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**A WORK OF ART IS NOT JUST A BARREL OF PORK* – THE RELATIONSHIP
BETWEEN PRIVATE PROPERTY RIGHTS, MORAL RIGHTS DOCTRINE AND THE
PRESERVATION OF CULTURAL HERITAGE**

“Works of art are the property of mankind and ownership carries with it the obligation to preserve them. He who neglects this duty and directly or indirectly contributes to their damage or ruin invites the reproach of barbarism and will be punished with the contempt of all educated people, now and in future ages.” – Attributed to JW von Goethe¹

I. INTRODUCTION

On 15 May 1990, at Christie’s in New York, Japanese paper tycoon Ryoei Saito, purchased Van Gogh’s *Portrait of Dr Gachet* for US\$82.5 million, and two days later made another bid for and won Renoir’s *Au Moulin de la Galette*, this time at Sotheby’s for US\$78.1 million.² At the time, Saito made headline news as not only was the combined sum of US\$160 million an astonishing amount of money even for paintings as celebrated as these two, the sale price for *Dr Gachet* had set the world record for the highest sum ever paid to date for a work of art. Saito made headlines again a year later when he announced that he wished to have the two paintings cremated with him on his death, so as to save on inheritance tax, sending shockwaves throughout the art world.³ Such was the public’s horrified reaction that Saito backtracked and claimed that he had only been joking.⁴ Since Saito’s death in 1996 however, while the Renoir has been accounted for,⁵ the whereabouts of *Dr Gachet* remains a mystery.⁶

The principal issue which arises in the above scenario and instantly springs to mind is the question of whether the owner of a work of art, particularly one which is so celebrated and revered, should have the right to destroy it. The right to destroy is an ancient right, encapsulated in Roman law as *ius abutendi*, a right of full dominion over property, including the right to abuse or destroy the

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* See note 122 below.

¹ Quoted in Julius S Held, ‘Alteration and Mutilation of Works of Art’ (1963) 62 *The South Atlantic Quarterly* 4, 26.

² Terry McCarthy, ‘The Last of the Big Spender: Ryoei Saito last week: under arrest and in deep trouble, a far cry from his coup at Christie’s’ *The Independent* (16 November 1993).

³ Yumiko Ono and Marcus W. Brauchli, ‘Shogun of Shizuoka: Japanese Tycoon who Dazzled Art World Hits a Rough Patch’ *The Wall Street Journal* (28 May 1991).

⁴ ‘Art Collector: ‘Burial’ Plans a Jest’ *Los Angeles Times* (15 May 1991).

⁵ M. Guides, *Art + Paris Impressionists & Post-Impressionists: The Ultimate Guide to Artists, Paintings and Places in Paris and Normandy* (Museum 2011) 39.

⁶ David Osborne, ‘Lost Van Gogh feared cremated with owner’ *The Independent* (27 July 1999).

same.⁷ The principle reflects the recognition of a sacrosanct right to private property with which third parties should not interfere, and is a principle which is ensconced within the liberal conception of property rights in Anglo-American law.⁸ Numerous legal scholars have described the scope of private property rights, and leading scholars such as Honore and Roscoe Pound have certainly acknowledged that private property rights include the right to destroy.⁹ However, the question is whether works of art constitute a special category of property which should be exempted from the application of *ius abutendi*.¹⁰

This is not only a question of private property rights but also a bigger ethical question as to whether the world at large has a moral interest in preventing the destruction of such masterpieces, or indeed in the general disposal of such works, even though these works are in private ownership. The tension is obvious: private property rights are generally accepted to be absolute, and they include the right to destroy. However, works such as the Van Gogh and Renoir can be seen to be part of our common cultural heritage and hence it is arguable that they deserve special protection, even against sacrosanct private property rights. The most passionate and articulate advocate for such special protection is Professor Joseph Sax, who in *Playing Darts with a Rembrandt* acknowledges the tension, saying that “the very idea that things can be both private goods serving private needs, and at the same time objects in which the public has a crucial stake, can be difficult to grasp”.¹¹ However, he argues that even though a Rembrandt owned by a private individual does not belong to us in the first place, and that its destruction therefore would not deprive us of anything, nevertheless it is a “symbolic loss that can occur to others even though the thing destroyed was not theirs”.¹² In his book, Professor Sax makes an impassioned plea for special consideration of culturally valuable or important items.

In particular, this article focuses on this very tension, from a particular angle situated in moral rights doctrine. While copyright law governs the economic rights of a creator, for example, by granting the creator exclusive rights to make copies of his own work, or to distribute copies of his work, moral rights doctrine focuses on the creator’s personal and spiritual relationship with his work, even after he has divested himself of his copyright, for example, by ensuring that his works are correctly attributed to him (paternity right or attribution right), or that they may not be treated in a

⁷ J.G. Sprankling, *International Property Law* (OUP Oxford 2014), 293; B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1972), 154; Lior Jacob Strahilevitz, ‘The Right to Destroy’ (2005) 114 *Yale Law Journal* 781, 785; Edward J McCaffery, ‘Must we have the Right to Waste?’ in Steven Munzer (ed), *New Essays in the Legal and Philosophical Theory of Property* (Cambridge University Press 2001); Roscoe Pound, ‘The Law of Property and Recent Juristic Thought’ [American Bar Association] (1939) 25 *American Bar Association Journal* 993, 997

⁸ Pound (note 7 above) p. 994, pp.996 - 97

⁹ A.M. Honore, ‘Ownership’ in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (1961); Pound (n 7) 997

¹⁰ Sprankling (note 7 above) p. 298.

¹¹ Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 6.

¹² *ibid.*, p. 2.

derogatory manner (integrity right). Although, the scope of the doctrine varies from jurisdiction to jurisdiction, the integrity right is widely recognised as being a core moral right. In its most common form, the integrity right is the right to object generally to mutilation or deformation of one's creation. This is reflected in Article 6bis Berne Convention which outlines the general scope of moral rights as follows:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

It is however not certain if the integrity right also encompasses a right for creators to object to the destruction of their works. While there have been conflicting cases in France and Germany on this issue,¹³ the right has been legislated in countries such as Australia,¹⁴ Switzerland,¹⁵ and the US,¹⁶ although primarily with respect to artistic works only. Recognition of the right has been rejected outright in the Netherlands recently,¹⁷ but hesitantly acknowledged in the UK.¹⁸ Generally, the tendency has been to avoid recognising such a right.¹⁹ It has been argued that destruction amounts to the ultimate form of mutilation,²⁰ and if so, it is unclear as to why the inclusion of a right to object to destruction within moral rights doctrine should be viewed with this much ambiguity and ambivalence. One possible reason for this uncertainty lies in the accepted basis for moral rights doctrine: if its foundation lies in the sphere of personality rights, then its focus centres squarely on the individual author; however if it functions as a public interest right, then there is ample scope for arguing that the integrity right should also accommodate the destruction of works.²¹

Several other reasons have been put forward for not recognising the right.²² The main focus of this article centres on one of the principal reasons: the potential prevalence of a private property right to destroy over the creator's moral right to object to destruction, or at least the tension between the

¹³ Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) at para 8.76.

¹⁴ Copyright Act 1968, s.195AK.

¹⁵ Swiss Copyright Act 1992, art.15, para.1.

