The Moral Rights of the Artists in Oslo's Y-Block:
Can a case against the demolition be made under copyright law?

– Mira T. Sundara Rajan*

When the celebrated sculptures embedded in the walls of downtown Oslo's Y-Block government buildings were damaged in an infamous terrorist attack in 2011, the city's leaders faced the difficult task of how best to address the harm. The sculptures were designed by Pablo Picasso and "translated" to this concrete surface by his long-time collaborator, Norwegian artist, Carl Nesjar.[1] "The Fisherman" is located on an exterior wall of the building, while "The Seagull" is a smaller work in the lobby.[2] In her 2015 obituary of Carl Nesjar, which appeared in the New York times, Margalit Fox notes that Nesjar

> described himself as a translator of Picasso's work, though perhaps it is more apt to call him a midwife — one who ushered into the world concrete-and-stone progeny whose height is measured in stories and whose weight is reckoned in tons.[3]

After the attack, questions arose about the feasibility of conserving the sculptures on site, where the safety of the damaged building needed to be assessed. By 2014, the government had decided to demolish the building and relocate the sculptures elsewhere. This was followed, in 2017, by plans to redevelop the area.[4] However, these proposals were unexpectedly met by a surge of public resistance. The sculpture, and the site on which it stood, had become a powerful symbol, not only of Norway's cultural heritage, but also, of memory and resilience in the face of violence. In the eyes of some Norwegians, destroying the building would effectively complete the terrorist attack – a "cruel irony," as noted by Mari Hvattum, professor of architectural history and theory at the Oslo School of Architecture and Design.[5] In the words of Janne Wilberg,

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[1] Margalit Fox, "Carl Nesjar, Sculptor Who Added Dimension to Picasso, Dies at 94" June 20, 2015, New York Times; available a thttps://www.nytimes.com/2015/06/21/arts/design/carl-nesjar-sculptor-who-added-dimension-to-picasso-dies-at-94.html.

[2] Matt Hickman, "Y demolish?
Norway will demolish Picasso-clad Oslo office building" March 20, 2020, The Architect's Newspaper; available at https://archpaper.com/2020/03/norway-demolish-picasso-oslo-office-building/.

[3] Fox (note 3).

[4] "Moma Weighs in on Oslo's Y-Block, Picasso-Muraled Icon Fated for Demolition" May 14, 2020, Art Forum; available at https://www.artforum.com/news/moma-weighs-in-on-oslo-s-y-block-picasso-muraled-icon-fated-for-demolition-83060.

[5] Stefanie Waldek, "Five Picasso Murals in Oslo Are at the Center of a Major Controversy

Oslo's director of cultural heritage, "We don't want the ministry to tear down the building when the terrorist didn't manage to do that."[6]

Public opposition to the demolition plans has gained the support of cultural heritage experts and advocacy groups in Norway, and around Europe and the world.[7] Nevertheless, in March of 2020, the government began taking concrete steps to move forward with the demolition, arguing that the delay was becoming expensive and would succeed only in postponing the inevitable. Redevelopment plans for the site were already in place.[8] As of early May, the building has been fenced off and initial demolition operations have begun – even as Carl Nesjar's daughter voiced her concerns about the possibility of damage to the murals while dismantling them. "Nobody has explained how they will do it," she says. "The art is the wall."[9]

Throughout this process, little attention has been paid to a key issue: the perspectives of the artists whose work lies at the heart of the controversy.

Artists hold in their hands what may be one of the most valuable tools available to conservationists: special rights under copyright law, known as the "moral rights" of the artist.

As part of a building complex that's slated for demolition, the murals are scheduled to be moved in the name of preservation" March 5, 2020, Architectural Digest; available at https://www.architecturaldigest.com/story/picasso-murals-oslo-major-controversy.

[6] Thomas Rogers, "Picasso Murals Caught Up in Terrorist Attack's Bitter Legacy" Oct. 19, 2017, New York Times; available at https://www.nytimes.com/2017/10/19/arts/oslo-picasso-mural.html.

[7] The scope of the opposition is too wide to be fully documented here. Organizations that have supported conservation of the artworks onsite include Europa Nostra (see https://www.europanostra.org/europa-nostra-backs-the-campaign-let-y-stay-to-save-a-norwegian-heritage-landmark/), the International Council on Monuments and Sites (see https://www.icomos.org/en/get-involved/inform-us/heritage-alert/current-alerts/3572-heritage-alert-y-block-government-quarter-oslo-norway), and the Twentieth Century Society (https://c20society.org.uk/building-of-the-month/y-block-oslo-norway, with information provided by The Society for the Preservation of Norwegian Ancient Monuments). Later interventions were made by the Museum of Modern Art (MoMA) in New York (see Nora McGreevy, "MoMA Joins Chorus of Critics Urging Norway to Save Site of Picasso Murals," Smithsonian Magazine, May 14, 2020, available at https://www.smithsonianmag.com/smart-news/moma-urges-norwegian-government-preserve-site-picasso-murals-180974874/) and the Musée Picasso in Antibes, France (see Letter from Jean-Louis Andral, Director and Chief Curator of the Musée Picasso in Antibes to the Prime Minister of Norway, May 19, 2020, available at https://m.facebook.com/243059203235939/photos/a.601125957429260/610685876473268/?type=3&source=57&__tn__=EH-R). To date, a petition opposing the demolition of the Y-Block has been collected close to 50,000 signatures; see "MoMA Weighs in on Oslo's Y-Block, Picasso-Muraled Icon Fated for Demolition" (note 4).

