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moral rights in modern art: an international survey*

Some artists have clear views on how their work should be preserved or conversely allowed to deteriorate. For example, Sigurdur Gudmundsson made an agreement with Amsterdam City Council that his sculpture *Wildzang* (1976) in a city park – made from a series of wooden poles – should not be maintained, but allowed to slowly rot away.[1] However, few artists are this clear in advance about how their work should be treated in the event of decay; it doesn't even cross the minds of many.

Nevertheless, when it becomes apparent that intervention is necessary to preserve the work, the question arises as to whether the artist, or his/her heirs, should be consulted. An affirmative answer can be justified on moral grounds. The bond between the artist and his or her creation is also protected by the copyright law. Although there are slight differences between copyright laws in every country, they all share important features.

This article will examine moral rights in terms of copyright and the role artists play in the conservation and restoration of their work. Particular attention will be paid to the differences between copyright laws in Europe (the Netherlands, France and Germany) and the United States. Relevant judicial rulings on works of art will also be discussed.

Copyright

In the case of all original, personal creations – books, music, paintings, films and so on – copyright is automatically awarded to the maker/author. Copyright therefore applies to works of art, though this can be questioned in cases where the artist has expressly striven for the absence of a personal signature in the work, or where the work has been made out of copies of someone else's creations. A work does not have to conform to demands of artistic quality: all original work is protected by these laws.

The Copyright Act distinguishes between (economic) exploitation rights and moral rights. On the grounds of exploitation rights artists may insist on being paid every time their work is used (royalties) if the work is reproduced in a calendar, for instance. So artists are paid for their creative work as a result of exploitation rights.

The right to receive payment may also be passed on to a third party. Exploitation rights in the European Union remain valid for seventy years after the artist's death and for fifty years in the United States.[2] Copyright protects artists from the unauthorised use or replication of their creations throughout this period, and thereby stimulates the creation of new works.

However, in cases of artists' involvement in the preservation of their work, moral rights are the main concern. These rights are non-commercial and protect the bond between the maker and the art work. They contain various clauses, including the right of paternity – the right to be identified as the author. However, the most important moral right is the right of the artist to resist another's intervention in his or her work: the 'right of integrity' or, in French, the droit au respect.[3] On these grounds everyone must respect the integrity of a work of art because of the highly personal bond that exists between it and its creator.

Artists may invoke their right of integrity against anyone who affects their work in a way that is prejudicial to them. Where conservation or restoration are concerned there is always a risk that changes may be harmful to the work. This is stated in paragraph 3.3 of the ICOM document *The Conservator-Restorer: a Definition of a Profession* (1984): "... the risk of harmful manipulation or transformation of the object is inherent in any measure of conservation or restoration..."[4]

A conflict with the artist which brings this integrity right to bear is therefore not unthinkable. Artists should be aware of their rights in case they have to go to court. This is where things sometimes go wrong, because many artists believe that having sold the work, they no longer have a voice in what happens to it.

The Berne Convention

Modern Art: Who Cares? (1999), p. 222-232

The fundamental principle behind moral rights – respect for the personal bond between the artist and his/her work – was originally a European one dating from the beginning of the twentieth century. It was introduced internationally by the Berne Convention for the Protection of Literary and Artistic Works, which was signed in Bern, Switzerland in 1886. This global copyright convention describes the minimum protection member states are obliged to afford makers and authors. This originally only covered exploitation rights; moral rights were added in 1928. The convention is constantly reviewed and, in December 1996, it was revised to cover new developments in information technology.

European countries signed up to the Berne Convention early on, while the United States only signed in 1989. The Americans' lengthy hesitation was due to the fact that they were uncomfortable with the doctrine behind the moral rights. The Anglo-American or Common Law copyright system only guaranteed the maker of a work of art economic exploitation rights, assuming that the works should (in return for payment) be made available to as large a public as possible without being restricted by moral rights.

The fact that no moral rights existed in the United States has seriously disadvantaged artists working there. Richard Serra, for instance, could do nothing to prevent his sculpture *Tilted Arch* being removed from New York's Federal Plaza.[5] The judge ruled that if Serra had wanted to have any say in the matter of how long his sculpture was to stand or the precise location of the work, he should have included these conditions in the sales contract. If an art work was damaged in the United States, artists were forced to resort to legal arguments such as a breach of contract, tort and defamation. Until recently, the absence of moral rights formed the greatest difference between American and European copyright law.

Exceptions in the United States

As a result of signing up to the Berne Convention in 1989, the United States is now obliged to recognise moral rights. American reserve with regard to the European way of thinking is apparent from the extensive exceptions this country laid down in its Visual Artists Rights Act (VARA) in 1990, a law that is specially designed to introduce moral rights into American copyright law. As is evident from the title, VARA only applies to visual art; unlike in Europe, there is no protection of moral rights for other kinds of works of art.

Art works by artists who have been employed by a client are also denied protection under the VARA. The broad interpretation applied to the concept 'employment' is apparent from the lawsuit Carter v. Helmsley-Spear in which the right of integrity was applied for the first time.[6] Three artists protested against the partial removal of their enormous, collaborative sculpture from a New York office building, because, according to them, the entire work would be destroyed. In the first instance, the removal was forbidden, but this decision was overturned on appeal because the artists were said to have been employed, even though this was only a one-off commission.

