performance which went into the creation of the original in the first instance. This is why a direct encounter with the originals of art works is so deeply meaningful and that is why we should endeavour to preserve them as best as we can, so as to enable future generations to also benefit from such encounters.

Finding (5) -Private property rights do not always trump moral rights

One of the main obstacles to recognising a right against destruction is the primacy of private property rights. The liberal theory of property recognises a right to destroy, *ius abudenti,* which conflicts with the author's right to object to destruction. The research, described and discussed in

[27] George E. Newman and Paul Bloom, 'Art and authenticity: The importance of originals in judgments of value' (2012) 141 Journal of Experimental Psychology 558.

[28] Denis Dutton, *The Art Instinct* (Oxford University Press 2009) 186-187.

chapter 7, sought to enquire the extent to which *ius abudenti* is applicable even in relation to works of art. The argument raised is that art works should be treated differently from ordinary objects. Even the strongest proponents of *ius abudenti* like Strahilevitz, Honore and Epstein have indicated that it is possibly inapplicable where at least valuable, unique and irreplaceable works are concerned. Drawing on the concept of the common good, it is argued that the fine arts are a common good, the stewardship of which is in the public interest. If so conceived, then it is incongruous for moral rights to reject a right against destruction.

Supplementary Question iii: What is the best practice for the UK?

Lessons learned from other jurisdictions

Alongside the close examination of moral rights provisions of the US, Australia and India in chapter 9, the respective legislative histories were reviewed to ascertain the concerns and issues which influenced the eventual drafting of the provisions. While all three jurisdictions generally justified the provision of the right against destruction on the basis of preserving cultural heritage, the manner in which the provisions operate and the way in which they have been interpreted by the local courts differ in subtle ways. In the future drafting of any anti-destruction legislation, the UK lawmakers should be well advised to pay special attention to the strengths and weaknesses of the legislation in these countries.

In the US, VARA's provisions are subject to a number of limitations. It is firstly applicable only to the fine visual arts, such as paintings and sculptures. The underlying reason lies in the uniqueness of such works, unlike the applied arts, which are commercially mass-produced. As pointed out, care should be taken in the drafting of the applied arts exception, as there are certain works of art which may straddle both the fine arts and the applied arts, for example Picasso's stage curtain for *Le Tricorne.*

The issue of whether claims may only be brought in respect of works of 'recognised stature' is something which has to be carefully considered. The justification is understandable for it serves to weed out frivolous claims. However, it should also be borne in mind that many works of art only gain stature after a period of time. Furthermore, the US courts have been unclear and inconsistent in their interpretation of 'recognised stature'. There is present uncertainty as to whether the merits of the work should be considered, or merely its status. The problem with the latter is that, 'status' may be manufactured through publicity and notoriety. A fairer approach may be to undertake a more objective assessment of a work's merits, utilising a combination of evidence and opinions of experts in the field as well as public opinion.

There are currently uncertainties in the status of site-specific works under VARA. It is suggested that there is no justifiable reason for treating such works any differently from other forms of visual art. They are not of lesser quality as compared to other forms. However, it is acknowledged that the public nature and generally considerable size of site-specific works mean that they tend to arouse strong feelings on the part of those who are compelled to encounter the works on a daily basis. A balance must therefore be sought and struck between the public audience and the artist, perhaps requiring the work to be removed to another suitable site with the consent of the artist if absolutely necessary.

Australia's legislation is generally straightforward and comprehensive. It does not necessarily limit the anti-destruction provision to any particular form of art or indeed any particular standard of art work. The more positive elements lie in its fairly detailed provisions on the removal or recording of works destined for destruction. The provisions are not without flaws however, and these are highlighted and discussed in detail in chapter 9.

India's approach has been particularly bold and ambitious. It appears that although s.57 Copyright Act 1957 has been modified such that it may be possible to disallow claims against destruction, the Indian courts have demonstrated that they are willing to interpret the section differently. They do so in the name of preserving their rich cultural history. This is perhaps not unlike HHJ Fysh in the UK case of *Harrison v Harrison* who could think of no reason why destruction should not also be covered under s.80.

Aside from the US, Australia and India, there are other countries which have chosen, either by way of legislation or through case-law, to recognise a right against destruction. For instance, although not included expressly in their copyright legislation, the jurisdictions of Canada and Israel, both being common law copyright countries, have indicated through case-law that such a right against destruction may be recognised. The crux of the arguments mapped out in chapters 4, 5, 6 and 7 is that essentially the currently accepted objections to a right against destruction in the UK are unsustainable, and that the courts should not be hesitant in allowing *prima facie* claims on this basis.

