



THE RIGHT TO PREVENT DESTRUCTION OF MURALS

Petra Žárská¹

Abstract

The destruction of murals burdens artists around the world. Many times, the only option they can rely on is the prohibition of any distortion, mutilation or modification of work under art. 6bis of the Berne Convention, because multiple legal orders are silent on the prohibition of destruction. Thus, this comparative analysis will impartially evaluate legal protection of murals in the USA, France and Germany. The author will thoroughly scrutinize and compare bidding laws and case law of selected jurisdictions. The aim of the analysis is to assess the level of protection afforded by the integrity right, which will lead to the conclusion on the necessity of the right to prevent destruction of artwork as a separate right included in Copyright acts.

Keywords

Mural, Destruction, Integrity Right, Copyright

I. Introduction

May artist experienced bigger pain than the destruction of her/his own work? Sadly, the threat of work's destruction is real for mural artists (the term mural accompanies also the term "graffiti", and this term will be also used in this article). Certainly, we must consider whether murals were created legally (with the consent of building's owner) or illegally (without such consent). It appears that in the case of legal murals, the destruction is not allowed. Illegal murals are being taken down very often. The concept of mural complicates the assessment of whether the property right prevail against Copyright, because murals are created on the physical medium usually owned by other people. Which right comes first? Copyright or property right? This fundamental conflict might be solved by the integrity right, more precisely by the right to prevent destruction of work. As often happens, this specific right is only implied from the wider integrity right which covers any mutilations, distortions or modifications of work. "An addition to or mutilation of a work may constitute a derogatory treatment of the author's production, but what of the case where the single copy is acquired by a purchaser, who then destroys the material object that has been

¹ Comenius University, Šafárikovo námestie č. 6, 810 00 Bratislava, Slovak Republic.
E-mail: petra.zarska@uniba.sk.

acquired? Is destruction in this sense a derogatory treatment of the work? Some argue that destruction is the ultimate form of mutilation, an act covered by Article 6bis of the Berne Convention². Others argue that if the work has disappeared, the author's reputation cannot be damaged by something that the public cannot perceive. The Berne Convention gives no specific guidance on the point, and the provisions of national laws fall broadly into three categories in this respect:

- (1) those which specifically include within the ambit of the moral right the author's right to prevent destruction (as is the case under US Law, for certain works of visual art, under the applicable statutory conditions);
- (2) those which, while not containing a general provision on the point have provided remedies in destruction cases before the courts (as in the case of France and Germany), and
- (3) those where the legislation is silent on the point, and there is yet no developed case law (as in the United Kingdom)."³

Why are we concerned over the destruction of murals? Apart from the fact, that murals are works protected by copyright, murals are also very important part of contemporary and street art worldwide.⁴ Murals are seen as "art gems" of city streets, often commissioned by cities or private companies to ornament buildings⁵. Murals are a firm part of movies and advertisements.⁶ Over years, murals have become fine art sold in galleries⁷, destroying fine art should not happen in our society.

The research focuses on legal protection of murals in the USA, France and Germany, highlighting similarities and differences of laws in the approach towards destruction. Due to a low number of cases concerning murals, the article in certain situation illustrates cases of similar art works such as sculptures, art installations, frescoes. The article portrays the position of murals in Copyright or Intellectual Property Codes, relationship of destruction to the integrity right and assumed benefits of a separate right to prevent destruction of work.

² Berne Convention for the Protection of Literary and Artistic Works as amended on Sept. 1979.

³ Sterling, JAL. (2008). *World Copyright Law* (3rd ed). London: Sweet & Maxwell. p. 397.

⁴ Street Art Today (2020). *7 best murals of the month: March 2020*. Retrieved November 2, 2020, from <https://streetart.today/2020/03/30/7-best-murals-of-the-month-march-2020/>.

⁵ Opticos Design. (2014). *The power of public art: How murals beautify cities and build communities*. Retrieved November 2, 2020, from <https://opticosdesign.com/blog/the-power-of-public-art-murals/>.

⁶ Street Advertising Services (2014). *Why are murals perfect for Movie release marketing?* Retrieved November 2, 2020, from <https://www.streetadvertisingservices.com/blog/article/why-are-wall-murals-perfect-for-movie-release-marketing>.

⁷ Artsy. (2019). *These Women Artists are Transforming Gallery Walls with Incredible Murals*. Retrieved November 2, 2020, from <https://www.artsy.net/article/artsy-editorial-women-artists-transforming-gallery-walls-incredible-murals>.

