THE LINE BETWEEN WORK AND FRAMEWORK, TEXT AND CONTEXT

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I. INTRODUCTION

It is a great pleasure to be at a symposium honoring John Henry Merryman. Like so many people who work in intellectual property, I have consistently found Professor Merryman's work to be full of admirable ideas and expressions. Jane Ginsburg and I share a few things in common, one being that we have both worked in France and count in that minority of Americans who are, yes, francophiles. So it is wonderful for me—and for Jane, I'm sure—to read Professor Merryman's work, not just because of its sophisticated presentation of French law and legal theories, but because he quotes French without translation. He belongs to that lovely, more worldly school whose members found it acceptable, indeed proper, to assume your audience could read French.

I also have to admire Professor Merryman on another stylistic front. In the few law review articles I have written, I have always struggled to avoid titles with colons. Scholarly works too often have some snazzy phrase, then COLON, then a nuts and bolts description of what the work is really about. This is because editors resist allowing authors to use snazzy but uninformative titles and because authors, for good reason, resist titles that inform but bore. Now, the first article of Professor Merryman's I ever cited is his piece called The Refrigerator of Bernard Buffet.[1] Isn't that great? Some editor would have made most of us add a colon - "*The Refrigerator of Bernard Buffet*—COLON—*moral rights, art markets, and the state of American law.*" As I was looking at that article again, I thought we all ought to commit ourselves to finding titles like that—succinct, thoughtful, maybe provocative, but neither silly nor unduly punctuated.[2]

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[1] *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) [hereinafter *The Refrigerator*].

[2] Other simple, but meaningful titles from Professor Merryman include John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985) [hereinafter *The*

In *The Refrigerator*, Professor Merryman noted that the moral right of the artist is "still comparatively young even in the nation of its origin" and that it probably "ha[d] not reached anything like its full development."[3] In the quarter century since he made that remark, the fabric of moral rights in the United States has changed from gossamer to patchwork.[4] When the United States adhered to the Berne Convention in 1986,[5] Congress concluded that U.S. law provided artists with the moral rights of integrity and attribution. One of today's panelists called that a lie. Being from the government, I would not say that. Let us just say that Congress's conclusion that then-American law provided moral rights might be called heroic.[6] (And it was a conclusion that many of us shared.)[7]

Since the mid-1980s, the United States has increasingly embraced moral rights—first in state laws,[8] then the Visual Artists' Rights Act [hereinafter referred to as "VARA"][9] and, most recently, certain provisions of the Digital Millennium Copyright Act [hereinafter referred to as "DMCA"].[10] I agree completely with Professor

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Elgin Marbles]; John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y of the U.S.A. 241 (1992) [hereinafter *The Wrath*]; John Henry Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61 (1994); John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445 (1995).

[3] *The Refrigerator*, *supra* note 1, at 1026.

[4] One commentator recently described it as the "creepings" and "glimmers" of moral rights. *See* Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35 (1998); *see also* Judge Posner's comments in Ty, Inc. v. GMA Accessories, 132 F.3d 1167, 1173 (7th Cir. 1997) *infra* note 54.

[5] *See* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27, 99th Cong., 2d Sess. 37, 828 U.N.T.S. 221 (1986) [hereinafter Berne Convention].

[6] *See, e.g.*, Crimi v. Rutgers Presbyterian Church, 89 N.Y.S. 2d 813 (Sup. Ct. 1949) (concluding that there were no moral rights in the United States); *see also* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (same).

[7] Congress's optimism has been shared by many of us not in elected office. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing how moral rights-like protection might be provided under a compendium of common law causes of action); *see also* Roberta Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (describing possible causes of action, although finding some deficient); Comment, *Toward Artistic Integrity: Implementing Moral Rights Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539 (1972); Melvin Nimmer, *Implications of the Prospective Revision of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 522 (1967) (concluding that then U.S. law complied with a narrow interpretation of Article 6bis); Martin Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 578 (1940) (arguing that American common law already provided moral rights-like protections).

[8] *See* CAL. CIV. CODE §987 *et. seq.* (West 1982) (California Art Preservation Act); *see also* MASS. GEN. LAWS ANN. ch. 231, § 85S (2000).

[9] *See* 17 U.S.C. §106A *et. seq.* (1990).

[10] *See* 17 U.S.C. §101 *et. seq.* (1995). Another sign of the changing attitude in the United States is U.S. support for the establishment of moral rights for audiovisual performers as a matter of international law. The U.S. proposal to the World Intellectual Property Organization for a new treaty in this area includes moral rights protection. *See Standing Committee on Copyright and Related Rights, available at* http://www.wipo.int/eng/meetings/1999/sccr_99/index_3.htm (last visited Feb. 8, 2001) (providing Article 5, entitled "Moral

Ginsburg's analysis that the copyright management information provisions of the DMCA effectively create a right of attribution in the Internet environment. There is some irony there, for sure, since the main proponents of copyright management information were corporate interests that are not always the champions of artists, writers, or performers.

With all these additions to American law, it is fair to say that the question of moral rights has to be considered on a case-by-case basis. In some areas, we have statutorily established moral rights. In other areas, we have not and must rely on traditional causes of action. Interestingly, this is similar to the comparative European and American approaches to legal protection of privacy. While the Europeans have opted for an over-arching approach to data privacy, Americans approach the problem piecemeal. We have a statutory right of privacy in our video rental records,[11] but not our dental records. Our young children's on-line privacy is statutorily protected,[12] but not our teenage children's. In both situations—moral rights and privacy rights—Americans are willing to legislate specific solutions to specific problems, while Europeans are more comfortable legislating broad principles whose ultimate effect is less known. (In our country, when there is no general law in a new area of concern, litigants will try creatively to apply traditional causes of action to the issue. To the degree that they are successful—and many have been on both moral rights and privacy issues—they strengthen the argument that no further legislation is needed.)