¹⁶ Visual Artists Rights Act of 1990.

¹⁷ Judica Krikke, 'Netherlands: copyright - no moral rights protection against destruction' (2004) 26 European Intellectual Property Review N155.

¹⁸ *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* [2010], ECDR, 3 (PCC).

¹⁹ Gerald Dworkin, 'Moral rights in English law - the shape of rights to come' (1986) 8 European Intellectual Property Review 329, 335.

²⁰ Jacques de Werra, 'Le droit a l'integrite de l'oeuvre. Etude du droit d'auteur suisse dans une perspective de droit compare' in H. Hausheer (ed), *Etudes de droit suisse* (Staempfli Editions 1997).

²¹ Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 45.

²² Tania Cheng-Davies, 'Honour in UK Copyright Law is Not 'A Trim Reckoning' - its Impact on the Destruction of Works of Art', *Oxford Journal of Legal Studies*, published online 17 September 2015.

artist's moral rights and the property rights of the owner over the artistic work.²³ It would seem that generally the integrity right, in its traditionally accepted scope, would in *principle* prevail over private property rights to alter, mutilate or to otherwise transform a work in a derogatory fashion. However, even so, there is a bias in favour of private property rights when deciding cases involving such conflict.²⁴

Although France and Germany recognise relatively robust moral rights, to the extent that there is no requirement to show that the treatment of a work affects the creator's honour or reputation,²⁵ in practice, the courts have always conducted an exercise in balancing the conflicting interests of the parties involved: the private property interests of the owner on the one hand, and the moral rights of creator on the other, and in such balancing exercises, private property rights have generally prevailed.²⁶ This general approach reflects the views of French jurists regarding private property rights i.e. that the private property rights of individuals should not be readily compromised even in the pursuit of a public good, except in exceptional cases.²⁷ There is thus no bright line rule, as it would seem, that the integrity right takes precedence over private property rights and cases in France and Germany have generally resolved conflicts on an ad hoc basis with no clear set of guidelines.²⁸ Considering that even though the ambit of the integrity right in its most minimalist form clearly encompasses at least a right to object to alteration, mutilation or deformation short of destruction, but that such right still plays second fiddle to private property rights in jurisdictions which traditionally favour moral rights, it would then appear that a right to object to destruction, the acceptance of which is still uncertain, would certainly fare badly.

The concern with moral rights trampling over private property rights is also evident in the US' chequered history of their copyright regime and its interaction with moral rights doctrine, prior to their eventual adoption of their Visual Artists Rights Act 1990 (VARA). Perkins, in a discussion of *Crimi v Rutgers Presbyterian Church in the City of New York*,²⁹ argued that

²³ Rajan (note 21 above) p. 41; Russell J. DaSilva, 'Artists' Rights in France and the US' (1981) 28 Bulletin Copyright Society of USA 1, 19; Francesca Garson, 'Before that artist came along, it was just a bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork' (2002) 11 Cornell Journal of Law and Public Policy 203, 204.

²⁴ Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 201, 205.

²⁵ *ibid.*, p. 212; Andre Lucas, 'Moral Right in France: towards a pragmatic approach?' (ALAI) in respect of the position in France. In Germany, the prejudice is not limited to honour or reputation but is to any legitimate intellectual or personal interest of the author in the work: Gillian Davies and Kevin Garnett, *Moral Rights* (1st edn, Thomson Reuters (Legal) Limited 2010) at para. 13-006. This is unlike the position in the UK or in the US under the provisions of VARA 1990.

²⁶ Teilmann-Lock (note 24 above) p. 201; Adeney (note 13 above) at para. 8.95-97 and para. 9.104-105; Davies and Garnett (note 25 above) at para. 13-021.

²⁷ See Maree Sainsbury, *Moral Rights and their application in Australia* (The Federation Press 2003), 25, quoting from Montesquieu, Marcade and Laurent.

²⁸ Cyrill P. Rigamonti, 'Deconstructing Moral Rights' (2006) 47 Harvard International Law Journal 353, 366.

²⁹ *Crimi v Rutgers Presbyterian Church in the City of New York* 89 (NYS 2d 813) (Sup Ct 1949).

...to require that the defendant retains a work of art, which he does not want, or as the only alternative, require him to remove it, or pay damages to the artist, would be in direct conflict with the American view that a person can do with his property what he wishes.³⁰

While some American cases pre VARA support Perkins' view and that of the court in *Crimi*, i.e. that the American courts were reluctant to recognise the existence of moral rights doctrine in American jurisprudence,³¹ other cases in the same era had recognised the need to redress such injuries nevertheless, through creative application of other legal principles and theories, such as those pertaining to libel laws and fraud.³² This indicates at least that pre VARA the American courts did acknowledge the injuries sustained by artists, which had to be redressed in some fashion.

In the debates that surrounded the enactment of VARA, it was felt that the enforcement of moral rights would "contradict common law property notions of free alienability and absolute ownership against the world".³³ Similarly the UK's grudging implementation of moral rights has been described as "cynical, or at least half-hearted."³⁴ The rather restrictive and hesitant drafting of the UK's moral rights provisions was in most part influenced by the economic interests of certain groups rather than the interests of authors.³⁵

This article thus identifies several problems in this state of affairs. Firstly, mutilation or alteration of works of art is rectifiable and restorable, but the utter destruction of the same is not. Hence it is inconsistent and ironic that in principle, an artist's objections to the mutilation/alteration of his work may override the property rights of the work's owner, but not his objections against destruction. Secondly, the Saito example throws into sharp relief the distressing consequences of allowing property rights to prevail over the moral rights of authors. While Saito may not actually have destroyed the paintings as he had threatened, nevertheless it was clear that it was within his legal right to do so. The possibility of such masterpieces facing destruction is unthinkable. The Saito example highlights the very issue in an extreme form: two renowned masterpieces with their fate in the hands of a wilful owner. While a Van Gogh will likely invoke an extreme reaction from the art world, would an unknown piece be met with similar opprobrium? The point however about lesser known pieces is that they may well be the masterpieces of the future, and hence be an indispensable element of our future generations' common cultural heritage.

³⁰ Charles Harvard Perkins, 'Literary Property - Artist's Right to Prevent Destruction of his Work after Sale' (1951) *Washington University Law Review* 124, 131.

³¹ A list of these cases are referred to in Mary Lee, 'Moral Right Doctrine: Protection of the Artist's Interest in his Creation after Sale' (1950) 2 *Alabama Law Review* 267 at footnote 28.

³² *ibid.*, pp.272-79.

³³ Garson (note 23 above) p. 214.

³⁴ Jane C. Ginsburg, 'Moral rights in a common law system' (1990) 1 *Entertainment Law Review* 121,129.

³⁵ Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Commonlaw Countries' (1994) 19 *Columbia Journal of Law & the Arts* 229, 245 and 257.

There are numerous other instances in which works of art have been destroyed by their owners with impunity. One well known example occurred in the UK, where Graham Sutherland's portrait of Winston Churchill was destroyed by Lady Churchill soon after Churchill's death.³⁶ In Australia, instead of selling a Picasso Lithograph, *Trois Femme*, in its entirety, a mail order company cut it up into several pieces, and offered each separate piece for sale, thus maximising the monetary return of the work.³⁷ In the US, the Rockefellers commissioned Diego Rivera to execute a mural on the Rockefeller Centre, only to demolish the same when they decided they did not like the content of the mural.³⁸ Apart from the fact that these examples comprise undoubted masterpieces, they also only form the mere tip of an immense iceberg comprising innumerable maimed and destroyed works of art in our cultural history, thus demonstrating the importance and urgency of the issues raised in this article.