II. The Right to Prevent Destruction of Murals in the US

The USA might seem as dreamy place for mural artists, because it is a sole country from selected ones, which protects murals against destruction under VARA 106 A(a)(3)B⁸. Artists becoming authors must overcome two hurdles. Firstly, “to be eligible for protection, a work must qualify as a ‘work of visual art’ under s. 101⁹ and not fall within any of the exceptions. The author will have the burden of establishing that a particular work falls within the definition.¹⁰ Only five types of creative works are covered: paintings, drawings, prints, sculptures¹¹ and still photographic images produced for exhibition purposes only¹². Each work must only be reproduced in a limited edition of 200 or fewer and must be signed and numbered.¹³ According to the legislative history of VARA, courts are to *use common sense and generally accepted standards of the artistic community* in determining whether a particular work qualifies.¹⁴ Dictionary definitions often are used for assistance by courts.¹⁵ Artists may work in a variety of media and use different types of materials when creating their works.”¹⁶ “VARA’s text does not indicate when an artistic project becomes a work of visual art subject to its protections, but VARA has been interpreted to protect unfinished, but ‘fixed’ works.¹⁷ The term *painting* includes murals, works created on canvas, and even wildflowers gardens.”¹⁸ Under section 106 (a)(3)(B) of VARA, the author of a work of visual art shall have right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. According to wording of the right to prevent destruction of a work of visual art, e.g., murals, a work of visual art must also be “a work of recognized stature”. The second hurdle for authors of murals is to prove that the work of visual art is also of “recognized stature”. What does this term encompass? “The term *recognized stature* is not defined in VARA or the Copyright Act. Courts in several cases have adopted an approach requiring a claimant to make a two-tiered showing to establish this element: (1) that the visual art has *stature*; i.e. is viewed as meritorious; and (2) that this stature is recognized by art experts, other members of the artistic community, or by some cross-section of society.¹⁹ The work

⁸ The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. 106.

⁹ Section 101 of VARA.

¹⁰ VARA Legislative History, n.1, p. 6923.

¹¹ S. 101 of VARA, “Work of visual art” (paragraph 1).

¹² S. 101 of VARA, “Work of visual art” (paragraph 2).

¹³ Davies, G. and Garnet, K. (2010). *Moral rights*. London: Sweet & Maxwell. p. 863.

¹⁴ VARA Legislative History, n. 17, p. 6921.

¹⁵ See, e.g. *Phillips v Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, at 99 (D mass., 2003) (referring to dictionary definition of “sculpture”) affirmed, 459 F. 3d 128 (1st Cir., 2006); *Kelly v Chicago Park Dist.*, No. 04C07715, 2008 WL 4449886, at 5 (ND Ill., Sept. 29, 2008) (referring to dictionary definitions of “sculpture” and “painting”); *Pollara v Seymour*, 206 F. Supp. 2d 333 at 335, 337–38 (NDNY 2002) (using dictionary definition of ‘poster’), affirmed, 344 F.3d 265 (2d Cir., 2003). See further nn.65 and 67.

¹⁶ Davies and Garnet (n 12), p. 864.

¹⁷ *Massachusetts Museum of Contemp. Art. Found., Inc v Buchel*.

¹⁸ Davies and Garnet (n 12), p. 864.

¹⁹ *Carter v Helmsley-Spears*, n.2 at 325 (SDNY, 1994); *Martin v City of Indianapolis*, n.32 at 631 (SD Ind., 1997); *Scott v Dixon*, 309 F. Supp. 2d 395 at 397–98, 400 (EDNY, 2004); *Hunter v Squirrel Hill Assoc.*, n.58 at 520 (ED Pa., 2005); *Phillips v Pembroke Real Estate*, n.55 at 97–98 (D. Mass., 2003).

must attain a recognized stature by the time it is destroyed, not afterwards.²⁰ Moreover, it is the work by the same author.²¹ The requisite showing has been made through evidence consisting of favourable newspaper and magazine articles, commentary describing a work to be of *note*, *socially valuable*, *newsworthy*, a *fine piece of public sculpture*, or of *artistic merit*, letters from art gallery directors or art professors supporting the statute, documents showing that the work has won awards, and other documentary evidence.²² Generally, but not inevitably, expert testimony will be required.²³ The court in *Carter v Helmsley-Spears*²⁴ acknowledged that, when determining whether a work is of recognized stature, courts should consider sources such as artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature.²⁵ With respect to the evidence before it, the *Carter* court concluded that the installation art work was of recognized stature. Consideration of the testimony of the expert witnesses who testified at trial leads to the conclusion that the work is a work of recognized stature. For example, Professor Rosenblum testified that *this was a coherent ongoing program*, and he wants *everybody to go and see it*. Further, Professor Rosenblum testified that *the sculpture is a work of art like almost nothing I've ever seen before* and that *the one thing that I know absolutely is that this is an incredible phenomenon and I want to see it again and learn more about it. And I am sure there are countless other people who would feel like me if they saw it.*²⁶ While adhering to requisites of a recognized stature, one cannot forget to openly exhibit a work of recognized stature, because otherwise, how expert public would get its opinion on it? “A work cannot be considered of recognized stature if it is not known to or open for review by the artistic community or if a claimant fails to submit expert testimony concerning the work.”²⁷ For example, in *Scott v Dixon*²⁸, the subject of the artist’s VARA suit was a giant sculpture of a swan located on private property and not visible to the public. The artist sought damages under s. 106 A(a)(3)(B) for the destruction of the sculpture after the possessors removed it from their property and placed it in outdoor storage. The claimant asserted that the sculpture was one of recognized stature based in part upon publicity concerning her other sculptural works. The court found that the claimant failed to establish the requisite stature based on the following: she did not call an expert to

²⁰ *Pollara v Seymour*, n. 55 at 271 (2d Cir., 2003) (Gleeson, J. concurring).

²¹ *Scott v Dixon*, n.189 at 400 (EDNY, 2004).

