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Protecting the Public Interest in Art

In recent years, controversy has arisen over whether the owner of a work of art has a duty to protect it from destruction, defacement, or other forms of mutilation.\(^1\) Because current law has failed to address the issue in a satisfactory manner, artwork with significant historical, cultural, and educational value has been damaged or destroyed.\(^2\) For example, in the late 1960's, New York State purchased a large number of valuable modern paintings for exhibition in the state museum and at the Albany Mall. By 1977, due to improper installation and insufficient upkeep, much of the work at the Mall had been seriously damaged.\(^3\) Although that damage

1. For example, considerable controversy arose when a real estate developer purposely destroyed artistically valuable bas-relief sculptures in the course of demolishing a New York City building. \textit{See}, \textit{e.g.}, \textit{Builder Says Costs Forced Scrapping of Bonwit Art}, N.Y. Times, June 9, 1980, at B3, cols. 4, 5 (destruction of Bonwit sculptures “shocked” art appraisers); \textit{Crumbling Patrimony}, N.Y. Times, June 15, 1980, § 4 (Week in Review), at 20, cols. 1, 2 (Editorial) (“New York needs to make salvation of this kind of landmark mandatory and stop expecting that its developers will be good citizens and good sports.”); \textit{Developer Scraps Bonwit Sculptures}, N.Y. Times, June 6, 1980, at A1, B5, cols. 1, 3-4 (reporting “disappointment and surprise” of Metropolitan Museum officials that Bonwit sculptures destroyed instead of, as earlier promised, donated to Metropolitan Museum); \textit{Grillwork Missing at Bonwit Building}, N.Y. Times, June 7, 1980, at 23, col. 2 (public outcry over loss of sculptures); \textit{Requiem for a New York Art Work}, N.Y. Times, June 14, 1980, at 22, cols. 3, 4 (letters to editor) (outrage that law permitted Bonwit sculptures to be destroyed; America’s cultural heritage should be preserved). In another instance, a public dispute arose over the condition of a prize-winning Alexander Calder mobile when its owner destroyed the effect of the piece by painting it another color, immobilizing it, and spinning it from an electric motor. After an art museum trustee “charged that the mobile’s integrity had been violated,” and after much national publicity, the owner was persuaded to restore the mobile to its original condition. \textit{Mobilizing for Pittsburgh}, \textit{ARTNEWS}, Apr. 1978, at 26. \textit{See also} \textit{Failing, The Maryhill Museum: A Case History of Cultural Abuse}, \textit{ARTINVS}, Mar. 1977, at 83 (concern over deterioration of two Rodin collections of international importance led to investigations and lawsuits); Hess, \textit{The Mess in Albany}, \textbf{NEW YORK}, Nov. 28, 1977, at 83, 86 (New York State “must accept a measure of responsibility” when valuable artwork that it owns is damaged).

2. \textit{See}, \textit{e.g.}, Kramer, \textit{Altering of Smith Work Stirs Dispute}, N.Y. Times, Sept. 13, 1974, at 28, col. 1 (criticism of stripping of paint off sculptor David Smith’s artwork after his death); Kramer, \textit{Questions Raised by Art Alterations}, N.Y. Times, Sept. 14, 1974, at 25, col. 1 (same); Sussman, \textit{It’s Student vs. Hopkins in Dispute Over Disposal of Old Books and Manet Prints}, Baltimore Sun, Mar. 9, 1980 (Magazine), at 14 (university library allegedly attempted to destroy Manet and Delacroix engravings it owned in order to make space for other library activities); \textit{A Miro in Trouble}, N.Y. Times, May 9, 1981, at 22, col. 4 (letter to editor) (dilapidation of Miro tapestry); \textit{see also} note 1 supra (describing instances of purposeful and negligent destruction of or injury to artwork); note 8 infra (discussing instances of purposeful dismemberment of artwork). As the above examples show, market forces do not always prevent owners from doing injury to their artwork.

3. For example, three panels comprising one painting by Al Held were “brutally cropped” and mismatched upon installation, which ruined the painting’s meaning, and were permitted to sustain unrepaiired abrasions and scratches. Hess, supra note 1, at 84. \textit{See also} note 9 infra (discussing damage to Kenneth Noland painting at same exhibit).
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constituted a cultural scandal, there was no way to compel restoration of the work.

This Note offers two independent legal strategies to help preserve the integrity of culturally valuable artwork. First, it develops a new theory, based on the American common-law doctrine of public dedication, which courts could adopt in order to protect certain types of important artwork from both negligent and intentional injury. This common-law approach, unlike European doctrines that safeguard artwork by protecting artists’ rights, is premised on the existence of a public interest and a public trust in the artwork itself. Second, the Note proposes a statutory approach to protecting artwork that could supplement the common-law method. It argues that the National Endowment for the Arts (NEA) should protect some artwork from injury by promulgating regulations that empower the agency to assert a public interest in the integrity of the works of visual art that it funds.

I. The Basis for Asserting a Public Interest in the Integrity of Works of Art

In the past, American courts have considered the problem of protecting artwork from injury and mutilation primarily in terms of protecting artists’ rights. Artists’ rights doctrines, however, do not adequately safeguard the public interest in art. Some of these doctrines have been rejected by American courts, and others are impractical. In addition, such doctrines respond only to the concerns of individual artists, instead of addressing the needs of the public. The common-law doctrine of public dedication, on the other hand, can provide a basis for protecting the public interest in art because it is specifically designed to safeguard public interests in private property.


5. The only method suggested for assuring repair of the Held painting was that the legislature appropriate money for restoration. Hess, supra note 1, at 86. For a discussion of the inability of current law to preserve artwork, see pp. 123-26 infra.

6. The categories of protection offered by this Note are not mutually exclusive. They achieve similar results, but differ in inclusiveness and in the ease with which they could be adopted. The common-law method of protection, see 131-40 infra, could be adopted more easily because it depends only upon favorable action by individual courts. This method would not, however, be geographically comprehensive. Administrative regulations promulgated by the NEA, see pp. 140-43 infra, would be uniform throughout the country and would expand the field of protected art, but would probably require some political support to adopt. Maximum protection could be afforded to artwork of national significance by enacting comprehensive federal legislation modeled on historic preservation laws. This Note does not discuss such a legislative approach, however, because enactment of such legislation seems unlikely.
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A. Inadequate Current Approaches

Artwork needs protection from various kinds of injury. It may be destroyed totally, or it may be subjected to other serious physical abuses either purposely or negligently. Such injury is especially unfortunate because there is, at present, no way to force an owner who has caused the damage either to restore the artwork to its original condition or to refrain from further injuring the work.

Visual artists occasionally have made unsuccessful attempts to sue to prevent the mutilation or destruction of their artwork, basing their claims on the European doctrine of the "droit moral." In Europe, the droit moral gives the artist a right to protect his creation by controlling and preventing any modification of it. In America, however, attempts by artists to prevent the destruction or mutilation of their creations through the droit moral have failed. In some cases, the foreign terminology and the absence of any remedy for such injuries has led to further abuse.

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7. See, e.g., Sussman, supra note 2 (library accused of attempting to destroy Manet and Delacroix engravings by throwing them in trash compactor in order to provide space for other activities).

8. Surprising as it may seem, it is far from unheard of for owners purposely to alter or dismember their artwork, often out of modesty or because of other personal preferences. Poussin's Venus and the Liberal Arts, for example, was cut into sections and some of the naked figures were draped. Failing, Picking Up the Pieces: The Case of the Dismembered Masterpieces, ARTNEWS, Sept. 1980, at 68, 74. See also Roeder, infra note 13, at 554; notes 1 & 2 supra. For a thorough, historical review of purposely destroyed and mutilated artwork in Europe, see UNESCO, AN ILLUSTRATED INVENTORY OF FAMOUS DISMEMBERED WORKS OF ART (1974).

9. For instance, the same negligence that caused the damage to the Al Held painting at the Albany Mall, described in note 3 supra, also resulted in injury to other artwork there. One Kenneth Noland canvas, for example, was taken off its stretchers and glued permanently to a wall, making it "impossible to remove for standard curatorial inspections," and later, during an ethnic food fair held in the space in front of the painting, "price tags for various menus were stuck to the canvas." Hess, supra note 1, at 83. See also notes 1 & 2 supra.