The way forward however, for the sake of clarity and certainty in the law, is to legislate for such a right explicitly and unambiguously within the CDPA. It is acknowledged that such a right, in order to be workable, cannot assume an absolute stance. A balance has to be struck between the rights and claims of the artist and those of affected third parties. It is suggested that some form of the 'reasonableness' standard incorporated in s.195AS(1) of the Australian Copyright Act may be contemplated. Furthermore, the Australian Act stipulates that by offering artists the opportunity to remove their works, infringement may be avoided. However, as discussed in chapter 9, this

provision is not without its flaws, e.g. it is not clear who shall bear the costs of such a potentially costly procedure.

There are other legislative examples apart from those discussed in this thesis. For instance, the copyright legislation in Switzerland also allows for claims against destruction,[29] stipulating that artists may purchase their own works at the market value of the cost of the *materials* used in their works. The downside in this is that should the work consist of expensive materials such as gold or precious stones, this might prove very costly for the artist.[30]

Proposed section 80A Right to object to destruction of artistic work

The following proposed section 80A and accompanying explanatory notes were drafted with the points noted above and the lessons illuminated in chapter 9 in mind.

80A Right to object to destruction of artistic work

(1) Independent of the exclusive rights provided for in section 80, the author of an artistic work, as defined in section 4(1)(a) above, has the right to object to any intentional or grossly negligent destruction of his work by any person, including the owner of the physical embodiment of the work, subject to the exceptions set out in subsection (3) below.
(2) The author of an artistic work has the right conferred by subsection (1) in his work, whether or not the author is copyright owner of the work.
(3) The right to object to destruction does not apply where the work is
    (i) a work of architecture in the form of a building, or a model for a building.
    (ii) a work of artistic craftsmanship or applied art, unless the work is primarily intended to be an artistic work and its utilitarian features are secondary to its artistic purpose;
    (iii) a copy of an artistic work, unless the copy is one of a limited edition of 850 copies, that are signed or otherwise marked by the author and consecutively numbered by the author, or in the case of a sculpture, one of multiple casts limited to 850 in number, that are signed or otherwise marked by the author and consecutively numbered by the author.
    (iv) a technical drawing, diagram, model, poster, map, chart, plan or similar work.
    (v) an item created for merchandising, advertising or promotional purposes.
    (vi) an item for the purposes of producing packaging or container material.
(4) Anything done in good faith to restore or preserve an artistic work is not, by that act alone, an infringement of the author's right to object to destruction of his work.
(5) The removal or relocation of a site-specific work, that is, an artistic work that is situated at a place that is accessible to the public, and was made specifically for installation in that place, shall be considered as destruction of the work, subject to subsections (6), (7), (8) and (9).
(6) A person does not, by destroying an artistic work, or authorising an artistic work to be destroyed, infringe the author's right to object to destruction of his artistic work if the person establishes that it was reasonable in all the circumstances to destroy the work, taking into

[29] Art.15 para 1, Swiss Copyright Act 1992.

[30] Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Thomson Reuters (Legal) Limited 2016), para 22-018.

account but not limited to the following factors to determine whether it was reasonable to destroy an artistic work:

(i) whether or not the work exists as a singular entity, or in multiple copies or editions.
(ii) the stature of the work.
(iii) the artistic quality of the work.
(iv) any health and safety issues surrounding the structural integrity, nature and placement of the work.
(v) where the destruction was required by law or was otherwise necessary to avoid a breach of any law.
(vi) where the work has 2 or more authors, their views about the destruction.

(7) The destruction of an artistic work, or site-specific work as defined in subsection (5), is not an infringement of the author's right to prevent destruction if the person who destroyed the work or authorised the destruction of the work, gave the author or the author's representatives, a reasonable opportunity to do one of the following before destruction:

(i) remove the work from the place where it was situated.
(ii) where the work may not be removed without being destroyed, to make a record of the work.
(iii) where the work is affixed to or forms part of a building which is subject to relocation, demolition or destruction, to remove the work if possible to do so, or to record the work.

(8) The removal or recording of an artistic work referred to in subsection (7) above is subject to the following:

(i) the costs of removal or recording of the work shall be borne equally by the person intending to destroy or authorise the destruction of the work, or the owner of the building to which the work is affixed, and the author.
(ii) the person intending to destroy or authorise the destruction of the work, or the owner of the building to which the work is affixed must provide the author or the author's representative a notice of intention to destroy the work.
(iii) the author or author's representative has 4 weeks from the date of receipt of the notice required in subsection (8)(ii) to respond to the person who provided the notice indicating if the work is to be removed or recorded, and to request access to the work in order to carry out either removal or recording.
(iv) within 4 weeks of receipt of the response from the author or author's representative, access to the work in question must be given to the author and/or his representatives in order to remove or record the work.
(v) the author and/or his representatives to have such period, as may be agreed between the author and/or his representatives and the person intending to destroy the work, of not less than 4 weeks to have continued access to the work in order to remove or record the work, which such period may be extended at the sole discretion of the author for a further and final period of 4 weeks.