II. OUTLINE OF ISSUES AND CENTRAL ARGUMENTS

The central issue which this paper addresses is the question of whether private property rights remain a valid objection against the recognition of the right to destroy in moral rights doctrine, with particular emphasis on artworks. It will be argued primarily that there are cogent reasons why works of art fall within a special category of private property, which is not subject to the usual rules of property. Following on from Joseph Sax's plea for an exception to the absolute private property principle in favour of culturally important items, this article will make the argument that such an exception *should* indeed be recognised, based on the idea that art is a *common good*.

This article will firstly closely examine the concept of *ius abutendi*, as a strand of liberal property theory, before considering the application of this concept to art ownership. Underlining any rebuff to *ius abutendi* involves the acceptance that the arts comprise a special category of property, deserving an exception to the application of *ius abutendi*. This argument will be made on the basis of the following four observations: firstly, that *ius abutendi* is not *always* applicable; secondly, that art is a common good and therefore it is in the public interest to preserve and protect art; thirdly, closely related to the common good argument, it is argued that stewardship is the more appropriate form of holding where cultural works are concerned; and finally, there is scope for arguing that cultural works possess a "special aura of worth",³⁹ therefore requiring and deserving some form of protection.

In confronting the above issues and in making the aforementioned arguments, this article will draw heavily upon the scholarship of academics such as Sax, Merryman and Elsen, all being

³⁶ Jennifer Mundy, *Lost Art* (Tate Publishing 2013), 100; Sax (note 11 above) p. 38.

³⁷ Nicholas Forrest, 'Picasso Gets the Chop!!' (2008) <<http://www.artmarketblog.com/2008/04/17/picasso-gets-the-chop-artmarketblogcom/>> accessed 12 January 2016.

³⁸ 'Rockefeller Centers Ousts Rivera and Boards Up Mural' (10 May 1933) <http://xroads.virginia.edu/~MA04/hess/RockRivera/newspapers/NYHerald_05_10_1933.html> accessed 29 September 2014.

³⁹ Richard Brilliant, 'Do Art Objects Have Rights?' (1991) 73 *The Art Bulletin* 534.

unremitting supporters of the idea that the preservation of the arts is indubitably in the public interest, together with a consideration of the principles key to the development of the concept of stewardship in property law, as well as the concept of the *common good* as developed by Thomas Aquinas. This article will also engage with key arguments raised by art philosophers such as Tormey, Young, Sparshott and Goldblatt, who have deliberated over the question of whether art objects themselves have rights, including the right not to be destroyed.

Crucially, the main point of the article is that if the arts are indeed a common good and that it deserves special recognition, treatment and *protection*, thus trumping private property rights, then for moral rights doctrine to disregard the right to object to destruction is utterly incompatible with this stand. It has been argued elsewhere that the question of whether moral rights doctrine offers the creator a right to object to destruction is dependent on how the doctrine is perceived. On the one hand, some academics argue that moral rights doctrine has a role in protecting cultural heritage and that, in the public interest of protecting cultural heritage, it should therefore encompass such a right.⁴⁰ On the other, others are equally adamant that it is merely a bundle of individual or personality rights belonging to a creator, and hence is concerned with only protecting the creator, not his work. However, even so, what is moral rights doctrine's rationale for protecting the creator? The underlying justification lies in the public interest as well. Moral rights doctrine complements and supplements the rights afforded by the copyright regime, which are fundamentally economic rights belonging to the creator, the impetus for which is driven by the public interest in "the production of new work...in order to enrich and diversify the whole culture".⁴¹ Moral rights doctrine, its integrity right in particular, recognises and protects the intrinsic value, as opposed to the purely monetary value, of a work to its creator. It reflects the deeply meaningful relationship that a creator has with his work, and as such, it makes sense that the creator would want to protect, nurture and preserve his work, and not to see it maimed or destroyed.⁴² By recognising this aspect, and not just the commercial aspects of a creator's relationship with his work, it sends a powerful message that the country's artists, writers and other creators are highly valued and cherished, and it is in the public interest to send such a message.⁴³ By protecting and preserving creative works, it also fulfils the public interest in ensuring that quality authentic and original works are maintained for not only the current generation but also future generations.⁴⁴

⁴⁰ Patrick Masiyakurima, 'The Trouble with Moral Rights' [Wiley on behalf of the Modern Law Review] (2005) 68 *The Modern Law Review* 411, 424; Rajan (note 21 above) p. 5.

⁴¹ Davies and Garnett (note 25 above) at para 2-002.

⁴² Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010).

⁴³ Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 *Columbia Journal of Law & the Arts* 297, 302.

⁴⁴ P. Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014), 51.

A more robust recognition of the right to object to destruction would ensure that no work ever fall victim to the caprices of the Saitos in the world. In the process, this article argues that the role of moral rights doctrine lies in the public interest to protect creators, and it can only do so if it also values the creator's right to object to destruction of his work.

III. PRIVATE PROPERTY RIGHTS AND *IUS ABUDENTI*

The key question addressed in this article is whether works of art are just like any other entity which might be the subject of private property or they constitute a special category of private property which deserve special consideration. If works of art constitute ordinary private property, are they however exempted from the draconian effects of the application of *ius abudenti*? If so, on what basis are works of art so exempted?

As identified above, the liberal theory of property is the current dominant theory in the West,⁴⁵ which has been propounded by theorists such as Locke, Bentham Austin through to Nozick and Rawls. Private property rights in themselves have been justified as far back as Aristotle, who in rejecting Plato's ideals of communal property as being unworkable, explained that "where everyone has his own sphere of interest, there will not be the same ground for quarrels, and the amount of interest will increase, because each man will feel he is applying himself to what is his own",⁴⁶ which anticipates the utilitarian justification for the liberal theory of property as we know it today. The key justification for Aristotle is that having private property over things ensures that the thing is cared for.⁴⁷ In 1766, William Blackstone's Commentaries on the Laws of England describes property ownership as thus:

That sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.

The classical utilitarians justified private property ownership by the measure of human happiness such ownership brings. According to JS Mill, "...the feeling of security of possession and enjoyment, which could not ... be had without private ownership, is of the very greatest importance as an element of human happiness."⁴⁸ Fellow utilitarian, Bentham defines property as an "established *expectation* of advantage" in the thing that is owned. Austin describes property holding in more specific terms: "...any right which gives the entitled party an *indefinite* power or *liberty* of using or disposing of the subject" which reflects the wholly autonomous characteristic of the individual in that

⁴⁵ Ross Zucker, 'The Underlying Logic of Liberal Property Theory' in *Democratic Distributive Justice* (Cambridge University Press 2003), 27.

⁴⁶ Gregory S. Alexander and Eduardo M. Penalver, *An Introduction to Property Theory* (Cambridge University Press 2012), 17.

⁴⁷ McCaffery (note 7 above) p.78.

