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## THE RIGHT TO DESTROY UNDER *DROIT D'AUTEUR*: A THEORETICAL MORAL RIGHT OR A TOOL OF ART SPEECH?

SOFIE G. SYED\*

In recent years, French artists have asserted the right to destroy their own work as a dramatic means of enforcing the right to preserve the integrity of their expression.<sup>1</sup> In 2007, conceptual artist Daniel Buren decried the French Ministry of Culture for allowing his famous columns at the Palais Royal in Paris to fall into disrepair. Commenters argued that Buren's columns conveyed a political message symbolizing inter-party collaboration, and that the Ministry of Culture was conveying a partisan statement by permitting their deterioration.<sup>2</sup> Buren's threat to destroy his columns received significant media coverage,<sup>3</sup> and resulted in the allocation of six million euros for the restoration of the work.<sup>4</sup> In 2014, artist Alain Mila announced that he intended to destroy one of his sculptures, after a local politician painted the work the color of the right-wing party Front National without Mila's consent.<sup>5</sup> In both cases, the government's treatment of the work resulted in a potential threat to the dignity of the artist, and the invocation of the right to destroy generated public debate about the boundaries of the moral right of integrity in practice.

\* The author would like to thank Professor Tim Wu for his guidance and the Journal staff for their hard work on this piece.

1. This right may be grounded in the rights to exclude or withdraw one's work; authors claiming the right to destroy in the French context have not explicitly cited a consistent legal theory. See *infra* part II.

2. John Lichfield, *Les Deux Plateaux: Monument to the French malaise?*, INDEPENDENT (Jan. 4, 2008), <http://www.independent.co.uk/news/world/europe/les-deux-plateaux-monument-to-the-french-malaise-768339.html>.

3. *Artist threatens to take down columns*, UPI (Dec. 31, 2007), [http://www.upi.com/Entertainment\\_News/2007/12/31/Artist-threatens-to-take-down-columns/27321199152254/](http://www.upi.com/Entertainment_News/2007/12/31/Artist-threatens-to-take-down-columns/27321199152254/).

4. James Mackenzie & Elizabeth Pineau, *Paris Palais Royal columns get 6 million euro facelift*, REUTERS (Jan. 8, 2010), <http://www.reuters.com/article/2010/01/08/us-france-sculpture-idUSTRE6074AX20100108>.

5. *Le maire FN de Hayange juge "sinistre" une sculpture, il la fait repeindre* [The FN Mayor of Hayange Repaints a "Sinister" Sculpture], L'EXPRESS (July 29, 2014), [http://www.lexpress.fr/actualite/politique/fn/le-maire-fn-de-hayange-juge-sinistre-une-sculpture-il-la-fait-repeindre\\_1562581.html](http://www.lexpress.fr/actualite/politique/fn/le-maire-fn-de-hayange-juge-sinistre-une-sculpture-il-la-fait-repeindre_1562581.html).

In contrast to these cases, street artists who work in mediums in which destruction of their work is inevitable reveal a different relationship to the right to destroy, integrating destruction into their work in a way that challenges traditional ways of viewing and commodifying art. These artists need not formally assert a right to destroy, as the nature of the shared space in which they produce art links destruction to the creation of new works.

Whether an artist seeks destruction to preserve a specific authorial intent, or implicitly consents to destruction so that other artists may make use of a shared canvas, destruction facilitates discourses on the relationship between art and political speech. The right to destroy can serve various purposes, which may or may not correspond to the moral rights rationale underpinning *droit d'auteur*. This paper seeks to examine the intersection of *droit d'auteur* and art speech, in order to compare the theory of the right to destroy with its actual application. In practice, do French artists use this right to gain leverage in negotiations, as a speech safeguard, as an assumed element of particular mediums of expression, or for some other purpose?

First, I examine the history of moral rights, including the spectrum of moral rights that is currently protected under French copyright law. Next, I consider the potential theoretical bases for a right to destroy, using modern examples from across Europe. Third, I analyze disputes over the pre-disclosure assertion of the artist's right to destroy the work as a means of retaining artistic control. Finally, I juxtapose the foregoing against a new context to frame destruction—street art created on “revolving canvases”—to demonstrate how destruction comes into play to either protect or reject economic rights entirely.

### I. DROIT D'AUTEUR AND MORAL RIGHTS

Copyright law has been justified according to a variety of rationales, including the promotion of economic incentives, the development of emerging industries, and the protection of the moral rights of creators. The French *droit d'auteur* (right of the author), which protects “works of the mind,” is known for its strong affiliation with the moral rights of authors. While the moral rights component of *droit d'auteur* is well established, the author's interest in commercial exploitation of their work may be equally compelling, and may be implicated even when the author cites moral rationales for the assertion of a particular right. In order to understand the relationship between the moral and economic rights theories, it is necessary to delve into the historical development of *droit d'auteur*.

*Droit d'auteur* protects both the economic rights (*droit patrimoniaux*) and moral rights (*droit moral*) of an author. Though “moral” appears to be

a cognate, its meaning in French includes connotations such as “spiritual,” “non-economic,” and “personal.”<sup>6</sup> *Droit moral* is premised on a conception of the author having a unique relationship to his work, by “infus[ing] into his work something of his own creative personality.”<sup>7</sup> Thus, *droit d’auteur* aims to protect the personality of the author by protecting the integrity of their work, protection that is available “by the mere fact of its creation.”<sup>8</sup> The focus on the author’s contribution is apparent in the statutory language of *droit d’auteur*. For example, originality under *droit d’auteur* is defined as “a print of the author’s personality,”<sup>9</sup> though in practice, originality is analyzed similarly as in the United States.

French law does not just view the creative act as investing some of the author into the work, but contextualizes it as occurring in a society whose interests oppose those of the author.<sup>10</sup> *Droit d’auteur* thus seeks to protect the author’s work as a “gift . . . to the world,” for which the author has “a moral right to expect that society respect his creative genius.”<sup>11</sup> Despite its history, the moral right aspect of *droit d’auteur* has been characterized as a “mere derogation from the normal exploitation of a work.”<sup>12</sup> Support for this view comes from the Cour de Cassation’s conclusion that moral rights are separate from personality rights, as well as the decision that legal entities may exercise moral rights over a work.<sup>13</sup> Jean-Luc Piotraut argues that although the French Intellectual Property Code attaches inalienable moral rights to the author’s person, “*droit moral* is often exploited for economic purposes under a remunerated waiver.”<sup>14</sup>

On the other hand, Russell DaSilva describes *droit moral* as “the very core of the French *droit d’auteur*, for it is by virtue of the moral right that

6. Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Copyright Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 595 (2006) (quoting SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 456 (1987)).

7. Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1, 11 (1980).

8. CODE DE LA PROPRIETE INTELLECTUELLE [C. PROP. INTELL.] [intellectual property code] art. L.111-1.

9. Scott A. Cromar, Note, COPYRIGHT & MORAL RIGHTS IN THE U.S. AND FRANCE, at 8 (May 1, 2011), <http://ssrn.com/abstract=1898326>; see Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 30, 1988, Bull. civ. I, 178, 2137.

10. DaSilva, *supra* note 8, at 11.

11. *Id.* at 12.

12. Piotraut, *supra* note 7, at 596 (quoting Professor Jacques Raynard).

13. *Id.* (citing Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 10, 1993, Bull. civ. I, 7, 78).

14. *Id.* at 614.

an author may secure and assert his pecuniary interests.”<sup>15</sup> The nature of moral rights is complicated by the difficulty in categorizing certain rights as either economic or moral. For example, the *droit de suite* (royalty right) protects rights of future resales for fifty years after the author’s death. Despite its appearance as an exploitation right, some scholars view it as a third category of *droit d’auteur* based on its origins as a moral right.<sup>16</sup>

#### A. History of Droit Moral

The exact origins of moral rights are often attributed to the period preceding the French Revolution, but some scholars connect these principles to social norms and industry customs developed far earlier. According to Katharina de la Durantaye, though the ancient Romans had no laws protecting authors’ rights, “powerful social norms governing conceptions of public morals and individual honor” protected interests that parallel modern *droit moral*.<sup>17</sup> Practices respecting the author’s interests in disclosure, attribution, and integrity of the work were common, but differed from *droit moral* in that they were based on social relationships between individuals rather than the work’s relationship to the author’s personality. Further, these “rudimentary” protections only applied to writers, not to other Roman artists, and were strongest for males with elite social standing.<sup>18</sup> Susan P. Liemer concludes that this early precursor to *droit moral* “did not exist as individual, legally-protected human rights,” because “the creative process was not protected for its own sake as the expression of an individual’s own consciousness.”<sup>19</sup>

While scholars recognize the influence of Roman law on 19th century French law, the act of locating the roots of *droit moral* in Roman law is highly contested. Traditional Roman law was divided into three categories: the law of persons, of property, and of obligations, none of which appeared a proper home for legal protections afforded to authors.<sup>20</sup> The law of persons was inappropriate as a source of *droit d’auteur*, because authors’ rights were not based on rules governing the status of persons. The law of

15. DaSilva, *supra* note 8, at 5.

16. *Id.* at 4.

17. Katharina de la Durantaye, *The Origins of the Protection of Literary Authorship in Ancient Rome*, 25 B.U. INT’L L.J. 37, 38 (2007).

18. *Id.*; see Susan P. Liemer, *On the Origins of Le Droit Moral: How Non-Economic Rights Came to be Protected in French Law*, 19 J. INTELL. PROP. L. 65, 75 n.54 (2011).