(9) The destruction, removal or relocation of an artistic work does not infringe the author's right to prevent destruction if the person who destroyed or authorised the destruction of the work, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author in order to give the notice required under subsection (8)(ii).

(10) The destruction or demolition of a building to which an artistic work is affixed does not infringe the author's right to prevent destruction if the owner of the building, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author in order to give the notice required under subsection (8)(ii).

Explanatory Notes

Summary

1. The main purpose of the Bill is to amend the Copyright Designs and Patents Act 1988 ("the Copyright Act") to provide a new right to prevent destruction of artistic works for the benefit of authors of artistic works.

Legislative context

2. Presently all authors of literary, dramatic, musical and artistic works have the right to object to the derogatory treatment of their works, which is provided for under section 80 of the Copyright Act. This right entitles the author to object to certain types of treatment of his work which may be prejudicial to honour or reputation. The definition of treatment under section 80(2)(a) does not explicitly encompass destruction of copyright works. The bill amends the Copyright Act to insert a new section 80A which provides authors of artistic works a clear right to object to the destruction of their works. The right is not extended to authors of the other copyright works and is limited only to authors of artistic works.

Right to object to destruction of artistic work

3. The new section 80A provides authors of artistic works with a right to object to the destruction of their works.
4. Subsection (1) provides an additional right to authors of artistic works, which is independent of the other rights provided for under Chapter IV of the Copyright Act, to object to the destruction of their works by any person.
5. Subsection (2) makes clear that the new right conferred under section 80A exists independently of copyright in the work and is conferred only on the author.
6. Subsection (3) lists the types of works which are excluded from protection from destruction under the right. The types of excluded works listed here are either copies of original artistic works (unless the copies are limited signed editions) or typically works which are of a utilitarian or commercial nature, for example, technical drawings or commercial packaging. The works listed in subsection (3)(i) include the works listed under section 4(1)(b) and section 4(1)(c) of the Copyright Act.
7. As acts undertaken to preserve or restore artistic works bear some risk of resulting in the destruction of the works, subsection (4) makes clear that such acts, conducted in good faith, do not amount to an infringement of the author's right to object to destruction.
8. Site-specific works are defined in subsection (5) as artistic works which are created specifically for particular locations. With respect to such works, the location is intimately linked with the installation created in its place. As such, authors of site-specific works regard the removal of such works from their locations as necessarily impacting negatively on their works, amounting to a complete destruction of the works. Subsection (5) provides that the

relocation or removal of site-specific works from their locations amount to a destruction of the works subject to subsections (6), (7), (8), (9) and (10).

9. Subsection (6) provides that a person does not infringe the author's right to object to destruction if the person establishes that it was reasonable in all the circumstances to destroy the work. Subsection (6) also provides a non-exhaustive list of factors to be taken into account when determining whether it was reasonable in the circumstances to destroy the work.
10. Subsection (7) provides that the destruction of works is not an infringement of the author's right to object to destruction if the author was given a reasonable opportunity to either remove or record the work first. This also applies to situations where the work is affixed to or is part of a building which is to be relocated, demolished or destroyed, and where the relocation, demolition or destruction of the building will necessarily result in destruction of the work.
11. Subsection (8) sets out the specific manner in which the reasonable opportunity to remove or record the work referred to in subsection (7) is to operate. This includes a requirement to give notice to the author or his representative that the work is to be destroyed and that the author or his representative has a reasonable opportunity to remove or record the work.
12. Subsection (9) provides that where the person who destroys or authorises the destruction of a work is unable to identify or locate the author or his representative in order to give notice of intention to destroy the work, the destruction of such work does not constitute an infringement of the author's right to object to destruction of the work.
13. Subsection (10) provides, in a similar way to subsection (9) that where the owner of a building which is relocated, destroyed or demolished is unable to identify or locate the author or his representative in order to give notice of intention to destroy the work, the relocation, destruction or demolition of such building which results in the destruction of the work does not amount to an infringement of the author's right to object to destruction of the work.

3. Contributions to the law of copyright and moral rights

The above findings contribute to the current scholarly literature available on moral rights, particularly in the UK, its relationship with copyright and its role in the preservation of cultural heritage.