⁴⁸ J.S. Mill quoted in Charles Norton, Letter to Chauncey Wright, 13 September 1870 referred to in Edward H. Madden, 'Charles Eliot Norton on Art and Morals' (1957) 18 *Journal of the History of Ideas* 430, 432.

he is utterly free to do what he will with the thing that he owns, in other words, there is an expectation on his part in enjoying every advantage that he can take from the ownership of his property, fulfilling Bentham's vision of property. Presumably then, this indefinite liberty to use or dispose of the subject includes the right to destroy.

Ius abudenti, while having its roots in Roman law, is reflected in traditional Anglo-American conception of property rights, which generally recognises the principle of full liberal ownership. In other words, a property owner possesses the thing owned so fully and completely that he is at liberty to do whatever he wishes with it, as described by Austin and Bentham above. JS Mill was apparently of the opinion that it was "just and expedient to exercise absolute control – the *ius utendi et abutendi* – over movable wealth".⁴⁹ *Ius abudenti* thus reflects the *ultimate* act a property owner may inflict on his property: utter destruction. If the property owner may destroy his property with impunity, then he clearly has the right to do less dramatic things to his property.

Tony Honore, in his essay *Ownership*, famously lists 11 necessary incidents of ownership under the liberal concept, one of which is no. 5 in the list, the Right to the Capital, which he describes as "the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it".⁵⁰ The question as to the extent of an absolute right to waste or destroy is questioned very briefly by Honore, following his description of the right to the capital: "the latter liberty [i.e. to waste or destroy] *need not be regarded as unrestricted*" and he goes on to observe "but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership."⁵¹ On the one hand he does acknowledge that such a right to waste or destroy may be restricted, and yet on the other, that this does not accord with his liberal conception of ownership.⁵²

The main point is that Honore does acknowledge that the right to destroy *may well have* restrictions. The questions as to what these restrictions are and why we should have them, considering that we are supposed to have full liberal ownership of our property, are unfortunately not dwelled upon by Honore as he merely says that "most people do not wilfully destroy permanent assets" anyway.⁵³ Similarly, Epstein thinks that the risk of people destroying their physical assets is small.⁵⁴ However, their assumption that most people do not wilfully destroy their assets, while based on perhaps a fairly reasonable observation of ordinary people in general, has not taken into account the numerous incidents involving the maiming, destruction or neglect of works of art throughout history,

⁴⁹ *ibid.*

⁵⁰ Honore (note 9 above) p. 372.

⁵¹ *ibid.*

⁵² This tentative view by Honore is noted by McCaffery in McCaffery (note 7 above) p. 80.

⁵³ McCaffery explains Honore's views on the basis that Honore deemed the fact of waste to be unimportant: *ibid.*, p. 80.

⁵⁴ Richard Epstein, 'Justice across the Generations' (1989) 67 Texas Law Review 1465, 1487.

many of which involve masterpieces by renowned artists.⁵⁵ Even though it is well known that many artworks by established artists, certainly those by renowned masters, not only command considerable value but also maintain and in many cases appreciate in value, this has not prevented the owners of art works, whether private individuals or museums, from destroying or neglecting their charges. As such, it is clear that market forces and an appreciation of the value of such works do not always prevent injury to art works.⁵⁶

Strahilevitz argues that we should have the liberty to destroy, if only to give full countenance to our ownership of our property, which in turn underscores our sense of security and liberty with our very own lives,⁵⁷ and indeed benefit society generally in that the freedom to destroy values our right to privacy, encourages innovation and risk-taking.⁵⁸ He writes that judicial treatment of our right to destroy, certainly in the US courts at least, has been inconsistent, as for example, the courts allow the destruction of organs and fetuses, notwithstanding their value to scientific research and to patients in need of transplants,⁵⁹ but disallow in some cases, the destruction of houses and personal items.⁶⁰ He also makes the point that destruction may also be an expressive act, for example, the person toppling the statue of a dictator expresses his anger at the repression signified by the statue and thus is an expressive act. To prevent this destructive act would be to curtail the destructor's freedom of expression.⁶¹

However, Strahilevitz does recognise that destruction achieves little on balance – the act is final and how is the creator of the destroyed work able to respond to the message deployed by the act of destruction?⁶² “Destroying a unique irreplaceable piece of property is...closer to heckling than to responding to what he [i.e. the creator of the property] has to say”.⁶³ Throughout his piece, Strahilevitz takes issue with Sax's position but in the end analysis, even though he is a strong advocate of the right to destroy, he is still hesitant about its wholesale application to situations involving valuable, “unique and irreplaceable” works.

There is therefore a substantial case for restricting the right to destroy in situations involving unique and irreplaceable works such as works of art. It is unfortunate that Honore and Epstein do not confront the risk or consequences of destruction in more depth, but instead simply brush it aside on the basis that the risk, although real, is small, primarily on the basis that people would not destroy

⁵⁵ Comment, ‘Protecting the Public Interest in Art’ (1981) Yale Law Journal 121, footnotes 1 and 2

⁵⁶ An observation by the authors of ‘Protecting the Public Interest in Art’ *ibid.*

⁵⁷ Strahilevitz (note 7 above)

⁵⁸ *ibid.*, p. 786.

⁵⁹ *ibid.*, pp. 803-07.

⁶⁰ *ibid.*, pp. 796-800.

⁶¹ *ibid.*, p. 824; Also a view taken by Amy M. Adler, ‘Against Moral Rights’ [California Law Review, Inc.] (2009) 97 California Law Review 263.

⁶² Strahilevitz (note 7 above) p. 827.

⁶³ *ibid.*, p. 827.

valuable works. As already pointed out above, their observation does not bear up considering the number of not only art works, but also other valuable creative works,⁶⁴ which have been destroyed throughout history. Further, although Strahilevitz makes a cogent case for the right to destroy, even he falters where valuable and unique works are concerned. McCaffery questions the wisdom and necessity of having such a right as *ius abutendi*, labelling it “an embarrassment” as it gives the owner the right to destroy valuable resources without justification.⁶⁵

In any event, there is precedent for the curtailing of property rights in modern property law. It has long been recognised that property rights are not absolute as illustrated by the following examples: the ownership of listed buildings; land ownership subject to laws such as nuisance and the Rylands v Fletcher rule; real covenants etc. Clearly, property rights may, in the right circumstances, be restrained in the public interest. Therefore, if the purpose of moral rights is to serve the public interest, then likewise, they pose a valid reason for the curtailment of property rights in certain circumstances at least.⁶⁶

In the sections which follow, an argument will be made for the value of the arts to society, and why the arts should be regarded as a common good or a public interest. Further, if the arts are truly in the public interest or are a common good, then an argument will be made for the stewardship of the arts.

IV. OWNERSHIP OF ART: CONFLICTING RIGHTS AND RESPONSIBILITIES

Eminent art historian, Professor Julius Held, explained away the various acts of mutilation and destruction meted out to art works over the centuries as the “widespread conviction that works of art owned by a private person are his undisputed property and that he can do with them exactly as he pleases”.⁶⁷ As such, Held exhorted that the legal relationship of art to private ownership needed to be clearly defined.