When people speak of moral rights, they are usually talking about the two core rights—a right of attribution and a right of integrity. The right of attribution has some shadier cousins—the right of anonymity, the right of pseudonymity, and the right of divulgation,[13] which are not expressly mentioned in the Berne Con-

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Rights of Performers" of Chapter II, entitled "Rights of Performers" on the Protection of Audiovisual Performances submitted by the United States of America at the WIPO Conference on November 16 to 20, 1999). In diplomatic consultations leading up to a December 2000 diplomatic conference held to write such a treaty, the United States has consistently and strongly reiterated its support for the establishment of such rights. Contrast this proactive advocacy of moral rights to the United States' slow embrace of the Berne Convention and its moral rights provisions. *See Diplomatic Conference On The Protection Of Audiovisual Performances, available at* http://www.wipo.int/eng/document/iavp/index.htm (last visited Feb. 5, 2001) (providing the Amendment to Article 5 of the Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference proposed by the Delegation of the United States of America at the WIPO conference on December 12, 2000).

11 *See* 18 U.S.C. §2710 (2000).

12 *See* 15 U.S.C. §§6501-6506 (1998).

13 The lesser known right of divulgation empowers the creator to determine when a

vention, but are generally considered part of the bundle of moral rights. Similarly, a right to prevent destruction of a work is sometimes included in the constellation of moral rights. Such a right "of preservation" can be understood as part of the right of integrity, although this is not expressly provided in the Berne Convention.[14]

But today we are honored with the presence of an esteemed artist whose best-known run-in with the law concerned a different kind of argument about artists' rights. Most people here know the story of Mr. Serra's efforts in the 1980s to keep *Tilted Arc* in its site—Federal Plaza in New York.[15] Mr. Serra's struggle was not a typical battle about the right of integrity. The right of integrity is usually understood as a right about the *work* or the *text.* For example, in 1976, the Monty Python troupe managed to beat ABC's ef-

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work is complete and ready to be seen by the public—and, at least in the literary area, to withdraw the work from its owner on the payment of an indemnity. *See The Refrigerator, supra* note 1, at 1028 (providing a clear discussion of the right of divulgation by Professor John H. Merryman). Some might also argue that the *droit de suite* is a kind of moral right, but if so, it is a curious one—an economic right built on top of, and without regard to, older property/economic rights. *See The Wrath, supra* note 2 (in which Professor Merryman sets forth one of the best arguments for and against the *droit de suite*); *see also* Martin Fletcher & Dalya Alberge, *European Levy May Drive Art Overseas,* THE LONDON TIMES, Feb. 16, 2000, at 11 (explaining that the European Union has recently moved toward a Directive on *droit de suite* to harmonize E.U. law in this area.)

[14] Article 6*bis* of the Berne Convention would allow the artist "to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention, *supra* note 5, at 5. Destruction could be a "derogatory action in relation to" the work that could prejudice the artist's reputation—simply by showing her works are not worth preserving or, for example, by making it harder to mount retrospectives of her work.

[15] When the sculpture was installed in 1981 in Federal Plaza in New York, it immediately generated controversy. In 1985, the General Services Administration concluded that the sculpture should be relocated. Mr. Serra's judicial appeal on First Amendment and due process grounds failed. On March 15, 1989, wrecking crews came and *Tilted Arc* literally disappeared into the night. *See generally* Serra v. General Services Administration, 847 F.2d 1045 (2d Cir. 1988); *see also generally* CLARA WEYERGRAF-SERRA and MARTHA BUSKIRK, THE DESTRUCTION OF TILTED ARC (1997); *PBS: Culture Shock: Flashpoints: Visual Arts: Richard Serra's Titled Arc, available at* http://tiltedarc_at.html (last visited Feb. 8, 2001). The experience of *Tilted Arc* is not unique. *See* Richard Holt, *Watch This Space Change, available at* http://www.newcastle.edu.au/department/fad/fi/perip/holt.htm (last visited Feb. 8, 2001) (describing a similar story concerning a sculpture nicknamed *Yellow Peril,* which was removed from City Square in Melbourne, Australia). For myself, a more disturbing story is that of Athena Tacha's 1986 sculpture, *Marianthe,* built at the Fort Meyers campus of the University of South Florida. Campus officials decided to tear down *Marianthe,* a brick labyrinth sculpture, not on the grounds that it was disliked, but on the grounds that it had deteriorated and could not be repaired. Since the University was contractually obliged to "keep the sculpture in good condition and repair," it seems like Ms. Tacha would have had a strong contract claim arising from the sculpture's destruction. *See Marianthe, University of South Florida, Fort Myers, available at* http://www.oberlin.edu/~art/athena/marian.html (last visited Feb. 8, 2001) (providing a photo of the sculpture); *see also* Athena Tacha, *Marianthe is Destroyed, available at* http://www.oberlin.edu/~atacha/destroyed.html (last visited Feb. 8, 2001) (providing the artist's report on the destruction).

forts to bowdlerize their recorded comedy performances,[16] just as others had stopped artless editing of their films in the past.[17] But those cases were about the work, the text. In the face of proposals to relocate *Tilted Arc,* Mr. Serra's claim that his sculpture should remain in Federal Plaza was a claim about the *framework* or the *context.*

In the spirit of John Merryman's own explorations of the possible "full development" of moral rights in the United States, it is worthwhile to wonder—could the law ever develop to protect a claim like Mr. Serra's? May a creator claim to control the social and physical context in which her work appears *after* it is released into the world? Should a creator have any rights to the preservation of the framework, the context, in which her art appears? There are some European cases which seem to recognize some degree of such "framework control."[18] This may not seem like such a radical claim for the artist and the aesthete who believe that there is no real boundary between the work and framework.