10. Injury to artwork is pointless because there generally is no economic incentive for an owner to destroy or mutilate artwork. But see Failing, supra note 8, at 71 (owner of two Toulouse-Lautrec paintings cut them into 10 pieces because he hoped to sell parts more easily than whole). Thus, most of the injury to artwork described in this Note results from negligent treatment, or is due to personal preferences or artistic ignorance.

11. In the case of the damage to the Al Held painting, New York State rebuffed the artist's offers to repair the work. Held spent "three years trying to correct the situation. He offer[ed] to come to Albany and repaint the picture, to fix the seams and interconnections, with no fee—just reimbursement of out-of-pocket expenses . . . . Instead of an apology and a grateful invitation, Held [got] runarounds and screaming matches." Hess, supra note 1, at 84. See also Crumbling Patrimony, supra note 3, § 20, col. 1 (current law mistakenly relies on owner's good faith to protect important cultural objects from injury); Requiem for a New York Art Work, supra note 1, at 22, cols. 3, 4 (same).

12. In the context of this Note, the term "visual artist" is used to describe a creator who produces objects that are meant to be permanent and are designed primarily to be experienced through vision.

13. In one German case, for example, the droit moral enabled an artist to prevent an owner from hiring another painter to drape nude figures in a mural. Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 HARV. L. REV. 554, 554 (1940). For discussions of the droit moral, see Diamond, Legal Protection for the "Moral Rights" of Authors and other Creators, 68 TRADEMARK REP. 244, 256-57 (1978); Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1027 (1976); Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 AM. J. COMP. L. 465, 480 (1968).
of domestic precedent have led courts to reject the doctrine;¹⁴ in others, courts have disapproved of the basic concept of allowing the artist perpetual control over his artwork.¹⁵

Although possible American common-law analogs to the droit moral do exist, these “artists’ rights” approaches do not provide a viable means of protecting artwork.¹⁶ First, courts may be reluctant to embrace the analogs because they are based on the same substantive notions as the droit moral. Second, in practice, these analogs could not adequately protect the artwork. For example, one analog would permit an artist to bring an action for defamation against a person who mutilated the work, on the grounds that the distortion injured the artist’s reputation and goodwill.¹⁷ But proving that the distortion was in fact defamatory because it held him “up to hatred, contempt or ridicule, or . . . cause[d] him to be shunned or avoided”¹⁸ would be difficult.¹⁹ In addition, injunctive relief to protect or restore the mutilated painting would not be available.²⁰ Because other American varieties of the artists’ rights approach suffer from similar infirm-

¹⁴ See, e.g., Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (refusing to recognize “so-called moral rights,” whether or not recognition would be desirable, because to do so would change American law to conform to European doctrines); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (1949) (refusing to embrace doctrine of moral rights because doctrine “has not yet received acceptance in the law of the United States”) (quoting S. LADAS, 2 THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY § 367, at 802 (1938)).

¹⁵ See Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring) (moral right doctrine includes very extensive rights that American courts are not yet prepared to acknowledge); Meliodon v. Philadelphia School Dist., 328 Pa. 457, 460, 195 A. 905, 906 (1938) (implicitly disapproving doctrine that would give artists control over artwork after sale).

¹⁶ In a few cases, courts have given a film producer a right to protect the integrity of his movie when it is threatened with excessive editing for television. See Treece, American Law Analogues of the Author’s “Moral Right,” 16 AM. J. COMP. L. 487, 496-98 (1968). These cases only suggest, however, that when interpreting contracts carefully spell out the rights of each party, the absence of a provision expressly allowing editing does not permit a user of the film to mutilate it grossly. Moreover, even an action brought under such a theory has, at best, an uncertain chance of success. Id. at 499. In any event, the public, as opposed to the artist’s, interest in the integrity of artwork would not be protected by this line of cases.

California has enacted a limited statutory version of the artists’ rights doctrine that gives visual artists the right to enjoin or to recover damages from a person who has intentionally mutilated the artist’s creation. CAL. CIV. CODE § 987 (West Supp. 1981).

¹⁷ “In the area of artistic creation, there is an action for defamation when one exploits a distorted version of a work which tends to injure its creator’s reputation ‘by diminishing his public esteem, respect, goodwill or confidence.’” Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing Legal Doctrines, 60 GEO. L.J. 1539, 1548 (1972) (quoting S. BOWER, ACTIONABLE DEFAMATION 4 (2d ed. 1923)).


¹⁹ Well-known artists would have to overcome significant burdens over and above the factual burdens that actions for defamation always entail. They would be “public figures” who could recover for defamation “only upon a clear and convincing showing of the defendant’s knowledge or reckless disregard of the falsity of the defamatory publication.” L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-13, at 639 (1978) (discussing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).
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...mities of proof, remedy, or applicability; traditional American common-law rights are inadequate to protect an artist's interests in the integrity of his artwork.

Even if these artists' rights approaches were practical, however, they could never adequately protect the public interest in important artwork. They focus primarily on protecting the artist's rights in his work, rather than on protecting the much broader public interest in the artwork itself. For example, these doctrines depend on rights that are personal to and inalienable from each individual artist, and therefore can be enforced only by the aggrieved artist or, sometimes, his heirs. This limitation, of course, makes it virtually impossible to protect older art. In addition, artists' rights doctrines do not protect artwork from destruction, as opposed to mutilation. Mutilation of artwork, when the artist is identified, mis-

21. For example, an artist could bring an action for invasion of privacy against the person responsible for mutilation of his work. The claim would be based upon the theory that the right of privacy includes the individual's right to protect the proprietary interest in his reputation. Comment, supra note 17, at 1548. This approach, however, would not protect the work of any important or publicly known artist, id. at 1548 n.59, which is precisely the type of work that the public has an interest in protecting.

22. For a discussion of various American analogs to the droit moral, such as breach of contract, copyright infringement, libel, and unfair competition, along with the infirmities of those doctrines, see Diamond, supra note 13, at 259-71, 281 (concluding that "the barriers to enforcement of moral rights under state . . . [and federal law] would seem to preclude a satisfactory solution to the moral rights problem in the United States by any means short of specific federal legislation"). See also Maslow, Droit Moral and Sections 43(a) and 44(i) of the Lanham Act—A Judicial Shell Game? 48 GEO. WASH. L. REV. 377 (1980); Comment, supra note 17, at 1548-56.

23. The artists' rights doctrine, for example, does not answer the complaint of the Mayor of the City of New York "that developers had a 'moral responsibility to consider the interests of the people of the city,'" which was voiced after a real estate developer in the course of demolishing a building jackhammered some bas-relief sculptures that had been sought by the Metropolitan Museum of Art. Grillwork Missing at Bonwit Building, supra note 1, at 23, col. 3. Public reaction to the loss of these sculptures was intense: "The loss of the sculptures were [sic] decried by planning officials, civic groups and even the architect who designed the . . . [replacement] tower that is to be built on the site." Id.; "The destruction of . . . the sculptures is an act of vandalism which is all too indicative of the value we . . . place on our cultural heritage . . . The crime outrages us all the more when we realize that its perpetrators have acted with an impunity that is guaranteed them by law." Requiem for a New York Art Work, supra note 1, at 22, col. 3.


25. See The California Art Preservation Act, CAL. CIV. CODE § 987(g)(1) (West Supp. 1981) (artist may enforce his own moral rights, and they may also be enforced by his heirs, legatees, or personal representative until the fiftieth anniversary of his death); Roeder, supra note 13, at 574-75 (describing which components of the artist's moral right can be enforced by the artist alone, and which can also be enforced by his heirs); Strauss, supra note 24, at 517-18 (same). In some European countries the right to sue to protect the artist's droit moral has been extended by statute beyond the family and descendants of the artist to bodies charged with protecting the nation's artwork. Roeder, supra note 13, at 575.

26. See Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 573, 89 N.Y.S.2d 813, 816-17 ("The right to prevent defamation does not include the right to prevent destruction of a created work.") (quoting Roeder, supra note 13, at 569). But see Merryman, supra note 13, at 1035 (issue of whether total destruction violates moral right not totally resolved; on balance argument that it does "seems persuasive").