Professor Sax has heeded this clarion call and taken up the mantle as an advocate for the imposition of responsibilities and obligations upon the owners of not only fine art, but also other important cultural treasures, such as personal letters penned by historical or important figures or presidential papers. He not only advocates a bar on destruction, but also calls for access, not necessarily full and unqualified, to works of historical, scientific or cultural importance. In his section on the fine arts, with which this article is primarily concerned, among the examples discussed were the Rockefellers’ destruction of Diego de Rivera’s mural, *Man at the Crossroads*, and Sutherland’s

⁶⁴ Sax has identified a variety of culturally valuable works which have been destroyed in history: Sax (note 7 above).

⁶⁵ McCaffery (note 7 above) p. 81; Sprankling (note 7 above).

⁶⁶ Sainsbury (note 27 above) p. 27.

⁶⁷ Held (note 1 above) p. 26.

portrait of Churchill. Both cases are difficult ones because the first involved the artist's commissioning patron, while the second involved an unflattering portrait of an important figure.

The conflicting rights of the parties involved are plain to see, and differ from the more unlikely scenario of an eccentric billionaire disposing of his Renoir. While the latter may argue that his personal property rights are sacred, the other parties have other rights which go beyond mere proprietary rights. The Rockefellers were understandably perturbed with the communist propaganda emanating from the mural, and hence did not want to be associated with the same. Being a commissioning patron of the mural, it would have indicated that the Rockefellers were behind the communist sentiments portrayed within. As for Winston Churchill, he was repulsed by the way he was portrayed, basically as an old man in his twilight years, no longer the great wartime leader that he once was. The conflict here is thus the right of the important subject who wishes to manage the way he is portrayed publicly with that of the artist's own vision of the subject.

Apart from Strahilevitz, other scholars have also disagreed with Sax on his call for a legal ban on destruction. After all, they argue, there are many social deterrents against destruction in place. Hall notes at least two.⁶⁸ Firstly, the prohibitive financial loss inflicted by the destruction of a work of art, especially if it is by an important artist.⁶⁹ Secondly, the public outcry at such an act.⁷⁰ In Honore's view, highlighted above, most people simply would not wilfully destroy their possessions anyway, and that is basically why academics have dismissed any problems which might arise from the wilful destruction of property.

It is submitted that this is only a perception, and simply a *reasonable expectation* of how *reasonable* people are likely to behave. The problem is that it is equally likely that there are a considerable number of unreasonable or simply unpredictable people who are in possession of important or valuable items. Just because it is *perceived* that *reasonable* people are *unlikely* to destroy their possessions including culturally important ones, it is no reason not to consider a legal solution to the problem. There are after all a fair number of cases involving the destruction of important works by *reasonable* parties, whether based on seemingly reasonable grounds (e.g. the removal of Richard Serra's *Tilted Arc*,⁷¹ or the demolition of 5Pointz⁷²) or more personal subjective ones (e.g. the burning of Sutherland's portrait of Churchill or the destruction of Rivera's mural). Further, a legal solution is also required mainly because of the extent of the loss to society in the event a work of art is destroyed.

⁶⁸Jason Y. Hall, 'Who "Owns" a Cultural Treasure? Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures by Joseph L. Sax' (2000) 98 Michigan Law Review 1863

⁶⁹ *ibid.*, p. 1865.

⁷⁰ *ibid.*, p. 1865.

⁷¹ Richard Serra, 'Art and Censorship' (1991) 17 Chicago Journals 574.

⁷² Susanna Frederick Fischer, 'Who's the Vandal? The Recent Controversy Over the Destruction of 5Pointz and How Much Protection Does Moral Right Law Give to Authorised Aerosol Art?' (2015) 14 The John Marshall Review of Intellectual Property Law 326, 326.

Indeed, is this not reflected in the second of Hall's two social deterrents: the public outcry. It is firstly doubted that a public outcry would necessarily be an effective deterrent to one who is determined to destroy anyway, and secondly, a public outcry surely reflects the depth of feeling on the part of society when something like this happens, and hence suggests that this is a serious problem at least, which requires a solution.

Sax's solution thus is that there should be "qualified ownership founded on the recognition that some objects are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community's rightful stake in them". One question is what objects are considered to be "constituent of a community", and why. In particular, the focus of this article is on works of art, and the question is whether they are "constituent of a community" and hence require *special consideration*. Although Sax does not explicitly make reference to the concept of *common good*, it is arguably what he had in mind in framing his argument in *Playing Darts with a Rembrandt*. Joseph Sax was after all a prominent environmental lawyer, passionate about the public rights to natural resources. In arguing that natural resources, such as land and water, are a public trust, requiring special protection, he drew inspiration from Roman Law and English common law, and argued against expansive private rights at the expense of public interest. His foray into cultural material is argued along the same vein, that works of art and other goods of cultural importance should be subject to a kind of public trust, entrusted to guardianship, stewardship and similar notions.

Arjo Klamer, professor of cultural economics, not only explains why the arts are a common good from an economics point of view, but more pertinently, explains why a private owner of a work of art, who experiences the value of the common good in the art he owns, would willingly invest more in and take responsibility for that art. According to him, the more valuable the common good in question, the more willingly would participants contribute to the common good.⁷³

The next section thus continues with a discussion of the notion of the public interest/common good as it applies to the arts, drawing from a diverse variety of sources, ranging from Aristotle and Aquinas to contemporary property theorists.

V. THE VALUE OF THE ARTS TO SOCIETY – IS IT A PUBLIC INTEREST/COMMON GOOD DESERVING OF STEWARDSHIP

Dr Werner Jerke, a renowned collector of Polish contemporary works, in a recent interview echoed Goethe's sentiments:

⁷³ Arjo Klamer, *Art as a Common Good* (2004).

In my opinion, if someone is an owner of a piece of art, it's not only his property. The masterpiece belongs to society in general and I'm only lucky to keep it for a moment.⁷⁴

A work of art thus “belongs to society in general” and is the “property of mankind” in the words of Jerke and Goethe respectively. The ethos behind these exhortations reflect the idea that artworks are of such important benefit and value to humanity that the few individuals in possession of them only hold them in trust for the rest of society and future generations. In other words, owners of art should act as stewards rather than as outright owners in possession of all the property rights which private ownership normally entails. The argument thus put forth in this article is that, if art owners are no more than stewards, then in contemplating the tension between the integrity right and the owner's rights in the art work, the courts should tread carefully in usurping any of the artist's rights, including and perhaps *especially* any possible right to object to the destruction of his work. This section thus firstly and briefly explores the general idea of what is a common good or public interest, as well as the concept of stewardship, before moving on to consider if art and culture are indeed a common good.

A. *Stewardship based on the Public Interest/the Common Good*

The aim here is to formulate and justify a clear argument for the stewardship of art works on the basis that they are in the public interest and/or a common good. The questions are firstly why stewardship is a more appropriate form of holding for certain types of property, secondly, what are the common features of such property, and thirdly, whether art and other types of cultural property fall within such categories of property, hence qualifying for stewardship.