19. Liemer, *supra* note 19, at 76.

20. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 95 (2007).

obligations was an unlikely source because authors' rights *in rem* went beyond liability rules.<sup>21</sup> Since the law of property, as used in 19th century law, was limited to rights in tangible things, this source was also an unlikely basis for later *droit d'auteur*.<sup>22</sup> However, Liemer presents the relationship between de la Durantaye's analysis and *droit moral* as a distant analogy in which the dynamics of strong social norms foreshadowed cultural developments that were eventually imported into the law. By viewing its Roman roots in a broader historical context rather than legal theory, Liemer presents the common strain in artistic custom as an alternate explanation for the emergence of moral rights in *droit d'auteur*.

Liemer argues that the next stage in the development of preconditions for *droit moral* was the establishment of artistic control over a work, exercised by well-known artists of the Renaissance in the 16th century. Leading into the Renaissance, works of art were not considered individual products, due to the patronage and guild systems. As patrons and guilds controlled the artist's material options and training, and Christian ideals labeled artistic inspiration as God-given, artists merely executed the work as "craftsmen," rather than creating it as authors.<sup>23</sup>

Prominent artists such as Michelangelo Buonarroti and Albrecht Dürer changed the model of artistic production. Michelangelo's refusal to allow the Pope to enter the Sistine Chapel while he was painting constituted an act of control over disclosure, whereas his decision to chisel his name into a sculpture was an assertion of attribution.<sup>24</sup> Dürer's use of printing technology to reproduce and sell his famous engravings allowed him to amass his own wealth, as he could market his work outside of the patronage and guild systems.<sup>25</sup> As these artists took on unprecedented control over their work, European rulers started to grant them limited exclusive rights in order to encourage industry development.<sup>26</sup>

According to Elizabeth Armstrong, the late 15th and early 16th centuries saw the establishment of legal precedents enabling writers to sue printers for control over their work.<sup>27</sup> Authors sought not only to protect their economic rights, but also to protect non-economic rights such as the

21. *Id.*

22. *Id.*

23. Liemer, *supra* note 19, at 76–77.

24. *Id.* at 78.

25. *Id.* at 81.

26. *Id.* at 79.

27. *Id.* at 83–84 (citing ELIZABETH ARMSTRONG, BEFORE COPYRIGHT: THE FRENCH BOOK-PRIVILEGE SYSTEM 1498–1526, at 12–20, 55–62 (Cambridge University Press 1990)).

reputational interest, extremely valuable in the context of the prevailing social hierarchy. This reputational interest motivated authors to contest misattribution and start appending their own coat of arms to a work, instead of their patron's coat of arms.<sup>28</sup>

The next stage in the emergence of norms supporting *droit moral* occurred in La Comédie-Française under the *ancien régime*. Liemer posits that the regulations concerning the Comédie-Française playwrights provide “the true origins of *le droit moral*,”<sup>29</sup> in contrast with the commonly accepted view attributing *droit moral* to modern French philosophers. The Comédie-Française was the most eminent repertory French theater of the 17th and 18th centuries, regulated by a group of nobles close to the king known as the First Gentlemen of the Royal Bedchamber.<sup>30</sup> Instead of closely monitoring the playwrights, the First Gentlemen set forth regulations over their practices. An overseer communicated directly with the playwrights, giving them an opportunity to have some influence over the regulations to which they were subjected. The interests that playwrights sought to have protected by the regulations reflected the conundrum they faced as upper middle class commoners relying on the support of nobles, whose social codes of conduct discouraged the appearance of striving for wealth.<sup>31</sup> Comédie-Française playwrights had a strong interest in protecting their reputations, as the development of one's career was contingent on cultivating a reputation as a “man of courtly honor.”<sup>32</sup>

Comédie-Française playwrights maneuvered to promote interests correlating to the main *droit moral* recognized under French law today. Securing the presentation of one's play constituted an early disclosure right, just as controlling the ways in which the theater group presented the play functioned as an integrity right. After a play finished its initial run, it became the property of the troupe. However, if a play was revived after its initial run, the playwright could expect to consult with the troupe on creative decisions, though he did not receive any of the profits from the revival.<sup>33</sup> Thus, the economic right was separated from the integrity right, with the latter attaching to the author instead of the work.<sup>34</sup> Both the economic and personality rights of the playwrights were labeled *propriété*

28. See Liemer, *supra* note 19, at 87–88.

29. *Id.* at 93, 95.

30. *Id.*

31. *Id.* at 96–97.

32. *Id.* at 98.

33. *Id.* at 101.

34. *Id.*

or *droits*, all of which were owed to the author, “because of their status as Comédie-Française playwrights.”<sup>35</sup> Not only were the *droit moral* recognized, they may have been even more important to authors than the fruits of their economic rights at times. Liemer notes that playwrights would donate their share of the box office proceeds to charity, in order to enhance the appearance of quasi-nobility that sustained their reputations.<sup>36</sup>

In contrast to the ancient Roman and Renaissance analogues to *droit moral*, the Comédie-Française norms are directly linked to the promulgation of intellectual property law during the Revolutionary period. Nineteen playwrights signed a petition to the National Assembly proposing specific provisions for theater law, which the chair of the Constitution Committee, Isaac Le Chapelier, incorporated into a law submitted to the Assembly.<sup>37</sup> The proposals provided that performance of a play by a living playwright would require his consent, and the playwright’s heirs would own the work for five years after his death before it entered the public domain.<sup>38</sup> Le Chapelier described an author’s work as “the most personal of all properties,” “the fruit of a writer’s thought,” and “a property of a type totally different from other properties.”<sup>39</sup> The National Assembly approved the proposal in 1791, passing the first French intellectual property statute.<sup>40</sup>

Though the 1791 law gave clearer protection to economic rights than moral rights, which were not explicitly defined, it enabled playwrights to sign theater contracts through which they could exercise control over disclosure, attribution, and the integrity of their work. A 1793 law expanded the 1791 rights from playwrights to all writers, engravers, painters and composers. The 1804 Napoleonic Code incorporated both laws, governing intellectual property in France until the passage of the 1957 statute.<sup>41</sup> According to Liemer, the influence of the Comédie-Française customs continued to be seen in the judiciary’s interpretation of these laws. Though post-Revolution judges limited the appearance of judicial lawmaking in order to differentiate themselves from the *ancien régime*, multiple decisions protected *droit moral* beyond the scope of the explicit text of the statutes. Liemer argues this is evidence that “an awareness of the interests protected by *le droit moral* was already part of

35. *Id.* at 102.

36. *Id.* at 103.

37. *Id.* at 106.

38. *Id.* at 107.

39. *Id.* at 108.

40. *Id.*

41. *Id.* at 110.

the social fabric,” such that judges had a common understanding that enabled broader applications of the statutory text.<sup>42</sup>

The conventional account of the development of *droit moral* focuses on the impact of European philosophy on French law post-Revolution, viewing *droit d'auteur* as one example of the broader debate on property and personality rights.<sup>43</sup> Hegel, conceiving of property as “the embodiment of personality,” believed that the personhood theory of property was especially applicable to works of art.<sup>44</sup> Under this theory, the fruit of mental labor contains even more of the author’s personality than the fruits of physical labor, and must be protected accordingly.<sup>45</sup> This implies that the author does not waive or transfer their moral interest in the work even when they transfer economic rights, with the result that the moral right limits the economic right.<sup>46</sup>

French judicial decisions demonstrating the growing use of moral rights rationales date back to the early 19th century. An 1814 case announced the rule, followed consistently thereafter, that “a work sold by an author to a publisher or a bookseller must bear the author’s name and must be published as sold or delivered, if the author so desires, provided that there is no agreement to the contrary.”<sup>47</sup> In a later case, author Auguste Comte sued his publisher for modifying a work without his approval, by adding a statement making negative comments about Comte to his *Cours de philosophie positive*.<sup>48</sup> Comte prevailed, as the court ruled that publishers could not modify a work without formal authorization by the author. While other European countries adopted statutory codes including default provisions against forced disclosure of unpublished works, France refrained from doing so in the 19th century, instead continuing to develop the moral rights of authors through judicial decision-making.<sup>49</sup>

In addition to these cases, scholarly debates set forth competing rationales for the results reached in French courts. According to Russell DaSilva, the philosophical development of modern *droit d'auteur* occurred during three stages beginning in 1793. From 1793 to 1878, the Gastambide school of thought argued that *droit d'auteur* was solely a property right.

42. *Id.* at 112–13.

43. DaSilva, *supra* note 8, at 9.

44. Linda J. Lacey, *Of Bread Roses and Copyright*, 1989 DUKE L.J. 1532, 1542 (1989) (internal quotation omitted).

45. *Id.* at 1542, 1549.

46. *Id.*

47. Rigamonti, *supra* note 21, at 85–86.

48. *Id.* at 86.

49. *Id.* at 90–91.

