by the Charter by the Supreme Court, or Congress, or by treaty such as the Covenant on Human Rights currently being drafted in the United Nations. The case has been appealed and will probably reach the Supreme Court of the United States when the issue will be squarely before the court, and in view of the concurring opinions in the *Oyama case* it may be that the Court will abandon its previous reluctance and make a determination of the obligations under Articles 55 and 56 of the Charter. If the court does this it may be that it would adopt a view that:

> . . . a promise *to promote* respect for and observance of human rights and freedom is not, under common sense interpretation, compatible with insistence upon the maintenance of internal doctrines and practices destructive of human rights and violent opposition to all change.[40]

WALLACE J. SHEETS

LITERARY PROPERTY—ARTIST'S RIGHT TO PREVENT DESTRUCTION OF HIS WORK AFTER SALE. In the United States an artist's rights in his work are legally protected from economic exploitation by statutory and common law copyright, but his further interest in the work after it has been sold has frequently been denied by the courts. The state of the law is illustrated by *Crimi v. Rutgers Presbyterian Church in the City of New York*,[1] in which the plaintiff, a nationally known artist, executed a fresco mural on the rear wall of the defendant's church. The work was copyrighted, and the copyright was assigned to the church. By 1946 opposition to the painting by various members of the congregation had grown to such a degree that, while redecorating, the church obliterated the mural by covering it with a coat of paint, without previous notice to the plaintiff. The latter filed suit, requesting one of the three following forms of relief: (1) that the defendant be required to remove the obliterating paint; (2) that the plaintiff be permitted to remove the mural at the defendant's expense; (3) that if the other forms or relief should be denied, the plaintiff be awarded damages for the destruction

40. McDougal and Leighton, *The Rights of Man in the World Community*, 14 LAW & CONT. PROB. 490, 513.

1. 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

of his work. The New York Court denied all relief, holding that an artist has no right to prevent destruction of his work by a person to whom it has been unconditionally sold. It based this result partly upon a denial of the proposition advanced by the plaintiff, that "an artist retains rights in his work after it has been unconditionally sold, where such rights are related to the protection of his artistic reputation."[2]

The plaintiff attempted to base his cause of action on the so-called doctrine of moral right of artists, which has been developed more fully in the civil law of the European continent. This doctrine recognizes and protects three main rights which reside in an artist apart from those found under the heading of copyright. They are briefly: 1) his right to control publication or presentation of the work created by him to the public, which includes in some cases the right to modify his work after publication, to withdraw it from the public, and to prevent certain uses of his work which he considers harmful; 2) his right to have his authorship recognized; and 3) his right to prevent alterations or mutilations of the work without his consent.[3] This doctrine of moral right exists in the civil law quite apart from any right of artists under either statutory copyrights or common law copyrights, which are designed to protect the artist's interest in the economic exploitation of his work; indeed, it is designed primarily to protect the non-economic interests of an artist in his work.[4] However, the doctrine has not been accepted in the United States,[5] although there seem to be several judicial hints that in a proper case some courts will use it as a basis of affording the artist relief.[6]

Apparently the principal case is the only one in the United States deciding whether an artist can complain at the de-

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2. *Id.* at 576, 89 N.Y.S.2d at 819. The court also said that the only interest which the plaintiff could claim in the work, since the mural was firmly attached to the wall, would be an interest in real estate and would consequently have to be in writing. This point of the case will not be discussed in this comment.

3. See 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 576 (1938).

4. *Id.* at 575.

5. *Id.* at 802.