In terms of legal regulation over property, discussions of the concepts of stewardship and the public interest have traditionally centred primarily on their application to natural resources. Further, until recently, legal debates over property ownership have been dominated by rights and entitlements discourse.⁷⁵ However, in tandem with a growing and acute awareness of urgent environmental and sustainability issues, in recent academic work on property rights, in particular those over land, the stewardship model of property has begun to emerge as the dominant theory, over the liberal or absolute property rights model in general.⁷⁶ One reason is the recognition that land ownership as practically conceived is subject to such a range of constraints that it is incompatible with notions of private property rights, which embraces full and unencumbered rights of control, exclusion and alienation. Another reason is the recognition that certain resources are not only scarce but lie also within a community's interests to be maintained not only for the community but also future

⁷⁴ Dr Werner Jerke, *"The Art is a Common Good Which Belongs to the Society No Matter Who Is Its Actual Owner" - A Conversation with the German Collector Werner Jerke* (Contemporary Lynx 2013).

⁷⁵ D.S. Cowan, L.F. O'Mahony and N. Cobb, *Great Debates in Property Law* (Palgrave Macmillan 2012), 121.

⁷⁶ Helena R. Howe, 'Copyright limitations and the Stewardship Model of Property' (2011) 2 Intellectual Property Quarterly 183.

generations.⁷⁷ Further, there has been a growing recognition that indigenous cultural heritage and land deserve special recognition on the basis that they belong to “peoples” rather than individual persons, and hence are more appropriately the subject of stewardship rather than liberal property rights, which narrowly conceived, focuses on strong individual rights and entitlements.⁷⁸

According to Lucy and Mitchell,⁷⁹ stewardship with its connotations of duties and obligations, is wholly incompatible with private property rights. They reject any suggestion that ownership of land is a combination of private property rights and stewardship. What they suggest is that private property is “conceptually and normatively inappropriate” in accounting for the ownership of land,⁸⁰ and that stewardship instead fully and accurately accounts for any possession of land, in other words, stewardship provides a more accurate description of the *actuality* of the rights and obligations to which land owners are usually subject, for example, statutory constraints such as planning restrictions or common law ones such as those imposed by the law of nuisance or the *Rylands v Fletcher* rule.⁸¹ This however was not the sole aim of their thesis; Lucy and Mitchell make it clear that by recognising land ownership as a form of stewardship rather than the “do with it as we please”⁸² form of private property, it helps to bridge the expectations of land owners and their actual experience.⁸³

The ownership of art, similarly, is already encumbered with certain legal constraints in actuality. For example, unless copyright ownership has also been transferred along with the property in the art work itself, the art owner may not make any copies of his property. Even more intrusive where the art owner is concerned are the moral right of attribution, whereby the artist must be identified whenever his work is exhibited,⁸⁴ and the *droit de suite*, whereby the artist is entitled to receive a portion of the price for which his work is resold.⁸⁵ These constraints are undoubtedly beyond those exhorted by the general ancient maxim, *sic utere tuo ut alienum non laedas* (use your own property as not to injure that of another);⁸⁶ they actually impose certain positive obligations on the part of the art owner. Not only must an art owner ensure that the artist is fully and properly identified

⁷⁷ J. Rawls, *A Theory of Justice (ORIG EDN)* (Harvard University Press 1971)

⁷⁸ Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, ‘In Defense of Property’ (2009) 118 *Yale Law Journal* 1022 ; Jessica C. Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer 2014)

⁷⁹ William N.R. Lucy and Catherine Mitchell, ‘Replacing Private Property: The Case for Stewardship’ (1996) 55 *Cambridge Law Journal* 566.

⁸⁰ *ibid.*, pp. 566-70.

⁸¹ *ibid.*, pp. 571-72.

⁸² *ibid.*, p. 570.

⁸³ *ibid.*, p. 598.

⁸⁴ For example, in the UK this is provided in the UK Copyright Designs and Patents Act 1988, s. 77.

⁸⁵ Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

⁸⁶ Victor John Yannacone, ‘Property and Stewardship - Private Property Plus Public Interest Equals Social Property’ (1978) 23 *South Dakota Law Review* 71, 91; Described in no. 9 of Honore’s List in Honore (note 9 above),

each time he exhibits his property, he must also relinquish part of his total takings in the event he sells on his property.

Similar to the aims of Lucy and Mitchell's article, the aims of this article are firstly to articulate a clearer and more appropriate understanding of the legal nature of art ownership, so as to bridge the expectations of art owners and their experience, and secondly, to also counter the "widespread conviction that works of art owned by a private person are his undisputed property and that he can do with them exactly as he pleases" as lamented by Professor Held.

Lucy and Mitchell however reject the idea that public interest accounts for the range of duties and obligations that accompany the ownership of land, on the basis that public interest is too vague to define. This is where this article and theirs diverge. While it is conceded that the concept of public interest is rather amorphous and difficult to grasp, nevertheless, it is contended that this in itself should not preclude the role it plays in property ownership. Richard Barnes, like Lucy and Mitchell, in examining the ownership of natural resources such as the ocean or fisheries,⁸⁷ argues that stewardship is an alternative regime for property holding, although unlike them, he argues that the public interest plays a profound role in the formulation of stewardship as a form of property holding. Underpinning his argument is the recognition that property ownership is a social institution, serving public interests. He counters the arguments raised by Lucy and Mitchell by arguing that although the notion of public interest is at first view a difficult one to pin down, and indeed there appears to be little scholarly agreement as to the precise content of public interest,⁸⁸ nevertheless it is possible to construct a coherent framework in which we can determine whether or not certain claims are in the public interest.⁸⁹ Barnes' interest lies in natural resources and in this regard he argues that they comprise what he terms as "first order interests",⁹⁰ i.e. according to him, public interests which meet the physical needs of a community essential for their survival.⁹¹ Although he barely refers to other types of subject matter beyond natural resources, he does acknowledge the existence of other community interests, the securing of which stewardship may have a role to play, which includes the community's aesthetic interests or cultural values,⁹² thus underpinning the arguments set out in this article.

This article is clearly not concerned with questioning the appropriateness of applying the concept of stewardship to the holding of land or natural resources, but instead, drawing from Barnes' scholarship, it endeavours to argue that the public interest is sufficiently defined and capable of underlining the features of stewardship, and that it includes a community's aesthetic interests or cultural values. Further, it wishes to draw from property scholarship, such notions and principles of

⁸⁷ Richard Barnes, *Property Rights and Natural Resources* (Hart 2009)

⁸⁸ *ibid.*, p. 69.

⁸⁹ *ibid.*, p. 69.

⁹⁰ *ibid.*, p. 161.

⁹¹ *ibid.*, p. 89.

⁹² *ibid.*, footnote 179 at p. 161.

stewardship which have been applied to land holding, but which also may be readily transferable and applied to the arts and cultural heritage, as well as the idea that there is undoubtedly a public interest in the arts.

The idea of the common good, and in particular, how it should be so treated also assists in informing the discussions central to this article. Essentially, it will be seen that the notions of common good will explain how best art owners should act in respect of their art collections vis a vis the community in which they reside. It is firstly necessary to clarify the meaning of the common good, a term which is generally used interchangeably with public interest.⁹³ There is, as conceded above, little scholarly agreement on the precise meaning of either public interest,⁹⁴ or common good.⁹⁵ That the terms may be regarded as synonymous with each other is certainly accepted by Amitai Etzioni, who describes the common good as those “that serve all members of a given community and its institutions, and...that serve no identifiable particular group, ...[and] members of generations not yet born”,⁹⁶ an approach adopted by this article. Although there are subtle variations of the common good, ranging from the common good as historically developed by Plato and Aristotle and later in Christian theology, notably by Aquinas, and later in economics, law and political theory, the common feature is that recognition of the common good is not only good for the community at large, but is also good for each and every member of that community including property owners themselves.