The VARA came into effect on 1 June 1991, and cannot be applied retroactively. This surfaced in the case Pavia v. 1120 Ave. Of the Americas Assocs in which a bronze sculpture made in four parts located in the New York Hilton Hotel in 1988 was dismantled so that parts of it could be placed elsewhere.[7] The artist resisted the mutilation of his work which was intended to be presented as a single entity. When his work was still being exhibited in a dismantled state three years later he called up-on the right of integrity in the VARA. However, the judge ruled against him on the grounds that the mutilation dated from 1988, before the introduction of this law.

Furthermore, visual artists may only invoke the right of integrity if their work is intentionally distorted or mutilated. The following is taken from paragraph 106A(a)(3)(A) of the VARA: "The author of a work of visual art shall have the right 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 other modification of that work is a violation of that right."

The VARA also states that the moral rights protecting work made after 1 June 1991 only apply up until the artist's death. In respect of older work, they are valid for as long as the economic exploitation rights may be invoked, that is, until fifty years after the artist's death.

Although the United States has signed up to the Berne Convention, American moral rights offer considerably less protection compared to the European ones. Opinion is divided on whether this situation will improve.[8] American artists may at least occasionally profit from the broader moral rights protection offered in Europe: if their work is threatened with distortion in a European country they may appeal to that country's copyright protection.

Spiritual versus material ownership

The Berne Convention describes the moral rights in Art. 6 bis(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 honour and reputation."

Moral rights are therefore separate from the exploitation rights. The maker retains his or her moral rights, even once a work of art has been sold. The owner does not have an unlimited say in the matter.

Here lies a potential conflict between the owner and the artist. It is difficult to distinguish between 'distortion', 'mutilation' and 'other modification'. In short, an artist may reject any physical alterations to his or her work – whether harmful or restorative – carried out by the owner, a conservator or anyone else. In cases of actual harm, the artist may claim damages or demand that the work be restored to its original state. The 'other derogatory action' stated does not cover physical intervention, for instance, if a work of art is exhibited or reproduced in a detrimental context.[9]

That owners are not only the ones to have a voice in what happens to a work of art was decided in 1912 in the German lawsuit *Felseneiland mit Sirenen*.[10] The owner of a private house commissioned the painting of a fresco depicting nude sirens on a rocky island. However, after a while she decided to have the sirens clothed by another artist. The fresco painter protested, the German 'Reichsgericht' ruled in his favour and the fresco had to be returned to its original state. This judgement was the earliest acknowledgement of the right of integrity in Germany.

Moral rights such as the right of integrity are inextricably linked to the artist's person. These rights are not transferable as long as the artist is alive, and only the artist may invoke them. Following the artist's death, these rights may pass to the heirs. In the United States, the moral rights remain valid for fifty years, although only in the case of work made before 1 June 1991[11]; in Europe they last seventy years, except in France where they are valid forever.[12] According to some copyright acts, transfer of the moral rights after the artist's death has to meet certain conditions. In France and Germany moral rights are automatically transferred to heirs, but transfer to a third party has to be stated in a will. In the Netherlands these rights must be transferred in writing (in a will) in all cases, something many artists neglect to do out of ignorance.

As a rule, the owner may only have full control over the work of art fifty (United States) or seventy years (Europe) after the artist's death. This may be longer if the work is protected by laws covering cultural heritage, such as the Dutch Monuments Act.

The situation most beneficial to the owner would be for the artist to give up his or her moral rights. However, these rights are considered so fundamentally important in Europe that this is not easily achieved. The value placed on the right of integrity in France was illustrated in 1994 when the heirs of the American film director John Huston successfully challenged the colourisation of his black-and-white film *Asphalt Jungle*. The United States possessed no legislation covering moral rights when this film was produced, yet in this case American law had to yield to French law.

Artists cannot completely renounce their moral rights. This is only possible partially or for a specifically stated use of the work, for instance, a writer may agree to changes being made to his or her story within the framework of a film adaptation.[13]

To summarise, the owner of a work has to take the moral rights of the artist into consideration. The artist may challenge distortion or mutilation of that work, but must also respect the owner's rights. This weighing up of interests forms the core problem examined in this paper.

Weighing up interests

The artist's protests against another's interventions in his or her work are not always successful when taken before a judge. The close of Art. 6 bis(1) of the Berne Convention includes the condition that intervention could be prejudicial to the reputation of the artist. It is the judge who determines whether this is the case or not. In international legal practice, this means that the interests of both parties are weighed up against each other. The judge will usually consider the specific circumstances of each case, for instance:

— Did the artist give permission for the alteration?
— What is the extent of the intervention?
  The artist is usually less successful in the case of minor changes than in cases where the work of art has been drastically altered or mutilated.
— What were the reasons for the intervention?
  If the work was altered to deliberately prejudice the artist, a judge will more often rule in the artist's favour than if the changes were not intended to be prejudicial.
— Is the work of art accessible to the public?
  If a publicly displayed work of art is mutilated, for example in a museum or in the open air, the artist's reputation will be harmed sooner than if his or her work is in the home of a private owner where only a few people will be able to see its altered state.
— Is the work unique, or do more specimens of it exist?
  Alterations are less easily accepted in unique works.
— Does the work serve a practical purpose?
  If so, alterations will more likely be allowed than in the case of a work of art. For example, architecture has to comply with changing demands for its use; alterations to buildings will be more readily accepted by a judge.
— What is the condition of the work?
  If a work is in a state of disrepair and the cost of restoration to its original state high, a judge may decide that the artist cannot demand that the owner pay for the repairs.
— Is the work of artistic importance?
  All work that bears the personal signature of the artist is protected by copyright. But, in jurisprudence, the scope of this protection varies from case to case: important works are more likely to be protected from (minor) interventions than less important ones. The judge usually consults an expert to ascertain the importance of a work of art.
— Is the work connected to its surroundings or adapted to them?
  If the surroundings are demolished the artist has to accept the same fate for his or her work.[14]

It is striking that Art. 6 bis of the Berne Convention does not mention the destruction of a work of art. The question of whether this article may be invoked in such a case is also the subject of international debate. Some defend the position that destruction may be regarded as the ultimate mutilation. Others are of the opinion that destruction does not harm the reputation of the artist because no one can be given the wrong impression by a work if there is nothing left to look at.