In seeking out answers to the main question posed, the in-depth research undertaken drew from a wide variety of disparate yet related areas of scholarly work, both within but also outside the legal sphere. The primary uniqueness in the study conducted is its synthesis of understandings not only from the usual legal sources of parliamentary debates and similar sources, but also the fields of anthropology, art philosophy, Roman law, early English law, copyright legal history, and property theory. Further, in the course of examining the cultural scene and cultural policies adopted in Singapore in chapter 8, the research has also drawn insights from aspects of Confucian thinking regarding authorship, which shed further light on how Confucianism supports the recognition of strong moral rights. These understandings all serve to underpin the arguments raised in support of recognising a right against destruction in moral rights. The end result of engaging critically with a variety of carefully selected sources is a far richer and deeper understanding of the impact that the lack of a right to claim against destruction has on art, culture, and society, then is commonly realised.

In particular, the research has advanced new interpretations of the key concept of 'honour' in the field of moral rights, by drawing inspiration from anthropological studies on the concept as well as the Roman law concept of *iniuria.* The research also gives fresh insight into an understanding of 'work' in copyright law, and how current understandings impact negatively upon art works.

The analysis of the position in Singapore demonstrates how copyright policy is reflected in a country's cultural policy or cultural ambitions. Little research has been undertaken in respect of the link between moral rights and Singapore's cultural scene. For a long time, Singapore looked askance at the pursuit of cultural activities, and while its copyright regime expanded exponentially in tandem with its development as a nation, scant regard was given to the notion of moral rights. Confucianism has been put forward as a reason for this attitude, but a closer analysis revealed that while Confucianism may be contrary to the economic rights offered by copyright, it is wholly compatible with the concept of moral rights. The pragmatic and soft authoritarian governing of Singapore are possible reasons for its conservative and commercially minded cultural policies, which in turn reflects its copyright policy, which rejects moral rights. Moral rights have traditionally been ignored in Singapore and they continue to be today – with the exception of attribution rights, the other core moral right, the integrity right, was conspicuously absent in the recent call for reform of its copyright regime.[31] There are therefore many unique reasons for Singapore's lack of moral rights, such reasons being absent in the UK.

What appears to be also uncovered by the research undertaken is that the UK's copyright regime has increasingly emphasised the breadth and strength of its economic rights. With such heavy emphasis on the economic rather than the non-economic needs of artists, the UK's copyright regime fails to recognise and protect their needs, and in turn fails to truly fulfil its public interest aims. One such need is the artist's quest for protection and preservation of his creation. In failing to simply extend the integrity right to close this gap, the UK arguably fails to protect its artists and their creations.

4. Future research

The research has thus far focused on the theoretical underpinnings of copyright law and moral rights. It has interrogated and dismantled the various objections to the recognition of a right against destruction. It has drawn from a variety of legal and non-legal written sources.

There is scope for further research which would be useful in confirming the initial findings of this present research. One would be a comparative analysis of the moral rights legislation of the Berne

[31] Ministry of Law, Public Consultation Open for Feedback on Singapore's Copyright Regime. <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/public-consultation-open-for-feedback-on-singapores-copyright-re.html>.

Convention countries, to ascertain the extent to which they have provided a right to object to destruction, how they have implemented it and in practice, the sort of outcomes they have experienced. While the seminal texts on moral rights by Adeney, Sundara Rajan, Davies and Garnett offer comprehensive overviews of the different moral rights approaches in selected jurisdictions, their studies have not looked at the issue of destruction as comprehensively. As such, there is a need for an analysis of different moral rights provisions, as well as applicable case-law on destruction claims. Insights gleaned from such a study will enable us to better understand the potential pitfalls in formulating laws in this area.

Another research plan would be empirically based and would serve to test the propositions asserted in the thesis. As moral rights are perceived as personality rights, the views of living artists would prove invaluable. How do artists actually perceive the extent of the impact of the destruction of their works on society, themselves as artists, and the progress and development of art? Questions may be asked of artists whose works have actually been destroyed as to *inter alia* the facts surrounding such destruction, their involvement, if any, in the event, their immediate reactions and perceptions at the time of destruction, and their reflections on the loss of their works. Such research is not unproblematic. Firstly, artists are popularly known to have introverted or reclusive tendencies,[32] which might make them difficult interview subjects, and secondly, the destruction of cherished works is a sensitive subject. There are clear difficulties in broaching such issues and evoking long buried memories of lost works. However, there are benefits to be had from such research as it will give a voice to lesser known and less established artists, who would stand to benefit from such a right, perhaps even more so than more established artists.