The Kantian Renouard school categorized the author's right as a right of personality, separate from the property regime.<sup>50</sup> During the 1860s, with the growing support for communism, "personalist" writers opposed the property characterization and insisted that *droit d'auteur* was based on a right of personality.<sup>51</sup> In 1872, Andre Morillot published an article analyzing whether an author's right of publication was attached to their person, differentiating moral rights from patrimonial rights on the grounds that the former are not subject to pecuniary valuation.<sup>52</sup> Morillot supported the personhood theory, by comparing the recognition of real property rights in literature to "recognizing property rights in human beings, which was legally impossible lest one were to allow the sale of people into slavery."<sup>53</sup> Less than a decade later, Morillot described the patrimonial and moral rights of the author as completely distinct and separable, arguing for an expanded idea of the author's moral rights that would survive publication.<sup>54</sup> Three of the main *droit moral* claimed today under *droit d'auteur* appeared in French jurisprudence by 1880: "*droit de divulgation, droit à la paternité, and droit au respect de l'œuvre.*"<sup>55</sup>

The second stage in the development of modern *droit d'auteur*, from 1878 to 1902, witnessed growing support for the personalist perspective, while Pouillet propounded incorporating both the property and personality approaches into a theory of intellectual property.<sup>56</sup> German debates over authors' rights became influential across Europe, in particular between Alfred Gierke and Joseph Kohler. Gierke considered both patrimonial and moral rights as intertwined parts of one whole<sup>57</sup> originating from the author's "sphere of personhood."<sup>58</sup> Gierke noted that no other theory explained the use of the author's lifespan as the unit defining the duration of their rights in their work.<sup>59</sup> Kohler did not deny the existence of personality rights, but "insisted on a clear conceptual separation between alienable rights of authors in their works (copyrights) and inalienable rights of authors in their personhood (rights of personality)."<sup>60</sup>

50. DaSilva, *supra* note 8, at 9–10.

51. *Id.* at 9–10.

52. Rigamonti, *supra* note 21, at 100.

53. *Id.* at 101.

54. *Id.* at 102–03.

55. DaSilva, *supra* note 8, at 10.

56. *Id.*

57. *Id.* at 10–11.

58. Rigamonti, *supra* note 21, at 97.

59. *Id.*

60. *Id.* at 99.

Kohler's approach, in which "*droit d'auteur* is considered to be a right of '*propriété incorporelle*' separable into moral and patrimonial rights," was adopted in France during DaSilva's third period, spanning from 1902 to 1957.<sup>61</sup> In 1902, the French Supreme Court recognized dualist theory in the *Lecocq* case. *Lecocq* was a divorce case in which the Court allowed the inclusion of an author's rights as marital assets, as their inclusion would not affect the author's "ability, 'inherent in his personhood,' to modify or suppress his work."<sup>62</sup> French legal scholars at the time also acknowledged dualism as the prevailing framework.<sup>63</sup>

### B. Current Protections for Droit Moral

The four major moral rights protected by *droit d'auteur* include *droit de divulgation* (the right of disclosure), *droit à la paternité de l'œuvre* (the right of attribution), *droit au respect de l'œuvre* (the right to claim respect for the integrity of the work), and *droit de repentir ou de retrait* (the right of modification or withdrawal).<sup>64</sup> French IP Law L121-1 describes the rights of attribution and integrity, attaching to the author's person, as "perpetual, inalienable and imprescriptible." These inalienable moral rights can be exercised after a work has entered the public domain.<sup>65</sup> In contrast, scholars argue that the withdrawal and modification rights are not perpetual, unless the author directly transfers those rights to their heirs.<sup>66</sup>

#### 1. Right of Disclosure

The right of disclosure concerns the author's right to publish, sell or unveil the work. The protection of the disclosure right "stems from a belief that only the artist himself can determine when a work is completed, and also from a recognition of the fact that public disclosure of a work has a direct impact on the artist's reputation."<sup>67</sup> So long as the work is still a "rough draft," no person except the author can claim a property right in it.<sup>68</sup> Three major cases played a role in the emergence of the disclosure right in French jurisprudence: *Whistler*, *Camoin*, and *Rouault*.

61. DaSilva, *supra* note 8, at 11.

62. See Rigamonti, *supra* note 21, at 104.

63. *Id.* at 104–105.

64. See Piotraut, *supra* note 7, at 597.

65. DaSilva, *supra* note 8, at 5.

66. Piotraut, *supra* note 7, at 611.

67. DaSilva, *supra* note 8, at 17.

68. Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM J. COMP. L. 465, 467 (1968).

In the 1891 *Whistler* case, Lord Eden sued artist James Whistler to compel the delivery of a portrait of his wife. Lord Eden had commissioned Whistler to paint the portrait, but Whistler withheld delivery after a payment dispute. However, Whistler claimed he had not delivered the portrait because he was not satisfied with the work. The court held that the artist could not be compelled to deliver a work if he was unsatisfied.<sup>69</sup> Whistler's right to "remain the master of his work" could not be ceded via contract.<sup>70</sup>

In 1931, the French judiciary further explored the disclosure right in *Camoin*. Charles Camoin was an expressionist painter who filed suit when paintings which he had destroyed and discarded were restored and placed for auction by writer Francis Caro.<sup>71</sup> The Paris Court of Appeals emphasized that because the author's moral right in the work attaches to his person, "the gesture of the painter who lacerates a painting and throws away the pieces because he is dissatisfied with his composition does not impair this right."<sup>72</sup> Caro's ownership of the physical pieces of the work was undisputed, but did not extend to Camoin's moral right "which he *always* retains over his work."<sup>73</sup> The court ordered the destruction of the work according to Camoin's wishes, a decision criticized by Nast. Nast argued that the court should have instead ordered the deletion of Camoin's signature from the paintings and the prohibition of the use of his name in connection with sale or exhibition.<sup>74</sup> Nast's solution fails to take into account the practical obstacles to a post-litigation imposition of anonymity as well as the underlying theory of moral rights. Under moral rights theory, the artist's personality inheres in the work, affording the artist unique control over certain terms of its existence. If the artist seeks to destroy the work, court-ordered removal of their name does not accomplish the same purpose in the eyes of the author.

*Rouault* addressed the question of determining when an author agrees to disclose their work. Artist Georges Rouault claimed that his dealer's heirs could not auction over 800 of his unfinished paintings. Rouault had accepted advances from the dealer and stored the paintings on the dealer's

69. DaSilva, *supra* note 8, at 18; Judgment of Mar. 20, 1895, Trib. Civ. Seine, [1898] D.P.2. 465; Judgment of Dec. 2, 1897, Cour d'Appel Paris; Judgment of May 14, 1900, Cass. Civ., [1900] D.P.1. 5000.

70. Sarraute, *supra* note 69, at 468.

71. *Id.*; DaSilva, *supra* note 8, at 18–19; Judgment of Mar. 6, 1931, Cour d'Appel Paris, [1931] D.P.2. 88.

72. Sarraute, *supra* note 69, at 468.

73. *Id.* (emphasis added).

74. *Id.* at 469.

property, but the court found for the artist, distinguishing between a buyer who has negotiated to purchase a work after its future completion and a buyer who has purchased a completed work.<sup>75</sup> Critics of the decision note that the court did not identify criteria for completion, failing to separate the question of completion from that of disclosure.<sup>76</sup> The diversity in authorial practices would render it difficult to choose a universal criterion, because even the widely acknowledged symbol of completion, the signature, is not used by all artists. In *Rouault*, the court relied on the artist's testimony that his work was unfinished.<sup>77</sup> While this approach respects the author's perspective, it also could enable authors to manipulate circumstances to suit their desires by denying completion even where their individual practices would point to the work being finished.

As developed in these early cases, the nature of the disclosure right is personal, discretionary, and exclusive. An author may exercise this right to refuse to complete a commissioned work or to deliver a completed work, though they must pay damages. Once the damages have been paid for such a refusal, the artist may disclose the work at a future time as they please.<sup>78</sup>

## 2. Right to Paternity (Authorship)

The 1957 statute established the author's right "to have his name, his status as author, and his work respected."<sup>79</sup> Thus, the author can attach their name to the work, attach their chosen pseudonym, or produce the work anonymously. Authors cannot be required to maintain pseudonymity or anonymity in relation to their work under contract.<sup>80</sup> This right also guards against misattribution, where another person claims the author's work and where the author is incorrectly recognized for authorship of someone else's work.<sup>81</sup>

Though some have characterized this right as the simplest *droit moral*, debate continues as to whether one can abandon their authorship. Henri Desbois argues that an author cannot waive authorship, analogizing authorial paternity to biological paternity, while Pierre Recht casts a prohibition on the waiver of authorship as itself paternalistic, and

75. *Id.*

76. DaSilva, *supra* note 8, at 19–20.

77. Sarraute, *supra* note 69, at 470.

78. DaSilva, *supra* note 8, at 20.

79. *Id.* at 26.

80. *Guille c. Colman*, Cour d'Appel, Paris, [1967] Gaz. Pal.1.17; *see* Sarraute, *supra* note 69, at 478–79.