According to the traditional interpretation in Germany, the owner of a work of art may destroy it. This German principle is based on two cases: the above mentioned Felseneiland mit Sirenen from 1912, and *Hajek v. ADAC* from 1982.[15] In both cases, the judge decided on the grounds of the moral right of the artist that the alterations made to the work of art had to be reversed, but that the owner also had the right to destroy the entire work. This is what happened in both these cases: in the latter case, the concrete sculpture was used by the army for explosives practice.

In French and Dutch jurisprudence, on the other hand, there have been certain cases where artists have successfully prevented the demolition of their work or have demanded compensation.[16] Generally speaking, the protection of moral rights does not appear to extend far enough to preserve the work under all circumstances.[17]

Copyright versus preservation of cultural property

Copyright does not strive to protect cultural property, but to protect all original works by every individual maker, regardless of quality. Hence, copyright serves the individual rights of the artist and separate laws have been introduced to preserve cultural property.

Of course, both sets of interests may well coincide, but they may also conflict with each other. For instance, an artist may refuse to allow conservation or restoration work to be carried out because the work's decay is intentional and inherent in the work; owners and conservators on the other hand argue the case for the physical preservation of art. The ethical codes conservators are morally obliged to comply with describe the essence of the profession as being "the preservation of cultur- al property".[18] And here lurks a potential conflict with (the right of integrity of) the artist, at least in Europe.

In the United States there is no danger of such a conflict. The Visual Artists Rights Act deprives the artist of the opportunity to use the right of integrity to challenge the conservation or restoration of his or her work. Paragraph 106A(c)(2) literally states: "The modification of a work of visual art which is the result of conservation...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."

The end – physical conservation – here seems to justify the means. This disregard for the artist's intentions indicates that the VARA protects the material work of art separately from the artist, and not, as is the case in European copyright law, the bond between the maker and the creation. Thus it would seem that American copyright law is guided by the concerns of the preservation of cultural property. This suspicion is confirmed by the fact that the VARA gives the artist the right to challenge the destruction of his or her work, but only if the work is of 'recognized stature'.[19] This limiting of the law to recognized art has met with much criticism because it denies the essential aim of copyright law to afford **every** maker protection since his/her work is the direct expression of his/her personality.[20]

In Europe then, the bond between maker and art work is of central importance, whereas in the United States the object itself is more important. Hence, fundamentally different interests are served: those of the artist as opposed to those of cultural property.

Possible conflicts in conservation and restoration

From the point of view of moral rights, conflicts between artists and owners or conservators concerning the preservation of the work only arise in Europe. Particular care has to be taken with regard to works of art, yet copyright law does not state what this care should consist of. A few ethical codes with respect to conservation speak of the responsibility of the conservator to the maker of the object, but do not state what this actually entails.[21] There is no legal obligation to consult the artist; copyright law makes no mention of this. According to the German copyright lawyer, Thomas Dreier the conservator is not obliged to consult the artist provided the intervention is successful.[22] However, the question is whether or not this may always be determined in advance.

From French and Dutch jurisprudence it is apparent that in the case of the destruction of an original work of art, the artist should always be warned in advance so that the possibility of preservation may be discussed (see note 15). If preservation is not possible, the artist has to be given the opportunity to take photographs of the work. The Dutch copyright lawyer, T. Limperg wrote: "In any case, it is always worth the artist's while to say something if he/she knows his/her work is under threat."[23]

No legal obligation to consult the artist about conservation or restoration exists. However, this obligation may be morally justified. After all, how can one restore a work of art without knowing what the artist's intentions were? Consultation with the artist at an early stage may also avoid the right of integrity being invoked at a later date. On the other hand, consultation may also give rise to conflicts if it becomes apparent that the artist's wishes do not coincide with the interests of physical preservation advocated by the owner or conservator. The following conflicts may arise[24]:

— The artist does not agree with the treatment proposed for his/her work and wants another method to be used which he/she suggests. Problems arise if the conservator and/or owner consider this method to be unsound.