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represents the artist to the public, thereby damaging his reputation.\(^7\) Outright destruction or mutilation of artwork to the point that the artist cannot be identified, however, does not violate the droit moral—there is no danger that such destruction will misrepresent the artist or invade his privacy by subjecting him to excessive criticism or ridicule.\(^8\)

**B. The Theory of Common-Law Dedication**

The theory of public dedication of land could provide a basis for the development of a doctrine to protect the public interest in artwork. Public dedication is a well-established method of asserting public rights in private property. It balances the public welfare, not merely the rights of an individual artist, against the rights of an individual owner of art.

1. **The Operation and Consequences of the Doctrine of Public Dedication**

Under the common-law doctrine of public dedication, the public can acquire rights to property useful to promote its welfare. The doctrine is based on combined principles of gift and contract law.\(^9\) Its basic components are offer and acceptance.\(^10\) If an owner offers a use of his property to the public, and if the public accepts that offer, the property will be considered dedicated. A public interest in it will be established although no consideration has passed.\(^11\)

Public dedication cases define the terms “offer” and “acceptance” in an

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27. See Roeder, supra note 13, at 569 (deformation of artwork subjects an artist to criticism for work not attributable to him and thus injures his honor and reputation).

28. Cf. Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (defendant could lawfully abbreviate plaintiff’s musical recording and sell shortened version as long as the shortened version was not attributed to plaintiff).

29. The doctrine is based on contract law in that offer and acceptance are required, see note 30 infra, and it is based on gift principles in that no consideration is required, see note 31 infra. See generally Note, Public Ownership of Land Through Dedication, 75 HARV. L. REV. 1406, 1406-07 (1962) (some courts analogize dedication to contract law without requirement of consideration, some analogize it to gift, and some analogize it to estoppel). Although there has been some confusion over the theoretical origins of the doctrine, “the distinction has lost all practical importance and the court’s choice of theory will not be dispositive of any given case.” Id. at 1407; see also 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1110, at 629 (3d ed. 1975) (“For the purpose of the particular case the confusion over the conceptual basis of the doctrine is immaterial. . . .”)


31. 6A R. POWELL, supra note 30, ¶ 926(2) n.19, at 84-85; Note, supra note 29, at 1406.

The fact that the dedicatory traditionally retains title to dedicated land distinguishes dedication from adverse possession and prescription. See 6A R. POWELL, supra note 30, ¶ 926[3], at 84-102 (public typically obtains only easement in dedicated land, with fee left in dedicatory). Another feature that distinguishes public dedication from adverse possession and prescription is that public dedication is based on offer and acceptance, and therefore does not require adverse use for a particular length of time. Courts, however, sometimes confuse the doctrines, or infer the existence of an offer on the basis of public use for a specified number of years.
informal, flexible manner. For example, an express invitation to the public to use property constitutes an offer; so can a grant of property to a public body. Even mere acquiescence by the owner in public use of property for a period of time can constitute an offer. In short, when a particular piece of property serves an important public use, courts are eager to construe circumstances to infer the existence of the required offer and acceptance. As long as the property is "thrown open" to the public to use in some manner, an intent and an offer to dedicate can be implied. This liberal approach to defining the components of public dedication law developed because of the public policy objectives underlying the doctrine. For example, in cases involving beachfront property, courts have favored finding an offer and acceptance because of "the need for more public recreational areas and the desire to avoid public expense by fulfilling this need with private 'donations.'"

Once public dedication has been found, no owner of the property—present or future—will be permitted to defeat or interfere with the public right to use it for its dedicated purposes. Dedicated property is

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32. See Miller v. Schotlen, 273 N.W.2d 757, 762 (S.D. 1979) ("no hard and fast rule can be laid down" to determine whether implied dedication has taken place) (quoting Evans v. City of Brookings, 41 S.D. 225, 229, 170 N.W. 133, 134 (1918)); 6A R. POWELL, supra note 30, ¶ 926[1], at 84-82 (processes by which dedication is accomplished may be informal); Note, Public Access to Beaches, 22 STAN. L. REV. 564, 573 (1979) (no formalities necessary to constitute dedication).

33. E.g., Breslin v. Gray, 301 Ky. 739, 743, 193 S.W.2d 143, 145 (1946) (finding offer to dedicate on basis of endorsement on plat that "[t]he streets and alleys as herein shown are hereby dedicated to the public use").

34. See Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 228, 147 N.E. 104, 105 (1925) (deed conveying land as cemetery is dedication for such purpose).

35. E.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38, 465 P.2d 50, 55, 84 Cal. Rptr. 162, 167 (1970) (owner's acquiescence in public use of beach for more than five years established dedication).

36. Although some courts, at least in dicta, require that an owner show some unequivocal intent to offer his land to the public, see, e.g., Anderson v. Felten, 612 P.2d 216, 218 ( Nev. 1980), when faced with a situation in which an important public use is at stake, courts usually interpret otherwise ambiguous actions in order to protect the public interest, see, e.g., Rainier Ave. Corp. v. Seattle, 80 Wash. 2d 362, 367, 494 P.2d 996, 999, 999 cert. denied, 409 U.S. 983 (1972) ("It is . . . a salutary rule to resolve doubts against the dedicator, and within reasonable limits, to construe dedications so as to benefit the public rather than the dedicator."); Albee v. Town of Yarrow Point, 74 Wash. 2d 453, 457, 445 P.2d 340, 343 (1968) (even if dedicator did not intend to extend dedication of road to provide access to navigable water, "the law will presume that . . . [the dedication] was intended because it should have been"); 6A R. POWELL, supra note 30, ¶ 926[2], at 84-86 n.21 (collecting cases).

37. E.g., Cincinnati v. Lessee of White, 31 U.S. (6 Pet.) 431, 440 (1832) (if owner "throws open" his property to public it will be presumed dedicated unless he affirmatively reserves his rights in it) (citing Rex v. Lloyd, 1 Camp. 260, 262 (K.B. 1910)); Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 936 (Tex. Civ. App. 1963) ("The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public.")

38. See 6A R. POWELL, supra note 30, ¶ 926 [2], at 84-85 to 84-87 (law of dedication is considerably elastic because although some courts require showing of unequivocal desire to part with land, other courts liberally construe ambiguous transactions since dedication increases the public inventory); pp. 128-29 infra.


40. "Dedication has been viewed as in the nature of an irrevocable covenant running with the
considered to be held in trust by the owner for the public even though no trust instrument has been executed. The owner is deemed to be a fiduciary of the public with respect to the dedicated use of the property; as such, he may not divert the property to a use inconsistent with that of the public. This public trust principle applies whether the owner is a private person or a municipality.

2. The Growth of Public Dedication in the United States

Strong public policy objectives have long been the principal, critical elements in the development and expansion of public dedication doctrine in the United States. In its original English form, the doctrine applied only to roadways. The public interest in facilitating commerce and travel naturally encouraged the growth of a public trust theory in regard to such property. In addition, because public use of the property could easily be measured, the theory was self-limiting in its application and therefore not very threatening to property owners.

In the United States, the law of public dedication was extended beyond its English origins to apply to many kinds of property of interest to the land..." 4 H. TIFFANY, supra note 29, § 1112, at 638. E.g., Cincinnati v. Lessee of White, 31 U.S. (6 Pet.) 431 (1832) (dedication of property continued to be effective although ownership changed hands many times); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 773, 330 N.Y.S.2d 495, 507 (1972), aff'd, 45 A.D.2d 841, 358 N.Y.S.2d 957 (1974) ("Once a dedication has become complete it is irrevocable.")

41. Courts generally refer to the duty of the owner of dedicated property as that of a public trustee. "[T]here is a very close kinship between trusts and dedications..." [D]edication cases have specifically talked in terms of the title being held 'in trust' [for the public] for the purpose of dedication," State v. Cooper, 24 N.J. 261, 276, 131 A.2d 756, 764, cert. denied, 355 U.S. 829 (1957) (Commissioner v. First Nat'l Bank 46 Pa. D. & C. 619, 623 (1943)). See id. at 266-67, 131 A.2d at 759 (land dedicated to park use cannot be freely alienated from such use because it is held in trust for public; municipality has interest in nature of "secondary title" to land, also held in trust for property's dedicated purposes).