[32] Katherine Tyrell, *Artists are Introverts! Discuss...* (2012) <https://makingamark.blogspot.co.uk/2012/04/artists-are-introverts-discuss.html>; Paul Foxton, *Artists: Are We Natural Introverts?* (2013) <http://www.learning-to-see.co.uk/introverts> ; E.W.L. Smith, *The Psychology of Artists and the Arts* (McFarland, Incorporated, Publishers 2012)

APPENDICES

APPENDIX A – SECTION 80 CDPA 1988

Section 80 Copyright Designs and Patents Act 1988

s.80. Right to object to derogatory treatment of work.

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.

(2) For the purposes of this section—

(a) "treatment" of a work means any addition to, deletion from or alteration to or adaptation of the work, other than—

(i) a translation of a literary or dramatic work, or

(ii) an arrangement or transcription of a musical work involving no more than a change of key or register; and

(b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;

and in the following provisions of this section references to a derogatory treatment of a work shall be construed accordingly.

(3) In the case of a literary, dramatic or musical work the right is infringed by a person who—

(a) publishes commercially, performs in public or communicates to the public a derogatory treatment of the work; or

(b) issues to the public copies of a film or sound recording of, or including, a derogatory treatment of the work.

(4) In the case of an artistic work the right is infringed by a person who—

(a) publishes commercially or exhibits in public a derogatory treatment of the work, or communicates to the public a visual image of a derogatory treatment of the work,

(b) shows in public a film including a visual image of a derogatory treatment of the work or issues to the public copies of such a film, or

(c) in the case of—

(i) a work of architecture in the form of a model for a building,

(ii) a sculpture, or

(iii) a work of artistic craftsmanship,

issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work.

(5) Subsection (4) does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed.

(6) In the case of a film, the right is infringed by a person who—

(a) shows in public or communicates to the public a derogatory treatment of the film; or

(b) issues to the public copies of a derogatory treatment of the film,

(7) The right conferred by this section extends to the treatment of parts of a work resulting from a previous treatment by a person other than the author or director, if those parts are attributed to, or are likely to be regarded as the work of, the author or director.

(8) This section has effect subject to sections 81 and 82 (exceptions to and qualifications of right).

APPENDIX B – ARTICLE 6*BIS* BERNE CONVENTION

Article 6*bis* Berne Convention (Paris Text 1971)

Moral Rights:

1. To claim authorship; to object to certain modifications and other derogatory actions;

2. After the author's death; 3. Means of redress

(1) 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.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

APPENDIX C – STATUTE OF ANNE 1710

Statute of Anne 1710

8 Anne, c. 19 (1710)

An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

I. Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same;

II. That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny

for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's courts of record at Westminister, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed. II. And whereas many persons may through ignorance offend against this act, unless some provision be made, whereby the property in every such book, as is intended by this act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted by the authority aforesaid,

That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before-mentioned, without any fee or reward; and the clerk of the said company of stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding six pence.

III. Provided nevertheless, That if the clerk of the said company of stationers for the time being, shall refuse or neglect to register, or make such entry or entries, or to give such certificate, being thereunto required by the author or proprietor of such copy or copies, in the presence of two or more credible witnesses, That then such person and persons so refusing, notice being first duly given of such refusal, by an advertisement in the Gazette, shall have the like benefit, as if such entry or entries, certificate or certificates had been duly made and given; and that the clerks so refusing, shall, for any such offence, forfeit to the proprietor of such copy or copies the sum of twenty pounds, to be recovered in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege or protection, or more than one imparlance shall be allowed.

IV. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, That if any bookseller or booksellers, printer or printers, shall, after the said five and twentieth day of

March, one thousand seven hundred and ten, set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; it shall and may be lawful for any person or persons, to make complaint thereof to the lord archbishop of Canterbury for the time being, the lord chancellor, or lord keeper of the great seal of Great Britain for the time being, the lord bishop of London for the time being, the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, the lord chief baron of the court of Exchequer for the time being, the vice chancellors of the two universities for the time being, in that part of Great Britain called England; the lord president of the sessions for the time being, the lord chief justice general for the time being, the lord chief baron of the Exchequer for the time being, the rector of the college of Edinburgh for the time being, in that part of Great Britain called Scotland; who, or any one of them, shall and have hereby full power and authority, from time to time, to send for, summon, or call before him or them such bookseller or booksellers, printer or printers, and to examine and enquire of the reason of the dearness and inhauncement of the price or value of such book or books by him or them so sold or exposed to sale; and if upon such enquiry and examination it shall be found, that the price of such book or books is inhaunced, or any wise too high or unreasonable, then and in such case the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the universities, in that part of Great Britain called England, and the said lord president of the sessions, lord justice general, lord chief baron, and the rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one or more of them, so enquiring and examining, have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable; and in case of alteration of the rate or price from what was set or demanded by such bookseller or booksellers, printer or printers, to award and order such bookseller and booksellers, printer and printers, to pay all the costs and charges that the person or persons so complaining shall be put unto, by reason of such complaint, and of the causing such rate or price to be so limited and settled; all which shall be done by the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the two universities, in that part of Great Britain called England, and the said lord president of the sessions, lord justice general, lord chief baron, and rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one of them, by writing under their hands and seals, and thereof publick notice shall be forthwith given by the said bookseller or booksellers, printer or printers, by an advertisement in the Gazette; and if any bookseller or booksellers, printer or printers, shall, after such settlement made of the said rate and price, sell, or expose to sale, any book or books, at a higher or greater price, than what shall have been so limited and settled, as aforesaid, then, and in every such