81. Sarraute, *supra* note 69, at 478–79.

unnecessarily protective over authors.<sup>82</sup> The boundaries of this right have also been contested in terms of its inclusion of the author's reputational interest. According to the exact text of the 1957 statute, "an author's right to be recognized as the creator of his work is not the same as his right to safeguard his reputation."<sup>83</sup> Sarraute argues that artists could manipulate courts into guaranteeing higher prices for their works by conflating the paternity and reputational interests, on the premise that the sale of their work at low prices harms their reputation.<sup>84</sup>

### 3. Right to Respect (Integrity)

The integrity right enables the artist to protect his work against mutilation once it has been disclosed to the market. While the integrity right was recognized as far back as the 1870s, its key formulation occurred in the 1965 *Buffet* case. Buffet painted different parts of a refrigerator, and the refrigerator's owner sought to sell the pieces separately. The court found for Buffet, who argued the piece was indivisible on the grounds of the integrity right.<sup>85</sup>

The integrity right has been applied to protect the artist's reputation, with some controversy. To protect his reputation, an artist may exercise the right to publish a reply to excessive criticism of the artist himself (but not criticism of the work).<sup>86</sup> Further limitations have been created by French courts, such as the focus on the "*material* integrity of the work," which mandates finding a violation of the integrity right only where the piece has been physically mutilated.<sup>87</sup> In addition, some courts have held the integrity right does not allow the author to prevent a subsequent owner from destroying the work. The rationale for this limitation is that total destruction of a work does not threaten the honor of the artist by falsely presenting alterations as the artist's decisions.<sup>88</sup>

The integrity right is more complicated in the context of adaptations, where the right of the original author may conflict with the prerogative of the adapter creating their own work. Authors seek to resolve this conflict via contracts falling into three categories: (1) contracts authorizing unconditional adaptation, (2) contracts authorizing all changes and

82. DaSilva, *supra* note 8, at 29.

83. *Id.* at 30.

84. *Id.*

85. *Id.* at 31.

86. *Id.* at 32.

87. *Id.* at 34 (emphasis added).

88. *Id.* at 33.

modifications “which do not distort the spirit and character of the original,” and (3) contracts in which the original author participates in the creative process of the adaptation.<sup>89</sup>

#### 4. Rights of Withdrawal and Modification

An author may also elect to withdraw or modify their work after disclosure based on a “change of conviction.”<sup>90</sup> These rights are conditioned on advance indemnification of the transferee for any resulting prejudice. Furthermore, if the author chooses to republish the work after withdrawal, the work must be offered to the original transferee on the terms of their original contract. While these rights were discussed before the 1957 codification, their exact implications are unclear because they are rarely exercised. They are limited by both pragmatic and legal challenges, as the advance indemnification requirement has the effect of restricting the availability of these rights to authors who can afford to indemnify.<sup>91</sup> For this reason, the withdrawal right has been described by some scholars as merely a “theoretician’s fantasy.”<sup>92</sup> As to the modification right, once the economic rights have been transferred, the author is only permitted to make insignificant changes to the work, and the publisher may reject changes that were not foreseeable at the execution of the contract.<sup>93</sup>

According to Raymond Sarraute, the withdrawal right does not serve a useful purpose, because it does not undo the effect of circulating a work. Sarraute argues

Once a thought is expressed, circulated, criticized, it cannot be erased. Copies of a book which have been sold cannot be destroyed. The author who modifies his views actually has only one recourse: to set them forth in a new work. In this sense every work constitutes a critique of an author’s previous creations.<sup>94</sup>

While these observations are forceful, an author may seek to exercise a critique in the form of silencing, not erasing, the original work rather than responding to it. If an author’s goal is not to erase a work, but to remove it from the sphere of public discourse such that the act of removal itself expresses a unique message, withdrawal might serve a purpose consistent with broader aims of *droit moral*. The author can claim paternity over their

89. Sarraute, *supra* note 69, at 480–82.

90. DaSilva, *supra* note 8, at 23.

91. *Id.* at 24.

92. Piotraut, *supra* note 7, at 608; see also Jane Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC’Y U.S.A. 269, 275–76 (1988–1989).

93. DaSilva, *supra* note 8, at 25.

94. Sarraute, *supra* note 69, at 477.

work; they can reject paternity over another's work. Using this logic, an author may (but is not compelled to) submit their work to the public market, and should be able to remove their work from that market. Regardless of the potential implications of the withdrawal right, it is limited to publishing contracts, excluding the fine arts.<sup>95</sup>

Sarraute notes that "no writer has found it desirable to ask the courts to assess the indemnity he would be required to pay in advance in order to secure the chimerical opportunity to attempt to suppress an already published work."<sup>96</sup> In a case that came close to broaching withdrawal arguments, the Paris Court of Appeals rejected an author's argument for the removal of their signature. The painter Vlaminck erased his signature from a painting on the grounds that it was a forgery. The court required him to pay damages, reasoning that if the painting were a forgery, it belonged to another, and if it were authentic, Vlaminck did not have a moral right of withdrawal after the sale of the work.<sup>97</sup>

In recent years, several artists have publicly claimed that they have a right to destroy their work, and legal commenters have assumed the existence of a right to destroy without clarifying its philosophical basis. This discussion contrasts with the historical approach to the withdrawal right, whose existence has been contested since the early 20th century.<sup>98</sup> Under the withdrawal right, the artist can do whatever she wants with the work, including destruction, once she has withdrawn the work and compensated the owner. However, claims based on a right to destroy in recent years follow a different type of reasoning, in which the artist seeks to protect the integrity of the work through its destruction, bypassing withdrawal and remuneration.

## II. RIGHT TO DESTROY

Over the past several years, multiple French artists have publicly declared their intentions to exercise a right to destroy their own work. The right to destroy has seen limited scholarly analysis, because it is rarely asserted. Its origins go back to the Roman law concept of *jus abutendi*, in which destruction was "the most extreme recognized property right" and served as the boundary against which less extreme rights could be

95. *Id.*

96. *Id.* at 477–78.

97. *Id.* at 477–78.

98. *Id.* at 477.

evaluated.<sup>99</sup> Most academic discussion focuses on an owner's right to destroy property they have purchased, rather than an author's right to destroy property they have created. This limits the applicability of those discussions to the *droit d'auteur* context, as the obligations of an owner to act as "steward" of a work for the public<sup>100</sup> do not apply to an author, who is considered the "master" of the work. As such, the author's moral rights permit them not to disclose their work to the public in the first place, and to place limits on its distortion post-disclosure.

Much discussion of the right to destroy is also concerned with notions of efficiency and waste<sup>101</sup> that are less relevant to property whose primary value is in its intellectual and cultural significance, as opposed to finite natural resources and property used in industry and development. Lior Jacob Strahilevitz defines destruction as "when an owner's acts or omissions eliminate the value of all otherwise valuable future interests in a durable thing."<sup>102</sup> Economically-oriented definitions of destruction may not be appropriate for moral rights analysis, but comparisons to economic contexts are useful in understanding the *droit d'auteur* right to destroy. The fact that the exercise of the right to withdrawal, one path to destruction, requires *ex ante* indemnification implicates economic analysis in the intersection of moral and patrimonial rights in practice.

Strahilevitz considers the right to destroy an extreme variation on the rights to exclude, to use and to control subsequent alienation. Destruction of an object precludes others from accessing it. For some types of property, destruction may be the inevitable result of use. Destruction also enables the destroyer to prevent its future sale in ways of which they do not approve.<sup>103</sup> In *droit d'auteur*, the right to destroy may be an extreme variation on the right of withdrawal, in which the act of destruction is contingent on withdrawal from third party ownership and constitutes an existential withdrawal of the work through physical negation. However, perhaps the right of withdrawal implicitly precludes destruction, due to the inclusion of language requiring the author to offer the work to the original owner in the event the author places the work back on the market. If withdrawal were limited only to private holding or modification of the work, then destruction would not be permitted. The right to destroy is also intertwined with the integrity right, as authors who have sought to destroy have argued

99. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 785–86 (2005).

100. *Id.* at 791.

101. *Id.* at 796–807.

102. *Id.* at 793.

103. *Id.* at 794.

that it is necessary to preserve the authenticity of their work and their personality invested in the work. Strahilevitz considers the right to destroy a useful basis for posing the question “what is the nature of ownership?” Similarly, destruction adds a unique context to the question “what is the nature of authorship?”

In the U.S., destruction to make an expressive point has been permitted where it is supported by strong social norms, such as the burial of chattel property along with the deceased, a practice approved by funeral homes.<sup>104</sup> Strahilevitz argues that because property owners generally seek to destroy their property for rational reasons, denying their right to destroy property that has become “embarrassing, unfashionable, unproductive, or obsolete threatens the impulses that spur future creation.”<sup>105</sup> An owner’s desire to destroy a piece of property may best serve the public interest, so that even stewards should be able to destroy.

Stronger arguments for destruction apply to authors. Under moral rights theory, an author is the best judge of their work’s integrity, and can judge whether their work has been distorted or allowed to deteriorate to the point of compromising its meaning and worth. Public sentiment is not a factor in *droit d’auteur*, in contrast to the limited American moral rights framework offered in the Visual Artists Rights Act of 1990<sup>106</sup> which considers whether a work is of “recognized stature.” Since moral rights theory is not concerned with economic efficiency, and the author’s perspective must be respected even where the public wants the work to be preserved as a matter of cultural history, the author should in theory have the right to destroy where they see fit.

A more ambiguous question would be the exercise of the right to destroy a particular work in order to preserve the integrity of the author’s portfolio as a whole. Do moral rights apply in the aggregate to the artist’s entire collection? Arguments in the affirmative would add a dimension to personality theory, in that an author may express their originality through a body of work, rather than individual works serving as discrete expressions. If that is the author’s purpose, their rights vis-à-vis individual works should translate to an entire body of work as well. Were a prominent author to seek to destroy an entire body of published work, this might run up against the boundaries of respect for the author’s autonomy. Destruction of an entire life’s work could be deemed destructive to a broader cultural legacy.

104. *Id.* at 801–03.

105. *Id.* at 820–21.

106. 17 U.S.C.A. § 106A (2012) (commonly referred to as “VARA”).