But for the rest of us—even those of us who appreciate that work and framework are often inextricably linked—it seems like a bold and generally untenable proposition. My own view is that "framework control" takes artists' rights too far. Advocating such rights is both morally questionable and politically stupid precisely because it undermines efforts to gain stronger acceptance for the traditional core of moral rights. As a general proposition, recognizing the artist's claim to control the framework of her art *after* she has introduced that art into the world would burden too many other social interests. I will talk a little bit about why that is so, then, to contradict my view on the general situation, I will talk about two specific areas of intellectual property law where there seem to be such rights to control the framework. Finally, I will describe an interesting new problem with the Internet—involving a

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16 *See* Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976) (enjoining television station from the use of edited Monty Python skits).

17 *See* Stevens v. NBC, 148 U.S.P.Q. 755 (Cal. Sup. Ct. 1966) (enjoining the broadcast of an edited version of *A Place in the Sun*); *see also* Autry v. Republic Productions, 213 F.2d 667 (9th Cir. 1954) (holding that sufficiently severe editing of film could undermine artist's work); Carroll v. Paramount Pictures, 3 F.R.D. 95 (S.D.N.Y. 1942) (Lanham Act used by producer to stop distribution); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (finding violation of §43(a) of Lanham Act for "reverse passing off" where actor who appeared in the film, *Convey Buddies,* had his name replaced); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (finding that sale of abbreviated jazz recordings without producer's permission constituted breach of contract and/or tort of unfair competition).

18 I am thinking particularly of Shostakovich's successful objection in France to the inclusion of his music in an "anti-Soviet" film, although he did not allege that the music proper had been distorted. *See* T.G.I. Paris, le ch., Jan. 13, 1953, D. Jur. 16, 80, note Shostakovich; *see also* Kwall, *supra* note 7, at 28.

piece of software, which raises a variety of difficult questions about the copyright law, moral rights, the First Amendment, works and frameworks.

II. The Intuitive Line Between Work and Framework

When told that there is no real boundary between work and framework, most of us may *understand* this notion that work and framework are inextricably linked but we do not *feel* it. Instead, most of us feel an almost metaphysical distinction between a work and its context. In this sense, aesthetics may be like physics—we can know about string theory and Einsteinian four-dimensional space while still very much feeling like the world is a comfortably solid, three-dimensional affair. That is not surprising. Historical judgments—at least those not backed up by years in archives—are dangerous undertakings, but I am going to try one here. That judgment is that *more* creativity nowadays is put into art works that are intended to be relatively context-free.

For centuries, most western art was religious and this religious art was typically context-dependent. Much religious art was produced for specific locations, such as the apse of a particular cathedral or the altar of a particular parish church. Most of the rest was intended for churches of a thematically-consistent, contemplative ambiance.[19] Secular portraiture marked a more context-independent art form. Leonardo certainly believed that the *Mona Lisa* was context-independent, as he carted her from chateau to chateau. More broadly, the portrait artist knew that such works would be moved from place to place—often because a noble family had only one set of household furnishings to take with them as they moved among residences.

Lithography and the rise of printmaking marked yet another degree of context-independence. The artist now knew she was making multiple prints of a particular image that would find their way into a variety of settings. Photography is a related wave of context-independence. Not only is the photographer aware of the extensive (possibly mass) reproduction of his images, but the power of great photographers like Martin Chambi, Diane Arbus, or

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[19] Art was often reproduced or mass-produced for smaller churches. In the spirit of Professor Merryman, we might quote Flaubert's characterization of the art and furnishings in a French country church complete with "enfin une copie de la *Sainte Famille, envoi du ministre de l'Intérieur,* dominant le maître-autel entre quatre chandeliers. . ." Gustave Flaubert, Madame Bovary 104 (Jean-Claude Lattes ed., 1995) (1857) ("[A]t the end, a copied painting '*The Holy Family*—presented by the Minister of the Interior' dominated the main altar, between four candlesticks." Gustave Flaubert, Madame Bovary 62 (Lowell Bair, trans., Bantam Books 1972) (1857))).

Gilberte Brassai, is to draw us into a world far from the viewing context and encapsulated in the "window" of the photograph. All of these framed works—paintings, prints, photographs—have a clear boundary between themselves and their world. Denys Rioout notes, "[t]he frame served also to isolate the tableau and to avoid all interaction with the exterior world."[20] The frame even provides temporal isolation: one of the regulars at Gertrude Stein's turn of the century Paris salon noted that the surest way he could tell when the works of the new radical artists—Picasso, Matisse, Cezanne—were finished was when they were framed.[21]

In the twentieth century, audiovisual works marked a further degree of context-independence because the films were delivered everywhere, simultaneously. A director might *expect* that his work would be shown in a darkened theater of certain proportions—and theaters have a consistency of ambiance not unlike churches. (For many of us, they are *like* churches—places to which we go reverently.) But when films are shown on television, the objections are usually about the integrity of the *work*—the speed of the frames, panning and scanning, colorization—not about how bad the *context* is. Surely watching a film while eating airline food in an economy class seat is a very bad context.

I am willing to go further and say that the Internet and the works it carries are another phase of context-independence. When the work is put on the Internet, whether it belongs to a commercial web designer, a photographer, or a visual artist, there is, in effect, an implied license to view the work in any imaginable context. Such context may be a dull gray-beige PC, a hip translucent purple Imac, a noisy and chaotic dorm room, or a parish priest's rectory office. All of these social and artistic developments have given rise to a popular belief that a work, by itself, embodies meaning.

The popular belief that there is a strong boundary between work and framework is apparent in the provisions of the VARA. While the VARA secures a right of attribution and a right of integrity to an artist working in the plastic arts, that right is lost under section 113 when "a work of visual art has been incorporated in or made part of a building in such a way that removing the work from

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[20] DENYS RIOUT, QU'EST-CE QUE L'ART MODERNE? 342 (Editions Gallimard 2000) ["Le cadre servait ainsi a isoler le tableau et a eviter toute interference avec le monde exterieur."].