²² See, e.g., *Martin v City of Indianapolis*, n.32 at 631 (SD Ind., 197), 192 F.3d at 612–13 (7th Cir. 1999) (finding sufficient proof of recognised stature by evidence that the model for sculpture won best of show. The art gallery director described the work as “interesting and aesthetically stimulating”, and a newspaper art critic and associate professor described it as a fine piece of public sculpture, and there were reviews and reports in print).

²³ *Carter v Helmsley-Spears*, n.2 at 325 (SDNY, 1994); *Martin v City of Indianapolis*, n. 32 at 612 (SD Ind., 1997); *Hunter v Squirrel Hill Assoc.*, n.58 at (ED Pa., 2005).

²⁴ *Carter v Helmsley-Spears*, n.2 at 325 (SDNY, 1994).

²⁵ *Carter v Helmsley-Spears*, n.2 at 325 (SDNY, 1994).

²⁶ Davies and Garnet (n 12), p. 884.

²⁷ *Pollara v Seymour*, n. 55 at 271 (2d Cir., 2003) (Gleeson, J. concurring) (agreeing with dismissal of claim because “it seems clear that a work that has never been exhibited cannot, as a matter of law, be a work of recognized stature”).

²⁸ *Scott v Dixon* (n 20).

testify about the sculpture's artistic merit, the only newspaper article she submitted about the swan merely referenced the sculpture in passing, and the sculpture was not on display or open for review by the artistic community.²⁹ At least at the summary judgment stage, however, a claim will not be defeated merely because the work *had not been exhibited to art critics or the general public*.^{30,31} After achieving the status of *work of visual art* in the USA, which encompasses also requirement of recognized stature, murals should be protected against destruction. The case called 5Pointz³² illustrates the risks of not reaching the quality of recognized stature, therefore also not matching the term work of visual art and also the risks of mural's creation without clear written consent of the owner of physical medium on which a mural is created. In the case of 5Point, "the primary issues that the District Court focused on were those of whether the works in question were of the necessary *recognized stature* to engage the relevant VARA moral rights provisions and, secondly, whether the inherent transient nature of the graffiti at hand would mitigate against the granting of injunctive relief."³³ Judge Block summed up the birth of 5Pointz by stating that, "starting in the early or mid-1990s, the exterior walls had become a place for distasteful graffiti by many self-proclaimed aerosol artists; it was then known as the Phun Phactory. To control this festering problem, Cohen approached Wolkoff in 2002 to become the curator of the works that would be permitted to be painted on the walls. Wolkoff agreed. But nothing was put in writing; it was just the 'general understanding that Cohen would be allowed to select who would be permitted to paint on the walls'. Wolkoff, therefore, gave his oral blessings to permit qualified aerosol artists, under Cohen's control, to display their works on his buildings. The site became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists. As Cohen described it: We have now 6 to 10 tour buses that come a day. Everyone wants to come and shoot a video there, and people come take engagement, wedding photos there. As he testified, there were also corporate and VIP tours; moreover, 5Pointz is listed in Time Out New York 'as a New York must-see' and is in 150 tour guidebooks."³⁴ 5Pointz had flourished until 2013, when Wolkoff applied for the requisite building permit and buildings were planned to bulldoze. Mural artists from 5Pointz including Cohen tried to prevent from tearing 5Points down. "Ultimately, in October 2013, Cohen and other 5Pointz artists petitioned the United States District Court for the Eastern District of New York for a preliminary injunction against the demolition of the building, citing the rarely-litigated VARA. On November 12, 2013, United States District Court Judge Frederic Block declined to issue a preliminary injunction and stated he would soon issue a written opinion."³⁵ In this opinion, judge Block totally grasped the complicated nature of this lawsuit by saying that

²⁹ *Scott v Dixon* (n 20).

³⁰ *Pollara v Seymour*, n. 55 at 398 (NDNY, 2002).

³¹ *Davies and Garnet* (n 12), p. 885.

³² *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

³³ Burke, S. M. (2014). 5 Pointz down: the New York District Court ruling on 'Graffiti Mecca'. *Queen Mary Journal of Intellectual Property*, 4(3), 226–235.

³⁴ See (n 31) par. II A.

³⁵ Thornley, D. (2019). The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal. *67 Clev. St. L. Rev.*, 351, p. 356.