Perhaps *droit d'auteur* is premised on the protection of the author, but such protection could produce the extreme result of eliminating all works through which an individual has gained the status of author. It would be difficult to devise a limiting principle without undermining the moral rights rationale entirely.

Joseph Sax gives greater support to the right of the artist to destroy their own work as a form of speech, arguing that the artist should be able to control their legacy to the world.<sup>107</sup> However, destruction can be more than reputational control; it can be its own form of speech. Strahilevitz regards destruction as the silencing of speech rather than speech in and of itself, reasoning that an author should respond to their previous works through the creation of new works, rather than eliminate the work. This approach reduces the purposes of destruction by assuming the goal of destruction is to un-ring a bell, a desire that is impossible and disingenuous. The silencing of speech that an author intends to endure is a real danger where the person seeking to exercise the destruction right is not the author. But when the author seeks to destroy their own work, they may do so in order to send a message whose meaning is contingent on the nature of destruction as the vehicle of speech, instead of trying to simply erase their previous message.<sup>108</sup> In cases where the author wishes to destroy private, unpublished works, the denial of that right would have the result of forcing their speech.<sup>109</sup> Similarly, a categorical ban on post-disclosure withdrawal and destruction by an author results in limiting the realm of gestures through which an author can speak, a speech restriction of another kind.

#### A. Recent Examples in France

Several artists have recently threatened to exercise their right to destroy, but have not filed suit in court. These incidents reveal the right to destroy as a form of speech, wherein even the threat to destroy the work carries such weight socially that an author can use it to make a political statement. On the other hand, some authors may invoke their right to destroy for economic gains, casting doubt on the degree to which destruction is established as a purely moral right under *droit d'auteur*. In such cases, perhaps the authors are seeking to exercise the withdrawal right, but framing it in terms of the right to destroy to capture maximum public attention.

107. *Id.* at 830.

108. *Id.* at 828–30.

109. *Id.* at 834.

One of the most well-known incidents involving the right to destroy concerns the sculptor Daniel Buren's work *Les Deux Plateaux*, also known as the Buren Columns. Buren constructed the installation, consisting of a fountain and a series of columns, outside Paris's Palais Royal in 1986 on commission by the French government. In 2007, Buren demanded the destruction of the columns, citing the right to respect for his work. He accused the French government of allowing his columns to fall into disrepair, deteriorating to the point of what he called "state vandalism."<sup>110</sup> The lighting and fountain components of the installation had ceased functioning seven years earlier.<sup>111</sup> According to Buren, for the Ministry of Culture (whose offices are actually located in the Palais Royal) to allow his work to reach such a state was tantamount to displaying half of a work of art in a museum. Buren's public criticism of the Ministry focused on the indignity inflicted on his work; he even went so far as to state that the pavement on Parisian roads was better maintained.<sup>112</sup> Buren explained that the intended visual effect of the work relied on the combination of columns, electricity, and fountains. Without flowing water, the columns were reduced to mere "dustbins."<sup>113</sup> The public location of the work added urgency to the task of maintaining its integrity, as millions of people from around the world would see the columns in a "half-destroyed" state.<sup>114</sup>

Buren's statements were characterized in the press as particularly strident, but his critique went beyond the assertion that the work's physical integrity had been compromised. Buren cast the French government's alleged neglect as a political message. While the columns themselves were originally controversial and detested by Parisians, Buren's installment came during a rare moment of bipartisan cooperation in the national government. Buren viewed his work as a symbol of that bipartisanship. He said of those who supported the neglect of his work, "[i]n these commentaries, I can feel the far right reawakening. I see again the old anti-Lang slogans, the old anti-Semitic insults."<sup>115</sup>

110. *Daniel Buren Menace de Faire Démolir Ses Colonnes* [Daniel Buren Threatens to Demolish His Columns], 20 MINUTES (Dec. 28, 2007), <http://www.20minutes.fr/culture/203391-20071228-daniel-buren-menace-faire-demolir-colonnes>.

111. John Lichfield, *Les Deux Plateaux: Monument to the French malaise?*, INDEPENDENT (Jan. 4, 2008), <http://www.independent.co.uk/news/world/europe/les-deux-plateaux-monument-to-the-french-malaise-768339.html>.

112. *Id.*

113. *Id.*

114. 20 MINUTES, *supra* note 111.

115. Lichfield, *supra* note 112.

Buren's arguments in support of the potential exercise of his right to destroy the columns was two-fold: (1) under the conventional integrity right line of reasoning, the work had been mutilated by the ravages of time, and the artist could demand to destroy it in order to protect the work and his own moral personality within it; and (2) the deterioration of the work was a purposeful political statement by the far right, which co-opted the significance of the work according to the artist, hijacking his creation in order to implicitly convey a political message he found repugnant. In order to stop the use of his work for such speech, which could be viewed as a form of misattribution or an infringement of integrity, Buren sought to assert his own speech by destroying the work.

Buren based his public demands on the right to integrity, stating "an artist has moral rights over his works . . . . That's what I am fighting for."<sup>116</sup> While he explicitly stated his desire to destroy the columns, he also noted that he would prefer the government provide funds to repair the works to avoid that "most absurd outcome."<sup>117</sup> Thus, Buren threatened the use of his right to destroy as a rhetorical tool, acknowledging that it was the last resort. His public campaign was successful. In 2010, the French government allocated six million euros to restore the columns with Buren's approval.<sup>118</sup>

Buren used *droit moral* in order to secure funding for his work, but because of the public nature of the work and the fact that he did not extract any additional funds for personal use, it seems that Buren's moral rights arguments concerning integrity and speech were sincere. In this way, the Buren Column incident differs from another high profile example of an artist invoking the right to destroy: Jean-Pierre Raynaud and his Neubauer sculpture. Raynaud did not seek to destroy his work, but to prevent its destruction. Looking at the right to destroy as an example of the property right to exclude, Raynaud's position represents an alternative way in which an author can manipulate the right to destroy for his own ends.

The Neubauer car dealership bought a building in which Raynaud had installed one of his sculptures for a previous owner. The exact location of the sculpture at the entrance of the building posed a problem for the dealership, and Neubauer sought to move the sculpture. Under French law,

116. *Id.*

117. *Id.*

118. James Mackenzie & Elizabeth Pineau, *Paris Palais Royal columns get 6 million euro facelift*, REUTERS (Jan. 8, 2010), <http://www.reuters.com/article/2010/01/08/us-france-sculpture-idUSTRE6074AX20100108>.

Neubauer needed Raynaud's permission to do so.<sup>119</sup> Raynaud initially refused to permit Neubauer to move the statue, then changed his position. Raynaud stipulated he would approve the destruction on the condition that Neubauer employed Raynaud's masons to execute the move, at a cost of twenty thousand euros.<sup>120</sup> Raynaud also requested that if Neubauer sold the sculpture, Raynaud would receive seventy percent of the payment. To Neubauer, Raynaud's assertion of the integrity right in the destruction context was an attempt to capture double payment for the sculpture.<sup>121</sup> Without Raynaud's permission, Neubauer could neither remove nor destroy the sculpture, at the risk of paying damages for Raynaud's moral rights, unless he could show the removal of the piece was necessary for security reasons.

While Raynaud exercised his right to integrity to prevent destruction for financial purposes, and Buren argued for destruction to procure funding to protect the integrity of his work, another artist threatened to destroy his work without seeking any remuneration. After the mayor of a French city painted a sculpture by Alain Mila without his consent, Mila protested the act, noting that it undermined his work and values.<sup>122</sup> Mila found political overtones in the alteration, observing that the color the mayor painted the sculpture resembled the color of the notorious conservative party Front National.<sup>123</sup> Mila received the support of the Minister of Culture, Aurélie Filippetti, who denounced the mayor's conduct as "a manifest violation of moral rights and the elementary rules of the intellectual property code and the protection of patrimony."<sup>124</sup> In response, the mayor denied that the sculpture was a work of art, dismissing the allegations of political exploitation of the work by characterizing his decision to paint as a functional alteration to a non-artistic installation. It is notable that Mila did not seek compensation, but publicly objected to the non-consensual recasting of his work into a vehicle for a politician's expression of partisan affiliation. While no court has ruled on this issue, in a similar case involving unauthorized changes to a column by artist Carlos Cruz Diez, the

119. Alice Antheaume, *Cette oeuvre d'art n'existe plus . . .* [This work of art no longer exists . . .], 20 MINUTES (Jan. 15, 2008), <http://www.20minutes.fr/culture/206355-20080115-oeuvre-art-existe-plus>.

120. *Id.*

121. *Id.*

122. *Le maire FN de Hayange juge "sinister" une sculpture, il la fait repeindre* [The FN mayor of Hayange repaints a "sinister" sculpture], L'EXPRESS (July 29, 2014), [http://www.lexpress.fr/actualite/politique/fn/le-maire-fn-de-hayange-juge-sinistre-une-sculpture-il-la-fait-repeindre\\_1562581.html](http://www.lexpress.fr/actualite/politique/fn/le-maire-fn-de-hayange-juge-sinistre-une-sculpture-il-la-fait-repeindre_1562581.html).

123. *Id.*

124. *Id.*

work's nature as a piece of art was denied.<sup>125</sup> Mila and Diez's experiences show that the artists most in danger of having a work of art successfully co-opted by a political party are those whose pieces can be redefined as non-artistic according to the predominant aesthetic.