42. See Bryant v. Gustafson, 230 Minn. 1, 10-11, 40 N.W.2d 427, 434 (1950) (dedicated land is owned subject to trust for its dedicated purposes); Hill v. Borough of Belmar, 3 N.J. Misc. 254, 256, 127 A. 789, 790-91 (1925) (both legal and "secondary" titleholders of land dedicated for use as park hold property in trust for public and cannot divert property from that use); 6A R. POWELL, supra note 30, § 926[3], at 84-102 (owner of dedicated land can use property in any manner "not inconsistent with the public easement").

43. See, e.g., City and County of Denver v. Publix Cab Co., 135 Colo. 132, 139, 308 P.2d 1016, 1020 (1957) (dedication can be made by municipal corporation as well as by private owner; when city dedicated approach to airport to public, it held that property in trust for the use of the public); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 769, 330 N.Y.S.2d 495, 504 (1972), aff'd, 45 A.D.2d 841, 358 N.Y.S.2d 957 (1974) (dedication can be made by municipal corporation as well as by private person).

44. 6A R. POWELL, supra note 30, ¶ 926[1], at 84-83; Note, The American Extension of the Doctrine of Dedication, 16 HARV. L. REV. 128, 128 (1902).

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public.44 Even in early cases, the doctrine was applied broadly, and the courts emphasized the effect of the doctrine on public welfare. In 1832, for example, the Supreme Court invoked the doctrine to prevent a landowner from interfering with the public’s use of property as a common, because to do otherwise "would be destructive of public convenience . . . ."45

The expansion of public dedication doctrine has continued recently in cases involving beachfront property.46 These cases explicitly refer to the public policy basis for applying the dedication doctrine.47 As one court remarked, "[e]ven if we were reluctant to apply the rules of common law dedication to open recreational areas, we must observe the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas."48 This trend of expanding public dedication law in response to modern public interests provides American courts with a common-law basis for developing a theory of public rights in important works of art.

II. The Public’s Common-Law Right to the Visual Integrity of Works of Art

Just as public dedication doctrine expanded from its narrow beginnings to take account of public recreational interests, the doctrine should expand

46. 6A R. POWELL, supra note 30, ¶ 926[1], at 84-83; 4 H. TIFFANY, supra note 29, § 1098, at 562-64; Note, supra note 44, at 128. For example, in the United States, the theory of public dedication is applicable to parks, see, e.g., Herron v. Boggs, 582 S.W.2d 643 (Ky. 1979); Birmingham Park Improvement Ass’n v. Rosso, 356 Mich. 88, 95 N.W.2d 885 (1959), to cemeteries, see, e.g., Haserlig v. Watson, 205 Ga. 668, 54 S.E.2d 413 (1949); Smith v. Ladage, 397 Ill. 336, 74 N.E.2d 497 (1947), to utility lines, see, e.g., Horsham Township v. Weiner, 435 Pa. 195, 220 A.2d 126 (1966), and to flood control areas, see, e.g., Toney Schloss Properties Corp. v. Berenholz, 243 Md. 195, 220 A.2d 910 (1966).


48. See, e.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (1972), aff’d, 45 A.2d 841, 358 N.Y.S.2d 957 (1972); Note, supra note 32, at 574.

49. E.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42-43, 465 P.2d 50, 58-59, 84 Cal. Rptr. 162, 170-71 (1970); Rainier Ave. Corp. v. City of Seattle, 80 Wash. 2d 362, 367-68, 494 P.2d 996, 999 (1972); see Note, supra note 32, at 579:

Neither the character of the public use nor the owner’s intent serves to explain the shift in judicial attitude toward creation of beach easements . . . . Growing recognition of both the importance of public beach recreation and the substantial threat posed to public recreation by private development has probably been the decisive factor in tilting [the] balance to favor the public claim.

50. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42, 465 P.2d 50, 58, 84 Cal. Rptr. 162, 170 (1970). The court in Gion did not base its public policy argument on any particular statute. Instead, it cited provisions from many parts of the California code and constitution. Some of the provisions mentioned by the court included presumptions of public ownership of land between high and low tide, constitutional provisions in favor of allowing the public right-of-way to water, guarantees of the right to fish, and prohibitions of structures on artificially accreted lands. Id. at 42-43, 465 P.2d at 58-59, 84 Cal. Rptr. at 170-71. The manner in which the court gathered and interpreted these statutes is criticized in Note, supra note 39, at 1106-09.
further to take account of public cultural interests. The doctrine should be applied to protect artwork acquired by museums. Such an application would protect the public interest in important artwork by allowing the public to bring suit to prevent destruction or mutilation of the work.

A. Artwork and Public Dedication Doctrine

The extension of public dedication doctrine to certain important works of art would continue trends in both public dedication and real property law. It is consistent with the historical public policy basis of public dedication law to apply the doctrine to artwork. As with beachfront property, there is a policy recognized by state and federal statutes that favors the development of public trust and dedication principles in the area. All fifty states have state arts agencies that are charged with promoting and supporting the arts. The California statutes state the policy directly: "The Legislature hereby finds and declares . . . [that there is] a public interest in preserving the integrity of cultural and artistic creations." Federal support for the arts is evidenced in many ways, most notably by the NEA, which in 1979 received $139,660,000 to distribute to support the development of the arts in the United States.

Although the concept of dedication has not been used previously to assert public rights in personal, as opposed to real property, American

51. Goerkjian, States Arts Agencies: An Overview, in L. KREISBERG, LOCAL GOVERNMENT AND THE ARTS 180 (1979). One state law expresses the policy in the following manner:

The Legislature perceives that life in California is enriched by art. The source of art is in the natural flow of the human mind. Realizing craft and beauty is demanding, however, the people of the state desire to encourage and nourish these skills wherever they occur, to the benefit of all. CAL. GOV'T CODE § 8750 (West 1980). The statutes of most other states express a similar public policy. See, e.g. MD. ANN. CODE art. 41, § 397 (1978). Total annual state appropriations for the arts amount to more than $80 million. 1979 NAT'L ENDOWMENT FOR THE ARTS ANN. REP. 3 (statement of chairman L. Biddle) [hereinafter cited as 1979 NEA ANN. REP.]. In addition, there are six regional arts councils that support and coordinate programs among the states. Goerkjian, supra, at 181.


53. For a discussion of federal support and policies that further cultural development through the visual arts, see pp. 140-41 infra. See also L. KREISBERG, LOCAL GOVERNMENT AND THE ARTS 169-79 (1979) (describing variety of arts programs run by federal agencies).

In general, important federal provisions concerning the arts are found in Chapter 26, Title 20 of the United States Code, Support and Scholarship in Humanities and Arts; Museum Services (1976 & Supp. III 1979). For an expression of federal policy recognizing the importance of protecting artistic national heritage, see the Museum Services Act, 20 U.S.C. §§ 961-968 (1976 & Supp. III 1979): "It is the purpose of this subchapter to . . . assist museums in modernizing their methods and facilities so that they may be better able to conserve our cultural, historic, and scientific heritage." Id. at § 961 (1976).

54. 1979 NEA ANN. REP., supra note 51, at 314.

55. In City of Chattanooga v. Louisville & N.R.R., 298 F. Supp. 1 (E.D. Tenn. 1969), aff'd, 427 F.2d 1154 (6th Cir.), cert. denied, 400 U.S. 903 (1970), a railroad company attempted to remove a historic Civil War locomotive (the "General") from display in Chattanooga to place it on exhibit in Georgia. The city of Chattanooga sued to require that the General be maintained in Chattanooga in perpetuity as a historical monument. One of the plaintiffs' contentions was that the engine had been
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courts and legislatures are not constrained to obey historically based distinctions between real and personal property when such distinctions are not useful or relevant. Real property doctrines may be applied to personal property in order to further public policy as long as disorder or injustice does not result. Applying the law of public dedication to certain types of personal property would not result in disorder or injustice and would be in accord with the modern trend to diminish the impact of arbitrary legal distinctions between real and personal property.