[21] *See* GERTRUDE STEIN, THE AUTOBIOGRAPHY OF ALICE B. TOKAS 15 (The Bodley Head 1933) (Penguin Books 1966) ("Of course you can tell it is a finished picture, he used to explain to the other American painters who came and looked dubiously, you can tell because it has a frame, now whoever heard of anybody framing a canvas if the picture isn't finished.").

the building will cause the destruction, distortion, mutilation, or other modification of the work" and the author has consented to the installation.[22]

Section 113 makes it clear that if removal of a work of art is possible, the owner of a building must give the artist an opportunity to remove it without its destruction or mutilation.[23] In other words, VARA envisions a clear trade-off—scuttle the context, scrap the framework—if that is what must be done to preserve the work. The right of integrity is decidedly not a right *in situ.*

Given the disparity in relative bargaining power, it can be argued that this provision of the VARA merely forces artists to sign agreements waiving their rights to stop destruction of installed art. But it might also inspire artists to choose materials and formats that lend themselves to removal from a building in the event that the building will be torn down, such as removable panels for frescos.[24] An artist who believes her work has meaning separate from its context might gravitate toward such technical solutions, while an artist who believes her work only has meaning *in situ* would not.

In another provision, the VARA implicitly addresses and rejects the *argument* that the artist should have some control over the framework. Section 106A(c)(2) provides that "[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or modification . . . unless the modification is caused by gross negligence."[25]

One may think of this as the "museum curator defense," but I also find this language interesting from a work/framework perspective. It says, yes, it is possible to argue that lighting and placement "distort" a work, but we are not buying it.

The VARA makes a judgment that accords with Professor Merryman's own views. Express focus on the framework and the context of a work is more familiar in discussions of cultural property

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[22] Simple consent is appropriate for a work that was installed before VARA. Proper consent for a work installed after the effective date of VARA is, "in a written instrument . . .that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." 17 U.S.C. § 113(d)(1)(B) (1995).

[23] *See, e.g.,* 17 U.S.C. § 113(d)(2) (1995); CAL. CIV. CODE §987 (West 1996) (envisioning the same trade-off); Botello v. Shell Oil Co., 229 Cal. App. 3d 1130 (Cal. App. 2d) (1991) (discussing evidence presented by plaintiff that mural could be removed from building and, therefore, was protected under statute).

[24] Consider for example, Jackson Pollack's decision, largely influenced by Marcel Duchamp, to paint his *Mural* commission from Peggy Guggenheim on stretched canvas rather than directly onto the wall of the Guggenheim apartment. *See* THOMAS CROW, MODERN ART IN THE COMMON CULTURE 43 (Yale University Press 2d ed. 1998) (1996).

[25] 17 U.S.C. §106A (1990).

and "cultural nationalism"[26] than in discussions of moral rights of artists. Professor Merryman has noted that this "notion of preservation of context can be pressed to the point of exaggeration."[27] If one believes that all or most of the meaning of a work of art depends on it remaining in context, then most of the content of the world's great artistic treasures sitting in the world's great museums suffer from decontextualization and loss of meaning.[28] This is a rather surreal image—throngs of people milling their way through the galleries of art museums looking at thousands of pieces rendered mute and meaningless because they are no longer in context. No wonder people stare and tilt their heads like puppies listening to distant, inaudible sounds.[29]

Clearly the throngs of people visiting the Metropolitan Museum of Art and the curators who bring the works into the museums do not believe this. Most of us believe that *most* artworks convey *most* of their meaning in and of themselves. In light of how culture has developed, it is no wonder we think that way.

This reasoning denies neither that there may be context-dependent art nor that such context-dependent art is important. The point is only that we have come to believe generally that artworks carry most of their meaning within themselves. We can create environments that bring out and complement those meanings—much as the right wine will complement flavors inherent in certain foods.

This distinction between work and framework means that there is a difference between removing a work from its context and dismembering an integrated artwork into constituent pieces, as was done with Buffet's refrigerator. Recognizing that we tend to draw such a line between work and context, some artists have argued that the framework is part of the work and therefore the "work" must be understood expansively. For example, in *English v. BFC&R East 11th Street LLC*,[30] plaintiffs trying to avail themselves of the VARA claimed that a sculpture garden itself constituted an integrated artwork, rather than a grouping of five independent artworks. They argued that the entire site was "a large environmental sculpture encompassing the entire site and composed of

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26 *See The Elgin Marbles, supra* note 2, at 1911-16; *see also* John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 356-59 (1989) [hereinafter *The Public Interest*].

27 *The Public Interest, supra* note 26, at 357.

28 *See id.*

29 So the next time someone looking at art says he does not "get it," do not think of this as the confession of a heathen. Think of him as a very astute, albeit perhaps unconscious, contextualist who senses that when art is shorn of its context, there's nothing left to "get."

30 No. 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 3, 1997).

thematically interrelated paintings, murals, and individual sculptures of concrete, stone, wood and metal, and plants."[31]

This kind of "integrated work" argument is neither new nor outlandish. In 1955, Fernand Léger, who created the sets for the premiere of the opera *Bolivar*, tried to prevent a subsequent production of the opera in which the director cut one of the opera's scenes and therefore one of Léger's sets was removed from the production. He claimed that the opera was a complex work of which Léger was a co-author, as designer of the original sets.[32] The *Léger* court found that the "work" was the opera proper—the libretto plus music—and that the costumes and sets were ancillary—that is framework.