[8] "Officials 'argued that further delays would lead to financial cost as well as the postponement of the reconstruction project which has already been decided.' Quoted in Matt Hickman, "Y Demolish? Norway will demolish Picasso-clad Oslo office building," The Architect's Newspaper, Mar. 2, 2020, available at https://archpaper.com/2020/03/norway-demolish-picasso-oslo-office-building/.

[9] Gro Nesjar Greve, quoted in "MoMA Weighs in on Oslo's Y-Block, Picasso-Muraled Icon Fated for Demolition" (note 7).

Moral rights allow the artist to object to actions that may be damaging to his or her work. The doctrine of moral rights emerged in nineteenth-century France and Germany,[10] and it reflects the deep philosophical conviction that an artist has a special bond with his or her own creation. Accordingly, mistreatment of an artwork can ultimately inflict various kinds of harm, from reputational damage to psychological trauma, not only on the work, but also, on the artist. Moral rights are often considered a lesser cousin to economic rights within the family of rights held by authors under copyright laws. Whatever the reasons that lie behind this characterization – the ostensibly "non-economic" nature of moral rights, the relative infrequency of moral rights complaints in courts (no doubt due, in some measure, to the economically disadvantaged position of many artists), or general discomfiture with the idea of a special, creative, or "spiritual" relationship[11] in the twenty-first century – it should not obscure the reality that moral rights, in practice, can be immensely powerful. Because the bond between an author and his or her work is permanent and indissoluble – an author will always be the author of his her own work – moral rights are generally inalienable, so that they continue to be held by the artist even after a work has been sold and ownership has been relinquished. In other words, owning an artwork is not enough to control its fate: the artist who made that creation retains the right to be involved.

Without departing from this basic philosophical stance, different jurisdictions implement moral rights differently. Notably, there are differences in the burden of proof borne by artists. Some countries argue that any treatment of the work to which the artist objects is not permissible – like France – while others emphasize that the artist's reputation must be endangered by the mistreatment before it can qualify as a violation of moral rights.

The French position means that the artist's chief obligation is to sue, and that the evidence that he or she must offer relates primarily to evidence of alterations to the work. In the more restrictive, reputation-based formulation, which has been established as the international minimum standard for protection by Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works,[12] it is not enough for the artist to show evidence of alteration; he or she must also demonstrate that the alteration has caused damage to his or her reputation. This is typically called an "objective" standard of proof, and can be supported, for example, by calling expert evidence,[13] while the artist-focused approach is usually considered "subjective" – the

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[10] Pioneering moral rights scholar, Stig Strömholm, analyzes the doctrine as the product of "French practical solutions" combined with "German theorizing": see Stig Strömholm *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 14(1) Int'l Rev. Indus. Prop. & Copyright L. 217 (1983) at 225.

[11] Moral rights are sometimes described with the language that the work is considered to be the author's "spiritual child": see e.g. Strömholm at 228, who calls the author the "spiritual father" of the work and cites the Swedish Royal Commission on Copyright Law for the term "spiritual children", and Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986,* para. 8.93 (Centre for Commercial Law Studies, Queen Mary College, Kluwer 1987), who points out that "[t]he adjective 'moral' has no precise English equivalent, although 'spiritual,' 'non-economic' and 'personal' convey something of the intended meaning."

[12] Berne Convention for the Protection of Literary and Artistic Works (adopted Sept. 9, 1886) 1161 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

[13] See e.g. the Canadian case of *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105.

viewpoint of the artist is enough.[14] Presumably, an artist can satisfy "objective" requirements by bringing evidence of a likelihood of damage, or potential damage, to his or her work, rather than actual damage. Otherwise, moral rights could not succeed in their ultimate aim – the prevention of harm – but could only compensate the artist for harm that has already occurred. Since injunctions are a typical remedy for moral rights violations, a requirement of showing actual damage would seem to be a poor fit with the logic of the law.[15]

The onus is generally on the artist to assert the moral right of integrity, rather than requiring that the person who wishes to make the alteration seek consent before proceeding. Nevertheless, proceeding without asking the opinion of the artist – or, after the death of the artist, that of the artist's heirs acting on his or her behalf – can lead to awkward situations. At a practical level, the unanticipated opposition of the artist, or the artist's heirs, can lead to conflicts and costs. This is what has happened in the case of the Oslo murals – with the added elements of long-standing public opposition and expert objections to the plans.[16]

However, the issue of costs – or at least, the risk of costs – may also impose itself on artists, thereby creating a further dis-incentive to assert moral rights. For example, in the ongoing Norwegian case about the Y-Block, a request by the heirs to limit their liability for the costs of stopping the demolition process while their case is heard, in the event that the finding ultimately goes against them, has been rejected by the government. In particular, the lawyer representing the government, "emphasizes that the heirs are late with their claims. [S]he writes. "For the state, …a delay in the work will lead to a great loss, depending on how long the delay becomes. This situation could have been avoided if the plaintiffs had asserted their alleged rights at an earlier stage." And yet, it is difficult to see how the heirs could have acted sooner when the government did not keep them informed of their plans, and, indeed, was not legally obliged to do so.

Moral rights are protected at least until copyright as a whole expires – in Europe, seventy years after the artist's death – but they may also be protected, as in France, without limitation in time.