“finally, whether viewed as bearing upon the issue of irreparable harm or the balancing of the hardships, the ineluctable factor which precludes either preliminary or permanent injunctive relief was the transient nature of the plaintiffs’ works. Regardless of Cohen’s belief that the 24 works were to be permanently displayed on the buildings, he always knew that the buildings were coming down—and that his paintings, as well as the others which he allowed to be placed on the walls, would be destroyed. Particularly disturbing is that many of the paintings were created as recently as this past September, just weeks after the City Planning Commission gave final approval to the defendants’ building plans. In a very real sense, plaintiffs’ have created their own hardships. But this does not mean that defendants do not share some responsibility. After all, Wolkoff gave his blessings to Cohen and the aerosol artists to decorate the buildings, and he did not choose to protect himself from liability by requiring VARA waivers. Moreover, while he was supportive of the artists and appreciated their work, he also stood to benefit economically from all the attention that had been drawn to the site as he planned to market the new buildings’ residences. Since, as defendants’ expert correctly acknowledged, VARA protects even temporary works from destruction, defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs’ works were of recognized stature.”³⁶ As judge Block accurately assumed muralist of 5Pointz filled on 6 June of 2015 a complaint seeking damages caused by destruction of murals.³⁷ In this following lawsuit, (the author will call this lawsuit Cohen II) the court stated that the court in Cohen I (the lawsuit where judge Block did not issue a preliminary injunctive relief) “recognized that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights. It did so by not interfering with Wolkoff’s desire to tear down the warehouses to make way for high-rise luxury condos.”³⁸ In Cohen II, “jury determined that Wolkoff had violated plaintiffs’ VARA rights and that he had acted wilfully. On a 98-page verdict sheet, the jury found liability and made various damage awards in respect to 36 of plaintiffs’ 49 works of art that were the subject of the lawsuit. In every case they found that Wolkoff had acted wilfully.”³⁹ The court in Cohen II agreed with jurors “that Wolkoff wilfully violated plaintiffs’ VARA rights in respect to those 36 paintings. The Court further finds that liability and wilfulness should attach to an additional nine works. Given the abject nature of Wolkoff’s wilful conduct, the Court awards the *maximum statutory damages* under VARA for each of the 45 works of art wrongfully and wilfully destroyed in the combined sum of \$6,750,000.”⁴⁰ The undoubtedly long awaited decision was issued on December 2 of 2018 and represents enormous victory for mural/graffiti artists in the USA.

³⁶ Par. 214 of *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

³⁷ *Maria Castillo and all. against G&M Realty LP*, Case No. 15-3230, US District Court, Eastern District of New York.

³⁸ See (n 36), p. 5.

³⁹ See (n 36), p. 6.

⁴⁰ See (n 36), p. 6.

III. The Right to Prevent Destruction of Murals in the EU

The right to prevent destruction of work is not explicitly incorporated into Intellectual Property Codes of Copyright Acts of compared countries from the EU. The protection against *destruction* is hidden in the integrity right, one of the moral rights. According to art. L-121-1 of the French Intellectual Property Code an author shall enjoy the right to respect for his name, his authorship and his work. “In France the right of integrity is expressed more laconically than elsewhere. *The author enjoys the right to respect for his... work.*”⁴¹ This general provision applies to all type of works protected under the Code but the legislator has considered it pertinent to reinstate this principle in relation to specific categories of exploiters who deal with protected material,⁴² namely publishers⁴³ and entertainment promoters⁴⁴ and to define it more clearly with respect to uses of audio-visual works.⁴⁵ Unlike the versions of the right seen in many countries, this right bears little obvious resemblance to article 6bis of the Berne Convention. No mention is made of the required treatment of the work (distortion, mutilation or modification under Berne); nor are the protected interests of the author listed. There is, therefore, no express requirement for the honour or reputation of the author to be prejudiced. The French legislators have preferred instead to leave the right broadly framed and subject to judicial elucidation and development.”⁴⁶ Despite laconically expressing the integrity right in the French Copyright law, the integrity right bears a stamp of colossal importance for authors, because they have no need to prove an interference into their honour or reputation. “The right of integrity under French law is far stronger than that granted under art. 6bis of the Berne Convention, which permits an author to object to alternations or distortions of his work only if they are ‘prejudicial to his honour or reputation’. Under French law, the author only needs to show that the integrity of the work has been violated, by way of alternation in form or spirit. He does not need to prove that he has suffered any prejudice as a result of such alternation.”⁴⁷ The right of respect for the work is expressed in France in a more absolute way than in other jurisdictions under discussion here. Its existence is not in principle affected by either the merit of the work or by the purpose for which has been created.⁴⁸ Furthermore, the Court de cassation stated in 1998 that the right of respect

⁴¹ Intellectual Property Code, consolidated as of October 2010, art. L 121-1.

⁴² Lucas, A. and Lucas, H.-J. (1995). *Traite de la propriété littéraire et artistique*. Revue internationale de droit compare, 47(2), 599–603. p. 372.

⁴³ In the chapter of the Code relating to Publishing Contracts specifies in art. L132-11 states: “he (the publisher) may not make any modification to the work without the written authorization of the author.”

⁴⁴ The chapter relating to Performance Contracts specifies in art. L 132.22 that “the entertainment promoter shall ensure that public performance takes places under technical conditions that guarantee respect for the author’s intellectual and moral rights.”

⁴⁵ Art. L 121-5 para. 3 specifies that “any change made to that (definitive) version by adding, deleting or modifying any element thereof shall require the agreement of the persons referred to in the first paragraph above” (the director, the joint authors and the producers).

⁴⁶ Adeney, E. (2006). *The Moral Rights Of Authors And Performers* (1rd ed). Oxford: Oxford University Press. par. 8.61–8.67.

⁴⁷ Sterling (n 2), p. 373.