This article is underpinned by the teachings of Aristotle, Aquinas and Etzioni on the common good in the following way. Firstly, it should be understood that the manner of property holding advocated by Aristotle is important in fulfilling an important goal: that of living a fulfilling, proper and moral life ultimately. Aristotle argued that man is a social and political being, who has to live harmoniously within the community, in relation to his fellow citizens.⁹⁷ In order for a person therefore to flourish and live a rich and complex life, he has to engage in virtuous activities which enable him to live harmoniously with his fellow citizens, contributing to the ultimate goal of a fulfilling, proper and moral life. Where property is concerned therefore, private ownership can contribute to human flourishing if it is also exercised with *generosity*. In other words, private ownership gives a person power over a thing, but if he chooses not to exercise that power, and instead generously shares his possession willingly with others, he is acting with virtue, which contributes to his well-being and allows him to flourish in turn. In the context of this article therefore, it is in the interests of the art owner and the community in which he resides, to generously “share” his collection of art works with his fellow members of the community. Only then will he flourish according to Aristotelian ideals.

⁹³ A. Etzioni, *The Common Good* (Wiley 2014)

⁹⁴ Barnes (note 87 above) p. 69.

⁹⁵ Etzioni (note 93 above).

⁹⁶ *ibid.*

⁹⁷ Aristotle, *Nicomachean Ethics*, trans. Ostwald (1962) IX.9 1169b17-19

Aquinas, in developing his common good theory, sees no contradiction between private interests and public interests, and proposes that the common good may be achieved without necessarily alienating individual or private goods.⁹⁸ While Aquinas' views are set within a theological framework, and that as a matter of theology, Aquinas may not have *sanctioned* private property,⁹⁹ he nevertheless *justified* it on the basis that possessions will be more carefully looked after and that property affairs will be administered in a more orderly fashion,¹⁰⁰ which reflects the views of Aristotle as set out above. Further, Aquinas sees private property as being "useful to the achievement of the common good".¹⁰¹ As such, where property is concerned, the issue with which this article is most concerned, he thought that property should be privately owned and managed but also *readily shared for the public good*.¹⁰²

Hence, following on from this, if we accept that a work of art is a common good, the owner of such a culturally important work can enjoy private ownership and possession of the same but also has a *duty to ensure that the public benefits* from it too, which in turn means a duty to protect and preserve art works in their charge.

B. Are the Arts a Common Good/in the Public Interest?

The public interest is a notion which, as already mentioned above, is difficult to define, and arguably vague according to Lucy and Mitchell. Even an article entitled "The Public Interest in the Arts" published in the Yale Law Journal in 1981,¹⁰³ neither specifies what this public interest is, nor why there should be a public interest in the arts, but nevertheless proceeds on the assumption that there is a public interest in the arts. However, as discussed above, Barnes has formulated a stable framework in which to measure the extent to which a good is in the public interest, which as we have seen above, includes aesthetic interests and cultural values.

Although the notion of the public interest or common good may be vague, the notion that there is a public interest in the arts is widely and commonly accepted. For instance, the argument that the arts or at least cultural values are held as a good of the very highest order can be found in teachings of the Christian church, which as mentioned above, is a source of common good theory. Sison and Fontrodona have, by referring to Puelles' commentary on church social teachings, identified cultural values, defined as "technical, artistic, intellectual, ethical and spiritual goods" as

⁹⁸ M.M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (Cambridge University Press 2006), 3.

⁹⁹ Anton Hermann Chroust and Robert J. Affeldt, 'The Problem of Private Property According to St. Thomas Aquinas' (1950) 34 *Marquette Law Review* 151,181.

¹⁰⁰ St. Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part, Question no. 66, Article no. 2.

¹⁰¹ Chroust and Affeldt (note 99 above) p. 181.

¹⁰² *ibid.*,p. 123.

¹⁰³ Comment (note 55 above).

being important for “authentic human flourishing”.¹⁰⁴ Although cultural values may not present themselves with the same urgency as material well-being or peace and concord, they are nevertheless deemed to be superior to these needs as they appeal to the higher aspirations of man.¹⁰⁵ Material well-being and peace and concord are all needs only because they allow people to participate in cultural activities.

Merryman argues passionately that there is an intrinsic quality in the arts which we all value, empirical evidence of which lie in the very fact that there are thousands of museums and galleries, thousands of dealers, millions of visitors to museums and concert attendees, multitudes of university departments devoted to the arts, public organisations representing the arts, laws in place for the protection of cultural heritage and many other entities which exist to protect, serve, and facilitate the generation, display and performance of the arts.¹⁰⁶ Merryman further supports his argument by referring to the establishment of moral rights laws. He identifies a dual purpose in these laws: one to protect the individual artist against alteration or destruction of his work and another to protect the *public* against alteration or destruction of their culture.¹⁰⁷

More importantly Merryman makes the point that the regard for cultural objects is universal. He argues that although certain objects or works are treated with reverence only within the culture to which they belong, and not particularly by others outside their culture, nevertheless we can all appreciate the “human component” in all cultural objects and understand its profound value to cultures to which these objects belong, and thus in such a way, we all value all cultural objects, whether or not they belong to our particular cultural landscape.¹⁰⁸

Along these same lines, Elsen argues “art is a powerful force for uniting a society”¹⁰⁹ and quotes from the 1954 Hague Convention that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each person makes its contribution to the culture of the world.”¹¹⁰ Stephen Ladas, in 1938, recognised that the “maintenance and preservation of a work of art is invested with the public interest in culture and development of the arts.”¹¹¹

We return to Merryman for he is the one who provides us with the most comprehensive case for recognising the public interest in the arts or that the arts are a common good. Briefly, he argues that

¹⁰⁴ Alejo Jose G Sison and Joan Fontrodona, ‘The Common Good of the Firm in the Aristotelian-Thomistic Tradition’ (2012) 2 Business Ethics Quarterly 211.

¹⁰⁵ *ibid.*

¹⁰⁶ John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 California Law Review 339

¹⁰⁷ *ibid.*, p. 344.

¹⁰⁸ *ibid.*, pp. 342-43

¹⁰⁹ Albert Elsen, ‘Why Do We Care About Art’ (1976) 27 Hastings Law Journal 951, 952.

¹¹⁰ *ibid.*, p. 953.

¹¹¹ Stephen Ladas, *International Protection of Literary and Artistic Property* (Macmillan 1938), 603.

there is “truth and certainty” in the authentic original objects and that to destroy or alter them would be to tamper with such “truth” to which we are entitled.¹¹² He also sees a “morality” in cultural objects,¹¹³ as well as a repository of “cultural memory”.¹¹⁴ Cultural objects evoke emotions and possess “pathos” and as they have the capacity to outlive us, they represent “humanity’s mark on eternity”.¹¹⁵ Finally, cultural objects help us create an “identity” and also encourages our participation in a “common human enterprise” as artists create a painting to be seen by others, or a pot to be used by others.¹¹⁶

VI. WHAT RIGHTS, IF ANY, DO WORKS OF ART THEMSELVES POSSESS?

Another angle from which the debates surrounding the right to object to destruction may proceed is the following viewpoint taken by certain philosophers in the US, i.e. that artworks possess rights. The range of potential rights discussed, vary from the right to be interpreted correctly,¹¹⁷ and the right not to be modified,¹¹⁸ to the right to be restored,¹¹⁹ all of which would bear some relation to the integrity right. Where the theme of this article is concerned, if there is any possibility that artworks themselves arguably possess rights, including a right not to be destroyed, then such a possibility firstly emphasises the unique properties of art works as opposed to those of more ordinary possessions, and secondly, it then follows that art works, being unique items which bear their own rights, should be more properly subject to stewardship, rather than the whims of private property ownership.