### *B. Destruction as a Moral Right Outside France*

According to Alexandre Pintiaux, Belgian courts decide disputes over the right to destroy by weighing the various interests of both parties.<sup>126</sup> In one notable case, a mural painted on the wall of a pool deteriorated over time due to humidity. Restoration would have been costly, so the judge ordered the destruction of the work instead of restoration. Pintiaux notes that there is no prevailing rule, as these cases are highly fact-specific. Although integrity is a moral right, Belgian judges consider "economic and commercial interests, the importance of the work, the cost of renovation, the capacity of persons, and obligation to maintain what rests on the property," among other factors.<sup>127</sup> The criteria for evaluating the subjective "importance of the work" element remain unclear. Under a moral rights theory, the importance of the work would be addressed by adhering to the author's wishes. It seems that in the Belgian context, the author's desires are less compelling than a pragmatic assessment of cost.

Recent actions by graffiti artists in Germany reinforce the appeal of destruction as a means of enforcing the integrity right. Lutz Henke, co-creator of Berlin's famous Kreuzberg murals, published an editorial in *The Guardian* in December 2014 explaining why he and his partners destroyed their iconic works by painting over them in black.<sup>128</sup> Henke wanted to clarify to the public that the destruction occurred at the hands of the artists themselves, as many had assumed developers were responsible.

According to Henke, the meaning and significance of the murals had changed from the artists' original intent due to gentrification and "zombification" in Berlin.<sup>129</sup> The murals, created as resistance art, over time came to be used in advertising for the city. Henke wrote

125. *Art à La Roche. Sa sculpture jetée, l'artiste Carlos Cruz-Diez réagit* [Art in La Roche. Pier sculpture, the artist Carlos Cruz-Diez reacts], OUEST-FRANCE (July, 17 2014), <http://www.ouest-france.fr/art-la-roche-sa-sculpture-jetee-lartiste-carlos-cruz-diez-reagit-2705329>.

126. Alexandre Pintiaux, *Detruite une oeuvre d'art* [Destroy a work of art], (July 30, 2014), <http://www.lesoir.be/611990/article/culture/marche-l-art/2014-07-30/detruire-une-oeuvre-d-art>.

127. *Id.*

128. Lutz Henke, *Why We Painted over Berlin's Most Famous Graffiti*, THE GUARDIAN (Dec. 19, 2014), [http://www.theguardian.com/commentisfree/2014/dec/19/why-we-painted-over-berlin-graffiti-kreuzberg-murals?CMP=fb\\_gu](http://www.theguardian.com/commentisfree/2014/dec/19/why-we-painted-over-berlin-graffiti-kreuzberg-murals?CMP=fb_gu).

129. *Id.*

Gentrification in Berlin lately doesn't content itself with destroying creative spaces. Because it needs its artistic brand to remain attractive, it tends to artificially reanimate the creativity it has displaced, thus producing an 'undead city'. This zombification is threatening to turn Berlin into a museal city of veneers, the 'art scene' preserved as an amusement park for those who can afford the rising rents.<sup>130</sup>

While their decision to destroy the work was an attempt to reclaim it as resistance art, Henke also considered the destruction inevitable. The murals "were doomed to disappear" from the moment of their inception, because "it is the nature of street art to occupy space in celebration of its uncertainty, being aware of its temporality and fleeting existence."<sup>131</sup> The fulfillment of this destiny at the hands of the artists constitutes a scenario in which destruction was necessary to prevent the work from being preserved unnaturally against authorial intent.

Henke destroyed his work without seeking prior legal approval. While he may have been able to do this because the location of the work prevented a private owner from excluding Henke's access, he and his peers still encountered the risk that the state would intervene in the destruction by labeling it an act of vandalism. Henke's exercise of a right to destroy without formal approval subtly emphasizes the fundamental nature of an author's connection to their work; here, public justification of the act is an afterthought, not a prerequisite.

Henke illuminates the right to destroy as a tool of maintaining the integrity of a work's message, particularly difficult to manage where the medium (street art, graffiti) necessarily places the piece at the mercy of its environment. Henke also raises a relatively new question for the right to destroy: How do we conceptualize integrity and destruction in a genre of art that incorporates the eventual destruction of the work as an inherent condition of its existence?

### *C. Art Speech: Manipulation and Covert Censorship*

As recent European examples show, authors have publicly stated their intent to destroy their works under circumstances where they felt that government actors had appropriated and altered the meaning of their work. Analyzing art as a discrete category of speech, one can see how even a minor manipulation of a work could impede an author's expression.

130. *Id.*

131. *Id.*

Edward Eberle argues that art speech is entitled to protection both on the basis of its uniqueness and its satisfaction of conventional protection rationales. Eberle defines art speech as “the autonomous use of the artist’s creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium.”<sup>132</sup> The special nature of art lies in its availability as a form of non-verbal communication, which encapsulates non-rational, non-cognitive aspects of the human experience excluded by written expression, and its existence in a private sphere of internal freedom not subject to traditional social and political regulation.<sup>133</sup> Art speech engages the author and audience in a particular object-subject relationship, a dialogue characterized by “the flow of sensory, emotional or intuitional data.”<sup>134</sup> This process gives art speech particular importance as a space for imaginative human autonomy and self-definition protected from government interference for its own set of reasons.

Art speech can also be protected under conventional free speech rationales. Hegel viewed art as truth revealing, claiming art offered a medium through which it is possible to present valuable knowledge and insight, as do other forms of speech.<sup>135</sup> Art speech may serve a liberty-enhancing purpose linked to both the artist and observer’s human dignity. The expression of political critique in art speaks to its checking function, and examples abound of political actors threatened by the ideological challenges represented in works of art.<sup>136</sup> The safety valve speech rationale also applies to art, which can function as an escape from society or provide an alternative version of society, thus facilitating the release of tension that could otherwise manifest in socially destructive behavior.<sup>137</sup>

The ways in which governments attempt to co-opt art speech and undermine these values differ depending on numerous historical and political factors. Under both the Nazi and Soviet regimes, artists were expected to further dominant state ideologies in their work; those who refused were held up as “degenerative” and subjected to political

132. Edward J. Eberle, *Art and Speech*, 11 U. PA. J.L. & SOC. CHANGE 1 1, 7 (2007).

133. *Id.* at 4, 6, 9.

134. *Id.* at 9.

135. *Id.* at 8.

136. Eberle discusses Salman Rushdie’s *Satanic Verses*, the photos of Abu Ghraib abuses, and Mathieu Kassovitz’s prescient 1995 film on the social inequality and the banlieues of Paris, *La Haine*, as examples. See Alan Riding, *In France, Artists have Sounded the Warning Bells for Years*, N.Y. TIMES (Nov. 24, 2005), <http://www.nytimes.com/2005/11/24/arts/design/in-france-artists-have-sounded-the-warning-bells-for-years.html>.

137. *Id.* at 10.

sanction.<sup>138</sup> However, state interference in artistic expression is hardly a relic of World War II and the Cold War. Agnès Tricoire asks, “Still today, from Cuba to Syria, from China to Tunisia, how many authors are in prison for not having served predefined collective interests?”<sup>139</sup> The “collective interest” here refers to art serving a “useful” or propagandistic function. Non-totalitarian governments may use more subtle methods of coercing ideological compliance, with the means taken corresponding to the mechanism<sup>140</sup> by which a particular genre of art expresses its meaning.

The distinction between fiction and non-fiction, which in the French context determines the boundaries of hate speech, reveals an interplay between the authorial voice and the existence of multiple meanings within a work that can be extrapolated to the issue of politically appropriated visual art. Tricoire argues that the law should not protect freedom of expression for works that incite hatred, such as racist and anti-Semitic work, but the treatment of objectionable content diverges when expressed in the realm of non-fiction versus fiction.<sup>141</sup> To explain the significance of the distinction between the two, she uses the criteria of “la polysémie de l’œuvre,” or the multiplicity of meanings of a work. Following from the theories of Gautier, Baudelaire, and Flaubert that “the thought of the author is not that of the characters, nor the narrator,”<sup>142</sup> Tricoire asserts that artistic works have polysemic meanings. In fact, a piece that only has one meaning would instead be categorized as a single idea, or an advertisement, rather than an artistic work.<sup>143</sup> Narrative fiction, a genre conducive to contrary and contrarian meanings, is polysemic.<sup>144</sup> Since visual art is not categorized according to the dichotomy of fiction and non-fiction, the question of how polysemic meaning is constructed and perceived in visual art may be more obscure.

The example of Alain Mila’s sculpture, painted the color of the Front National by a city mayor, demonstrates how political coercion can disrupt a polysemic work of art by reducing its significance to a one-dimensional political statement. First, when the mayor denies Mila’s sculpture is an

138. *Id.* at 6, n.32, n.33.

139. Agnès Tricoire, *Les Dangers du Relativisme pour la Liberté de l’Art*, 121, 138, <http://www.agnestricoire-avocat.fr/>.

140. For example, while both a novel and a painting might make use of a pastiche of fantasy and reality, meaning is constituted in different structures and techniques in a written work than a visual one and would thus be vulnerable to different types of distortions.

141. *Id.* at 121.

142. *Id.* at 135.

143. *Id.* at 143.

