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Harry Potter and the (Re)Order of the Artists: Are We Muggles or Goblins?

In our modern, globalized world, conceptions of the ownership of property, especially artistic and cultural property, are continually being challenged and revised. In *Harry Potter and the Deathly Hallows*,[1] author J.K. Rowling uses a nonhuman species, the goblins, to bring this reconception into sharp relief. According to Rowling, goblins have an intriguing view of ownership rights in artistic works.[2] They believe that the creator of an artistic object maintains an ongoing ownership interest in that object even after it is sold, and the creator is therefore entitled to get the object back when the purchaser

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1 J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007) [hereinafter DEATHLY HALLOWS].

2 *Id.* at 516–17.

dies. While this view may strike some as rather odd when it is applied to tangible property in our "Muggle" (that is, nonmagical human) world,[3] it actually has some very interesting parallels to the legal treatment of intangible property, particularly in the areas of intellectual property and moral rights. The first Part of this Article lays out the goblin view of property, and the second Part examines some of the parallels between that view and Muggle law.

The third Part of this Article explores the question of whether we Muggles are becoming goblins. The ways in which the parallels between our law and the goblin view have been developing and growing suggest that we are becoming more goblinish in our willingness to recognize ongoing rights in artistic objects, including allowing an artist to collect a commission on subsequent resale of his or her work. Practical and social considerations suggest that we are unlikely to go as far as granting creators a permanent personal right that lets them reclaim such an object after a sale or other transfer is made. However, we are moving closer to recognizing some forms of the collective property right that the goblins actually seem to demand, namely a moral right in important cultural objects that enables the descendants of that culture as a group to demand the return of the object. Thus, we Muggles may not be as far from the goblins as we may have first believed.

I
THE GOBLIN VIEW OF OWNERSHIP

In *Harry Potter and the Deathly Hallows*, Harry and his friends have enlisted the assistance of the goblin Griphook in planning and executing a dangerous scheme.[4] In exchange for Griphook's help,

[3] The term "Muggle," in Harry's Wizarding world, refers to a nonmagical human. This Article borrows the term here to refer to aspects of the real, mundane world we (at least most of us) inhabit. The term "Muggle" also brings out an interesting point related to the capitalization of group names. For simplicity, this Article follows Rowling's convention of always capitalizing "Muggle," never capitalizing "goblin," and capitalizing "wizard" only when referring to Wizards as a cultural group. Arguably, the last rule should be followed in all cases—lower case should be used when referring to an individual, and upper case should be used when referring to a group or cultural identity. Indeed, Rowling's failure to capitalize her references to goblin culture might be interpreted as reflecting a very Wizard-centric (wizard-centric?) view of the world, one that relegates goblin culture to a lower status.

[4] Although this Article assumes that the reader has either read the book or does not intend to do so, it will provide as little in the way of "spoilers" as is consistent with making its point.

Harry has promised to give Griphook a sword of goblin manufacture, the sword of Godric Gryffindor, which is currently in Harry's possession. Harry's friend Bill Weasley, who is not in on the scheme but who has worked closely with goblins for many years, pulls Harry aside to warn him about the risks of making bargains with goblins, "most particularly if that bargain involves treasure."[5] Bill notes that "[g]oblin notions of ownership, payment, and repayment are not the same as human ones,"[6] then goes on to explain the source of his concern:

> "[T]here is a belief among some goblins . . . that wizards cannot be trusted in matters of gold and treasure, that they have no respect for goblin ownership."
>
> "I respect—" Harry began, but Bill shook his head.
>
> "You don't understand, Harry, nobody could understand unless they have lived with goblins. To a goblin, the rightful and true master of any object is the maker, not the purchaser. All goblin-made objects are, in goblin eyes, rightfully theirs."
>
> "But if it was bought—"
>
> "—then they would consider it rented by the one who had paid the money. They have, however, great difficulty with the idea of goblin-made objects passing from wizard to wizard. You saw Griphook's face when the tiara passed under his eyes. He disapproves. I believe he thinks, as do the fiercest of his kind, that it ought to have been returned to the goblins once the original purchaser died. They consider our habit of keeping goblin-made objects, passing them from wizard to wizard without further payment, little more than theft."[7]

Thus, according to Bill, goblins believe that the individual creator of a tangible artistic object maintains an ongoing property interest in that object.

An earlier exchange involving a beautiful tiara owned by Bill's Aunt Muriel presages this discussion of goblin views:

> Fleur [Bill's wife] drew out a worn velvet case, which she opened to show the wandmaker. The tiara sat glittering and twinkling in the light from the low-hanging lamp.
>
> "Moonstones and diamonds," said Griphook, who had sidled into the room without Harry noticing. "Made by goblins, I think?"