— The artist wants to carry out the restoration him/herself. In terms of copyright law, this is the ideal situation, because any possible changes the artist makes will implicitly have his/her approval. Artists, however, are not conservators and are therefore not bound to ethical codes. Artists might not limit themselves to the preservation of the work and may take the opportunity to use the restoration to make changes to the work, because they can no longer support the work as it is. The function of the work of art as a document of the period in which it was made is then lost. Although it is safer to allow the artist to carry out restoration work in terms of preventing more conflicts about rights, there is also a risk that the result will conflict with ethical codes. A similar situation arose in the recently concluded conflict between the conservator Daniel Goldreyer and Amsterdam's Stedelijk Museum over the former's treatment of Barnett Newman's painting *Who's Afraid of Red, Yellow and Blue III*. Goldreyer restored paintings by Newman before the artist's death, and Newman approved of his methods. When the painting was vandalized with a knife, the Stedelijk Museum asked Goldreyer to restore it. From a moral-rights perspective, the work was satisfactorily carried out. However, Goldreyer contravened the ethical codes of restoration. The Dutch legal scholar, Jan Kabel also asks: "...what if the museum, against the wishes of the copyright holder, want-ed to provide the work with better care? The Stedelijk Museum should have been able to find a more refined restorer...than Goldreyer whose flattening use of a paint roller had the support of Barnett Newman's widow."[25]
— The artist rejects conservation or restoration because deterioration is an essential part of the work. Since this inevitably means the destruction of capital for the owner, it is important that the artist make this intention clear at the point of sale. Furthermore, one may ask whether the case for preservation shouldn't weigh more heavily than the moral rights of the artist where important works of art are concerned? The English legal scholar, G. Dworkin also proposes: "With important works of art, it could be argued that the responsibility for their protection should shift from the private rights of the author to those public authorities responsible for protecting our cultural heritage, enforceable by public law means."[26]
In cases where artists' intentions are (no longer) clear – as is often the case after they have died – the priority in conservation and restoration work must be the physical preservation of the authentic appearance of the work.[27]

In all these cases, the artist's right of integrity is opposed to the owner's interest in preserving the work unchanged. Copyright offers no solution to such conflicts and there have been no judgements in such cases. It is therefore unclear whose interests will prevail in court. Each case is unique. Hence, the judge will always consider the specific circumstances of each case. In European jurisprudence there have been judgements that relate to aspects of conservation and restoration. These concern the owner's obligation to maintain the work of art, the artist's use of materials and the non-physical distortions of works of art. This is discussed below where, once again, the contrasts with American copyright law will become apparent.

Maintenance obligation

The question of whether the owner is legally obliged to maintain work of art is not answered by the copyright law. Lawyers are therefore agreed that this law does not impose a maintenance obligation on the owner. Nonetheless, some are of the opinion that museums are obliged to conserve their collections on the grounds of their duty to preserve cultural property.[28] The fact that works of art are intended for long-term, public exhibition should carry an implied warranty from the museum to the artist that it will take particular care of his or her work. An implied warranty is, however, not enforceable by law. In the United States, an artist cannot invoke the right of integrity in cases where the way their work has been exhibited (e.g. positioned or lit) is prejudicial to the work, unless there is a case for gross negligence (see note 16).

The question of whether the owner of a work of art is obliged to maintain the work has been explicitly challenged in a number of Dutch and French lawsuits. In the Netherlands, two contradictory decisions were taken in the case De Haas v. Ulrich from 1978. The owner, Ulrich arranged for a painting he had commissioned from De Haas to be entirely overpainted because it had begun to

deteriorate.[29] The judge ruled that Ulrich should have consulted the artist about repairing the painting and offered him the opportunity to repair it. This judge was therefore well disposed towards the artist. However, this verdict is an exception. In most other Dutch lawsuits concerning the destruction of works of art, the interests of the owner are taken very seriously. This also occurred in the case *Lenartz v. Sittard* in 1990. Sittard City Council wanted to demolish a fountain that had fallen into disrepair.[30] The artist was informed of the decision. He demanded that the fountain be repaired and accused the council of not fulfilling its maintenance obligations. But the court ruled against him: repairing the fountain would be too expensive and it was unreasonable for the artist to make this demand. The court, furthermore, also questioned whether the city council was indeed obliged to carry out maintenance work on the fountain, considering that no such arrangement had been agreed upon by the city council and the artist. The court hereby suggested that a prior agreement is required if the owner is to be obliged to carry out maintenance work.

The French case *Munch v. Mulhouse* from 1992 implied rather the opposite.[31] A glass paste mosaic had cracked and pieces had become loose; the artist demanded immediate restoration. The 'Cour de Cassation' – the highest court in France – ruled that the owner did not have to entirely repair the mosaic, but was obliged to carry out normal maintenance work to prevent or retard the work's deterioration. In other words: the owner was only responsible for maintenance and not restoration. Unfortunately, it remains unclear as to whether the judge's decision intended to indicate that the duty to carry out normal maintenance applies to all French owners and commissioners of art.

This ruling is, however, an exception. International opinion says that copyright law does not oblige the owner to maintain the work. If artists consider the maintenance of their work important, they would be wise to stipulate this in an agreement with the owner.[32] In 1986-7, the Netherlands Institute for Fine Art – which was integrated into the Netherlands Institute for Cultural Heritage in 1997 – developed a model agreement for government purchases which attempts to meet artists' requirements. Through this agreement, the Dutch government is obliged to care for the work of art with necessary diligence.[33] This formula is, however, too noncommittal to form a basis for any rights. If the artist created the work to last for a specific, indicated length of time, the state is not obliged to maintain it be-yond that period (art. 12, section 1 of the model agreement). The artist then has to make more specific demands in the sales agreement. This is also the case if the artist wishes no maintenance to be carried out because deterioration is fundamental to the work: the artist can only invoke this if his/her intention is clear to the owner at the point of sale.[34] In all cases, specification in the sales agreement offers the artist the most certainty.