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[14] See e.g. *Judgment of December 19, 1994 (Turner Entertainment v. Huston Heirs), Cour d'Appel, chs. Réunies (Versailles),* 164 RIDA 389 (1995) (Fr.), on remand from Judgment of May 28, 1991, Cass. Civ. lre, 149 RIDA 197 (1991) where the filmmaker's opinion was sufficient to establish, before a French court, that his moral right of integrity had been infringed by the colorization of his black and white film.

[15] See e.g. Silke von Lewinski, *International Copyright Law and Policy* (Oxford Univ. Press 2008), para. 5.104: "It is not entirely clear whether an actual prejudice must be established or whether the threat of a prejudice would be sufficient. There are better reasons for the second option—in particular the wording 'would be prejudicial'." (footnotes omitted).

[16] See Hanne Mauno, "Y-blokka: Regjeringsadvokaten avviser arvingenes krav
Regjeringsadvokaten sier nei til at Carl Nesjar og Erling Viksjøs arvinger skal slippe å betale for forsinkelser i arbeidet med å sikre kunsten i Y-blokka" ["Y-block: The government lawyer rejects the heirs' claims –The Attorney General says no to Carl Nesjar and Erling Viksjø's heirs not to pay for delays in the work to secure the art in the Y-block"], Dagavisen, July 1, 2020, available at https://www.dagsavisen.no/kultur/y-blokka-regjeringsadvokaten-avviser-arvingenes-krav-1.1738071. See also note 23, below, and accompanying text.

Since moral rights are, in principle, inalienable, the question of how they can be protected after the artist's death must be resolved. In general, the artist's heirs, who would usually inherit the artist's copyright as a whole, are also empowered, after the artist's death, to assert moral rights on his or her behalf. But other legal scenarios are also possible. For example, a moral rights "executor" may be appointed and charged with this responsibility. Under rare national laws, an organization, or even an individual, can assert moral rights on public interest grounds.

In the case of site-specific art, provisions on moral rights typically pit the artist against the owner of the property, leading to the challenge of finding an equitable balance between these competing interests. It is, therefore, all the more noteworthy that artists have been known to prevail in these conflicts. Notably, courts have shown themselves to be sensitive to the significant overlap between an artist's moral rights, in these circumstances, and the public interest in the protection of cultural heritage.

Given this background, what is the situation under Norwegian copyright law?

Section 5 of the Copyright Act provides broad protection for the artist's moral right of integrity, stating that a work must not be altered or made available to the public "in a manner or context that is prejudicial to the reputation or individuality of the author or the work."[17]

Changing the location of site-specific artwork, particularly where there is a significant risk of damage to the work in this process, is, at the very least, a change of context; and it may also lead to other alterations to the work, including damage. This clearly has the potential to violate the moral right of the artist under s. 5.

When significant alterations to the work or its context are proposed under Norwegian law, they should not be carried out over the objections of the artists who created the work. If the artists are opposed to planned alterations, they have the right to raise their concerns. In response, the person proposing to make the changes essentially has two options: to arrive at an agreement with the artists, obtaining their consent – or to risk the prospect of carrying out alterations that may ultimately be found to violate the artist's moral rights. Under section 5 of the Norwegian law, which operates according to a so-called "objective" standard of proof for moral rights violations, if the artist can show the possibility of damage to his or her reputation, or to the status of the work – its "reputation" or "individuality", in the language of the Act – the person responsible for the alterations should be held liable for these acts.

In the case of the Y-Block sculptures, the Norwegian government approached the Picasso Administration, the organization established by Picasso's heirs for the purpose of safeguarding the artist's rights, about its plans to relocate the artworks. The Picasso Administration officially announced its agreement to these plans in 2019, but it struck a bittersweet tone: after years of deliberation, the Administration was able to overcome its initial reservations, but concluded that

[17] See Norwegian Copyright Act of June 15, 2018, available in Norwegian at https://lovdata.no/dokument/NL/lov/2018-06-15-40/. Similar language can be found in the corresponding provision of the old Norwegian Copyright Act of 2006, section 3, which is available in English translation via WIPO: https://www.wipo.int/edocs/lexdocs/laws/en/no/no005en.pdf.

a "cultural loss" was still involved.[18] In an interesting sequel, the director and chief curator of the Picasso Museum in Antibes, Jean-Louis Andral, has now written to the Norwegian prime minister, in a letter dated May 19, to urge her to intercede against the demolition.[19]

As highlighted by Mr. Andral's letter, Picasso was not the only artist involved in the creation of the Y-Block sculptures. A crucial collaborative role was played by Carl Nesjar, an artist who Picasso, himself, considered to be outstanding, and without whose practical and creative involvement, the Y-Block sculptures could not have been realized. Nesjar passed away in 2015. Before his death, he had expressed his concern about the plans for demolishing the Y-Block and dismantling the sculptures, raising the question of what would replace them.[20] And yet, according to a 2014 interview, the government had not even informed Nesjar or his wife, a scholar of the artists' work, about the demolition plans.[21]

Two important conclusions can be drawn from this analysis. First, securing the agreement of the Picasso Administration was insufficient to address the moral rights in the works, because another artist was also involved in their creation. Picasso's accord, or the agreement of his heirs, cannot be a substitute for Nesjar's.