The perspective that I am advocating may be more contingent, more a passing fancy than I admit. Michael Govan makes a plausible case that the things we now consider "works" separated from their original contexts may someday be viewed as "fragments," no longer whole works precisely because they have been taken from their intended contexts. My intuitions tell me that Rodin's *Gates of Hell*, the *Venus de Milo*, and all the Medieval sculptures in our museums which were crafted for a "frame" are artworks, rather than fragments.[33] But Michael may have the better argument one hundred years from now. Law libraries are full of court opinions and law review articles that now seem quaint (and wrong). Even today the integrated work argument is strong. Although a court found that Léger's sets were part of the framework of *Bolivar*, what if the *Bolivar* librettist had argued that the opera could not be staged with Léger's sets because they were part of the "work?"

There is no question that the installation art or *in situ* art movement has challenged the idea of art autonomous of its context and insisted on art that must be experienced in its intended place in order to be understood and appreciated.[34] If this idea of framework control for permanent works ever gains traction, let me suggest that it will do so with a very different, arguably more pedestrian, kind of installation art than *Tilted Arc*. An artist like Frederick Hart whose *Ex nihilo* sculpture dominates the main entrance to the National Cathedral in Washington has very clear and extensive expectations of the environment in which his art will be exper-

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[31] *Id.* at 1.

[32] *See* Léger v. Réunion des Théâtres Lyriques Nationaux, Cass. 1è civ., La Seine, Oct. 15, 1954, Revue Internationale du Droit d'Auteur, 1955, vol. 6, p. 146.

[33] UMBERTO ECO, ART AND BEAUTY IN THE MIDDLE AGES 40 (Yale University Press 1986) (1959).

[34] *See* RIOUT, *supra* note 20, at 342-48; *see also* CROW, *supra* note 24, at 131-50.

ienced. Many artists were commissioned to create works for particular locations in the Cesar Pelli-designed terminal at Reagan National Airport in Washington; all of the artists planned and executed their works with knowledge of what the building would do and, therefore, the experiential framework in which the works would be on public display. Not surprisingly, many of these works have travel, flight, or distant-land themes. We can understand the legitimate concern of any of these artists that their works remain in the intended context.

But if one were a legal strategist seeking a test case for such concerns, the *Tilted Arc* controversy might not have been one's first choice—precisely because Richard Serra did not want his sculpture to integrate into Federal Plaza. Serra did not want *Tilted Arc* to relate to its surroundings in the simple sense of the examples given just above. Art historian Thomas Crowe has insightfully described Serra's intentions:

> [H]e has been concerned to frustrate any search for links between the piece of sculpture and the given character of its setting, thus achieving a precise and unrelieved *non*-relation to the site, as the only means by which sculpture can be salvaged as a meaningful activity. Otherwise sculpture falls into. . .the intolerable position of 'being subordinated to/accommodated to/adapted to/subservient to/required to/useful to. . .' something other than itself.[35]

Crow sees *Tilted Arc* as both intentionally *not* relating to its environment and as loudly announcing—and demanding attention for—its status as a stranger: "[t]he overbearing scale and intrusive placement of a *Tilted Arc* was planned to enforce the same concentrated attention in a passing non-committal audience as that habitually exercised by informed gallery visitors."[36] In short, Serra's reasoning was that *Tilted Arc* had claim to its place in order to force people to pay attention to *Tilted Arc's* message, which was separate from and not dependent on its environment. *Tilted Arc* could only be called context-dependent in the sense that it was context-resistant. This is hardly the most sympathetic fact pattern to build the case that an artist's work should stay in the framework for which it was created.

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[35] CROW, *supra* note 24, at 146 (quoting Richard Serra, *Introduction* to CLARA WEYERGRAF-SERRA and MARTHA BUSKIRK, THE DESTRUCTION OF TILTED ARC (1997)).

[36] *Id.* Similarly, the ironic placement of Claes Oldenberg's "monumental" sculptures might make them bad candidates for framework control. *See, e.g.*, JEAN-MARC POINSOT, QUAND L'OEUVRE A LIEU: L'ART EXPOSE ET SES RECITS AUTORISES 90-91 (Institut d'art contemporain & Art ed. 1999) (discussing Oldenberg's *Lipstick* and other sculptures).

III. DERIVATIVE WORK MEETS FRAMEWORK

Having expressed concern about "framework control," let us consider a few places where it arguably exists. One of the places where the legal system may be considered to create some framework control is through the right to control derivative works. After all, the right to control derivative works often does not implicate the *intra-work* right of integrity. When the copyright owner of *Gone With the Wind* controls whether there will be a sequel called *Scarlet,* the issue is not maintaining the quality of the original work.[37] A pair of *fin de siecle* cases arguably brings the section 106(2) derivative right into the battle for control of context.

The more recent case concerned Annie Lee, an artist whose works are reproduced in note cards and small lithographs.[38] In the late 1990s, she discovered that copies of her works were being bought at retail by A.R.T. Company. The company was mounting her works on ceramic tiles and covering the art with a transparent epoxy resin—I presume to make them waterproof.[39] Ms. Lee objected and sued the company. In a very real sense, this case was about an artist's work being presented in a different context—literally a new framework for Ms. Lee's image.[40]

Writing for the Seventh Circuit, Judge Easterbrook concluded that Ms. Lee had no right to stop these ceramic tiles once she sold copies of her images to the public.[41] The law defines a "derivative work" as "a work consisting of editorial revision, annotations, elaborations, or other modifications that, as a whole, represents an original work of authorship."[42] The court concluded that the ceramic tile was not an "original work of authorship" and, therefore was not a derivative work.[43] The derivative work argument made it easy for the court to recognize the statutory right of a person who buys an authorized copy of a work to do whatever he or she wants with that copy. The court recognized that "the choice or frame or glazing affects the impression the art conveys, and many artists specify frames . . . in detail" but found that this concern for context could not be cabined into the right to make derivative works.[44]

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37 Of course, it can be argued that the subsequent work "contaminates" or somehow "corrupts" the original work, but people seem to have no problem in common discourse distinguishing the quality of an original from its descendants.