Use of materials

In a number of Dutch and French court cases, judges have ruled that the decay of the materials used is the artist's responsibility. The first Dutch case took place in 1977. At Schiphol Airport, a work made from Formica panels by Hans Koetsier was unscrewed from the wall, whereupon it immediately bent. According to the judge, this 'bending' could not be blamed on human action but on the inherent qualities of the material, which meant that Koetsier could not invoke his right of integrity.[35] In the *Lenartz v. Sittard* case from 1990 discussed earlier, it became apparent that Lenartz's fountain's decay partly resulted from its poor construction. This led to the judge ruling that the artist could not demand that Sittard City Council carry out expensive repairs.

Prior to this, in 1976, there was the French case *Roussel v. Grenoble*.[36] The artist, Roussel had made an art work for Grenoble City Council out of old railway sleepers. After four years, the work had become so unstable it was a danger to visitors to the park in which it stood. It was manifestly impossible to carry out repairs without drastically altering the character of the work. The mayor had the work removed, but without informing the artist. According to the tribunal, Roussel could not expect his piece to be granted eternal life: he had, after all, used second-hand sleepers. As in the Dutch case *Koetsier v. Schiphol*, the artist was confronted with the objection that the deterioration was inherent in the materials he had chosen to use.

In the French case *Munch v. Mulhouse* from 1992 mentioned above, the judge accused the artist of not ascertaining where or how his mosaic was to be placed and therefore also the conse-

quences of installing it in a fountain. The judge found that it was the artist's fault that the mosaic had cracked and become loose. This decision sounds reasonable. However, in the *Koetsier v. Schiphol* and *Roussel v. Grenoble* cases, one might question whether the artist should be blamed for the deterioration of the material. If artists use fragile materials, it is equally possible to conclude that they regard careful maintenance to be a priority. Furthermore, it is not always known in advance how quickly a certain material will deteriorate, as was the case with plastics when they were first invented.[37] Should artists therefore refrain from using revolutionary materials? According to the judicial rulings discussed, the risk lies with the artist. This makes it all the more important for the artist to demand maintenance in writing if he or she considers it important to the work.

Since European copyright law does not mention deterioration, judicial findings have to bring clarity to the matter. Conversely, the American Visual Artists Rights Act does specify deterioration, preventing artists from invoking their right of integrity. Paragraph 106A(c)(1) literally states: "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)."[38]

Non-physical modification

Dutch jurisprudence has made a number of remarkable decisions in which it has ruled against the non-physical modification of a work of art. The incorrect placing of a work may violate the artist's right of integrity if it results in the artist's intention for the work being distorted. This was examined in the case *Van Soest v. De Meerpaal* in 1989.[39] The artist, Pierre van Soest had been commissioned by the Community Centre De Meerpaal to paint a picture measuring 6 metres x 15 metres which was installed free-standing, at eye level in the centre. The centre was later renovated and the art work moved without Van Soest being consulted. According to the artist it was rehung too high thus distorting the work. He invoked his right of integrity. The judge, together with the art expert Wim Crouwel, inspected the situation and reached the following conclusion: "The painting, to an important extent, derives its essential meaning from the space for which it was made and the way in which it is positioned within that space." Thus, the repositioning of the painting, according to the judge, should as far as possible have taken place with Van Soest's consent. The artist won the case and the painting was repositioned at eye level.

From this it is possible to deduce that in the Netherlands, if the installation or exhibition of a work is not carried out according to the artist's intention, or if it is later moved, the result may be viewed as a non-physical modification. This is certainly the case in site-specific art. In Germany there was also a debate about whether the arrangement of works made by Joseph Beuys in the museum in Darmstadt could be moved and separated without harming the intentions behind the work.[40] In a Dutch case from 1993, the artist, Devens protested against the placing of a fountain in the garden of the Town Hall in Eijsden, because it would disrupt the spatial effect of his own work in the same garden.[41] This work, comprising concrete cubes and perforated metal screens, derived its meaning to an important extent from the space for which it was made; the space was therefore an important part of the work. Experts agreed that the fountain would completely disrupt the visual play of Devens's work. The court accordingly prohibited the city council from building the fountain. Here too the artist was successful in invoking his right of integrity. What convinced the court was that Devens's position was supported by various national and international experts.

However, there was no such expert opinion in the case concerning two monuments to commemorate A. Winkler Prins in Veendam.[42] The first, a bronze statue, was designed by the artist Chiffrun. An imaginary, straight line ran from the sta-tue's plinth to a point one kilometre away where the parsonage once stood in which Winkler Prins wrote his encyclopaedia. This was precisely the spot on which the Rotary Club placed a second monument. According to Chiffrun, this modified her work. She argued that the place where the parsonage had stood was an essential part of her work because it was joined to it via this imaginary line. However, the judge ruled that this was not protected by copyright because it wasn't, as copyright law demands, perceivable to the senses. He literally stated: "This part of her work has, as it were, remained a concept." Furthermore, the judge

considered it unreasonable to expect the Rotary Club to know that the parsonage's location was an essential part of Chiffrun's work. The artist's protest was therefore rejected.