The government's contention, parroting that of the Picasso Administration, has been that Nesjar's contribution is insufficient to qualify him as a co-author of these works.[22] Only an author can hold moral rights in a work of art. This seems an astonishing assessment for a country to make against significant artistic contributions by one of its own nationals. From a copyright perspective, its validity is doubtful. The Norwegian Act tells us that the contributions of the creators must be "inseparable" to make a finding of joint authorship – a practical approach, meaning that copyright arises in the final work, alone, rather than any of its component parts, thereby avoiding the problem of multiple copyrights arising in a single work. The Act also

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[18] See Oda Ording and Marianne Rustad Carlsen, "Arvinger godkjenner flytting av Picassos kunst" ["Heirs approve the relocation of Picasso's art"] Mar. 12, 2019, available at https://www.nrk.no/kultur/arvinger-godkjenner-flytting-av-picassos-kunst-1.14467321; and Jonas Brekke (text) and Tom Henning Bratlie (photos), "Picasso Skal Gjenoppstå [Picasso will be Resurrected], Jan. 13, 2017, available at https://arkiv.klassekampen.no/article/20170113/article/170119982.

[19] Andral (note 7).

[20] See Kaja Korsvold and Knut-erik Mikalsen, "Jeg skjønner ikke at de kan gjøre dette" ["I don't think they can do this"], May 26, 2014, available at https://www.aftenposten.no/kultur/i/emlR/jeg-skjoenner-ikke-at-de-kan-gjoere-dette.

[21] Korsvold and Mikalsen (*ibid.*).

[22] See e.g. "Nesjar-arvingene vil hindre riving av Y-blokka – saksøker staten:
Arvingene etter kunstner Carl Nesjar og arkitekt Erling Viksjø har bestemt seg for å stevne staten for å hindre demontering av Picasso-verkene i Y-blokka"
("The Nesjar heirs will prevent the demolition of the Y-block – the state sues:
The heirs of artist Carl Nesjar and architect Erling Viksjø have decided to sue the state to prevent dismantling of the Picasso works in the Y-block"), Aftenposten, June 29, 2020, available at:
https://www.aftenposten.no/norge/politikk/i/QoQE0W/nesjar-arvingene-vil-hindre-riving-av-y-blokka-saksoeker-staten

confirms that copyright is held by all joint authors, and that their contributions must be creative and intellectual in nature.[23]

On this last issue, copyright practice in a variety of jurisdictions shows that the assessment of contributions to a work is necessarily fact-dependent; even the intentions of the authors are generally not determinative of the issue.[24] Rather, the focus is on the work, and whether it is a reflection of authorship contributions on the part of both joint authors. For example, in British and Indian law, this is known as the "prosecution of a preconcerted joint design."[25] In the context of French law, Michel Vivant and Jean-Michel Bruguière note that the idea of creative "freedom" *("liberté")* is important, but that this would certainly not exclude situations where one artist may play a leading role. They remark, "For the judge, a work made by one artist under the direction of another can very well constitute a collaborative work."[26] It is worth noting that the debate, if any, generally centres on the status of *conceptual* contributions. It would be extremely unusual for a person who *physically* created a work to be denied authorship status in preference to someone who furnishes only an idea or concept. This would go against copyright's fundamental preference for protecting actual works, rather than (only) the ideas behind them.[27]

Secondly, Nesjar was in a particularly powerful position to comment on the Y-Block plans. Unlike Picasso, he lived long enough to see the terrorist incident and its aftermath unfold before his own eyes. As one of the creators of the works that were threatened by the attack, he was in a unique position to defend the integrity of these works. He was clearly concerned about the demolition plans. His position reflects the *artist's own view* of the situation.

If, indeed, Nesjar's opinion stands in opposition to that of the Picasso Administration, from a legal perspective, how should these opinions be weighed against each other? The basic theory of moral rights, once again, is the personal connection of artist and work. The artist's view is, therefore, the proper starting point for a discussion about the integrity of an artistic work – and, potentially, understanding the artist's position can help us to determine what is truly needed in

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[23] Norwegian Copyright Act (note 17), s. 8; the former s. 6, which can be seen on the WIPO website (note 17).

[24] See e.g. W. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013) para. 13-20.

[25] *Ibid.* and note 71 (citing *Levy v. Rutley* (1871) L.R. 6 C.P. 523 at 528, 529); *Najma Heptulla vs Orient Longman Ltd.* (1989) AIR Delhi 63 at para. 25.

[26] Michel Vivant and Jean-Michel Bruguière, *Droit d'auteur* (Précis: Droit privé, 1st edn., Dalloz 2009) para. 313: "Pour le juge, l'oeuvre confectionnée par un artiste sous la direction d'un autre peut très bien consituter une oeuvre de collaboration" (trans. mine). Vivant and Bruguière go on to discuss the case of *Renoir c. Guino,* Civ. 1ère, 13 nov. 1973, D. 1974, 533, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006991012; here, the court found that Renoir's guidance to Guino was enough to establish him as a co-author of the finished sculptures, which were physically created by Guino. An English translation of the case has been published in Franklin Feldman & Stephen E. Weil, *Art Works: Law, Policy, Practice* (Practising Law Institute, 1974).

[27] But see the thought-provoking discussion of how to understand the idea-expression dichotomy in more fluid terms, as a continuum between unprotectable idea and protectable expression, in *Designers Guild v Russell Williams* [2001] FSR 113, available at https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd001123/design-1.htm.

order to make a meaningful attempt to preserve that work. From an evidentiary perspective, the doctrine of moral rights requires that the artist's point of view, as expressed by himself or herself, form the core of any assessment of the moral right of integrity. Accordingly, it must be concluded that an artist's *own* opinion must be weighed more heavily, in reaching judgement, than even the opinion of an artist's heirs.