38 *See* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997).

39 *See id.* at 580.

40 *See id.*

41 *See id.*

42 17 U.S.C. §101 (1995).

43 *See Lee,* 125 F.3d 583.

44 *Lee,* 125 F.3d at 581.

Yet on the same operative facts, courts poised on the edge of civilization—that is California—have taken a different view. In *Mirage Editions v. Albuquerque A.R.T. Co.*,[45] the defendant had taken artwork from pages of a commemorative book of Patrick Nagel's art and mounted each image on a ceramic tile with a protective plastic film over the image and exposed tile surface.[46] In *Munoz v. Albuquerque A.R.T.*,[47] the same defendant engaged in the same mounting activities vis-a-vis notecards carrying the Alaska-themed art of artist Rie Munoz.[48] In both cases, the courts found that mounting an artwork to a ceramic tile produced a new work in which the original artwork had been "recast [ ], transform[ed], or adapt[ed]."[49] In the 1993 *Munoz* case, the district court expressly recognized that while variations in traditional means of framing art do not create derivative works, the ceramic tiles did create derivative works because they permanently bound the art to a new medium.[50] (The Seventh Circuit believed that this difference between permanent fixation and temporary fixation was too thin a reed on which to build a legal distinction.)

The legal pigeonholes used in these cases are not as interesting to me as the conflicting impulses that animate the discussion. On one hand, Professor Patry is certainly right that after it is mounted on a ceramic tile, the artistic image is still the same as when it left the artist's studio.[51] On the other hand, it is certainly easy to imagine that the artist could object to her art being presented in such a wholly new context. It is quite a leap from note cards sent to friends to ceramic tiles mounted in shower stalls. The comparison by both courts to the framing and displaying of a painting was required to parse out the legal definition of "derivative work." However, this focus misses the point. The two courts did not reach different conclusions because there are different techniques for framing painting in California and Chicago.[52] *Perhaps they reached different results because one sought to protect an artist's*

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45 856 F.2d 1341 (9th Cir. 1988).

46 *See* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1342 (9th Cir. 1988). The artworks were single pages taken from *NAGEL: The Art of Patrick Nagel*. *See id.* Nagel is, of course, best known for appearing in *Playboy*. *See id.*

47 829 F. Supp 309 (D. Alaska 1993), *aff'd without published opinion*, 38 F.3d 1218 (9th Cir. 1994).

48 *See id.* at 310-11.

49 *Id.* at 314; *Mirage Editions*, 856 F.2d at 1343-44.

50 *See Munoz*, 829 F. Supp at 314.

51 See William F. Patry, Copyright Law and Practice 823-24 (1994) (disapproving of the decision in *Mirage Editions* on this basis).

52 In California, perhaps, people use more plexiglass (earthquakes) with stronger UV protection (endless summer).

right of integrity through whatever tools were available and the other court was not as solicitous of that artist's concerns and may, in fact, have been more concerned with the downstream uses—often creative— of the art.

Judge Easterbrook was very clear that he was unwilling to see the derivative work right as a "back door [for] an extraordinarily broad version of authors' moral rights"[53]—almost a counterpoise for the recognition twice in the same year by his colleague, Judge Posner, that moral rights have real resonance in American law.[54] The disagreement between these two courts has never been resolved and the derivative work right may yet have power to give a creator some control over context and framework.

IV. Work Within a Work

Another area where "framework" control arguably exists is with reproducible works, including literary, audiovisual, and musical creations. An example of a reproducible work is a "work" that appears within a larger work. I am thinking in particular of copyrighted characters and by some extension, possibly the right of publicity.

In the early 1990s, artist Jeff Koons suffered a series of legal defeats stemming from his incorporation of copyrighted works into his own three-dimensional sculptures.[55] One court stated, "Koons [wa]s part of a contemporary, artistic movement which takes images from popular culture and 're-contextualizes' them in a work of art in an effort to convey a certain message or idea to the viewer."[56] In the case of this sculpture, *Wild Boy and Puppy*, Koons juxtaposed a three-dimensional "Odie" dog character from the *Garfield* cartoon against a stuffed doll and a "butterfly-bee."[57] The artist was using protected images for his own communicative mes-

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[53] *See* Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997). Perhaps to assuage this concern, Ms. Lee had "disclaimed any contention that the sale of her works on tile ha[d] damaged her honor or reputation." *Id.* at 583.

[54] Such recognition was noted in dicta which did not determine the results of the case at issue. *See* Seshardi v. Kasraian, 130 F.3d 798, 803-4 (7th Cir. 1997) ("There are glimmers of the moral-rights doctrine in contemporary American copyright law"); *see also* Ty, Inc. v. GMA Accessories, 132 F.3d 1167, 1173 (7th Cir. 1997) (stating that preliminary injunction "draws additional sustenance from the doctrine of 'moral rights,' . . . a doctrine that is creeping into American copyright law."). *But see* Pierre Leval, *Commentary: Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1129 (1990) (arguing against development of moral rights in copyright law and that "[i]f we want to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of art.")

[55] *See* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 365 (1992); *see also* United Features Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993); Campbell v. Koons, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993).

[56] *United Features Syndicate*, 817 F. Supp. at 372.

[57] *See id.* at 385.

sage, but admitted to the courts that he was not parodying the images.

Under copyright law, Koons would be liable for the simple reproduction of Odie's image even if the context had been a pirated *Garfield* cartoon. But the case is interesting for a discussion of "work" and "framework" because the value to Koons in using "Odie"—perhaps most of the "meaning"—was that his audience was seeing a familiar image in an unfamiliar (and unpermitted) milieu. His audience confronted an image with a familiar personality having familiar characteristics cultivated in one forum: the newspaper cartoon strip. That protected work was suddenly being thrown into a different context. The "recontextualization" of Odie failed as part of Koons's defense in court.