case such bookseller and booksellers, printer and printers, shall forfeit the sum of five pounds for every such book so by him, her, or them sold or exposed to sale; one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety to any person or persons that shall sue for the same, to be recovered, with costs of suit, in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed.

V. Provided always, and it is hereby enacted, That nine copies of each book or books, upon the best paper, that from and after the said tenth day of April, one thousand seven hundred and ten, shall be printed and published, as aforesaid, or reprinted and published with additions, shall, by the printer and printers thereof, be delivered to the warehouse keeper of the said company of stationers for the time being, at the hall of the said company, before such publication made, for the use of the royal library, the libraries of the universities of Oxford and Cambridge, the libraries of the four universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the faculty of advocates at Edinburgh respectively; which said warehouse keeper is hereby required within ten days after demand by the keepers of the respective libraries, or any person or persons by them or any of them authorized to demand the said copy, to deliver the same, for the use of the aforesaid libraries; and if any proprietor, bookseller, or printer, or the said warehouse keeper of the said company of stationers, shall not observe the direction of this act therein, that then he and they so making default in not delivering the said printed copies, as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds for every copy not so delivered, as also the value of the said printed copy not so delivered, the same to be recovered by the Queen's majesty, her heirs and successors, and by the chancellor, masters, and scholars of any of the said universities, and by the president and fellows of Sion College, and the said faculty of advocates at Edinburgh, with their full costs respectively.

VI. Provided always, and be it further enacted, That if any person or persons incur the penalties contained in this act, in that part of Great Britain called Scotland, they shall be recoverable by any action before the court of session there.

VII. Provided, That nothing in this act contained, do extend, or shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas; any thing in this act contained to the contrary notwithstanding.

VIII. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done any thing in pursuance of this act, the defendants in such action may plead the general

issue, and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath.

IX. Provided, That nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

X. Provided nevertheless, That all actions, suits, bills, indictments or informations for any offence that shall be committed against this act, shall be brought, sued, and commenced within three months next after such offence committed, or else the same shall be void and of none effect.

XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

APPENDIX D – US VISUAL ARTISTS RIGHTS ACT

17 U.S.C.

United States Code, 2011 Edition

Title 17 - COPYRIGHTS

CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec. 106A - Rights of certain authors to attribution and integrity

From the U.S. Government Printing Office, <www.gpo.gov>

§106A. Rights of certain authors to attribution and integrity

(a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) 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.

(b) Scope and Exercise of Rights.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) Exceptions.—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) Duration of Rights.—(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) Transfer and Waiver.—(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

(Added Pub. L. 101–650, title VI, §603(a), Dec. 1, 1990, 104 Stat. 5128.)

References in Text

Section 610(a) of the Visual Artists Rights Act of 1990 [Pub. L. 101–650], referred to in subsec. (d), is set out as an Effective Date note below.

Effective Date

Section 610 of title VI of Pub. L. 101–650 provided that:

"(a) In General.—Subject to subsection (b) and except as provided in subsection (c), this title [enacting this section, amending sections 101, 107, 113, 301, 411, 412, 501, and 506 of this title, and enacting provisions set out as notes under this section and section 101 of this title] and the amendments made by this title take effect 6 months after the date of the enactment of this Act [Dec. 1, 1990].

"(b) Applicability.—The rights created by section 106A of title 17, United States Code, shall apply to—

"(1) works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author, and

"(2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.

"(c) Section 608.—Section 608 [set out below] takes effect on the date of the enactment of this Act."

Studies by Copyright Office

Section 608 of Pub. L. 101–650 provided that:

"(a) Study on Waiver of Rights Provision.—

"(1) Study.—The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.