The problem here was that the copyright law has a narrower view of art than the discipline of art history. Dutch law recognizes that the space in which the art work is installed can be part of the work. However, this has to be evident (for instance, recognized by various experts) if the artist is to have any hope of successfully defending his or her right of integrity in any case of mutilation or distortion. All cases are stronger if the artist's intention for the work is clearly recorded. When an artist is commissioned to make a work for a specific site, it is usual for the commissioning party to describe the place in the contract. If the work is not installed there or is later moved, the artist may protest and will often win.[43]

In the model agreement of 1986-7, the Netherlands Office for Fine Art reserved the right for the artist to state the correct positioning or installation of his or her work.[44] The government may install the work elsewhere, but only in consultation with the artist and in such a manner that the work is exhibited in the best possible way (art. 11, section 2). Despite agreements in the contract however, the artist can still lose. In the Netherlands, permission was given to remove a wall hanging that had been especially designed for a crematorium because relatives complained that it was too cheerful. The same happened when people complained that a painting in the children's ward at a hospital was too sombre. An art work on top of an old peoples' home which announced in neon letters de negende van OMA was also removed after complaints from the public. (OMA is the Office for Metropolitan Architecture and the Dutch word for grandma, so, "OMA's/Grandma's Ninth".)[45]

Changing times can also lead to the removal of work. In united Germany, the heirs of a Russian sculptor protested in vain against the removal of his Lenin sculptures from East Berlin.[46] In a few French cases it has been ruled that works of art that threaten public safety (for instance because their condition has deteriorated) may be removed.[47] In the United States, artists usually have to give way to their opponents: the overpainting of wall paintings that were considered indecent was left unpunished and the removal or repositioning of (parts) of site-specific sculptures took place unhindered.[48] (See also notes 5,6,7) The VARA, moreover, states in paragraph 106A(c)(2): "The modification of a work of visual art which is the result 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."

Summary and conclusion

Copyright law guarantees artists' moral rights giving them a say in what happens to their work for the rest of their lives. After their deaths the heirs may continue to exercise these moral rights (though this is limited in the United States), although it is questionable whether this can happen satisfactorily: heirs must be aware of the artist's intentions with regard to the work in question.

Artists may invoke their right of integrity to prevent (threatening) modification or mutilation as well as non-physical alteration. If the preservation of a work requires intervention, conflict may arise between the artist and the owner and/or conservator. However, copyright law does not answer the question of whether the right of integrity carries more weight than the rights of the owner in such cases. Furthermore, there is no jurisprudence about such conflicts. When cases like this do arise, the judge will quite probably have to consult experts, including conservators.

Considering the unpredictability of judicial rulings, it is advisable to consult the artist on the preferred method of treatment of the work and so reach an agreement.[49] Even then, not all differences of opinion can be avoided, which is why it is better if the artist provides guidelines for preservation of the work when it is sold. The 1986-7 model agreement from the Netherlands Office for Fine Art (now the Netherlands Institute for Cultural Heritage) took a step in the right direction by requiring artists to "supply a detailed description of the materials and techniques used, to aid any future conservation of the art work".[50]

As is evident from judicial rulings, artists cannot demand that the owner restore the work unless a mutual agreement has been reached.[51] If artists consider the physical maintenance of their work important, it is their responsibility to make these arrangements with the buyer. If they omit to do

so, they are left at the mercy of the buyer's good will. In the case of (threatening) interventions which the artist does not agree to, he or she may invoke the right of integrity. In order to prevent this, the owner may choose to take the initiative of first asking the artist's advice.

It is prudent, at the time of purchase, to ask the artist to write down guidelines about whether or not conservation and/or restoration work may be carried out and, wherever possible, how (see note 49). Guidelines are not binding. This is important because in the future other, improved conservation methods may become available. If the artist refuses to agree to preservation, he or she must justify the reasons in order to clarify what the intentions behind the work are. Any potential buyer must be informed if degeneration is part of the work. The buyer will then know what lies in store for him or her – and can decide not to procede with the purchase – while the artist can later defend his/her wish not to allow preservation work to be carried out. It must therefore be clear from the sales agreement that the art work's future has been considered. If the artist makes special demands with regard to positioning, lighting and so on, he or she may also indicate in the contract how the work should be presented.

Though artists may consciously calculate degeneration into their work, conservators find this hard to accept. The position of deliberate degeneration is difficult to reconcile with the ethical codes of conservators which specify their duty to physically preserve works of art. In the case of important works of art, the general interest served by the preservation of cultural property is defended over the individual wishes of the artist.[52] American copyright law implies the same thing: the VARA specifies that the artist may not invoke his or her right of integrity to prevent conservation or restoration. The protection of the bond between maker and art work here has to yield to the preservation of cultural property. From a legal perspective, American conservators are therefore in an easier position than their European colleagues.

In European copyright law, there is a deep-rooted respect for the personal bond between the artist and his or her work. Furthermore, involving artists in the treatment of their work is often viewed as a moral obligation, even though this does not always make it easy to reach a decision about which treatment should be used.[53] After all, the ethical codes for restoration always approach a problem from the perspective of the preservation of cultural property and are therefore sometimes difficult to reconcile with the artist's original intentions – whose moral rights also have to be respected. Furthermore, compared to earlier art which has no copyright, modern art brings with it a range of specific problems. The large variety of materials used and the speed with which they degenerate constantly present conservators with new and complex choices.