⁴⁸ See (n 45).

for the work prohibits ‘any alternation or modification, no matter what its importance’.⁴⁹ The author may object to the alternation of a work at his discretion, and, in the theory at least, a court must accept his objection. Respect is due to the work in the form that the author wanted it to take.⁵⁰ Lucas and Lucas state that the right goes ‘to the limit of subjective logic / *jusqu’au bout de la logique subjective*’.⁵¹⁵² What is more pressing question to be answered in the French copyright law, is whether the actual wording of integrity right contains destruction or does it contain only alternation or modification of a work? “Another vexed issue is whether destruction of the work infringes the right of integrity. Commentators in France, as elsewhere, see logic in classifying destruction as a particularly egregious form of disrespect of the work and author. Nevertheless, neither doctrine nor jurisprudence is entirely consistent.”⁵³ Regarding the destruction of murals, the ownership of a wall concerns authors as well. Admittedly, there is clash of the property right of wall and the integrity right of an author of mural. “The moral right of integrity is also relevant in the relation to the destruction of a work of art, when the author is no longer the owner of the tangible object. The question remains whether the property right of the owner of the work prevails over the possible breach of the integrity of the work which would be arguably committed if the work were to be destroyed. Various aspects may be considered and the interests of the owner of the work. The prevailing approach indicates that it would be necessary for the owner to inform the author of the destruction, and give him the possibility to re-acquire the work that would be otherwise destroyed.”⁵⁴ “This, however, raises issues about the quantification of the indemnity due to the owner of the tangible object.”⁵⁵ By agreeing on the notion that the integrity right encompasses the right to prevent destruction, authors might have one additional hurdle to overcome in order to qualify for protection against destruction under the Intellectual Property Code in France. Is it a real hurdle as in case of a visual work of art under VARA or is it a piece of cake? To be protected by the Intellectual Property Code, one must create a work in the line with art. L-112-1 of the Code, which reads that the provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose. According to The Author of this article (further only “The Author” for purposes of distinguishing from the general term author or authors used here), this wide definition incorporates murals as well. Even, closer specification of works in art. L-112-2 lists paintings⁵⁶ and the list is open, not closed, therefore the law keeps its gate open to new

⁴⁹ *Tf 1 c Sony*, Cass, 1 ch civ, 24 February 1998, (1998) 177 RIDA 212. In this case, extracts of musical work had been used as part of a promotional broadcast.

⁵⁰ *Centre Culturel Aragon-Triolet c Association L’Instant Theatre*, CA Paris, 4 ch, 27 September 1996, (1997) 172 RIDA 270; *Lindon et SACD c La Compagnie Brut de Beton et Boussagol*, TGI Paris, 3 ch, 15 October 1992, (1993) 155 RIDA 225.

⁵¹ See (n 41), par. 412.

⁵² See (n 45) p. 186.

⁵³ See (n 45) p. 186.

⁵⁴ In TGI Paris, 3rd Ch., October 13, 2000 – *Benjamin Aichouba et autres v Francis Lecole*, January 2003 RIDA 378, the authors of a mosaic produced on the ground of a squatted property could retrieve the work, but the owner did not have the duty to contribute to the costs of such retrieval.

⁵⁵ See (n 41), p. 384 and (n 45), p. 186.

⁵⁶ Murals/graffiti are paintings on walls.

kinds of works. The Author assumes that such wide definition of a work and the absence of other criterion for painting result into the inclusion of murals into works protected by the Intellectual Property Code. Coming back to the clash of the property right to the tangible medium on which murals are created and the integrity right, how do the French courts approach different cases? “In a seminal case, an artist, who painted some frescoes in a building located in a city of Juvisy, opposed their being plastered over by the owner of the building. The Court d’appel overturned the first instant judgment in a favour of the artist, invoking article 544 of the Civil Code which gives the owner of the property full power of dispose of it or destroy it.”⁵⁷ “Frescoes were commissioned for chapel wall by the cure, but displeased the congregation; the Vicar-General had the walls whitewashed without the consent of the artist, who claimed infringement of his moral right of respect; the Court of Appeal held that in the circumstances obliteration was justified, as not being motivated by malice or desire to harm, and as being within the right of property in the object (to dispose, or even destroy).”⁵⁸ “This decision, however, has limited precedential value, since it arouse out of a particular factual context,⁵⁹ and a subsequent decision had enforced moral rights in the face of contrary wishes of the owner of the tangible or real property embodying the work at issue.”⁶⁰ “For pure works of art, as opposed to utilitarian works such as architectural works or works of applied arts, courts appear to adopt an approach that is favourable to authors. The examples of infringement of the right of integrity in this field are varied. The right of integrity also includes a responsibility for the owner of the tangible object to take good care of the work. A small village had commissioned a fountain but due to neglect, vandalism and the weather the fountain quickly deteriorated. The local authorities decided to have it destroyed. The sculptor opposed the planned destruction, claiming that his moral right would be infringed. The Court agreed and considered, in particular, that even more than an individual, a local authority which purchases a work of art must protect authors’ rights by taking care of it in the public interest.”⁶¹ It might seem that in France, when the court takes into account circumstances of the case and it is a pure work of art, the integrity right might prevail over the property right. How is the situation elsewhere? In Germany, we have the same situation regarding the silent right to prevent destruction. Section 14 of German Copyright Law construes the integrity right more precisely regarding the content of the right, than in the case of the French Intellectual Property Code. According to this section “the author has the right to prohibit a distortion or any other impairment of his work that is apt to endanger his legitimate intellectual or

⁵⁷ Trib. Civ. Versailles, 23 June 1932, D.H. 1932, 487, reversed, Paris, 27 April 1934, D.H. 1934, 385.

⁵⁸ Sterling (n 2), p. 421.

⁵⁹ See H. Desbois, *Le droit d’auteur en France*, no 454 (3rd., Paris 1978). For example, the court took care to note that the frescoes at issue had been painted in the chapel without the consent of the diocese.