B. The Operation of the Doctrine of Public Dedication of Artwork

All of the elements that must be established to prove a case of public dedication of land are also present in the context of museum acquisition of artwork. A public right, and an owner's corresponding duty, to protect the visual integrity of artwork could be created through the same offer and acceptance mechanisms that operate in the context of real property dedication.

publicly dedicated solely to the people of Chattanooga, and therefore could not be moved from the city. In response, the court said that "dedication" was not an accurate term to use in reference to personal property. 298 F. Supp. at 9. The court of appeals noted that the General was not threatened with destruction—that the case involved only a dispute between groups as to the more appropriate means of doing honor to the General. 427 F.2d at 1156. It affirmed the district court's judgment but commented that:

"We applaud and admire the zeal, the creativeness and the tirelessness with which [plaintiffs] have continued to press on with their claims. Surely they will go the last mile and knock at the portals of the Supreme Court. Innovators have not always been turned away merely because they come without precedent support."

427 F.2d at 1155.

56. Many of the traditional distinctions that in the past were drawn between real and personal property have solely historical justifications and thus are no longer adhered to. See note 57 infra. In large part, the common law distinction between real and personal property is due "to the circumstance that feudalism . . . was largely based on landholding . . . [M]uch of the structure of medieval English legal, political, and economic society was based on the institution of landholding." R. BROWN, THE LAW OF PERSONAL PROPERTY 9-10 (Raushenbush 3d ed. 1975). Of course, there are inherent differences between real and personal property that should be, and are, important and given weight in formulating law.

57. For example, "the same estates that exist in land can now be created in chattels." O. BROWDER, R. CUNNINGHAM, & J. JULIN, BASIC PROPERTY LAW 9 (1966). Modern statutes also provide for uniformity in intestate succession to real and personal property, and in this regard, "the clear modern tendency is to abolish any differentiation between . . . [real and personal property] as having at the present time solely a historical justification," E. CLARK, L. LUSKY, & A. MURPHY, GRATUITOUS TRANSFERS 72 (2d ed. 1977). There are also signs that the law of bailment and landlord-tenant law are merging into a common doctrine. O. BROWDER, R. CUNNINGHAM, & J. JULIN, supra, at 9. See J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 10 (2d ed. 1975) ("Artificial distinctions [between real and personal property] which obfuscate the law and complicate its practice should be abolished but the real difference should never be lost to sight.")

58. See pp. 136-40 infra.

59. J. CRIBBET, supra note 57, at 10 (gradually diminishing differences in impact of law of real and of personal property); see also O. BROWDER, R. CUNNINGHAM, & J. JULIN, supra note 57, at 9 (development in law of "coalescence of the two branches of property law, which in fact amounts to extension of real property concepts to personal property").
1. Common-Law Dedication Through Museum Acquisition

Art museums collect and display artwork for purposes of scholarship and cultural education. When an owner of artwork donates, sells, or loans a work of art to a museum, he implicitly offers his property to the public for educational uses. In the terminology of public dedication law, he is "throwing open" his property to the public for its evident public use, and thus an inference arises that he intends to dedicate the property for those cultural and educational purposes. Since museums may be considered representatives of the public for cultural purposes, once a museum accepts the offer to dedicate, that is, once it agrees to acquire the work, the public interest in that work should be established. As with real property dedication, a public trust would thereafter run with the work, permanently prohibiting the owner from treating it in a manner inconsistent with the public interest.

60. See 20 U.S.C. § 968(4) (1976) ("[m]useum' means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or esthetic purposes, which, utilizing a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis."); 1979 NEA ANN. REP., supra note 51, at 141 (museums "symbolize disinterested excellence; they are places where scholarship can be conducted for its own sake, where quality matters more than anything else"); PROFESSIONAL PRACTICES COMMITTEE, ASSOCIATION OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS (1971), reprinted in 2 J. MERRYMAN & A. ELSN, LAW, ETHICS AND THE VISUAL ARTS 7-45, 7-45 (1979) (Resolution #1) ("A museum is defined as a permanent, non-profit institution, essentially educational or aesthetic in purpose, with professional staff, which acquires objects, cares for them, interprets them, and exhibits them to the public on some regular schedule.") [hereinafter cited as PROFESSIONAL PRACTICES IN ART MUSEUMS]; id. at 7-51 (Resolution #41) ("The program of an art museum must necessarily be related to the museum's purposes and goals. The program should recognize the nature of the institution's various audiences and their expectations. Broadly speaking, the program is developed to interpret the collections and to amplify their significance for the public."); Cerra, Museum's Future Tied to Politics of Its Past, N.Y. Times., Nov. 23, 1980, § 11 (Long Island Weekly), at 1 (quoting L. Reger, Director of American Association of Museums) (museums should use their collections to produce a catalog that "discuss[es] how the collection relates to society. Objects . . . are only a way of us [sic] appreciating cultural or natural history.")


61. See p. 127 supra; cf. Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 228, 147 N.E. 104, 105 (1925) (deed conveying cemetery is dedication of it as cemetery).

62. Museums are taxpayer-supported institutions, see 1979 NEA ANN. REP., supra note 51, at 3, 314 (partial summary of state and federal funding of museums).

63. All such dedicated artwork will have educational value. Professional museum practices require that acquisitions be made for purposes of education and conservation, and that objects not be acquired solely for their commercial value. International Council of Museums, Recommendations on Standards of Museum Acquisitions, reprinted in L. DUBOFF, ART LAW, DOMESTIC AND INTERNATIONAL 559, 561 (1975) (Resolution #12).

64. See pp. 127-28 supra (describing public trust principle and irrevocability of dedication).

Even now, museums generally recognize, in some vaguely defined way, that they hold artwork in
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This dedication is neither limited nor conditional. A transfer to a museum constitutes an offer to dedicate the work to the public for its educational purposes regardless of the form—donation, sale, or loan—that the transfer takes. Even a loan arrangement represents recognition by the offeree and the offeror of the permanent educational characteristics of the work. The existence of that implied mutual understanding constitutes an irrevocable dedication of the work to the public for educational uses.

Moreover, the dedication cannot be avoided by a reservation in the bill of transfer disclaiming a public interest in the integrity of the artwork. Traditionally, an owner may not annex limitations to his grant of use in real property that defeat the purpose of the dedication. If he attempts to do so, the dedication will be effective, but the restriction will be deemed null and void. Since the purpose of public dedication of art is to educate the public through exposure to the visual characteristics of the work, a reservation that in effect allowed the dedicator or his successors to impair those characteristics would be inconsistent with the purpose of the grant, and thus void.

The imposition of a permanent public trust on artwork acquired by museums would not deter owners of art from dedicating their work to the trust for the public. See College Art Association, Resolution Concerning the Sale and Exchange of Works of Art by Museums, reprinted in L. Duboff, Art Law, Domestic and International 409 (1975) (Resolution #12) ("Objects in tax-exempt institutions are held in trust for the public. In this sense they are the cultural property of the public, both present and future."); Problems in the Acquisition, Management, and Disposal of Museum Objects, in ALI-ABA Course of Study on Legal Problems of Museum Administration 69 (Transcript 1973) (statement of S. Weil, Administrator of Whitney Museum of American Art) ("[Y]ou have the assertion that works held in a museum are held in public trust . . . . [T]here is no point being insensitive to the question; it's just there.") [hereinafter cited as Legal Problems of Museum Administration].

Although public tastes in art change, one of the essential qualities of good artwork is its timeliness and the educational and cultural contributions it makes to future generations. See H.R. Rep. No. 618, 89th Cong., 1st Sess. 5, reprinted in [1965] U.S. Code Cong. & Ad. News 3186, 3190 (quoting President Eisenhower's Commission on National Goals, 1960 report) ("In the eyes of posterity, the success of the United States as a civilized society will be largely judged by the creative activities of its citizens in art, architecture, literature, music, and the sciences.").

66. The dedication is not violative of the Fifth Amendment takings clause because it is based on implied consent between the owner and the public. E.g., Haven Homes, Inc. v. Raritan Township, 19 N.J. 239, 247, 116 A.2d 25, 29 (1955).