The most controversial and prominent advocate of the argument that art works bear rights is Professor Alan Tormey, who in his article *Aesthetic Rights*, posits that “art works are bearers of a special class of rights”. In a nutshell, his conclusion is based on an observation of the way in which human beings regard art, and of the ‘aesthetic pain’ experienced in the event a work of art is maltreated. It follows that as all rational beings are *obliged* to prevent such pain, and that artworks *impose* this particular obligation, such artworks in turn bear rights. In the article, Professor Tormey professes that he is not interested in the *justification* for such rights, but only in asserting that art works *de facto* have such rights. He brushes aside very quickly any objection that insensate beings may have rights by simply referring to obvious examples such as corporations and nations, which are generally accepted to have rights. He understands that the most fundamental objection to his thesis lies in the fact that the aesthetic pain experienced through a maltreatment of a work is felt by

¹¹² Merryman (note 106 above) p. 346.

¹¹³ *ibid.*, p. 346.

¹¹⁴ *ibid.*, p. 347.

¹¹⁵ *ibid.*, p. 348.

¹¹⁶ *ibid.*, p. 349.

¹¹⁷ Edmund Burke Feldman, ‘On the Rights of Artworks and Other Ethical Issues in Art Education’ (1998) 32 *Journal of Aesthetic Education* 81.

¹¹⁸ David E.W. Fenner, ‘Why Modifying (Some) Works of Art is Wrong’ (2006) 43 *American Philosophical Quarterly* 329.

¹¹⁹ Yuriko Saito, ‘Why Restore Works of Art’ (1985) 44 *The Journal of Aesthetics and Art Criticism* 141.

interested parties, such as the artist, performer, art-lover or collector, and therefore, such aesthetic rights, as there may be, belong to them, not the work itself. However, he counters this by reiterating that “it is the work itself that is affronted, distorted, defamed, maligned, insulted or done violence to – not the artist, the performer, or the public, even though their interests may suffer...”.

Tormey’s thesis has been objected to by fellow philosophers. James Young in exploring the question of whether it is always wrong to destroy art works, takes issue with Tormey’s contention that artworks bear rights.¹²⁰ Young claims that artworks themselves do not suffer from the abuse of art and therefore cannot bear rights. Another philosopher, Goldblatt, questions Tormey’s refusal to engage with the justification of such rights, claiming that only the justification of obligations can ensure that such obligations *ought* to be fulfilled, and that it is no use to only establish *de facto* rights. Like Young, Goldblatt contends that if it is only art lovers and similarly interested people who feel ‘aesthetic pain’ when art is abused, then they are the ones who are entitled to such rights as there may be.

Notwithstanding the numerous criticisms, the thesis introduced by Tormey is a stand which has been accepted to some extent by other philosophers, who may not necessarily have advocated fundamental rights akin to that of human rights, but have called for certain key rights, such as the right not to be modified or even a right to be restored. Tormey’s thesis only takes such calls a step further.

Furthermore, while Goldblatt and Young are correct to say that as only artists and art lovers are the ones who feel ‘aesthetic pain’, they should be the bearers of such rights if any, not the artworks, it is arguable that people often feel or experience pain *on behalf of* another who has borne the injury. In other words, they feel the ‘aesthetic pain’ because it *reflects* the injury wrought on the cherished artwork – that does not make the injury suffered by the artwork any less real. As in the words of Richard Brilliant, editor of *Art Bulletin*, in drawing a comparison with our dumb animal companions, “Abused animals can reveal their distress with loud cries but art objects are voiceless. Just as animals require human champions to voice their right to “proper” treatment, so art objects deserve champions”.¹²¹

It is not proposed, at this juncture, and for the purposes of this article, to put forth an entirely new normative basis on which to formulate rights for artworks, but it is only intended to bring attention to a body of work which has explored this issue, and to suggest that, in any serious contemplation of moral rights and the ownership of art, the possibility that artworks may bear fundamental rights should not be dismissed so easily.

¹²⁰ James Young, ‘Destroying Works of Art’ (1989) 47 *The Journal of Aesthetics and Art Criticism* 367.

¹²¹ Brilliant (note 39 above).

VII. CONCLUSION

We have seen thus far that there is a strong case for treating art and other cultural works as a common good, not in the sense as a good which commonly belongs to all in a Marxist sense, but as a common good more along the lines developed by Aquinas, i.e. a good *for* all members of a community. Furthermore, according to Aquinas, private property was completely acceptable, save that such holding of property also entails a duty to manage them for the good of the community at large. Aquinas' common good is closely aligned to the public interest, and indeed there can be little doubt that cultural works are in the public interest; they not only represent the "truth" for mankind as Merryman contends, but they are essential for "authentic human flourishing", an important aim of any subject matter which vies as a common good in the Aristotle or Thomastic sense.

There is an appreciation that artistic works, as opposed to ordinary everyday objects, are different entities deserving of special treatment. Indeed, prior to the enactment of VARA, when the American courts were mainly opposed to the recognition of moral rights doctrine, there was nevertheless judicial appreciation of the fact that perhaps cultural works were different and needed special protection. Justice Seabury articulated such a view by saying that the sale of an artistic work was quite different from the sale of a barrel of pork, in that while the pork seller is not interested in whatever happens to his barrel after he has disposed of it, an artist is not only interested in what happens to his work after sale, but is indeed entitled to see that it is dealt with in a manner which is acceptable to him.¹²²

The perception that works of art possess special and unique qualities which qualify them for special protection in the public interest is further supported by the possibility that artworks themselves bear rights. It then follows that if such works are in the public interest or indeed a common good, they have to be treated differently to other more prosaic types of property, and are more properly the subject of stewardship than outright property ownership. This in turn means that owners of art works are more properly stewards of these works, rather than outright property owners with absolute rights over them including the right to maim or destroy them.

In accepting that the ownership of art is more properly stewardship with all its connotations of preserving and maintaining such works for the present community and future generations, then it seems incongruous that moral rights doctrine should then fail to recognise the creator's ability to object to the destruction of his works. It is incongruous because, as has already been argued above, moral rights doctrine ultimately serves the public interest too, not just individual creators. By recognising the artist's right to object to the "ultimate form of mutilation", moral rights doctrine thus ensures that artists are encouraged to create in the knowledge that the law is on their side and that it

¹²² Referred to in the title to this article. Judgment in *Clemens v Press Pub. Co.*, 122 N.Y. Supp. 206, at 207-08, referred to in Lee (n 31) p. 277.

serves to protect their creations, which in turn, sends a powerful message to those who possess art that art is to be cherished, nurtured and protected, and that they are stewards, not mere owners, of our cultural heritage.