1 See T.A. Schiphof in: Justitiële Verkenningen 1 (1997), pp. 54-62; and Het Amsterdams Beeldenboek: vier
eeuwen buitenbeelden (1600-heden), Amsterdam 1996 (Amsterdam Arts Council), p. 91.
2 U.S. Copyright Act, title 17 U.S.C. paragraph 106.
3 Art. L. 121-1 Code de la Propriété Intellectuelle 1992 (CPI).
4 According to the design by A. Gräfin Ballestrem and recorded by the ICOM Committee for Conservation, Copenhagen, September 1984.
5 Richard Serra v. U.S. General Services Administration, 847 F.2d. 1045 (2d Cir. 1988).
6 Carter v. Helmsley-Spear, 852 F.Supp. 228 (S.D.N.Y. 1994); 861 F.Supp. 303 (S.D.N.Y. 1994); 71 F.3d. 77 (2d Cir. 1995); 116 S.Ct. 1824 (1996).
7 Pavia v. 1120 Ave. of the Americas Assocs, 901 F.Supp. 620 (S.D.N.Y. 1995).
8 M. Nimmer, P. Geller are pessimistic about this in: International Copyright Law and Practice, Vol. 2, New York (M. Bender, loose-leaf) 1996, p. USA-125. On the other hand, J. Ginsburg expects improvements in 'Urheberpersönlichkeitsrechte im Rechtssystem des Common Law', in: Gewerblicher Rechtsschutz und
Urheberrecht Internationaler Teil 8/9 (1991), pp. 593-603, particularly p. 598.
9 See S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Work: 1886-1986, London 1987, p. 469 note 513: "an artistic work reproduced together with articles not enjoying a good reputation", and p. 470: "...there is no reason why an artist should not be able to complain of a derogatory action in relation to his work where it is exhibited in an inappropriate place, for

example, where a monumental piece of art is displayed in an area which is far away from the public."
10 Reichsgericht 8 June 1912, Entscheidungen des Reichsgerichts in Zivilsachen 79, p. 397.
11 In the case of works made on or after 1 June 1991, the moral rights end on the maker's death. See par. 106A (d) (1) Visual Artists Rights Act.
12 Respectively: art. L. 121-1 Code de la Propriété Intellectuelle 1992; par. 28 and 30 Urheberrechtsgesetz 1965; art. 25 par. 2 Nederlandse Auteurswet (Dutch Copyright Act).
13 According to Dutch copyright law, a maker may renounce his/her right to object to changes to his/her work, but not the right to protest against deformation, mutilation, or other derogatory action (art. 25 par. 2 Aw).
14 One exception to this general rule, for example, is the Dutch court case Siep van den Berg v. Rijksuniversiteit Groningen, Leeuwarden Court, 29 December 1993. See: Informatierecht/AMI 1996, p. 13. The artist managed to prevent the destruction of his wall painting which would have disappeared during renovation work.
15 Landgericht München 3 August 1982, Neue Juristische Wochenschrift21 (1983), p. 1205.
16 A.C. Beunen, Vernietiging van moderne kunst en het 'droit au respect', doctoral thesis, Catholic University Nijmegen, 1993 (unpublished).
17 S. Gerbrandy, Kort Commentaar op de Auteurswet 1912, Arnhem, 1988, p. 305. See also A.A. Quaedvlieg, Auteur en aantasting, werk en waardigheid, Zwolle, 1992 (inaugural lecture, Nijmegen), pp. 16-17.
18 See art. III of the Code of Ethics of the American Institute for Conservation (AIC) and art. II of the Professional Guidelines of the European Confederation of Conservator-Restorers' Organizations (E.C.C.O.). The Preamble of the latter describes 'cultural property' as "material and cultural heritage to be passed on to forthcoming generations".
19 Par. 106A (a) (3) (B).
20 See J. Dieselhorst, 'Das Ende des "amoralen" Copyrights? Der Visual Artists Rights Act der USA von 1990', in: Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 12 (1992), pp. 902-910, particularly p. 908.
21 Included by the AIC in par. II of the Code of Ethics and par. 3 of the Guidelines for Practice; and the E.C.C.O. in the Preamble of his Code of Ethics. The responsibility of the conservator towards the artist in note 4 of the above mentioned ICOM-document.
22 T. Dreier, 'Restoration and Moral Rights of the Artist under Comparative Law', in: The Restoration of Works of Art, in: Q. Byrne-Sutton, M.A. Renold, B. Rötheli-Mariotti (eds.): The Restoration of Works of Art – Legal and Ethical Aspects (seminar organized in Lausanne on 17 October 1994 by the Art-Law Centre, Geneva), Zürich, 1995 (Studies in Art Law 6), pp. 105-123, particularly p. 113.
23 T. Limperg, Auteursrecht in de hortus der beeldende kunsten, Culemborg (Phaedon), 1992, p. 34.
24 See C. d'Assay, H. Norloff, 'Difficultés éthiques et pratiques soulevées par la restauration de l'art contemporain', in: The Restoration of Works of Art, Zürich 1995 (Studies in Art Law 6, Art-Law Centre Geneva), pp. 145-155, particularly pp. 150-152 and A. Beunen, 'Restauratie & Recht', in: IIC Mededelingenblad 3 (1995), pp. 11-17.
25 Bijblad Industriële Eigendom 1994, p. 240 (book discussion by J. Spoor, D. Verkade, in: Auteursrecht, Deventer 1993C).
26 G. Dworkin, 'Moral Rights in English Law – The Shape of Rights to Come', in: European Intellectual
Property Review 11 (1986), p. 335.
27 See J. Kabel, 'Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar', in: T. Pronk, G. Schuijt (ed.), Hoe vrij is de kunst?, Amsterdam, 1992, pp. 68-85, particularly pp. 81-82.
28 F. van Isacker, De morele rechten van de auteur, Brussels, 1961, p. 164 and D. Cohen, 'La restauration et le droit moral de l'artiste selon le droit francais', in: The Restoration of Works of Art, Zürich 1995 (Studies in Art Law 6, Art-Law Centre Geneva), pp. 125-138, particularly p. 134.
29 Amsterdam Court of Appeal 15 November 1978, Auteursrecht AMR 1979, p. 32.
30 President District Court, Maastricht 21 February 1990 and Den Bosch Court of Appeal, 17 December 990, Nederlandse Jurisprudentie 1991, no. 443; Intellectuele Eigendom & Reclamerecht 1991, p. 63; Informatie-recht/AMI 1992, p. 33.