There is yet another artistic layer to the Y-Block – that of the remarkable building itself, known as a "brutalist jewel of the Oslo cityscape."[28] The building was designed by noted Norwegian architect, Erling Viksjø, whose collaborative work with artists reflected a unique conception of the relationship between art and architecture.[29] An architect, too, is entitled to moral rights under copyright law, although, in Norway, the extent of those rights is limited to the "aesthetic" aspects of the work. In the case of the Y-Block, these would be significant.

While the circumstances of the Y-Block are unique, Norway is by no means the first country to face challenges involving the preservation of important public artworks. Similar cases in the United States and India offer disturbing precedents, which also show the intolerance of courts towards defendants whose actions have flouted public opinion and led to cultural harm.

In India, the case of renowned Indian artist, Amar Nath Sehgal, remains the seminal ruling on moral rights. A mural, commissioned by the government of India to decorate a building, was damaged when the government wanted to undertake renovations and dismantled the artwork. It took twenty-six years for the artist to obtain a ruling, in 2005, that his moral rights had been violated.[30] During that time, the Indian government exploited various strategies to limit its liability – including reform of the relevant section of the Indian Copyright Act.[31] Yet the Delhi High Court still found in Mr. Sehgal's favor.

In doing so, the Court relied on submissions on Mr. Sehgal's behalf that pointed out the importance of India's membership in international conventions for the protection of cultural property. It argued that moral rights must be understood as part of a broader imperative to protect cultural heritage under Indian law.[32]

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[28] https://www.artforum.com/news/moma-weighs-in-on-oslo-s-y-block-picasso-muraled-icon-fated-for-demolition-83060.

[29]This was to have been the subject of an exhibition at the Norwegian national museum that was originally scheduled for Fall 2020: see https://www.nasjonalmuseet.no/en/exhibitions-and-events/the-national-museum--architecture/exhibitions/2020/the-architect-erling-viksjo-and-the-artists/. Viksjø's unique approach to construction included his patenting of a unique material, developed in conjunction with engineer Sverre Jystad, described as 'naturbetong', a type of concrete with embedded river gravel. The surface is sandblasted to reveal the stones, and can also create decorative patterns." See Twentieth-Century Society (n 7).

[30] *Amar Nath Sehgal v. Union of India*, (30)PTC 253 (Delhi High Court 2005), available at http://artlawpodcast.com/2020/03/02/moral-rights-in-street-art-the-5pointz-story-revisited/.

[31] See the discussion in Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press, 2011), 174-79 [new edition pending].

[32] Mira T. Sundara Rajan, "*Moral Rights and the Protection of Cultural Heritage:* Amar Nath Sehgal v. Union of India, 10(1) Int'l J. Cultural Prop. 79 (2001); the article is quoted in para. 41 of the judgement, but language from the article appears throughout the decision.

In the United States, the destruction of graffiti murals at 5 Pointz, a site in New York city that had come to be known as a "graffiti mecca," pitted the property owner against the artists who, with his consent, had used the walls of his buildings over a period of many years as locations for their artworks.[33] The court that heard the initial arguments of the artists decided not to grant a preliminary injunction against the owner of the building.[34] However, it simultaneously warned him that, were he to harm the artworks while a final ruling on the dispute was pending, he might face significant liability for his actions. In spite of this warning, the building owner arranged for the works to be whitewashed in the middle of the night. When the matter went to trial, a damages award of 6.75 million dollars was made against him – in part, because he had persisted in his intent to remove the artworks even when he had been warned, by the court, that doing so could ultimately be found to violate the moral rights of the artists.[35]

It is noteworthy that, in both the Indian and the American cases, the works were destroyed – in the case of 5 Pointz, the murals were destroyed outright, and in Amar Nath Sehgal's case, the sculpture was so badly damaged that it was considered to have been effectively destroyed. Curiously, international legal opinion is divided on the question of whether the moral right of integrity prohibits the outright destruction of a work of art, as opposed to damage. The argument hinges on the idea of reputation, and it involves some legal sleight of hand. A damaged work can harm the reputation of the author; but how can a work that is destroyed have any impact at all on the author's reputation? If there is no longer any work to affect an author's reputation, then, so the argument goes, the moral right of integrity can no longer apply.[36] From a cultural heritage perspective, the practical shortcomings of such a right are apparent: this limited moral right of integrity would allow an artwork to be destroyed, while acting, somewhat paradoxically, to prevent lesser damage to the very same work.

The present author first confronted this legal tradition surrounding the destruction of works under the moral right of integrity in the context of Amar Nath Sehgal's case. She argued that the destruction of a work can affect an author's reputation, at the very least, by reducing the quantity, and perhaps the quality, of his or her overall body of work – the artist's "creative corpus," a phrase that was then adopted by the Delhi High Court in support of this principle.[37]

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[33] The facts are reviewed in Mira T. Sundara Rajan, "The 5 Pointz case: Should works of art be protected from destruction?" IPKat, Mar. 5, 2018, available at http://ipkitten.blogspot.com/2018/03/the-5-pointz-case-should-works-of-art.html.

[34] See Cohen v. G&M Realty L.P., available at https://casetext.com/case/cohen-v-gm-realty-lp.