⁶⁰ Versailles, aud. sol., 8. July 1981, R.I.D.A. 1981, no. 110, 201 D, 1982, inf. rap. 45, obs. Colombet, *appeal rejected*, Cass. Civ. 1, 16 March 1983, no. 117, 80 (the *Dubeffet* case). See e.g., Limoges, 30 March 2011, P.I. 2011, no. 40, 295, obs., Brugiere, (finding a violation of moral right in the destruction of the sculpture commissioned by a bank as a result of renovation work). But cf. Basse-Terre. 30. September 1996, D. 1998, somm. 58, obs. Robert (admitting the destruction of frescoes deteriorating because of humidity, despite the author’s contrary wish).

⁶¹ Davies and Garnet (n 12), p. 419.

personal interests in the work.”⁶² What is the real role of the integrity right in a legislative system of any state? In Germany, “section 17⁶³ is the main source of the integrity right. The right of integrity is not intended as a form of cultural preservation. It does not focus on the embodiment of the work as such and it is not intended to protect public interest, though such interests may be protected incidentally through its exercise. It is rather directed at protection of authorial personality against harm that could come to it through various treatments of the work. The author is subject of protection, the work is object.”⁶⁴ The Author assume that the same approach is applicable in other compared states, because the dominant function of integrity right is to preserve the integrity of a work of mind while this work is materialized in some medium. “The issue of how to deal with the destruction of the work has been a vexed one in German law.”⁶⁵ Is it potentially infringing distortion? Is it an impairment? Or does it have no relevance to authorial rights at all. Since a non-existent work is unable to prejudice authorial interests. While in most circumstances destruction is a concept needing little explanation, the case of work consisting of discrete components raise difficult issues. For example, the work may consist of a complex building, all complementing each other. One or some of those buildings might be pulled down.⁶⁶ Has the work then been destroyed? Or the work may consist of site-specific sculpture, where both the sculpture and the site may be considered components of the work.⁶⁷ If the sculpture is removed from the site, has destruction occurred?”⁶⁸ Such considerations are rather confusing in these specific examples, we must rely on courts to decide in every single case, taking into account general meaning of the term destruction and actual circumstances of a case. Regarding the question whether murals are protected subject matter under German Copyright Law, the answer lies in the case from 2011 called *Berlin Wall*. Under sec. 2(1)(4) of Copyright Act⁶⁹ the German Court of Appeal in this case on distribution right decided that “without more detailed analysis, also rightly assumed that the plaintiffs’ murals were to be treated as works of art entitled to copyright protection within the meaning of Sec. 2(1)(4) of the Copyright Act. As can be determined from the illustrations on record, these works are personal creations of individual expressive force that can be ascribed to the school of graffiti art. As the postcards and advertising brochures show, they have achieved wide recognition, becoming the subject matter of a large-scale auction. As far as concerns the entitlement to copyright protection that derives from the creation of a work by virtue of the Act, it is fundamentally of no significance that the work has been created unlawfully – in the present case an infringement of property rights subject to both civil and criminal law sanctions (Sec. 823 Civil Code, Sec. 303 Penal Code) (see

⁶² Law on Copyright and Neighbouring Rights as amended July 16, 1998.

⁶³ Section 17 of Law on Copyright and Neighbouring Rights as amended July 16, 1998.

⁶⁴ See (n 45), par. 9.84.

⁶⁵ Schack, H. (2001). *Urheber und Urhebervertragsrecht* (2nd ed). Tubingen: Mohr Siebeck.

⁶⁶ As discussed in OLG Munich [2001] GRUR-RR 177-Kirchenschiff.

⁶⁷ As discussed in OLG Hamm [2001] ZUM-RD 443-Keilstuck.

⁶⁸ See (n 45), par. 9.94.

⁶⁹ Law on Copyright and Neighbouring Rights as amended July 16, 1998.

Von Gamm, Urheberrechtsgesetz, point 17, Sec. 2).’’⁷⁰ Apart from recognition of murals as works of art protected by Copyright Law, this case brought very interesting result. The court disregarded unlawful status of murals related to the physical medium perhaps due to its cultural importance and irretrievability. As established from sec. 14 and case law, in Germany authors can rely on the integrity right and murals are protected as works under the German Copyright Law. Despite these positive facts for authors in the Germany, there is no mention of the right to prevent destruction. While the French Intellectual Property Code requires only some kind of intervention in Copyright, Germans see the situation differently. “Under art. 14, authors have the right to prohibit any distortion (Entstellung) or any other mutilation (Beeinträchtigung) of their works which would jeopardize their legitimate, intellectual or personal interests in their own works. Article 14 tracks art. 6bis of the Berne Convention⁷¹ in protecting authors against distortion or other mutilation of their works. But, as already mentioned, art. 14 goes beyond this international minimum right, in that it protects authors against any such act which would jeopardize their legitimate intellectual or personal interest in his work. This broad definition covers all the other intellectual or personal interests of the author in his work that the German legislator has left for the courts to explore. The conditions that authors must show some ‘jeopardy’, i.e., threat or actual harm to such interests, is intended to preclude them from asserting his right in vexation legal actions because of hypersensitive reactions to slight changes made to their works. This requirement that there be evidence of prejudice often in tandem with art. 39 which, in its first paragraph, confirms that the holder of an exploitation right may not alter the work, its title or the designation of author, unless otherwise agreed, while its second paragraph permits such alternation to the work and its title as the author cannot reasonably refuse. The case law must be consulted to see how, in applying arts 14 and 39, courts ‘balanced interests’ in relation to these issues.’’⁷² The German approach to the destruction of a work started with the decision⁷³ from 1912 by former Reichsgericht. “That old case concerned a fresco with nude sirens in the staircase of a private house, where the owner suddenly had repainted the frivolous, as she saw it, parts of the fresco. The Reich Court underlined the given opposition of two absolute rights, the author’s right and the owner’s right, but came to the conclusion that alteration without consent of the artist was not permissible. Once more in an obiter dictum the Court, however, explained that, as a rule, full destruction of the work of art does not involve an attack on the integrity of an existing work and, therefore, also not on the personality right of the artist.’’⁷⁴ One of the German experts on Copyright law, Adolf Dietz pondered on the meaning of this old decision and its impact on current copyright law, “I personally doubt whether this oversophisticated argumentation still holds true today since particularly a professional artist also depends in a certain way on the integral existence of his works of art for his honor and