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[5] DEATHLY HALLOWS, *supra* note 1, at 516.

[6] *Id.*

[7] *Id.* at 517.

> "And paid for by wizards," said Bill quietly, and the goblin shot him a look that was both furtive and challenging.[8]

Griphook thus appears to covet the return of this goblin-made tiara in addition to the sword, and Bill responds by asserting his wizard family's claim to it.

However, Griphook's actual words and actions do not entirely support this view of goblin beliefs, suggesting instead what would seem to be a somewhat different conception. Griphook's words and actions pertain only to the rights of goblins, as a race or cultural group, to artistic works created by earlier goblin artisans. The two main artistic objects at issue, the sword and the tiara, are both at least several centuries old.[9] Griphook makes no reference to knowing the particular creator of either piece, or being descended from any such creator, as would be expected if his claim were based on the view described by Bill. Rather, he makes his claim on behalf of the goblins as a group. For example, he says he wants the sword back because, "[i]t is a lost treasure, a masterpiece of goblinwork! It belongs with the goblins!"[10] Thus, he does not espouse precisely the view that the artist maintains a continuing relationship with the artistic object that Bill ascribes to the goblins, but rather a right to have important cultural artifacts returned to the descendants of their creators as a cultural group. Furthermore, Bill's assertion of what goblins believe implies a more economic motive, in that what they seem to desire is a new payment to the goblins for each subsequent transfer. In contrast, Griphook seems to desire return of the object itself because of its importance as a cultural artifact.

Because the book discusses only ancient artifacts explicitly, it provides no direct evidence of Griphook's views regarding more recent objects of goblin craftsmanship. Given this gap in knowledge, the two pronouncements are not necessarily inconsistent; in fact they may be reconcilable. For example, goblins might view a particular object as belonging to the individual creator for his or her[11] lifetime,

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[8] *Id.* at 512.

[9] *See id.* at 505–06 (discussing the acquisition of the sword by Godric Gryffindor, who had lived "over a thousand years ago," J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 150 (1999) [hereinafter CHAMBER OF SECRETS]); DEATHLY HALLOWS, *supra* note 1, at 141 (according to Bill's Aunt Muriel, the tiara has "been in my family for centuries").

[10] *Id.* at 506.

[11] Although to the best of the author's recollection no female goblins are mentioned in any of the Harry Potter books, this Article will assume that they exist.

and perhaps longer, for the economic benefit of the creator. At that point, the object may fall into the possession of the goblins as a group because of the object's continuing importance as a cultural artifact. In any case, the two views have somewhat different parallels in Muggle law, and this Article will discuss them separately when the distinction is relevant.[12]

II
PARALLELS TO OWNERSHIP UNDER MUGGLE LAW

A. Tangible Property Law

The view of property ownership that asserts an ongoing ownership right in a sold object seems least like Muggle law when considered in terms of the rules of ownership interests in tangible property. In general, we Muggles expect to be able to do as we wish with objects we purchase, including reselling them or otherwise passing them on as we see fit.[13] Under Muggle law, the creator of an artistic object

[12] An additional complication arises from the nature of the sword as a magical object, not merely an artistic one. In the Wizarding world, magical objects have, to varying degrees, a limited control over who can own and use them. For example, magic wands behave differently depending on who they view as their true owner and how their current holder obtained them. *See, e.g.*, DEATHLY HALLOWS, *supra* note 1, at 494 ("'The wand chooses the wizard,' said Ollivander. 'That much has always been clear to those of us who have studied wandlore. . . . Subtle laws govern wand ownership, but the conquered wand will usually bend its will to its new master.'"). In an earlier book, the sword of Gryffindor magically presented itself to Harry in his time of need. *See* CHAMBER OF SECRETS, *supra* note 9, at 319–20, 333–34. Indeed, Harry's friend, Hermione Granger, uses this earlier event as an argument supporting Harry's ownership interest in the sword, but she is informed that "[a]ccording to reliable historical sources, the sword may present itself to any worthy Gryffindor [House member]." DEATHLY HALLOWS, *supra* note 1, at 129. It has thus been suggested that the rule of ownership in the wizarding world might be "in a magical system the ability to manifest an object is prima facie evidence of rightful ownership." Reply Posting of Eric j to Asymmetrical Information: An Opinion-Ridden Free-for-All Blog, http://www.janegalt.net/archives/009921.php#131305 (July 26, 2007 9:22 AM). *But see* Reply Posting of Mike S. to Asymmetrical Information: An Opinion-Ridden Free-for-All Blog, http://www.janegalt.net/archives/009921.php#131322 (July 26, 2007 12:08 PM) ("In a system with controlled teleportation and sapient/semi-sapient magical artifacts of varying motivation . . .[,] I don't think a standard like that would be very practical."). Resolving the ownership interests of such self-determining objects raises some complex questions: Does the original owner lose his or her rights if the object chooses a new master? Or does the original owner retain those rights, and the wizard who receives the object's allegiance have only a limited right of use, somewhat analogous to an easement? Muggle law does not consider this issue because Muggle objects are not self-determining; this Article will therefore not explore this idea further.