"(2) Report to Congress.—Not later than 2 years after the date of the enactment of this Act [Dec. 1, 1990], the Register of Copyrights shall submit to the Congress a report on the progress of the study conducted under paragraph (1). Not later than 5 years after such date of enactment, the Register of Copyrights shall submit to the Congress a final report on the results of the study conducted under paragraph (1), and any recommendations that the Register may have as a result of the study.

"(b) Study on Resale Royalties.—

"(1) Nature of study.—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

"(A) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

"(B) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

"(2) Groups to be consulted.—The study under paragraph (1) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

"(3) Report to Congress.—Not later than 18 months after the date of the enactment of this Act [Dec. 1, 1990], the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this subsection."

APPENDIX E – AUSTRALIA COPYRIGHT ACT 1968

Division 4—Right of integrity of authorship of a work

s.195AI Author's right of integrity of authorship

(1) The author of a work has a right of integrity of authorship in respect of the work.

(2) The author's right is the right not to have the work subjected to derogatory treatment.

s.195AQ Infringement of right of integrity of authorship

(1) This section has effect subject to this Subdivision.

(2) A person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment.

(3) If a literary, dramatic or musical work has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of ***derogatory treatment*** in section 195AJ that infringes the author's right of integrity of authorship in respect of the work, a person infringes the author's right of integrity of authorship in respect of the work if the person does any of the following in respect of the work as so derogatorily treated:

(a) reproduces it in a material form;

(b) publishes it;

(c) performs it in public;

(d) communicates it to the public;

(e) makes an adaptation of it.

(4) If an artistic work has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of ***derogatory treatment*** in section 195AK that infringes the author's right of integrity of authorship in respect of the work, a person infringes the author's right of integrity of authorship in respect of the work if the person does any of the following in respect of the work as so derogatorily treated:

(a) reproduces it in a material form;

(b) publishes it;

(c) communicates it to the public.

(5) If a cinematograph film has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of ***derogatory treatment*** in section 195AL that infringes the author's right of integrity of authorship in respect of the film, a person infringes the author's

right of integrity of authorship in respect of the film if the person does any of the following in respect of the film as so derogatorily treated:

(a) makes a copy of it;

(b) exhibits it;

(c) communicates it to the public.

s.195AS No infringement of right of integrity of authorship if derogatory treatment or other action was reasonable

(1) A person does not, by subjecting a work, or authorising a work to be subjected, to derogatory treatment, infringe the author's right of integrity of authorship in respect of the work if the person establishes that it was reasonable in all the circumstances to subject the work to the treatment.

(2) The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular circumstances to subject a literary, dramatic, musical or artistic work to derogatory treatment include the following:

(a) the nature of the work;

(b) the purpose for which the work is used;

(c) the manner in which the work is used;

(d) the context in which the work is used;

(e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;

(f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;

(g) whether the work was made:

(i) in the course of the author's employment; or

(ii) under a contract for the performance by the author of services for another person;

(h) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law;

(i) if the work has 2 or more authors—their views about the treatment.

(3) The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular circumstances to subject a cinematograph film to derogatory treatment include the following:

(a) the nature of the film;

(b) whether the primary purpose for which the film was made was for exhibition at cinemas, for broadcasting by television or for some other use;

(c) the purpose for which the film is used;

(d) the manner in which the film is used;

(e) the context in which the film is used;

(f) any practice, in the industry in which the film is used, that is relevant to the film or the use of the film;

(g) any practice contained in a voluntary code of practice, in the industry in which the film is used, that is relevant to the film or the use of the film;

(h) whether the film was made in the course of the employment of the director, producer or screenwriter who alleges that the treatment was derogatory;

i) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law.

(4) A person who does any act referred to in subsection 195AQ(3), (4) or (5) in respect of a work that has been subjected to derogatory treatment of a kind mentioned in that subsection does not, by doing that act, infringe the author's right of integrity of authorship in respect of the work if the person establishes that it was reasonable in all the circumstances to do that act.

s.195AT Certain treatment of works not to constitute an infringement of the author's right of integrity of authorship

(1) The destruction of a moveable artistic work is not an infringement of the author's right of integrity of authorship in respect of the work if the person who destroyed the work gave the author, or a person representing the author, a reasonable opportunity to remove the work from the place where it was situated.

(2) A change in, or the relocation, demolition or destruction of, a building is not an infringement of the author's right of integrity of authorship in respect of an artistic work that is affixed to or forms part of the building if:

(a) the owner of the building, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author; or

(b) if paragraph (a) does not apply—the owner complies with subsection (2A) in relation to the change, relocation, demolition or destruction.