The "Odie" situation is a relatively pure text-in-new-context situation precisely because Koons did not attempt to give Odie new characteristics or traits. A more mixed situation is described in the 1978 case of *Disney v. Air Pirates*.[58] At issue in the case was "an 'underground' comic book which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the Mickey Mouse canon of scrubbed faces, bright smiles, and happy endings."[59] This is a "mixed" example because although the works (the Disney characters) were "placed . . . in incongruous settings," there were also changes made in the characters themselves because they were portrayed "as *active members* of a free thinking, promiscuous, drug ingesting counterculture."[60] Honest and ethical Mickey Mouse was portrayed as having a new personality, not simply being thrown into a very un-Disney situation.

The "work within a work" situation might encompass the right of publicity, although the connection may not be immediately clear. Valuable personas like Brad Pitt, Madonna, and Prince usually become valuable through their appearances in controlled public displays—environments that are often copyrighted works—films, television programs, sports broadcasts, CDs, and music videos. In a sense, these copyrighted works establish a sort of "framework" for the persona being protected. To the degree that we allow celebrities to control their images, we often prevent *not* an alteration of the image, but simply its insertion into a new and unauthorized context.

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58 581 F.2d 751 (9th Cir. 1978).

59 *Id.* at 753 (quoting Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571, 582 (1976)).

60 *Id.* (emphasis added).

V. THE PROBLEM OF *THIRD VOICE*

The Internet offers a new medium in which works seem very unattached to any context. Yet even here, there are some interesting issues related to work and framework. Indeed, one legal dispute that has arisen in cyberspace literally concerns "framing," when person A's web page is presented to Internet users by person B with a "frame" around it that includes person B's own materials. So, the *New York Times* might discover its on-line "cyberlaw" article available on, say, Matt Drudge's "Internet news" site with a frame that says "for the most up to date Internet news, always come to mattdrudge.com." The technology of the Internet permits such "framing." Most of the disputes that have arisen concern commercial ventures and "framing" where a company takes a competitor's content (the "work") and puts it in its own frame, often with advertisements.

It is, however, easy to imagine that these disputes could involve the work of artists who suddenly find their photography or graphic art filtered through someone else's "frame" on the Internet. A new technological development called the *Third Voice* raises the question of whether creators should be free from undue criticism on the Internet, particularly criticism that could take the form of contextual material supplied directly with the creator's on-line graphic art or literary work—in short, a negative *context* forced upon a work.

As configured in early 2000, *Third Voice* was essentially an HTML application that creates a digital overlay on websites, allowing visitors to add comments, annotations, and criticisms that pop up like balloons or "electronic Post-It Notes" on the web page. Opponents of *Third Voice* were concerned about "webmasters' rights to control the integrity of their websites" for whom *Third Voice* is "a digital spray can that tags websites with online graffiti."[61]

These digital Post-Its are only visible to people using *Third Voice* software. The original, underlying website is not corrupted for those not using *Third Voice.* In other words, a web page is "transported" and reproduced in the *Third Voice* environment—a context not chosen by the website creator. Imagine a graphic artist

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[61] Ryan Bigge, *Window Dressing,* SHIFT, Mar. 2000, at 34. More generally, all disputes about unauthorized "framing" of websites by other websites are just that: disputes about the "framework" in which a work is presented. Typically, these involve commercial entity A presenting the content—news stories, databases, etc.—of commercial entity B with a "frame" around A's content so that B can take credit for the content or present advertising in conjunction with the content, etc. *See, e.g., Futuredontics, Inc. v. Applied Anagramics, Inc.,* 1998 U.S. Dist LEXIS 2265, 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

who has put her images on the Internet and discovers, to her chagrin, that her art transported into the *Third Voice* environment has many unpleasant criticisms *directly attached to the visual* images. The "integrity" of the underlying work is not disturbed, but the condition under which it is viewed is nothing like what the artist would have imagined.

The Third Voice technology is itself changing, but this generation of the system raises a host of interesting problems for copyright, First Amendment, and our notions of unfair competition. This technology and similar applications have the potential to generate some commentary in the field of moral rights as well.

VI. Conclusion

Art is a particularly vexing subject because legal scholars are always searching for descriptive generalizations about the world on which to hang legal rules and distinctions. But artists, particularly the self-conscious visual artists of the late 20th and early 21st century, break conventions with gleeful intent. As sure as scholars or judges will make one generalization, a school of artists will start behaving in ways that turn that generalization on its head.

Professor Merryman wrote in his essay *Thinking about the Elgin Marbles*, "[l]ife seems brighter when feelings and thoughts lead in the same direction."[62] He is surely right. But life may be more interesting when our thoughts lead in different directions, not to mention when our thoughts and feelings are sometimes on divergent paths.

Postscript

The essay above tracks fairly closely the comments I made at the Merryman symposium on April 6, 2000. A few things are new here—the *Léger* case, Michael Govan's ideas, Thomas Crow's notions on *Tilted Arc*—but they are exemplary of points made in the April 6 presentation. This postscript addresses some different thoughts.

At the symposium, Mr. Serra said it is a good thing that Michelangelo's Sistine Chapel paintings are not in the United States because, since they are firmly affixed to the chapel ceiling, they would not be protected under the VARA. That is true according to VARA law, but it misses the point. Great works of art and their frameworks can be protected by mechanisms that do not depend

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62 *The Elgin Marbles, supra* note 2, at 1921.

wholly on the will and whim of the individual artist. Recognizing a strong boundary between work and context will not always result in the artist's interests versus those of everyone else. There are real listeners' interests or audience interests[63] "in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted, and 'unimproved' by the unilateral actions of others."[64] Historic preservation laws are an example. Acquisition policies of museums are a non-legal, "social market" mechanism for work/framework preservation. Public attention of the same sort that toppled *Tilted Arc* can preserve some works in context. A work which becomes synonymous with a location—such as Joseph Borovsky's *Ballerina Clown* is in Venice, California, or Martin Puryear's *That Profile* may eventually be at the entrance to the new Getty Museum[65]—begins to approach the status of a "monument." Then, if anything, it is *defended* by a public almost always comfortable with the familiar.