[35] See Castillo v. G&M Realty L.P., No. 18-498-cv (L) (2d Cir. Feb. 20, 2020), available at http://artlawpodcast.com/wp-content/uploads/2020/02/E.C.F.-2nd-Cir.-18-00498-dckt-000171_000-filed-2020-02-20.pdf; the judge expresses his general dismay with what the district court had called, "conscious material misrepresentations" (p. 31).

[36] This perspective is summarized in von Lewinski (n 15) at paras. 3.50 and 5.103; but she also points out that countries were advised in a *voeu* at the 1948 Brussels conference of Berne Union members to provide protection against the destruction of works (para 5.103 and accompanying notes).

[37] Sundara Rajan (note 32).

The Court buttressed its stance against destruction by relying on international conventions on cultural property, to which India is a party, and arguing that recognized artworks, should be protected from destruction. In the case of Amar Nath Sehgal, the court pointed out that the work was considered a "modern national treasure of India."[38] It argued that India's moral rights provisions should be read "in the light of" its membership in the international conventions.[39]

But the Visual Artists Rights Act of 1990 (VARA),[40] which provides moral rights for visual artists in the United States, offers an interesting contrast to the Berne Convention and to the moral rights modeled on Article 6*bis* in various laws of the world. VARA includes a specific proviso that a work of "recognized stature" cannot be destroyed.[41] This led to one of the most interesting aspects of the 5 Pointz litigation – the question of whether graffiti could be considered "work of recognized stature," with the courts ultimately determining, based on a wealth of factual and expert evidence, that it could.[42]

Norwegian copyright law does not explicitly address the destruction of a work as a potential violation of the moral right of integrity. However, the Norwegian Copyright Act includes an indirect reference to destruction in Section 109, which provides that, "where the circumstances require that the original be destroyed and the author is alive, reasonable notice when it can be done without any major disadvantage" must be provided before the work is destroyed. The conditions imposed on these actions are significant. Destruction must be "required" by the "circumstances" – a potentially high standard of proof to be satisfied by the entity seeking to destroy a work. There is no further clarification in the Act on what happens in the case of a work whose author is deceased, only that there appears to be no requirement of notice to any party at that point. Precedent also exists to show that failure to provide reasonable notice before destroying a work can be sanctioned under Norwegian law.[43]

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[38] *Sehgal* (note 30), para. 37.

[39] Paragraph 56 states: "There would therefore be urgent need to interpret Section 57 of the Copyright Act, 1957 in its wider amplitude to include destruction of a work of art, being the extreme form of mutilation, since by reducing the volume of the authors creative corpus it affects his reputation prejudicially as being actionable under said section. Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation." *Sehgal* (noet 30).

[40] 17 U.S. Code § 106A (a) (3) (B), available at https://www.law.cornell.edu/uscode/text/17/106A.

[41] Presumably, this applies equally to site-specific works of recognized stature; in other cases, a site-specific work can be destroyed after adequate notice is provided, a provision that is mirrored in s. 109 of the Norwegian copyright law, available, in the original Norwegian, at https://lovdata.no/dokument/NL/lov/2018-06-15-40 (similar language appears in s. 49 of the old Norwegian copyright act, available in English via WIPO, n 7), and discussed below.

[42] The court specifically found that the "transitory nature" of graffiti was not a bar to considering it "work of recognized stature": see Castillo (n 29), e.g. at pp. 7-8. See VARA (n 34), § 106A (a) (3) (B), available at https://www.law.cornell.edu/uscode/text/17/106A. In the case of site-specific art, these provisions are subject to certain specific limitations: see also s. 113 (d).

[43] See RG-1992-652, available at http://folk.uio.no/olavt/Dommer/RG/RG-1992-652.htm. Beatrice Ignacius also provides insight from Norwegian legal scholars, Ole Andreas Rognstad and Birger Stuevold Lassen, who state: "Om åndsverkloven etter dette bare foreskriver en varslingsplikt, og intet egentlig vern mot ødeleggelse av

A closer examination of Norwegian law sheds light on the scope of this provision and, more generally, on the status of destruction under Norwegian law. In particular, Norway has a tradition of emphasizing preparatory works in legislative interpretation – an interesting contrast to the international position on the use of preparatory materials in legal interpretation, where they are generally considered only "supplementary means of interpretation."[44] As Rebecca J. Five Bergstrøm and Pål A. Bertnes write:

> Preparatory works to a statute are all the official documents produced during the legislation making process, not only the one from the ministry or expert groups. …[A] part of the Norwegian legal tradition [is] that the legislator can keep the text of a statute short since preparatory works are important supplements to the law. They are an expression of the will and intention of the legislator and hence they are used both as a supplement and as a ground for interpretation of the legal text. …[T]hey have a central role as a source of law…[45]

The preparatory materials surrounding the Norwegian Copyright Act of 1960[46] show that the Norwegian government became interested in the possibility of a right against the destruction of works because of the *voeu* adopted at the 1948 Brussels revision conference of the Berne

originaleksemplar, kan opphaveren ha et kontraktsrettslig vern mot dette. For kunstneriske utsmykningsoppdrag kan mye tale for å anse det som en stilltiende forutsetning for oppdraget at kunstneren har krav på at arbeidet forblir på det sted det er utformet for"
["If copyright law only prescribes a duty of notification, and offers no real protection against destruction of original copies, the author may have contractual protection against this. For cases involving artistic decoration, many regard it as a tacit assumption that the artist is entitled to the work remaining in the place it was designed for": see Ole Andreas Rognstad and Birger Stuevold Lassen, *Opphavsrett*, (2d ed., Universitetsforlaget, 2019), 274. Judging from this commentary, and in the absence of precedents, the issue would still appear to be unsettled under Norwegian law ("If").