67. See 4 H. Tiffany, supra note 29, § 1111, at 631; see, e.g., Kirsch Holding Co. v. Borough of Manasquan, 24 N.J. Super. 91, 104, 93 A.2d 582, 589 (1952) (attempted reservation in dedication of beachfront to allow owner and his successors to maintain bathing grounds, ropes, and boats on beachfront held invalid because it was inconsistent with purposes of public recreation); City of Fort Worth v. Ryan Properties, 284 S.W.2d 211 (Tex. Civ. App. 1955) (reservation by dedicator of right to maintain ornamental stone columns on dedicated property held void because it obstructed use for street purposes).

68. See Village of Grosse Pointe Shores v. Ayres, 254 Mich. 58, 65, 235 N.W. 829, 832 (1931) (condition in street dedication that prohibited use of street for public utility purposes was void but dedication was still valid; when condition in dedication "is void as against public policy or as inconsistent with the grant, the dedication is effective but the condition is inoperative"); Kuehn v. Village of Mahtomedi, 207 Minn. 518, 524, 292 N.W. 187, 190 (1940) (quoting 18 C.J. Dedication § 64, at 71 (1919)) (dedicator cannot impose conditions or limitations inconsistent with legal character of dedication); note 67 supra.
public. Those who sell or donate works of art to museums are not concerned with the conditions that will be placed upon future owners. Owners will not be discouraged from loaning their artwork either. When artwork is put on loan, its sale price and donation value increase. The appreciation in value that results from the loan arrangement produces a strong positive inducement to loan that would not be outweighed by the imposition of a reasonable public trust responsibility upon the work. Moreover, the appreciation is in itself adequate compensation to the owner for the costs of future maintenance.

Museum acquisition is an ideal occasion to recognize a public interest in artwork. First, the requirement of museum acceptance appropriately limits the doctrine of public dedication of art. A public trust should not be imposed without some guarantee that a work is of some importance to the public. Museum acquisition ensures that the public interest will attach only to a limited amount of art of recognized quality.

Second, museum acquisition provides certain evidence that the public has in fact accepted an owner's implied offer to dedicate a work of art.

2. The Responsibilities of the Owner of Publicly Dedicated Artwork

As a fiduciary of the public, the owner of dedicated artwork would be entrusted with a duty to prevent it from being destroyed or defaced, either negligently or willfully. Museum acquisition of a work of art is premised on the quality of its visual characteristics. When those characteristics are

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69. The sales price of the work will not be adversely affected. Future owners will be largely indifferent to the imposition of the trust because they generally intend to treat the work with care whether or not the trust is imposed.

70. Rosenbaum, The Care and Feeding of Donors, ARTNEWS, Nov. 1978, at 98, 100 (quoting G. Glueck, art critic for New York Times) (periodic exhibition and catalog of private art collection loaned to museum "will boost its sales or donation value elsewhere" and in return, museum hopes to get donation of some pieces); see Kinkead, The Spectacular Fall and Rise of Hans Hoffman, ARTNEWS, Summer 1980, at 88, 95 (exhibition caused value of artwork to "leap dramatically").

71. In fact, the incremental cost of maintenance after the work is dedicated will usually be zero because in most instances, due care was being exercised before dedication. In such a case, the owner will be indifferent to the imposition of the public trust upon his work.

72. To be considered a "museum," an organization is expected to maintain professional standards in the acquisition and exhibition of artwork. See note 63 supra (museums must acquire objects for educational and not commercial value); see also 20 U.S.C. § 968 (1976) (definition of "museum" includes a requirement that the organization utilize a "professional staff"); PROFESSIONAL PRACTICES IN ART MUSEUMS, supra note 60, at 7-45 (same). If it does not maintain those professional standards, the museum faces loss of accreditation from the American Association of Museums. See Cerra, supra note 60, at 1 (museum losing its accreditation because it did not meet "professional quality" standard in educating and exhibiting objects to public). Loss of accreditation can impair museum fundraising activities and endanger its receipt of state appropriations.

73. If the existence of a public offer and acceptance could be proved in other circumstances—for example, in the case of outdoor urban sculpture—then works in those cases should also be considered publicly dedicated. The problem, however, is that the requirement of public acceptance would not be convincingly satisfied merely by proof that the public viewed a work of art in passing.

74. See notes 63 & 72 supra.
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altered, the cultural and educational benefits provided by the work are impaired. Therefore, to fulfill his fiduciary duty, the owner would be required to preserve the work’s visual integrity as it existed at the time it was dedicated.\footnote{5}

This duty to preserve dedicated artwork would continue even if the artwork were temporarily removed from display or deaccessioned from the museum’s collection.\footnote{6} Artwork that has been removed from public display often returns to it through repurchase, donation, or loan.\footnote{7} The public trust in it remains effective in the interim so that the work can continue to contribute to the culture and serve its educational purpose in future years.\footnote{78}

For the owner to fulfill his fiduciary duty, he would have to perform

\footnote{5}{This assumes that the work of art was not damaged or in need of restoration at the time of acquisition. If the work is in need of restoration when it is acquired by the museum, then the implicit terms of museum acceptance incorporate an anticipated restoration. In that case, the dedication prohibits further damage to the work, and, if the work is restored, requires that the integrity of its visual characteristics be maintained in such restored condition.}

\footnote{6}{Property dedicated for public purposes need not be available to the public continuously; the public’s use of the property may be regulated for the public benefit. See, e.g., Town of Chouteau v. Blankenship, 152 P.2d 379, 384 (Okla. 1944) (town did not need to open street dedicated to public, but was not estopped from opening it later); Hyland v. City of Eugene, 179 Or. 567, 173 P.2d 464 (1946) (temporary mobile home community for veterans could be built on property dedicated for park purposes because interference with park purposes was not permanent).}

\footnote{7}{Rotation and substitution of artwork on display enhances public education by exposing the public to different works of art. Similarly, deaccessioning work from a museum’s collection enhances the museum’s services to the community by providing money to purchase, and space to display, new works. In addition, deaccessioning lowers museum inventory and upkeep costs.}

\footnote{77}{Custody of museum-quality works of art often changes hands, from museums to private individuals and back again. Museums acquire a large part of the work displayed in their exhibitions and contained in their collections through loans and donations, and at least some of it is likely to have been exhibited previously. For an interesting example of the return of an important painting to public view after deaccessioning, see LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, supra note 64, at 69:}

\footnote{78}{There is a difference between the character of the public interest in restoration of dedicated land and in restoration of dedicated artwork. In cases involving public dedication of land, the state or the public can direct that the public be given access to the property. In the case of artwork that remains in the control of a private owner, however, the interest in its integrity is not based on a right to demand immediate access. Instead, the interest is based on the idea that over time, the ownership of important artwork often changes hands, from public to private owner, and back again, leading to a longer-range public benefit:

The old adage that ‘Art is long, and life is short’ is still apt. For scientists and scholars even a minor work from the past encapsulates religious, political, social, economic, and technological systems. Preserving the art of the past is essential to knowledge and wisdom . . . [An] artistic heritage is a country’s identity card for the present and passport to the future. Art tells us who we are and where we came from.

Elsen, Why Do We Care About Art? 27 HASTINGS L.J. 951, 952 (1976). See also pp. 140-41 infra (describing legislative recognition of contribution good artwork makes to culture and advancement of future generations).}
reasonable maintenance procedures and refrain from abusing the visual attributes of the work. This standard of care would prevent an owner from negligently permitting valuable work to deteriorate, as well as from purposely destroying or mutilating it. The standard would be one of good faith and reasonable effort, not one of strict liability. Under this standard, for example, the owner of dedicated work would be permitted to restore a previously damaged painting.

C. Mechanisms to Enforce Public Rights in Artwork

In order to be effective, rights obtained by the public through principles of public dedication must be enforceable. Enforceability would require the existence of adequate notice, standing to sue in an appropriate court, and the availability of appropriate remedies.

1. Notice

As a prerequisite to enforcement of the public's interest in the integrity of artwork, the owner of the work must have adequate notice that his property is subject to a public trust. Although some owners of dedicated artwork—such as the museum that acquires the work, the owner of a work on loan, or the first purchaser of a deaccessioned work of art—would have actual notice of the public use and therefore of the public interest in the artwork, subsequent owners might not have such notice.