⁷⁰ D. W. (1997), Germany: Wall Pictures. *International Review of Industrial Property and Copyright Law*, 28 (2), 282–287.

⁷¹ See (n 1).

⁷² Davies and Garnet (n 12), p. 416.

⁷³ *Rock Island with Sirens* (RGZ 79, 397/401).

⁷⁴ Dietz, A. (1994). The artist’s right of integrity under copyright law – a comparative approach. *International Review of Intellectual Property and Competition Law*, 25(2), 177–194.

reputation, be it only in their capacity as reference works for other possible commissions. Therefore, there are doubts expressed in legal theory in Germany⁷⁵ whether in comparable cases, when the owner of a work of art wants to destroy it, he/she should not at least have the obligation to inform an artist in advance and, if possible, allow him/her to take the work back, if the author/artist is prepared to compensate the owner for the material value of the work.”⁷⁶

IV. Conclusion

The general approach to murals in compared countries begins with the initial prerequisite for protection by national Intellectual Property Codes. This prerequisite is the mural's qualification as a work under specific provisions. In the US, murals must qualify as works of visual art. This term encompasses the requirement of being a work of recognized stature and to prove it seems to be the most challenging part of the process of qualification as a work of visual art. In France, authors only have to prove that it is a work of the mind, whatever their kind, form of expression, merit or purpose, more precisely in case of a mural, it is marked as painting. According to the case Berlin Wall, murals are protected by the Act on Copyright and Related rights⁷⁷. The fact that we can recognize murals as works protected by national Intellectual Property Codes is crucial for authors in order to rely on Copyright to murals. When Copyright to these works is breached, authors can protect themselves at courts. They invoke the integrity right to murals relying on their absolute right to decide about any change of the work. Although the integrity right stems from the Berne Convention, we see amendments to it. According to the art. 6bis of the Berne Convention, authors have the right to prevent changes and derogatory actions prejudicial to their honour or reputation. In France, in order to claim the infringement of integrity right, the infringement in the form of any intervention is sufficient to trigger protection by the integrity right. In Germany, apart from the unwished intervention, the authors also have to prove that this intervention is prejudicial to their honour or reputation. The integrity right in Germany copies the integrity right from the Bern Convention, while the integrity right in France is more relaxed, more favourable towards artists, because they do not have to prove prejudices to their honour and reputation. VARA's integrity right requires changes and/or derogatory actions which would be prejudicial to author's honour or reputation, but VARA goes far beyond the art. 6bis of the Berne Convention by explicitly voicing the right to prevent destruction of work. The crucial point for authors is that the Copyright in the US explicitly protects against destruction of murals requiring only the act of destruction itself without proving author's honour or reputation, while in France and Germany authors are in a precarious situation due to the silent right to prevent destruction only derived from the integrity right. How courts in compared countries approach destruction of murals? What are decisive factors for allowing destruction? The obliteration of murals has been approached by the French courts through the good will

⁷⁵ Dietz, A. (2010). *Kommentar* (4rd ed). Berlin: Beck. supra note 18, at 272 et seq.

⁷⁶ See (n 73).

⁷⁷ Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 28 November 2018 (Federal Law Gazette I, p. 2014).