144. *Id.*

artistic work at all, he is removing the work from consideration as an object that carries and expresses multiple meanings. Second, by painting the sculpture his party's color, the mayor takes the work hostage, transforming it to serve his interests. The mayor's act functions as a way to replace the original meanings infused by the author. The nonconsensual nature of this transformation is itself an enactment of the model of extreme right-wing governance envisioned by the Front National.<sup>145</sup> Thus, the mayor does not just symbolically express a political ideology, he engages in its methodology through a direct subversion of artistic speech.

The mayor's alteration resembles the use of popular songs for political campaigns without permission, which encourages a public identification of the message of the work and the image of the artist with those of the political actor. For example, in 2012 Francois Hollande released a Presidential campaign advertisement set to Jay-Z and Kanye West's "N\*\*gas in Paris."<sup>146</sup> The music served to showcase (or some would say, exploit<sup>147</sup>) Hollande's visit to the Parisian suburb Creil, in order to present an image of the candidate that was appealing to young Black and Arab voters. A politician on the campaign trail likely does not alter the song itself, but presents it in a specific context linked to their platform. The artist may resist the implied association by publicly expressing disapproval and demanding that the politician cease their use of the work, as happened repeatedly to Mitt Romney in 2012.<sup>148</sup> Even if the politician could not be legally compelled to stop their use due to the applicable licensing scheme, the negative attention an artistic rejection would draw to the candidate ensures some extralegal protection for the offended artist. In contrast, an artist in Mila's position must take a more assertive stance to counteract the invasive use of their work, which goes beyond implied ideological approval to actual physical transformation.

145. This is a broad characterization, but fitting for an extreme right-wing party that has repeatedly engaged in Holocaust minimalism and called for the rearmament of French imperialism. See Bruno Waterfield, *Jean-Marie Le Pen Repeats Holocaust Comments in European Parliament*, THE TELEGRAPH (Mar. 25, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/france/5050338/Jean-Marie-Le-Pen-repeats-Holocaust-comments-in-European-Parliament.html>.

146. 'N\*\*gas in Paris' a Winning Campaign Ad or Offensive 'Ethnic' Marketing?, CNN (Apr. 30, 2012) <http://www.cnn.com/2012/04/27/world/europe/france-politician-uses-offensive-song/>.

147. Ashley Fantz, *N\*\*gas in Paris': A Winning Campaign Ad or Offensive 'Ethnic' Marketing?*, CNN.COM (Apr. 30, 2012), <http://edition.cnn.com/2012/04/27/world/europe/france-politician-uses-offensive-song/>.

148. Justin Sullivan, *Mitt Romney Asked to Quit Using 'Eye of the Tiger,' Among Others*, CBSNEWS.COM (Apr. 17, 2015), <http://www.cbsnews.com/media/8-politicians-scolded-by-musicians-over-song-use/2/>.

In various ways, the mayor obliterates Mila's control over the physical and intellectual contours of his work. Mila is left with few options for resistance. One path is to publicly contest the alteration and add to the speech around his work in the public sphere; the other is to repaint the work according to his authorial voice, restoring his speech in accordance with his vision. Public contestation of the work serves several purposes, so long as adequate attention is drawn to the issue. It makes clear that Mila does not endorse the change to his work, nor its resulting association with the Front National. In Mila's case, the distinction between the authorial voice and other voices in the sculpture as a single entity is less self-evident, thus increasing the risk that the public will perceive the color alteration as the voice of the author himself. Farida Shaheed, the U.N. Special Rapporteur in the field of cultural rights, noted in 2013 that

An artwork differs from non-fictional statements, as it provides a far wider scope for assigning multiple meanings . . . and interpretations given to an artwork do not necessarily coincide with the author's intended meaning. Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information.<sup>149</sup>

While an audience may attribute meanings to the work that the author did not intend due to the attenuated nature of the interpretive act, interference by government actors subverts the unique subject-object relationship and ensures the audience will misinterpret the work.

Given the singularity of individual sculptures, Mila cannot easily substitute new works to compensate for what has been done to this particular work. Whereas novels can be printed in different editions in various jurisdictions, accompanied by explanatory prefaces conveying the author's approval, reproductions of a sculpture do not achieve the same effect. A reproduction does not occupy the original installation space, which is part of the work's context, a component of meaning. The meaning of a novel is more transportable than that of a sculpture, as its elements can be reconstituted coherently outside of the physical structure of a specific edition. The novel itself presumes mass reproduction as the means of disclosure, in contrast to an individual sculpture. Mila's public statement in favor of destruction may be the only effective corrective measure. Even if Mila does not expect the work to be destroyed, advocating for its destruction is the most extreme disavowal available to him. Mila's protest implicitly asserts the rights of other authors, drawing attention to

149. Farida Shaheed (Special Rapporteur in the field of cultural rights), *The Right to Freedom of Artistic Expression and Creativity*, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

government action that could threaten other artists' integrity rights and hopefully disincentivizing future abuses.

If Mila instead were to repaint the work, perhaps the mayor would not intervene again and Mila would succeed in his restoration. Unless he was compensated for this labor, Mila would sacrifice a pecuniary interest to protect a moral interest, undermining the general author's rights scheme in which these interests co-exist rather than conflict. Whether or not the mayor were to impermissibly paint Mila's sculpture a second time, the very threat of a second appropriation backed by the financial resources at the mayor's disposal highlights Mila's vulnerability as an artist. Mila would also risk his restoration being labeled an act of vandalism. The mayor's use of public resources and authority to disrupt author's rights, valuable both to French citizens as the audience benefiting from artistic creation and to Mila himself as an author-citizen entitled to the protection of his legal rights, would constitute an expressive harm.

Actions like those taken against Mila's sculpture can constitute a subtle form of censorship in pursuit of "the suppression of political dissent, the quest for nation-building and pursuit of hegemonic policies."<sup>150</sup> Even where it is unclear what particular ideology underlies the nonconsensual alteration of an artist's public work, the encroaching threat on art speech as an imaginative zone for the construction of autonomy speaks to a hegemonic politics that limits cultural expression in the shared public sphere. Shaheed notes the crucial importance of public space as an artistic forum, "as it allows people, including marginalized people, to freely access, enjoy and sometimes contribute to the arts, including in its most contemporary forms."<sup>151</sup> Political alteration of public art implies a model of exclusive state ownership of the public sphere, wherein government actors can avoid transparency by hijacking others' expression for their messaging without disclosing their own identities outright.

The Buren column dispute may qualify as a form of covert censorship according to the Special Rapporteur's framework, as "financial cuts . . . against cultural institutions or specific artworks may also be a cover for censorship."<sup>152</sup> Preferential funding for artists who support the regime in power, as well as the withdrawal of support for art commissioned by previous administrations, can reduce the participation of certain artists and their ideas in the public sphere without triggering public concern as would

150. *Id.* at 10.

151. *Id.* at 14.

152. *Id.* at 16.

overt censorship through formal restrictions. In this way, politically motivated artistic erasure does not have to rise to the level of Taliban or ISIS-style demolitions to have the damaging effect of restricting speech.

### III. PRE-DISCLOSURE DESTRUCTION: WHO OWNS THE ARTIST'S SPEECH?

Thus far, this discussion of the implications of an author's quest to destroy in the context of art speech has focused on post-disclosure destruction as a reaction to post-disclosure appropriation. What is at stake when an established author seeks to destroy their work pre-disclosure? The examples of Franz Kafka and Diego Rivera illuminate how tensions around author-directed destruction play out pre-disclosure.

Kafka bequeathed his unpublished manuscripts to his friend Max Brod with the specific instruction that they be destroyed upon his death.<sup>153</sup> Brod rejected this directive by publishing several works in 1935 and, in turn, bequeathing the rest to Esther Hoffe, eventually leading to a lawsuit over the ownership of the materials in 2011.<sup>154</sup> The dispute was resolved in 2012 in a ruling that transferred ownership to the state of Israel, based on Brod's instructions to Hoffe upon his own death.<sup>155</sup> Despite the seemingly simple reasoning for the outcome, the arguments offered by competing parties broached complex notions of public ownership of Kafka's artistic legacy that triumphed over Kafka's explicit wishes for his work.

Judith Butler catalogues the competing German and Jewish-Israeli claims to ownership of Kafka's work, which invoked the German-speaking, Jewish, Czech-born Kafka's cultural and linguistic belonging.<sup>156</sup> The National Library of Israel argued Kafka did not belong to Hoffe's beneficiaries, but "either to the 'public good' or else to the Jewish people," two interests treated as identical at times.<sup>157</sup> This argument framed Kafka as a "primarily Jewish writer," and his writing as a cultural asset of the Jewish people, presuming Israel to be the representative of the Jewish people.<sup>158</sup> The presumption of who represents such a broad identity group is contestable, as Butler notes this claim denies both the perspective of non-

153. *Id.*

154. *Id.*

155. *Id.*

156. Judith Butler, *Who Owns Kafka?*, 33 LONDON REV. OF BOOKS 3, 3–8 (2011).

157. *Id.* at 2.