6. In Shastakovich *et al.* v. Twentieth Century-Fox Film Corporation, 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948), *aff'd.* 87 N.Y.S.2d 430, the court said: "Conceivably, under the doctrine of Moral Right the court would in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights."

struction of his work after it has been unconditionally sold to another. Thus, it must be accepted as the American law on the point, and it is in full accord with the civil law which will not grant relief to an artist in a similar situation.[7] However, the general language used by the New York court implying that an artist has no rights whatsoever in his work after an unconditional sale to another seems inappropriate; for there are a few cases which demonstrate that an artist retains some rights in his work after its sale, in addition to those protected by a copyright. In several cases it has been held that a purchaser of an artistic work cannot alter the work without the permission of the artist.[8] Although in these cases the courts do not always base the artist's rights upon the doctrine of moral right, they nevertheless have allowed relief on the ground of unfair competition, in spite of the absence of genuine competition.[9] A similar result has been obtained by resorting to the doctrines of defamation, on the ground that imputing to the artist a completely foreign work is a libel.[10] Yet, in other similar cases, the courts in granting relief to the artist, seem to apply something similar to the doctrine of moral right.[11]

7. In the French Case of Lacasse et Welcome C. Abbé Quenard, Cour de Paris, April 27, 1934, D.H. 1934.385, cited in Roedder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, the court held that the artist, who painted murals on the walls of a church could not complain when they were destroyed by the abbé without notice to the artist.

8. Drummond v. Altemus, 60 Fed. 338 (C.C.E.D. Pa. 1894). Prouty v. National Broadcasting Co., Inc., 26 F. Supp. 265 (D.Mass. 1939). Packard v. Fox Film Corp., 207 App. Div. 311, 202 N.Y.Supp. 164 (1st Dep't. 1923). Archbold v. Sweet, 5 C. & P. 219, 1 Moody & R. 62. *Contra:* Meliodon v. School District of Philadelphia, 328 Pa. 457, 195 Atl. 905 (1938) where the Supreme Court of Pennsylvania dismissed the complaint of a sculptor who alleged in his bill that he had created some models for the use of the school district on one of its buildings, that the models were accepted and paid for in full, that the models were altered and placed on the building in the altered form, and that because it was generally known that the plaintiff did the work, he was subject to ridicule and contempt of his fellow artists and as a result he found it difficult to get other sculptural contracts and he was not allowed to enter a bid for similar work on another building. The court refused to require the work to be torn down, saying that if the plaintiff had any cause of action, it was at law for damages, but the defendant, being a governmental agency, would not be liable in tort at law.

9. Prouty v. National Broadcasting Co., Inc., 26 F.Supp. 265 (D.Mass. 1939) Criticized in Roeder: *The Doctrine of Moral Right*, 54 HARV. L. REV. 554, 567.

10. D'Altomonte v. New York Herald Co. 154 App.Div. 453, 139 N.Y.S. 200 (1st Dep't. 1913); Kerby v. Hal Roach Studios 53 C.A.2d 207, 127 P.2d 577 (1942). Criticized in Roeder: *The Doctrine of Moral Right*, 53 HARV. L. REV. 554, 566.

11. See Drummond v. Altemus, 60 Fed. 338 (C.C.E.D.Pa. 1894).

To sustain the artist's right to recover in a case such as the principal one, it could be argued that the plaintiff-artist retains a limited property right in the picture after he has sold it, such as a news gathering agency retains a limited property right after publication in the particular form of news which it has gathered and published.[12] With this as a foundation the plaintiff-artist could prevent the destruction of the work or recover damages after its destruction. Or it could be argued that there is an implied condition in the contract of sale which prevents the owner of the work of art from destroying it.[13]

Aside from these arguments, which may be called strictly legalistic, there are four principal "moral" arguments on which an artist can base his claim of a right to prevent the destruction of his work after he has sold it. These are, briefly, that destruction of the work (1) would tend to destroy the artist's reputation, which would in turn tend to destroy his means of obtaining a living, (2) would greatly injure the personal interest which an artist naturally retains in his own work, (3) would tend to lessen the artist's chances of being remembered in the future, and (4) would be a contravention of the public interest, which should be directed toward protecting the cultural heritage of our society.