Mr. Serra might respond, as he has said publicly, that art is not democratic and that art should challenge and confront people with perspectives that they would rather avoid. In intellectual property terms, a system that depends on popular will to keep works *in situ* is likely to encourage familiar, happy, and Disneyesque work and discourage confrontational art that pushes the envelope. Perhaps. But our system is hardly one that relies exclusively on popular will. The will of philanthropic patrons more than popular will determined that a Dubuffet occupy One Chase Manhattan Plaza, a Henry Moore fountain be showcased in Lincoln Center, and a Calder hug the corner of 57th Street and Madison Avenue in front of the IBM building. Perhaps people are more comfortable with commemorative art than with manifestations of abstract alienation, but *in situ* art can *confront* people and become very popular. Maya Lin's Vietnam Memorial may be the best example.

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63 *See* Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 987 (1999).

64 *Id.*

65 *See Jonathan Borovsky's Ballerina Clown, available at* http://www.usc.edu/isd/archives/la/pubart/sculptures/clown.html (last visited Feb. 8, 2001) (displaying an image of the *Ballerina Clown*); *see also Clayton Campbell Gallery, available at* pubart/sculptures/clown.html (last visited Feb. 8, 2001) (displaying an image of the *Ballerina Clown*); *see also Clayton Campbell Gallery, available at* http://www.claytoncampbell.com/writings1.html (last visited Feb. 8, 2001) (providing Clayton Campbell's interview with Frank Gehry, where Mr. Gehry notes how the sculpture is treated as representative of the Venice area); Martin Puryear, *Getty Trust Announces Installation of New Sculpture,* ARTSCOPE NEWS (Nov. 18, 1999) *available at* http://www.artscope.net/NEWS/news111899-3.html (last visited Feb. 8, 2001) (discussing *That Profile*).

Still, an artist who wants to "confront" people ought to be prepared for the results of the confrontation. As one commentator wrote, "[t]he public, fed up with the irrelevance of contemporary art, not to mention its manifest hostility toward them, finally rebelled and the work '*Tilted Arc*' was quite properly removed."[66] Art may not be democratic, but we struggle for a democratic social discourse. If "fine art" wants to participate in that discourse, it cannot expect to do so from a completely privileged position. One hundred and twenty-two people out of the one hundred and eighty people who testified at the *Tilted Arc* hearing wanted to keep the sculpture. It appears that fifty-eight opponents were mainly people who used the plaza daily—a fact that, in a democratic, interest-group driven society, presaged the result.[67]

Clearly Mr. Serra feels that the government made a commitment to permanently display *Tilted Arc* in Federal Plaza. I have not examined the evidence in his case, so I do not know the power of this contract claim. I *am* sure that the GSA, as a patron of the arts, performed an injustice to Mr. Serra by not better anticipating the kind of reaction engendered by *Tilted Arc.* The critic Cyril Connolly wrote in *The Unquiet Grave,* "[p]atiently and obstinately, the artist must convince the State that, in the long run, it will be judged by its art and that, if the State is to replace the private patron, then it must imitate and even surpass that patron's tolerance, humility, and liberality."[68] I do not think of the Medicis as having been particularly tolerant or humble, but the GSA was also a very un-ideal patron in Connolly's sense. Professor Hamilton's remarks may point in the right direction: perhaps in a democracy, "the State" cannot be these things. Perhaps by definition, it cannot make a deal like the deal Richard Serra believed that he had.

To extend the point—even if Mr. Serra's contract claim were sound, even if the government had made such a promise, would it be reasonable for Mr. Serra to expect *Tilted Arc* to be there forever? I do not think so. As discussed above, the intention behind *Tilted Arc* was very different from site-specific work like Raymond Kaskey's *Portlandia* that adorns Portland, Oregon's Public Service Building or Daniel Chester French's sculpture of Abraham Lincoln in the Lincoln Memorial. The intention behind *Tilted Arc* was also very different from the temporary installation art of someone like

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66 YAWN, *Artist Sucks* (Nov. 24, 1989), *available at* http://www.thing.de/projekte/7:9%23/y_Artist_Sucks.html (last visited Feb. 8, 2001).

67 *But see* CROW, *supra* note 24, at 148-49 (calling the petitions for the sculpture's removal "unrepresentative").

68 CYRIL CONNOLLY, THE UNQUIET GRAVE 55 (Persea Books 1999) (1944).

Gordon Matta-Clark or Christo. The artist who claims a right to permanently occupy and dominate a major public plaza with an abstract sculpture that does not even pretend to relate to its environment says what to future artists? He either expects society to keep building major public plazas or he expects his art to remain more important and more relevant than that of future artists. In philosophical terms, this raises a problem of "justice among generations." As Professor Merryman reminded us, such a claim sounds a bit like Ozymandias, "king of kings," who expected a giant statue of himself to endure through the ages.[69] In Shelley's poem, we do not know whether wind or earthquake or war or revolution toppled Ozymandias's image, but we know that it was bound to fall.[70]

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[69] *See* John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 348 (1989).

[70] *See* PERCY BYSSHE SHELLEY, *Ozymandias*, *in* THE COMPLETE POEMS OF PERCY BYSSHE SHELLY 589 (1994) ("[t]wo vast and trunk less legs of stone" and "[h]alf sunk, a shattered visage . . . . Nothing beside remains.").