31 Roger Munch v. S.A. d'Economie Mixte de Rénovation Urbaine de Mulhouse, Cour d'Appel Colmar, 30 March 1990 and Cour de Cassation, 1ère chambre civile, 3 December 1991, Revue internationale du droit d'auteur 153 (1992), p. 160.
32 According to Kabel, deliberate neglect with the intention of damaging the artist's name can be a violation of the artist's moral rights if the work is on public display – but only if it is deliberate. See J. Kabel, 'Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar', in: T. Pronk, G. Schuijt (ed.), Hoe vrij is de kunst?, Amsterdam, 1992, pp. 68-85, particularly p. 80.
33 Art. 11 par. 1 of the Model Agreement Dutch Government/Netherlands Office for Fine Art, included in: H.J.M. Akkermans et al (ed.), Handboek Cultuurbeleid, Den Haag (VUGA, loose-leaf), 1989, I.3.5 Supplement 1.
34 See also T. Dreier, 'Restoration and Moral Rights of the Artist under Comparative Law', in: The Restoration of Works of Art, Zürich, 1995 (Studies in Art Law 6, Art-Law Centre Geneva), pp. 105-123, particularly p. 122.
35 Koetsier v. Schiphol, Amsterdam Court of Appeal, 16 June 1977, Nederlandse Jurisprudentie 1978, no. 218; Auteursrecht AMR 1978, p. 30; Bijblad Industriële Eigendom 1978, p. 124.
36 Roussel v. Grenoble, Tribunal administratif de Grenoble 18 February 1976; Revue internationale du droit d'auteur 91 (1977), p. 116.
37 Compare: Henk Peeters's work 59-18 made from foam rubber (Netherlands Institute for Cultural Heritage), pilot object no. 7 from the Foundation for the Conservation of Modern Art.
38 For this subsection see note 2.
39 Van Soest v. de Meerpaal, President District Court Zwolle 14 April 1989, Informatierecht/AMI 1989, p. 100.
40 See A. Dietz, 'The Artist's Right of Integrity under Copyright Law – A Comparative Approach', in: International Review of Industrial Property and Copyright Law 2 (1994), pp. 177-194 and particularly p. 193.
41 Devens v. Eijsden, Den Bosch Court of Appeal 24 February 1993, Nederlandse Jurisprudentie 1993, no. 440; Informatierecht/AMI 1989, p. 116.
42 President District Court Groningen, 20 October 1993, Informatierecht/AMI 1989, p. 114.
43 In the Netherlands, the agreed positioning of the work could be enforced in the case Patrimonium v. Reijers, Amsterdam Court of Appeal, 5 May 1972 and the Dutch Supreme Court, 22 June 1973, Bouwrecht 1973, p. 138; Nederlandse Jurisprudentie 1974, no. 61 and Haarlem/Spronken, Den Bosch Court 17 December 1990, Nederlandse Jurisprudentie 1991, no. 444.
44 Article 1 under 'bijzondere eisen ten aanzien van het openbaarmaken', Model Contract Dutch Government/Netherlands Office for Fine Art (see note 33).
45 Respectively Smeets v. Crematorium, Arnhem Court of Appeal 13 July 1989, Informatierecht/AMI 1990, p. 33; Mirko Krabbé/AMC, President Amsterdam District Court 28 October 1993, Informatierecht/AMI 1994, p. 103; Körmeling v. Vlaardingen en bejaarden, Dutch Supreme Court 20 May 1994, Informatierecht/AMI 1995, p. 12.
46 Berlin Court of Appeal, 8 November 1991 (unpublished). See A. Dietz, 'The Artist's Right of Integrity under Copyright Law – A Comparative Approach', in: International Review of Industrial Property and Copyright Law 2 (1994), p. 193.
47 P. Scrive, Tribunal de Grande Instance Paris, 14 May 1974, Cour de Paris 10 July 1975, Revue Internationale du droit d'auteur 91 (1977), p. 114 and Roussel v. Grenoble, see note 36.
48 Crimi v. Rutgers Presbyterian Church, 149 Misc. 570, 89 N.Y.S. 2d 813 (New York Supreme Court).
49 See also C. d'Assay, H. Norloff, 'Difficultés éthiques et pratiques soulevées par la restauration de l'art contemporain', in: The Restoration of Works of Art, Zürich, 1995 (Studies in Art Law 6, Art-Law Centre Geneva), p. 150. These French conservators of modern art feel it is their duty to ask artists, if they are still alive, to lay down guidelines.
50 See note 33, art. 4 par. 1.
51 Perhaps in France, if the case Munch v. Mulhouse from 1992 (note 31) becomes a precedent.
52 cf. Dworkin (note 26) and Kabel (notes 25 and 27). The Dutch legal scholar, Kabel argues for artists to give up their right of integrity in cases of conservation, as in the United States. Moreover, he propagates limiting the exclusive reproduction right of the artist if, for preservation reasons, it is necessary to make a copy of the work.

53 During the symposium ‘Modern Art: Who Cares?’, it became apparent that this moral obligation is also felt in the United States. However, the legal position of artists who want to protest is not strong, since the American VARA does not recognise the right of integrity in cases of conservation.

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