To provide this notice, state arts councils, or the National Endowment

79. For example, the standard would prevent the negligent deterioration of the Rodin collection at the Maryhill Museum, described in Failing, supra note 1, at 83. It would also prevent the purposeful stripping of paint from sculptor David Smith's work described in Kramer, Altering of Smith Work Stirs Dispute, N.Y. Times, Sept. 13, 1974, at 28, col. 1, and the immobilization of one of Alexander Calder's mobiles described in Mobilizing for Pittsburgh, supra note 1.


81. Under traditional due process analysis, a property owner is entitled to notice before his property is attached or impaired by the state. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (notice must be given to beneficiaries of trust in proceeding that settles their rights to sue trustee); L. TRIBE, supra note 19, at 509.

With real property, dedication is viewed as a covenant running with the land, see note 40 supra, and is applied against successors to the original dedicatory's interest. This does not seem too harsh because public claims on land may be evidenced openly by public user, or successor owners may have access to plats that indicate the public interest in the property. But cf. Town of Chouteau v. Blankenship, 152 P.2d 379, 384 (Okla. 1944) (although at least 30 years had gone by without evidence of public user, and abutting owners had fenced in property and made improvements on it, town that did not affirmatively mislead parties was not estopped from opening street whenever it chose because "the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public") (emphasis added).

Public dedication of personal property such as art presents more difficult problems of notice because the claims probably will never be evident on the face of the property. A mechanism is needed, therefore, to provide successor owners with notice that a public interest in the work of art exists.

82. All fifty states have state arts councils. Goerkjian, supra note 51, at 180. There are also six
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for the Arts, could maintain a master list of protected art. Several state, regional, and federal art information systems already exist that could be adapted to meet this end. The master list would be a compilation of all works subject to public dedication, based on information supplied by museums about their collections. The list would become a public record to which buyers of art could refer, thus providing notice to uninformed purchasers of the public interest attached to their art.

2. Standing

If artwork on the master list were threatened with injury, or if damage to it were discovered, both individual members of the public and government representatives of the public would have standing to bring suit against the owner for failing to live up to the standard of care imposed on him. Government representatives, such as local governments and state attorneys general, traditionally have been given standing in public dedication cases in order to protect their constituents. In addition, individual

regional arts councils. Id. at 181.

83. The National Endowment for the Arts is the primary agency responsible for federal support of the arts. See generally pp. 141-42 infra.

84. To provide notice of public dedication of art, an archive of either computer or microfilmed descriptions of artwork open to the public would be necessary. Coordinated, computerized art information networks that could be helpful in instituting such an archive have already been developed for sixty state arts agencies and regional organizations. 1979 NEA ANN. REP., supra note 51, at 310-12. In 1979 alone, the NEA spent at least $369,465 to develop and improve these systems. Id. In addition, there currently exist two major federal programs that collect information about works of visual art that could be adapted for use in maintaining a master list of dedicated art. The "Archives of American Art" has assembled the world's largest collection of material documenting the history of the visual arts in the United States. The original collection is kept in Washington and microfilm copies are kept in six regional branches. Copies of the original collection are accessible through interlibrary loans. The National Collection of Fine Arts, connected to the Smithsonian Institution, also maintains a large archive of information concerning American art. Its "Bicentennial Inventory of American Paintings Executed Before 1914" contains computerized descriptions of over 150,000 paintings.

85. Museums already document their collections and exhibitions as a matter of sound professional practice. See, e.g., Smithsonian Institution Policy on Museum Acquisitions, reprinted in L. DUBOFF, ART LAW, DOMESTIC AND INTERNATIONAL 593 (1975). Thus, organizing a master list of dedicated art would only require museums to transmit their documentation to the organization responsible for maintaining it.

86. The list might also be adaptable to other uses. For example, the information could be helpful in instituting a list, similar to that kept by France, Japan, and Hungary, of significant art located within the country, in order to control the movement of cultural property. See Feldman & Burnham, An Art Archive: Principles and Realization, 10 CONN. L. REV. 702, 723-25 (1978).

87. The owner of dedicated artwork would himself, of course, be able to bring a private suit against anyone who damaged the work. However, because he holds the work in trust for the public, see note 41 supra (owner of dedicated property is public trustee), any money recovered would have to be held in trust for the purpose of restoring the work, cf. pp. 139-40 infra (damages for destruction of dedicated property must be held in trust for public for purposes of dedication).

88. See, e.g., County of Los Angeles v. Berk, 26 Cal. 3d 201, 224, 605 P.2d 381, 396, 161 Cal. Rptr. 742, 757 (1980) (county and city had standing to assert public recreational interests in beachfront property as trustees for public although they had no other rights in it). In the case of publicly dedicated artwork, the appropriate public representatives would be the attorney general or the arts council of the state in which the dedication occurred. See also Note, supra note 39, at 1096; Note,
members of the public historically have had standing to sue to protect the public interest in dedicated property on the ground that they ordinarily would be entitled to the benefits of the property being threatened or destroyed, or on the ground that they have a justiciable interest in cases that involve dedicated property maintained with government funds. In a dispute arising over the mutilation of dedicated artwork, therefore, members of the public would be able to sue in their individual capacity as beneficiaries of the public trust. They would also have standing to sue as taxpayers, because government funds are spent to support museums and to finance acquisition and maintenance of artwork.

3. Jurisdiction

The suit would be brought in a state court, which would exercise jurisdiction over the case in accordance with the minimum contacts theory of state court jurisdiction. The minimum contacts doctrine would be satisfied if the work of art was located within the state. It would also be

supra note 32, at 572.

89. E.g., Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (suit concerning dedicated beachfront brought by plaintiffs on behalf of the public); Trustees of the Philadelphia Museums v. Trustees of the Univ. of Pa., 251 Pa. 115, 122-23, 96 A. 123, 125 (1915) (individuals have standing to contest alienation by city of publicly dedicated land because they are members of public to whom property was donated).

90. E.g., Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495, 502 (1972), aff'd, 45 A.D.2d 841, 358 N.Y.S.2d 957 (1974) (resident and nonresident state taxpayers have standing to sue in suit concerning dedicated town beach); Trustees of the Philadelphia Museums v. Trustees of the Univ. of Pa., 251 Pa. 115, 122-23, 96 A. 123, 125 (1915) (taxpayers have standing to contest alienation by city of publicly dedicated land because their money has been used in improving it).

91. Museums are supported by state and federal tax dollars. All fifty states have arts agencies that subsidize museums. In fiscal year 1979-1980, for example, the New York State Council on the Arts awarded $5.6 million to 170 different institutions.

92. The minimum contacts doctrine imposes due process constraints upon the exercise of jurisdiction by state courts. See generally World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 562-66 (1980); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.14, at 630-38 (2d ed. 1977); D. Lounsell & G. Hazard, Pleading and Procedure 194-289 (4th ed. 1979). Because public dedication is a common-law doctrine, jurisdictional gaps and lack of uniformity among the states will inevitably cause slippage in the protection of publicly dedicated artwork. This situation argues in favor of a comprehensive federal solution to the problem. But see note 6 supra. Despite the slippage, courts could gain jurisdiction over cases involving public dedication of art in the variety of situations described in the text.

The development of the doctrine of public dedication of art in less than all the states would not discourage ownership of or commercial transactions in art in states that did develop the doctrine, since the incremental cost of maintaining artwork in compliance with the doctrine is a minimal one, see note 71 supra, and is outweighed by positive personal and business reasons for ownership of an investment in art. Cf. Cal. Civ. Code § 986 (West Supp. 1981) (artists' five percent resale royalty tax, which implicitly evidences willingness to impose even heavier burden on sales and ownership of art in California). That resale royalty law was unsuccessfully challenged as an impermissible burden on interstate commerce. Morseburg v. Balyon, 621 F.2d 972 (9th Cir.), cert. denied, 101 S. Ct. 399 (1980).

93. "A state has power to exercise judicial jurisdiction to affect interests in a thing if the relationship of the thing to the state is such as to make the exercise of such jurisdiction reasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56(1) (1971). It is reasonable, under the minimum contacts
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satisfied if the owner of the dedicated artwork resided in the state or purchased the artwork there. Jurisdiction could probably also be exercised over an owner who maintained a relationship with an art gallery or museum located within the state, and, in rare cases, might even be exercised over an owner whose only relationship with the state was that he owned property such as a bank account there.