Destroying the Artist's Means of Gaining a Livelihood

Where the work of art has been destroyed, especially where it has been exhibited to the public for many years and has been located in such a prominent position that the public would know of its actual destruction, the public would naturally be led to believe that it was of inferior quality, a belief most injurious to the reputation of the artist in the public eye. Since he depends to a great extent on his reputation for his livelihood, destroying the work would be harming a very real economic interest of the artist. This is more obvious still where the work is merely altered and then shown to the public, for in such a case it is quite possible that the display of the altered form of the work would hold the artist up to the ridicule of the connoisseurs and others. True, the modification of the

12. See International News Service v. The Associated Press, 248 U.S. 215 (1918).

13. See Curwood v. Affiliated Distributors, Inc., et al. 283 F. 219 (S.D. N.Y. 1922).

work may actually be an improvement, but it would seem that the artist himself should be the final judge of the form of the work upon which his reputation depends. Therefore, it follows that he should not only be allowed to choose the form in which the work is to be displayed to the public, but he should be allowed to insure that the work not be destroyed.

Personal Interest in the Work

Apart from the injury to the artist's reputation and economic interest, the destruction of the work would be a great personal discomfort to the artist. Since an artist takes great pride in his work, the destruction of it would be a personal injury to him of no little magnitude.

> When an artist creates, be he an author, a painter, a sculptor, an architect, or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect. . .[14]

Therefore, it is incumbent upon courts to recognize an artistic creation not only as an economic product of the artist, but also as an embodiment of his personal expression of beauty, which certainly merits legal protection.

Artist's Desire for Immortality

One of the most impelling factors which drives an artist to create is his desire to be remembered and honored by posterity. But certainly if his work was destroyed immediately after its creation, this desire would be completely frustrated. What would Rembrandt be today if all of his masterpieces had been destroyed so that they could not have been viewed by the public? It would seem that for this reason also, the artist should have some assurance that his works, once they are released for display to the public and out of his control, will not be destroyed.

Public Interest in the Country's Cultural Heritage

The final argument in favor of prohibiting the destruction of the artistic work—and the one upon which the others ultimately rest—is that the public is interested, or should be, in the preser-

14. Roeder: *The Doctrine of Moral Rights*, 53 HARV. L. REV. 554, 557 (1940).

vation of the culture of the country and the development of the arts, which interest should be preserved.[15] The United States has been notoriously backward in the legal protection of those qualities which appeal to the person's aesthetic tastes, and has been often criticized for this neglect. Perhaps the best example of this complete lack of consideration for aesthetic values in determining the legal doctrines of the country is the group of cases concerning the erection and maintenance of billboards which scar the countryside throughout the nation. In cases considering the constitutionality of municipal regulation of the erection of billboards, it is frankly admitted that only a danger to human life or health or something similar will afford a constitutional basis for such control, and that aesthetic considerations are not enough.[16] It would seem that the United States should attempt judicially to correct this oversight, and to offer as much protection to artists as possible in order to preserve the country's cultural heritage.

It has been suggested that the doctrine of moral right be adopted in this country by entering the Bern Convention,[17] which contains the folowing provision:

> Independently of the patrimonial rights of the author, and even after the assignment of said rights, the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his reputation.[18]

Already something closely akin to parts of the doctrine of moral right has been enforced by some of our courts under various headings of the law, sometimes with what appears to be an open acceptance of this doctrine.[19] Undoubtedly, in these areas, a frank recognition of the artist's interest would do much toward standardizing legal thinking on the matter, but to take a further step and suggest that it be adopted, in order to pre-

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15. See 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 603 (1938).

16. Kansas City Gunning Advertising Co. v. Kansas City *et al.*, 240 Mo. 659, 140 S.W. 1099 (1912).

17. See the bills introduced into Congress advocating the entry of the United States into the Bern Convention. S. 1928, H.R. 5853, 73rd Cong. 1st Sess. (1933); S. 3947, 74th Cong. 1st Sess. (1935); H.R. 10632, 74th Cong. 2d Sess. (1936).

