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'Moral rights' and copyright may crash digital art restoration efforts

Since the Renaissance, technological progress has generally been perceived as falling on the "plus" side of the balance sheet. In 1964, at the New York World's Fair, Walt Disney's Carousel of Progress celebrated the development of such then-modern conveniences as the electric stove, air conditioning, the rotary phone and television. Today's vignettes would undoubtedly include smartphones, laptops, Wi-Fi and Google's streaming video glasses.

Yet for all the benefits of technology, each advance comes with its own major drawback — obsolescence. Anyone who has ever faced the daunting prospect of transferring digital files from an obsolete platform can attest to the problems involved. At best, you lose time. Wait too long, and a merely time-consuming project becomes an impossibility. Migrating digital files between platforms is hard enough. When those files qualify as "digital art," such migration may also violate the artist's rights under international law, regardless of who owns the copyright.

This summer I had the chance to visit the Biennale in Venice. A celebration of "art" in all its forms, this year's Biennale featured video installations in nearly every pavilion. Video art is not a new phenomenon. Artists have been using videos, and other forms of "digital art," including computer-generated images, for decades. But as I gazed at all these modern installations, I wondered how many would remain observable in 10 years. With the rapid pace of technology, it is hard to remember that the iPhone is only 6 years old. Yet the first generation iPhone is already an antique, technologically speaking.

Museums, art galleries and libraries have complained for years about the difficulty of maintaining digital collections in the face of platform obsolescence. Aside from the technological issues in migrating such content from one plat-

form to another, which can be daunting, these problems may pale in the face of the even greater stumbling block of international moral rights restrictions on such "restoration." Even if the museum owns the copyright, where platform migration alters the digital work, moral rights can still crash restoration efforts when authors or their heirs object.

"Moral rights" were first recognized during the French Revolution when authors were granted strong rights to control their works. Unlike copyright, "moral rights" do not reflect an author's exploitation interest in his or her work. Instead, "moral rights" are founded on the natural or personality rights that an author shares with any created work.

These inalienable rights allow authors to protect the integrity of their works, even against authorized derivations allowed by copyright. As defined by Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, the premier multilateral copyright treaty, authors are granted two moral rights.

The first assures an author's right to be known as the author of the work (the "right of paternity"). The second grants authors the right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to (their work) which would be prejudicial to (their) honor or reputation" (the "right of integrity").

These rights last as long as the economic rights (copyright) in the work. Under the WIPO Copyright Treaty, moral rights also attach to works on the Internet. Thus, even migrating digital works to Internet websites can still raise potential moral rights issues.

By the very nature of the changes required to migrate digital art, there is no question that the art is "modified." Depending on the platform, migration can alter the pixels, the speed at which the art is displayed, the symbols that appear on the screen during play, even the distinctiveness of

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any colors or images. Any one of these changes could well be found sufficient enough to harm an author's reputation.

In France, colorizing a black-and-white movie was considered harmful to the director's reputation (*Huston v. Turner Entertainment*). In Canada, tying Christmas ribbons around the necks of 60 wooden geese installed in a shopping center was considered similarly harmful (*Snow v. The Eaton Centre Ltd.*). In both instances, even though the entity seeking to change the works owned the copy-

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right in them, such changes were ultimately prohibited under the artist's moral rights in the works.

There is presently no recognized offset to an artist's moral rights for the social benefit achieved in conserving her works, although in some countries, such as the United States, "fair use" defenses could theoretically be raised in defense of such claims.

There are no easy solutions. In some countries, such as the United States and Germany, written waivers of moral rights are enforceable. Artists who do not object to migration efforts can consent ahead of time through a combination of written copyright transfer and moral rights waivers.

In other countries, such as France and Mexico, however, not even written waivers are enforceable. Consequently, artists whose works are exhibited in these countries can always object if they dislike the changes caused by any platform migration.

Perhaps most significantly, these limitations on platform migrations are not limited to digital art displayed in museums or art galleries. On the contrary, they apply with equal vigor to other forms of digital graphic works, including video games. In the United States such issues are rarely raised. Under the Visual Artists Rights Act (VARA), artists' rights to object to harmful modifications to their works do not extend to works created by employees within the scope of their employment, so-called "works for hire" (17 U.S.C. Section 101 (definition of "work of visual art"). No such exceptions exist in other countries, however.

The easiest technique for assuring a continuing right to migrate digital works to new platforms is preplanning. Written consent to such migrations, combined with copyright transfers and waiver of moral rights at the time the work is acquired provide the clearest means for assuring that today's digital art remains tomorrow's accessible classic.