(2A) This subsection is complied with by the owner of a building in relation to a change in, or the relocation, demolition or destruction of, the building if:

(a) the owner has, in accordance with the regulations and before the change, relocation, demolition or destruction is carried out, given the author or a person representing the author a written notice stating the owner's intention to carry out the change, relocation, demolition or destruction; and

(b) the notice stated that the person to whom the notice was given may, within 3 weeks from the date of the notice, seek to have access to the work for either or both of the following purposes:

(i) making a record of the work;

(ii) consulting in good faith with the owner about the change, relocation, demolition or destruction; and

(c) the notice contained such other information and particulars as are prescribed; and

(d) where the person to whom the notice was given notifies the owner within the period of 3 weeks referred to in paragraph (b) that the person wishes to have access to the work for either or both of the purposes mentioned in that paragraph—the owner has given the person a reasonable opportunity within a further period of 3 weeks to have such access; and

(e) where, in the case of a change or relocation, the person to whom the notice was given notifies the owner that the person requires the removal from the work of the author's identification as the author of the work—the owner has complied with the requirement.

(3) A change in, or the relocation, demolition or destruction of, a building is not an infringement of the author's right of integrity of authorship in respect of the building, or in respect of any plans or instructions used in the construction of the building or a part of the building if:

(a) the owner of the building, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author, or of any of the authors or persons representing the authors, as the case may be; or

(b) if paragraph (a) does not apply—the owner complies with subsection (3A) in relation to the change, relocation, demolition or destruction.

(3A) This subsection is complied with by the owner of a building in relation to a change in, or the relocation, demolition or destruction of, the building if:

(a) the owner has, in accordance with the regulations and before the change, relocation, demolition or destruction is carried out, given the author or a person representing the author, or the authors or the persons representing the authors, whose identity and

location the owner knows, a written notice stating the owner's intention to carry out the change, relocation, demolition or destruction; and

(b) the notice stated that the person to whom the notice was given may, within 3 weeks from the date of the notice, seek to have access to the building for either or both of the following purposes:

(i) making a record of the artistic work;

(ii) consulting in good faith with the owner about the change, relocation, demolition or destruction; and

(c) the notice contained such other information and particulars as are prescribed; and

(d) where the person to whom the notice was given notifies the owner within the period of 3 weeks referred to in paragraph (b) that the person wishes to have access to the building for either or both of the purposes mentioned in that paragraph—the owner has given the person a reasonable opportunity within a further period of 3 weeks to have such access; and

(e) where, in the case of a change or relocation, the person to whom the notice was given notifies the owner that the person requires the removal from the building of the author's identification as the author of the artistic work—the owner has complied with the requirement.

(4) Subsections (2), (2A), (3) and (3A) do not limit the operation of section 195AG.

(4A) The removal or relocation by a person (the ***remover***) of a moveable artistic work that is situated at a place that is accessible to the public, and was made for installation in that place, is not an infringement of the author's right of integrity of authorship in respect of the work if the remover:

(a) after making reasonable inquiries, cannot discover the identity and location of the author or a person representing the author; or

(b) if paragraph (a) does not apply—complies with subsection (4B) in relation to the removal or relocation.

(4B) This subsection is complied with by the remover in relation to the removal or relocation of a moveable artistic work if:

(a) the remover has, in accordance with the regulations and before the removal or relocation is carried out, given the author or a person representing the author a written notice stating the remover's intention to carry out the removal or relocation; and

(b) the notice stated that the person to whom the notice was given may, within 3 weeks from the date of the notice, seek to have access to the work for either or both of the following purposes:

(i) making a record of the work;

(ii) consulting in good faith with the remover about the removal or relocation; and

(c) the notice contained such other information and particulars as are prescribed; and

(d) where the person to whom the notice was given notifies the remover within the period of 3 weeks referred to in paragraph (b) that the person wishes to have access to the work for either or both of the purposes mentioned in that paragraph—the remover has given the person a reasonable opportunity within a further period of 3 weeks to have such access; and

(e) where the person to whom the notice was given notifies the remover that the person requires the removal from the work of the author's identification as the author of the work—the remover has complied with the requirement.

(5) Anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of the work.

APPENDIX F – SECTION 57 INDIA COPYRIGHT ACT 1957 (AS AMENDED)

Section 57.Authors special rights:- (1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim the authorship of the work as well as the right to restrain, or claim damages in respect of, ---

(a) any distortion, mutilation or other modification of the said work; or

(b) any other action in relation to the said work which would be prejudicial to his honour or reputation.

(2) The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representative of the author.

APPENDIX G – 17 US CODE §101 'DEFINITIONS'

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

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