[44] This position is explained, in relation to the interpretation of international treaties, by Yahli Shereshevsky and Tom Noah, "Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts" (2017) 28 (4) European Journal of International Law 1287 at 1287, available at https://doi.org/10.1093/ejil/chx069. See also Elizabeth Adeney, who discusses the specific issue of whether the protection of works from destruction is prohibited by the Berne Convention, pointing out that this issue was addressed at the Brussels revision conference in 1948, without, however, finding its way explicitly into the text of the Convention. As a result, protection against destruction is now considered an optional element of Article 6*bis;* according to the preparatory materials, it had not been "prohibit[ed] in express terms." See Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford, Oxford University Press, 2006), paras. 7.22-7.23.

[45] See UPDATE: Guide to Legal Research in Norway, Oct. 2015, GlobaLex (Hauser Global Law School Program, New York University School of Law), available at https://www.nyulawglobal.org/globalex/Norway1.html#PreparatoryWork.

[46] Innst.O.nr.XI (1960–1961) Innstilling fra kirke- og undervisningskomiteen om lov om opphavsrett til åndsverk, Ot.prp.nr.26 (1959–1960) (Mar. 23, 1961), pp. 30-31. An earlier discussion around the 1930 Norwegian law also considered the issue in terms of the conflict between artists' rights and property ownership: see Innstilling 30. mai 1925; discussed in a master's thesis at the University of Oslo Law Faculty, Apr. 25, 2015, available at https://www.duo.uio.no/bitstream/handle/10852/44385/Kandidatnummer-651.pdf?sequence=1&isAllowed=y (p. 41).

Convention in this regard. Preparatory materials from the 1948 Brussels conference show that the delegates intended to allow, though not require, the prohibition of destruction by open ended language preventing "other modification of the work" – *toute autre atteinte à la même oeuvre,* the more indicative French phrase[47]– which must then be shown to be damaging to the author's reputation. As Elizabeth Adeney notes:

> While the Hungarian suggestion [that destruction should be included among the prohibited acts in Article 6bis] was not incorporated in the text of the Convention, it nevertheless gave rise to a recommendation enjoining domestic legislatures to provide such protection.[48]

The materials surrounding the Norwegian Copyright Act of 1960 make it clear that the adoption of then-section 49 – the clause relevant to destruction in s. 49 has now been transposed into the current Act of 2018 as section 109[49] – was envisioned as a direct response to the discussion of a right against the destruction of works in the 1948 revision conference of the Berne Convention. The Committee states:

> Although provisions for protection against destruction and author access rights are new in Norwegian law, they are not without role models. The Bern Convention's *voeu* no. III adopted at the Brussels conference in 1948 urges member states to impose a ban on the destruction of literary and artistic works. …The committee has not wanted to propose any particularly far-reaching provision, as it finds it most appropriate first to gain experience of how a more cautiously shaped rule will work.

Moreover, the Committee goes so far as to say that its plan, once the practical effects of the provision can initially be assessed, is that the notice requirements where a work needs to be destroyed should be extended to the works of deceased authors, as well, in future legislative reform:

> It is the committee's premise that the provisions' effects be kept under close observation, so that its scope of conduct can be expanded if it seems inadequate, or curtailed if it proves necessary. In particular, the committee notes that in the longer term, the possibility of extending the provision to apply also for the benefit of the heirs and, at the end of the conservation period, in favor of the public, should be considered.

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[47] See the comments in Adeney (note 44) para. 7.21.

[48] Adeney (note 44) para. 7.23 and note 33.

[49] The original s. 49 included a provision on an author's right of access to his or her own work, referenced in the preparatory materials; it continues to be available, in English, on the WIPO website: https://www.wipo.int/edocs/lexdocs/laws/en/no/no005en.pdf. The first clause of the provision, dealing with the destruction of works, remains unchanged between the two versions (i.e. the original s. 49 states: "If circumstances necessitate the destruction of the original copy, the author, if he is alive, shall be notified in reasonable time, if this can be done without particular disadvantage.")

In doing so, the Committee shows, once again, an interesting awareness of public interest in its approach to moral rights, commenting on a potential benefit to the public after the expiry of copyright term. To date, however, there has been no further action on this issue.

The Norwegian Copyright Law also includes specific measures on works of "applied art" appearing on buildings. Section 39 states that, "Buildings and works of applied art may be altered without the author's consent when this is done for technical reasons or for utilitarian purposes." This provision is crucially important to any case that the government would wish to make regarding the relocation of the works by Picasso and Nesjar, since it could allow the government to act without the consent – that is to say, agreement – of the artists or their heirs. Here, however, the burden of proof that falls on the government appears to be substantial, since the desired alterations must be shown to be for "technical reasons or …utilitarian purposes." Indeed, one of the contentions of those opposing the relocation of the sculptures is that adequate technical and utilitarian reasons have not been offered for the move – in particular, that inaccurate justifications, on safety and security grounds, have been offered as reasons for the relocation of the sculptures.[50]