of the property owner and her/his satisfaction by the work. In the fresco case, the court found the obliteration justifiable when the congregation only whitewashed walls due to displeased members of congregation and the intent of congregation was not malignant. How would the French court decide 5Pointz? Wolkoff was satisfied with murals, because it prevents the place from disorganized painting and also it became famous. Shortly after the rejection of preliminary injunction against destruction, Wolkoff at night whitewashed the whole site without giving notice to authors.⁷⁸ Surely, we can see his actions as malignant. Would the French court rule in favour of authors thanks to Wolkoff's satisfaction and malignant action after the refusal of preliminary injunction? Would be the outcome of this case different in France? Based on fresco case, 5Pointz might be decided in favour of authors. Somehow the same result came later in the US as well, in Cohen II, the jury agreed that Wolkoff acted with bad will and the judge awarded authors with maximum statutory damages. Universally, the destruction is seen as unlawful intervention to the integrity of work, plus, in Germany and the US, the prejudice to honour or reputation is required. How to detect an infringement of the integrity right? France evaluates the infringement on the notion that the undesired intervention happened, while the German law and the US law require also prejudice against honour or reputation. We might say that the evaluation of infringement of integrity right in France depends on the individual perception of the author, when the author perceives the action as unwanted. In Germany and the US, the evaluation seems to be impartial, because the author must establish real prejudice against honour or reputation, not only unwanted intervention into the integrity of a work. As legal conditions in Germany and France for authors of murals are unsure towards preserving their works, they must rely on the voluntary notice before destruction of work and in the event of destruction, on a remedy available for the original work of fine art. Remedies for these authors are only available when courts see murals as fine art works. Only in the US, written 90 days' notice before destruction is prescribed by law. Besides, finding legal conditions for authors facing destruction in the US clearer and more favourable towards them, the utmost hurdle to overcome represents the qualification of recognized stature. Murals often do not qualify as of recognized stature due its transient character and lack of recognition among art experts. Undoubtedly, unclear legal standards regarding whether the author has the right prevent destruction of murals in EU create hardship for them and stifle creation of art. In the competition between the US and EU on producing more murals which are preserved as fine art piece, the US is winning, because the legal position of authors there is more predictable in the case of impending destruction or already happened destruction, where they can at least receive financial remedy.⁷⁹ Authors in EU would surely benefit from the right to prevent destruction. The actual situation where the destruction is seen

⁷⁸ Maria Castillo and all. against G&M Realty LP (n 99) 15: "without providing plaintiffs with notice as required by VARA, Defendants destroyed, mutilated, modified and defaced each and every one of the works of art installed by Plaintiffs on 5Pointz, including of each work of art listed by name herein and other works of art not specifically identified and described herein. Defendants did not provide Plaintiffs with notice in writing regarding their intent to destroy the artwork nor did they afford Plaintiffs pursuant to 17 U.S. Code p. 113, a period of 90 days after receiving such notice either to remove the work or pay for its removal."

⁷⁹ In Cohen II, authors received 6,75 million \$ and in the case of Ed Ruscha Monument created by Kent Twitchell between 1978–1987, the author received 1.1 million \$ settlement over the removal of the mural in California.

permissible, might lead to awarding high damages to authors. The danger for owner of walls seems to be real, therefore enacting the right to prevent destruction would increase the number of murals and minimize the chance of paying monetary damages by owners of walls to authors. The enactment of right prevent the destruction is also the question of balance. We have at one hand very powerful property right and on the other hand weak implied right to prevent destruction. Moreover, in the EU case laws of compered countries varies that much that completely different results can by assumed depend on which country authors would protect their works against destruction. The balance is the key. The Author suggest establishing the right to prevent destruction with the statutory but wide definition of protected works, such as murals, in order to avoid the uncertainty in the US on the term of recognized stature, in Intellectual Property Codes of EU members. Similarly, the statutory definition of destruction is needed, because compared countries do not define it the same way nor see at as the utmost mutilation of a work. The unified right to prevent destruction of a work would stabilise the position of authors through the EU and help to build the Digital Single Market.

References

- Adeney, E. (2006). *The Moral Rights Of Authors And Performers* (1rd ed). Oxford:Oxford University Press.
- Artsy. (2019). *These Women Artists are Transforming Gallery Walls with Incredible Murals*. Retrieved November 2, 2020, from <https://www.artsy.net/article/artsy-editorial-women-artists-transforming-gallery-walls-incredible-murals>.
- Burke, S. M. (2014). 5 Pointz down: the New York District Court ruling on ‘Graffiti Mecca’. *Queen Mary Journal of Intellectual Property*, 4(3), 226–235.
- Dietz, A. (1994). The artist’s right of integrity under copyright law – a comparative approach. *International Review of Intellectual Property and Competition Law*, 25(2), 177–194.
- D. W. (1997), Germany: Wall Pictures. *International Review of Industrial Property and Copyright Law*, 28 (2), 282–287.
- Davies, G. and Garnet, K. (2010). *Moral rights*. London: Sweet & Maxwell.
- Desbois, H. (1978). *Le droit d’auteur en France* (3rd ed). Paris: Dalloz.
- Dietz, A. (2010). *Kommentar* (4rd ed). Berlin: Beck.
- Lucas, A. and Lucas, H.-J. (1995). Traite de la propriété littéraire et artistique. *Revue internationale de droit compare*, 47(2), 599–603.
- Opticos Design. (2014). *The power of public art: How murals beautify cities and build communities*. Retrieved November 2, 2020, from <https://opticosdesign.com/blog/the-power-of-public-art-murals/>.
- Schack, H. (2001). *Urheber und Urhebervertragsrecht* (2nd ed). Tübingen: Mohr Siebeck.
- Sterling, JAL. (2008). *World Copyright Law* (3rd ed). London: Sweet & Maxwell.
- Street Advertising Services. (2014). *Why are murals perfect for Movie release marketing?* Retrieved November 2, 2020, from <https://www.streetadvertisingservices.com/blog/article/why-are-wall-murals-perfect-for-movie-release-marketing>.

Street Art Today. (2020). *7 best murals of the month: March 2020*. Retrieved November 2, 2020, from <https://streetart.today/2020/03/30/7-best-murals-of-the-month-march-2020/>.
Thornley, D. (2019). The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal. *67 Clev. St. L. Rev.*, 351, p. 356.