18. Bern Convention, International Copyright Union, as revised in Rome (1928), article 6bis.

19. See note 8 *supra*.

vent the destruction of all artistic works, does not take into consideration all of the problems involved.

Undoubtedly the question of destruction only becomes important in the case of paintings, murals, statues, and other forms of art of which there is only one copy, for when many copies are created and distributed, as in the case of books, the destruction of a single copy can hardly do much harm either to the personal interests of the artist or to the public interest in cultural work.

If the work is movable, perhaps the courts would be justified in requiring that the owner sell it or at least give an opportunity to the creator to buy it back rather than destroy it. However, in the case of a fresco mural, the problem is more difficult, because the mural cannot be easily removed. The painting is done directly on the wall, while the plaster is still wet. When the paint is applied to the wall, a chemical reaction takes place, the carbonic acid gas of the paint and the lime oxide of the wall uniting to produce carbonate of lime as the water evaporates. The result is that the wall is not merely coated with a layer of paint, as it is when paint is applied to a dry wall, but the pigment in the paint is in effect absorbed in the wall, and becomes itself a part of the plaster. Although such a work can be transferred, the task is difficult and expensive, and it seems extremely harsh to require the owner of such a work to remove and sell it, as the only alternative to keeping it, rather than to allow him to obliterate it with paint when he has become dissatisfied with the work.

The real issue then narrows down to a balance of the hardship. At this point, two possible courses are open to the courts. They could decide that the aggregate of rights, which is retained by the artist in his work after its sale, is smaller when the work of art is a fresco mural than when the work is movable in nature. Under that theory, the artist would have no right to complain of the destruction of the fresco mural and thus would not be entitled to an injunction against the threatened destruction, nor would be have an action to recover damages, if the work had been destroyed prior to his suit. The other alternative would be to decide that the group of rights remaining in the artist is the same whether his work of art be a fresco mural or a movable creation. Under that theory, the artist

would be allowed to complain of the destruction of his work, but his right to injunctive relief would be limited by the doctrine of balancing the equities, by which the artist would not be allowed to prevent the destruction of the work where it appears, as it does here, that the injunction would cause an undue hardship on the owner of the creation; but the denial of the injunction would not deprive the artist of a cause of action for damages.

In the principal case, the court in effect followed the first of the above mentioned alternatives. It is submitted that the court followed the only reasonable path open to it, and reached a desirable result. Although it is to be hoped that in proper cases, the courts will prevent the destruction or modification of a work of art by applying the doctrine of moral right, the relief asked for in the instant case would have put an intoleralbe burden on the defendant. To require that the defendant retain a work of art, which he does not want, or, as the only alternative, require him to remove it or pay damages to the artist, would be in direct conflict with the American view that a person can do with his property what he wishes. If the artist feels so strongly about the destruction of the work, he should be given the opportunity of removing it at his own expense, where practical, but it would be entirely unreasonable to force upon a person owning such a work of art the alternatives previously mentioned.

C. H. PERKINS

TORTS — EFFECT OF RETRACTION STATUTES ON THE LAW OF LIBEL. — Upon appeal, the present plaintiff's conviction of bribery and grand theft was reversed;[1] defendant newspaper thereupon published an article allegedly defaming plaintiff, who brought an action for libel. Plaintiff alleged that defendant willfully and maliciously published the article knowing it to be false. No allegation was made concerning demand for and refusal of a retraction. Defendant demurred to the complaint, and the court sustained the demurrer, basing its decision on a California statute,[2] which specifies that, as a condition precedent

1. People v. Werner, 29 Cal. App.2d 126, 84 P.2d 168 (1938); People v. Werner, 101 P.2d 513 (1940); People v. Werner, 16 Cal.2d 216, 105 P.2d 927 (1940).

2. CAL. CIV. CODE § 48a (1941). This statute applies only to newspapers and radio stations.