With respect to all of these matters, there is one further consideration: in the Norwegian context, moral rights are not only an artist's right; they are rights explicitly in the public interest, as well. In an unusual provision, Norwegian moral rights allow for the protection of the "general cultural interests" of the public. Under the Norwegian Copyright Act, all aspects of the integrity right enjoy permanent protection. Section 108 states:

> Even if the term of protection of copyright has expired, an artistic work may not be made available to the public in a manner or context that is prejudicial to the reputation or individuality of the artist or the work, *or that may otherwise be considered harmful to general cultural interests.* [51]

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[50] See e.g. a letter from the Campaign for the Conservation of the Y-Block, sent to the Museum of Modern Art/MOMA New York, Jean-Louis Andral at the Picasso Musuem, and the Minister of Local Government and Modernisation (and, possibly, others), on June 16, 2020, entitled, "The truth about the Y-Block": "The conclusion was that the Y-block and the H-block buildings were structurally intact and had withstood the bombing well, probably largely due to their solid and enduring concrete structures. The condition of the buildings in positive sense was also confirmed in a report of 2013 by the Norwegian Directorate for Cultural Heritage, which stated that only windowpanes and ceiling cladding were destroyed in the Y-block. The conclusion is also coherent with the Concept Evaluation Report carried out by the central government itself in 2013/14 which stated that both the H- and the Y-block could technically be conserved if that was politically desirable. … However, as time has passed, the Ministry of Local Government has shifted this technical description towards a more negative content by putting the Y-block and H-block in the same
category as the S-block and the R4 building, both severely damaged during the attack. …The story now conveyed is that the Y-block is severely damaged. …But this is not true. … The technical argument for demolition is therefore not correct." The letter is available at https://innsyn.pbe.oslo.kommune.no/saksinnsyn/showfile.asp?jno=2020079327&fileid=9095966; the Municipality of Oslo has created an archive of documentation related to the Demolition of the Y-Block, available at https://innsyn.pbe.oslo.kommune.no/saksinnsyn/casedet.asp?mode=&caseno=201818270.

[51] Italics mine; Norwegian Copyright Law (note 17); this provision mirrors the language of the old s. 48 in English translation (note 17).

A wealth of evidence attests to the cultural importance of the Y-Block sculptures. However, the protection of "general cultural interests" relies upon the government to assert the right. We have come full circle: under these innovative provisions, the government is effectively assigned the role of custodian of the public interest in the integrity of artistic works. What remedy can the Norwegian public now hope to rely upon when the government, itself, is moving inexorably forward with plans that carry a very real risk of damage to unique and irreplaceable works of art?

Indeed, it is more than a risk. Jean-Louis Andral argues that changing the location of a site-specific artwork such as this may amount to a form of harm in its own right – whether or not the work is physically conserved. To an important degree, artworks like these derive their meaning from their context; by changing it, though the work may be physically protected, its creative essence is destroyed.[52] An artwork is something more than a physical object.

In June of 2020, Nesjar's daughter and the heirs of architect, Viksjø, sought to bring an action against the government for violating the moral rights of the artists. The heirs initially sought a preliminary injunction to place the demolition work on hold while the dispute was pending. Their lawyers asked the government to waive its right to damages, to which it would be entitled if the suit were ultimately unsuccessful, for the costs incurred due to the decision to halt work temporarily. But the government refused. No alternate means could be found to request an injunction while limiting the liability of the heirs. Accordingly, the heirs had to relinquish the hope of an injunction to stop the demolition from going forward. According to Gro Nesjar Greve, the demolition works began on July 6, 2020 – her father's birth centenary.[53]

This story has a bitter moral: cost remains a significant obstacle to the ability of many, if not most, artists to vindicate their moral rights in court. This situation is only reinforced by the difficulty of obtaining a preliminary injunction, a legal remedy that must usually satisfy rigorous tests before it can be invoked.[54] Yet, in moral rights cases involving works of art, a preliminary injunction may be a necessary step on the path towards a just resolution. The failure of the 5 Pointz artists to secure a preliminary injunction, by demonstrating that "irreparable harm" would arise, led to the destruction of their work; despite a final ruling with a large damages award against the property owner, this still fell short of their ultimate goal, which had been to preserve it. Similarly, if the heirs of Nesjar and Viksjø ultimately succeed in their moral rights claim, it will, in some sense, be a Pyrrhic victory. These factors reveal some of the important reasons why the moral rights of artists remain so difficult to vindicate – and why precedents remain elusive in this area of law.

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[52] Jean-Louis Andral in private conversation, July 6, 2020.
[53] Gro Nesjar Greve, private email communication, July 6, 2020.
[54] A notable success was the preliminary injunction obtained by Amar Nath Sehgal in 1992, with Justice Jaspal Singh of the Delhi High Court writing (at para. 3; available at https://indiankanoon.org/doc/624173/): "In a country rightly proud of its creativity and ingenuity, men who can hardly distinguish the heads of Venus from those of Mars cannot be allowed to decide the fate of artists who create our history and heritage. The cry is *Ne passons pas*, and in such a situation Indian courts will always be found dynamic and responsive, Section 57 of the Copyright Act provides the light."

As Jørn Holme and Audun Eckhoff write: “The administration of world-class art and architecture is a heavy responsibility, and time will show whether we have proved worthy of the task.”[55]

[55] Jørn Holme, Director General, and Audun Eckhoff, Director Nasjonalmuseet, “Picasso in Today’s Norway” in *Picasso-Oslo: Art and Architecture in the Government Building Complex,* Nasjonalmuseet (2013).