4. Remedies

The owner, if held liable, would be responsible for restoring the artwork to the condition it was in at the time the work was originally dedicated, just as an owner who interferes with the condition of publicly dedicated land must restore the land to its original state. If dedicated

standard, for a state to exercise jurisdiction over artwork that is in the state and that has been dedicated to the people of that state. The dedication gives the state an interest in the property; the fact that the owner keeps it in that state indicates that he maintains minimum contacts there.

94. See, e.g., CAL. CIV. CODE § 986(a) (West Supp. 1981) (“whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller must pay artist five percent of resale value as royalty). The defendant would then be transacting an art business in the state and thus it would not be unreasonable to subject him to a suit concerning a work of art that had been dedicated there. Cf. Black v. Acme Markets, Inc., 564 F.2d 681, 685 (5th Cir. 1977) (jurisdiction in Texas may be exercised over out-of-state corporation when alleged conspiratorial activity took place wholly out of state, but corporation had made purchases of products from Texas and Texan interests were affected). In general, the courts would be liberal in exercising jurisdiction over defendants in a suit to protect the integrity of publicly dedicated artwork. The minimum contacts doctrine views the burden placed upon the defendant by the exercise of jurisdiction in light of the forum state's interest in adjudicating the dispute, the shared interest of the several states in furthering fundamental substantive social policies, and the absence of any other forum in which the injury can be redressed. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

95. The suit usually would be instituted only after the threat or injury to the artwork was discovered, and would be directed toward compelling the owner to restore the work to its original condition. It would also be possible, however, to bring suit against the owner to compel him to account for the good condition of the artwork. As with monetary trusts, artwork in the hands of a private owner is invisible to the beneficiary, and therefore any party interested in the administration of the trust, even if he “has only a future interest and that . . . interest is contingent,” A. SCOTT, THE LAW OF TRUSTS § 172, at 1401 (3d ed. 1967), should be able to bring suit against the trustee to compel an accounting to ensure that the trust is being properly administered. See G. G. BOGERT & G. T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 142, at 501 (5th ed. 1973) (it is elementary principle that fiduciaries can be required to account for their dealings with trust property). Of course, the request for an accounting must be a reasonable one. See A. SCOTT, supra, § 172, at 1400. A request for an accounting of the condition of dedicated art should be denied as unreasonable if suits were instituted too frequently and without just cause, or if the work was on exhibition and thus its condition was already ascertainable. If suits became duplicative, res judicata or collateral estoppel defenses might also be raised.

96. See Herron v. Boggs, 582 S.W.2d 643, 644 (Ky. 1979) (defendant must remove his residence
artwork were destroyed irreparably, the defendant would be responsible for damages measured by the value of the destroyed work. The damages recovered for irreparable destruction would be allocated to future museum programs. This type of a distribution is consistent with the rule applied by courts when restoration of dedicated real property is not possible: the defendant compensates the public, and the damages are applied toward the same purposes as the original public dedication. In addition, in the rare cases in which the destruction was malicious or due to gross negligence, punitive damages also could be assessed and awarded for use in museum activities.

III. A Statutory Basis for Asserting a Public Right in the Visual Integrity of Artwork

The class of artwork threatened with injury by careless, tasteless, or selfish owners extends beyond work acquired by museums. A statutory approach already exists that can protect some of this larger class of artwork. Artwork produced under government subsidy should be protected from mutilation and destruction by the promulgation of regulations under existing statutes and executive orders.

A. The Federal Policy of Support for the Arts

Many sections of the federal statutory framework express a concern for protecting a public interest in art. The Historic Sites, Buildings and Anti-
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royalty-free license to use the reproducible results of the activities it supports. In addition to obtaining this license, however, the NEA should secure more fully the public interest in Endowment-supported works of art by asserting a qualified proprietary interest in them.

The award of an NEA grant represents the recognition of artistic excellence. Artwork that has been altered or damaged does not properly represent that excellence and misrepresents to the public the educational and cultural value of the NEA investment. In order for the public to receive the full value of the NEA expenditures, therefore, the NEA should protect the visual integrity of the work that it finances.

Because NEA-supported projects can usually be possessed by only one individual at a time, the NEA cannot, like other agencies, secure the public interest by guaranteeing the public access to the work it funds. Instead, in order to carry out legislative mandate and executive policy, the NEA should afford contractual protection to the integrity of work produced under its grant. It should assert, as a condition of the terms of a grant, a qualified proprietary interest in the work produced under it. Such an assertion of government co-ownership, limited to the extent of an interest in the integrity of the final product, would allow the government to protect the cultural and educational purposes for which the project was supported.

C. Enforcing the NEA’s Interest

As in the case of artwork subject to public dedication, in order for the

109. 1976 NEA Draft Resolution (statement on copyright policy) (adopted as final) (on file with Yale Law Journal). This license is rarely used.

110. Although for the sake of simplicity this Note discusses the NEA’s role in protecting the integrity of the artwork that it finances in terms of grants to individual artists, the principles described in this Note apply broadly—to all NEA grant programs that are used to finance the production, acquisition, or conservation of artwork.

111. See S. Rep. No. 100, 93rd Cong., 1st Sess. 6, reprinted in [1973] U.S. Code Cong. & Ad. News 2289, 2294 (award of NEA grants to individuals should be supplemented by “some type of recognition ceremony or appropriate written document” to honor grantees because they “have been selected for national recognition of achievement”).

112. For an example of mutilated, federally supported artwork, see Gross, Mural Restored, but the Hurt Remains, Newsday, Sept. 19, 1980, at 17 (describing incomplete restoration of mural financed by Works Progress Administration in 1930’s that was painted over during McCarthy era because its design supposedly incorporated hammer and sickle).

113. The National Science Foundation, for example, is able to implement the public interest in the inventions that it funds by requiring its inventors to disclose accurate information about their Foundation-supported activities for other public purposes. 41 C.F.R. 142, § 25-9.106(a) (1980). Although the NEA does retain a non-exclusive license to reproduce publishable results of Endowment-supported activities in furtherance of Endowment purposes, see note 109 supra, the dissemination of reproductions of works of visual art cannot satisfactorily take the place of public exposure to the original.

114. The United States has the same right as a private owner to sue to protect its property from injury. Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1955).
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NEA to enforce the public interest in the work it funds, adequate notice of the interest must be given to owners, and the appropriate party must bring suit to remedy the injury. Notice to owners of the federal government’s proprietary interest in their work could be accomplished\textsuperscript{115} by compiling a list of artwork produced under NEA grants.\textsuperscript{116} The NEA, as the agency asserting the federal proprietary interest, would then sue any person who interfered with the integrity of the work.\textsuperscript{117} It would request injunctive relief to force the owner to restore the work to its original condition, or, if restoration were impossible, it would seek damages to be used for related NEA purposes.\textsuperscript{118}

Conclusion

The public interest in protecting and preserving important works of art has not been adequately safeguarded in the past, even though a legal basis for such protection exists. Courts should adopt a common-law doctrine of public dedication of art that allows government representatives and private individuals to bring suit to protect the visual integrity of culturally valuable works of art from both intentional and negligent injury. In addition, the National Endowment for the Arts should further protect the public interest in art by promulgating regulations that allow that agency to sue to protect publicly supported artwork from injury. These two legal solutions would provide the public with the tools necessary to better protect its cultural heritage.

\textsuperscript{115} The National Science Foundation, for example, solves the problem of providing notice of the government’s proprietary interest in inventions it finances by requiring that patents and patent applications be stamped with a legend that indicates the government’s interest. 41 C.F.R. 141-42, § 25-9.105(e) (1980). Although such a legend could be applied to the back of certain works of art, in other cases it would not be possible to mark the work without marring its features. A different notice system is therefore necessary.

\textsuperscript{116} The information necessary to compile an effective list is already available. The NEA grant procedures already require grantees to provide information, descriptions and photographs, if possible, concerning the work produced under the grant. NEA Fellowship Acceptance Agreement (on file with \textit{Yale Law Journal}).

\textsuperscript{117} See note 114 \textit{supra}.

\textsuperscript{118} See pp. 139-40 \textit{supra}. The United States may resort to the same remedies as private persons. \textit{See Rex Trailer Co. v. United States}, 350 U.S. 148, 151 (1955).