158. *Id.*

Israeli Jews and non-Jewish Israelis, implicitly attributing to Israel stewardship over “all significant Jewish cultural production.”<sup>159</sup>

Though Kafka was Jewish, the question of whether to categorize his legacy as exclusively Jewish is significant in the competing claims to his unpublished work. The German Literature Archive challenged this proposition, offering an account of Kafka as belonging to the German language and literature, focusing on the “purity” of Kafka’s German. This reductive account of his German writing, troubling in its reference to the concept of German purity, idealized Kafka’s imperfect fluency in German. It also relied on a concept of belonging which goes against the essence of much of Kafka’s work, “given the fact that [his] writing charts the vicissitudes of non-belonging, or of belonging too much.”<sup>160</sup> Butler notes that Kafka was known for his comment on the Jewish people, “My people, *provided that I have one.*”<sup>161</sup>

For an author whose identity fell under multiple categories, and whose work touched upon a persistent sense of non-belonging, it is remarkable that competing litigants sought judicial resolution of his primary identity as the basis for dismissing his own desire for his work’s destruction. Had Kafka been alive when this dispute took place, perhaps the outcome would have been different, as the living artist’s rights to their work should counter the derivative notion of “cultural ownership” constructed by various groups. Nonetheless, the Kafka example reveals the type of interpretation that follows from a thwarted pre-disclosure destruction claim for an artist of significance. Kafka’s heritage and personal beliefs offered ambiguous evidence over who should inherit from the artist the modern stewardship of his work, taking precedence over the property-based chain of title. These competing accounts served political interests, as the victory over which country could claim Kafka as their own transformed the dispute into a mechanism of national identity construction. Israel’s legal victory is a historical one, as its National Library’s custody of the physical manuscripts confers upon the state the status as Kafka’s symbolic home in the continuing future. This concept of home is not just based on abstract association, but on the state’s tangible control over Kafka’s speech vis-à-vis his unpublished manuscripts. In this way, the state can control the art speech of the deceased much as it controls the speech of the living—by controlling public access.

159. *Id.*

160. *Id.* at 8.

161. *Id.* (emphasis added).

In contrast to Kafka, Diego Rivera initiated the pre-disclosure destruction of his work in a high-profile dispute with the Rockefeller family. In 1932, John D. Rockefeller, Jr. commissioned Rivera to paint a mural in Rockefeller Center.<sup>162</sup> The mural was to depict a “Man at the Crossroads Looking with Hope and High Vision to the Choosing of a New and Better Future.”<sup>163</sup> An openly Communist artist strongly devoted to his leftist ideals, Rivera initially agreed to paint the image of a soldier, a worker, and a peasant clasping hands.<sup>164</sup> However, after being criticized for “selling out” by agreeing to paint for the industrialist Rockefellers, Rivera decided to add the figure of Vladimir Lenin to the mural, saying, “[i]f you want communism, I will paint communism.”<sup>165</sup> In addition, Rivera depicted the senior Rockefeller “drinking martinis with a harlot and various other things that were unflattering to the [Rockefeller] family.”<sup>166</sup>

The Rockefellers repeatedly requested Rivera change his mural, which had been painted as a fresco and thus could not be moved, leaving only the choice of alteration or destruction. Nelson Rockefeller wrote to Rivera that because the mural was in a public place, it risked offending a large number of people.<sup>167</sup> Rivera refused to change the mural, declaring that, “[r]ather than mutilate the conception, I should prefer the physical destruction of the conception in its entirety, but preserving, at least, its integrity.”<sup>168</sup> In response, Rockefeller had the mural destroyed. Rivera later recalled that he had not expected “that a presumably cultured man like Rockefeller would act upon my words so literally and so savagely” by destroying the work.<sup>169</sup> Despite the ambiguity over Rivera’s intentions, he described the destruction as an act of “cultural vandalism,” much as Buren described the damage to his columns in Paris.<sup>170</sup> Rivera painted a replica of the mural faithful to his artistic vision in Mexico City, and the reputation of the Rockefellers as art patrons was diminished by the affair.

The Rivera case gives a unique glimpse into how a powerful patron can control political content during the process of creating a work, such

162. Allison Keyes, *Destroyed by Rockefellers, Mural Trespassed on Political Vision*, NPR.ORG (Mar. 9, 2014), <http://www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision>.

163. *Biography: Diego Rivera*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/biography/rockefellers-rivera/>.

164. Keyes, *supra* note 163.

165. *Id.*

166. *Id.*

167. PBS.ORG, *supra* note 164.

168. *Id.*

169. *Id.*

170. *Id.*

that the artist would attempt to reassert control with the most extreme threat: total destruction. While this threat has worked for artists like Buren, the question of whether Rivera maintained the integrity of his work is less clear in light of his later comments casting his threat as a bluff. Rivera succeeded insofar as resisting the completion and disclosure of a work going against his political and artistic principles, but the outcome of the ultimatum may not have been his underlying goal.

The Rockefellers' action in this case suggests a conflict between multiple audiences when it comes to the preservation of art speech. Their reference to possible offense to a segment of the intended audience may have been pre-textual, but it enabled the patron to occupy the position of public representative in order to stifle explicitly political art speech that may have resonated with some portion of the audience. Though the Rockefellers presented the Center as a public space, it was actually a mixed private-public space, as their ownership of the eponymous building effectuated their control of the mural. The Center's availability to public traffic did not render it any less of a privately controlled institution. The Rivera mural highlights the danger of quasi-public spaces, which gain part of their prominence due to a misleading characterization as public spaces, yet are susceptible to manipulation by private actors with ownership rights.

Rivera wrote in a letter at the time, "If someone buys the Sistine Chapel, does he have the authority to destroy it?"<sup>171</sup> This comment discloses Rivera's perspective on who bears responsibility for the destruction. Though it was Rivera who initially suggested destruction, perhaps such a suggestion does not carry conclusive weight in light of the evident power disparity between the wealthy patron and the artist working on commission. Unlike the Sistine Chapel, Rivera's mural was not disclosed to the public, precluding the opportunity to gain valued historical status that could have afforded the artist more power. Had Rivera somehow disclosed his mural, it might have acquired cultural value that could have given him more control over its fate, in opposition to the Rockefellers.

#### IV. STREET ART AND THE RIGHT TO DESTROY

Where the choice to destroy is ultimately wielded by the artist, the context in which destruction takes place shapes the significance of the destructive act. This applies to the temporal context, as demonstrated by Kafka and Rivera, as well as the physical context, as discussed with Buren,

171. Keyes, *supra* note 163.

Mila and Henke. The existence of public spaces that serve as “revolving canvases,” for example, particular walls in Paris famous for their ever-changing murals,<sup>172</sup> adds an evolving dimension to the debate. For artists who create their work in such spaces, destruction is presumed. The inevitability of the destruction of their work is a function of the space’s shared nature; each artist paints over their predecessor’s work, implicitly consenting to their successor’s decision to do the same. While their work is temporarily fixed, possibly satisfying the elements of a copyrightable work in the short-term, the common recognition of the space as an informal gallery contributes to the brief lifespan of each work. No artist has a permanent claim to the canvas; no artist can remove the canvas to control its exhibition once their work has been created. The development of these specific locations as displays for high-profile street art could only occur with the acceptance of the property owners, who may indirectly benefit from the attention the murals draw but do not have a means to charge passerby for the pleasure of observing them.

The choice to create a work in such a space is an act of resistance to the commercialization of street art. While Berlin’s Kreuzberg murals came to be seen by their creators as casualties to the “zombification” of the gentrifying city, the works’ prominence relied on their continued existence. A mural that disappears within a week does not have the opportunity to become a landmark. Artists who purposely create work in and on spaces known for their turnover can thus reject attempts to commodify their expression through the conventional consumption of art. In presenting their work on public streets, they also dispense with the access fee that private institutions impose on viewers. Any passerby can observe the work without pressure (or even the option) to pay the artist or a middleman. The use of everyday public contexts, such as walls that come to be identified as displays by virtue of their use as such rather than by the establishment of formal galleries, rejects the idea that art is circumscribed to elite-controlled environments. Revolving canvases, defined by the inevitability of the destruction of the works they host, reflect an anti-elitist democratic

172. The walls framing Radio Marais on Rue Chapon are one example of what I call a public “revolving canvas.” Street artists paint large-scale murals on two particular walls framing the Radio Marais building on a nearly weekly basis. The process appears to be formally unregulated but guided by informal norms of the street art community. Another example of such a space is located on Canal Saint-Martin, just north of République. The corner wall of an apartment building, overlooking a small public square, is the site of a variety of murals and graffiti tags, constantly changing and building on one another. On the rare occasion that the Canal wall is co-opted for commercial purposes, such as advertisements for music festivals, the next round of street art effectively cuts short the temporary commercialization and transforms the wall back from a billboard into a public canvas.

ideology on the meaning of art in relation to the public. This ideology, though broad and amorphous, is no less political in its nature than the arguments made by the artists discussed throughout this paper.

## V. CONCLUSION

Authors may explicitly claim a right to destroy their work in order to protect it or embrace the right to destroy through the spaces in which they create. This distinction exemplifies the varying approaches to the right to destroy in relation to economic rights. While Buren's public discourse on destruction enabled him to secure millions of euros for restoration, other artists have utilized the theme of destruction to reject the economic benefits of their work. By implicitly ceding the right to destroy to the next artist to use the space, they produce their own framework for navigating moral rights.

The right to destroy may be the artist's ultimate rhetorical weapon to defend their work. The artist employing this "nuclear option" may hope its mere mention will function as a deterrent to protracted conflict, but may not necessarily intend to exercise it to completion. Notwithstanding the philosophical and legal bases for an artist's right to destroy, real examples demonstrate that the question of who can destroy, or prevent the destruction of, a work may often be someone besides the artist. The tension over the ultimate disposition of a work speaks to the many valuable purposes served by the creation of art speech, as well as the conflicts arising when its multiple beneficiaries are unequally situated in terms of political and financial influence.