[13] Such free alienability of objects via sale is a strong value of our legal system—hence the classic statement that restraints on alienation are "disfavored." *See, e.g.*, Bank of Am., N.A. v. Moglia, 330 F.3d 942, 947 (7th Cir. 2003) (Posner, J.) ("'[R]estraint[s] on

could fashion an ongoing, goblin-like relationship to that object by granting the purchaser a life estate in the object, with the creator retaining the reversion.[14] In this situation, the creator would retain an ownership interest in the object while, at the time of the grant, surrendering possession to the purchaser as the holder of the life estate. The creator would then be entitled to recover possession of the object upon the death of the life tenant. However, such a relationship in an artistic object would only be created by explicit agreement of the parties. In contrast, Bill's statement suggests that goblins would automatically apply such a rule to *all* transactions involving goblin-made objects.[15]

B. Intellectual Property Law

While fitting the goblin perspective into tangible property law is rather difficult, the intellectual property laws contain some closer parallels. One such parallel may be found in copyright law, under which some of the creator's rights limit the rights of the owner of a work. For example, the owner of a painting or sculpture has the right to display it in his or her home or other fixed location, and has the right to resell it.[16] However, the owner does not have the right to make and sell copies of the work, nor to transmit the image of the work over the television waves or the Internet, because the right to make and sell copies and make transmissions belongs to the holder of the copyright in the work (presumably, but not necessarily, the

alienation'[] are traditionally disfavored."); RESTATEMENT (SECOND) OF PROPERTY 143 (1983) ("Much of modern [real] property law operates on the assumption that freedom to alienate property interests which one may own is essential to the welfare of society.").

[14] *See* THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 34 (1984) ("The estate for life . . . is just about what its name implies—an estate the duration of which is measured by a human life."); *id.* at 56 ("When the owner of an estate transfers a lesser estate [such as a life estate], the future estate that the owner keeps is called a *reversion*.").

[15] The exact wording of the excerpt raises the interesting question of whether the goblin view of ownership applies to *all* transactions involving goblin artifacts, or only to those between goblins and nongoblins. In other words, what happens when a goblin sells an artistic object to another goblin? Is that goblin free to pass it on to other goblins, or does the same limitation on resales apply? Are transactions to outsiders disfavored as against goblin public policy? Exploration of these questions is beyond the scope of this Article.

[16] *See* 17 U.S.C. § 109(c) (2006) ("[T]he owner of a particular copy lawfully made under this title . . . is entitled, without the authority of the copyright owner, to display that copy [of the work] publicly . . . to viewers present at the place where the copy is located."); *id.* § 109(a) ("[T]he owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .").

creator), rather than to the purchaser.[17] Similar limits on copying and transmission apply to other protected works. Thus, even after a work leaves the artist's hands, he or she retains a degree of control over its subsequent use.

Another interesting parallel is found in section 203 of the Copyright Act, which provides that the creator of a work who has assigned the copyright in that work may terminate that assignment "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant"[18] and thus regain control of the rights in that work. To emphasize the importance of this ongoing right, the statute makes the right inalienable: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[19] Thus, even if the artist has explicitly agreed not to exercise the statutory right to terminate the assignment of copyright after thirty-five years, that agreement will not be enforced, and the artist will be able to effect the termination. Although the purpose of these termination rights is largely economic—they are intended to "better insure that authors and their families are able to reap a fair portion of the benefits of the author's creative efforts"[20]—the rights still reflect a belief that a creator retains some connection to an artistic work even after it has passed out of his or her hands.

However, there is at least one very important distinction between the regimes of intellectual property rights, as exemplified by the copyright example, and tangible property rights. Copyright law is concerned only with rights in the *artistic design* of an object, not with the right to the *physical possession* of a tangible object embodying that design.[21] Copyright law leaves the latter determination to the

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17 *See id.* § 106(1), (3), (5) (2006).

18 *Id.* § 203(a)(3) (2006).

19 *Id.* § 203(a)(5).

20 ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 472 (rev. 4th ed. 2007) (further noting that "Congress was concerned that authors had 'unequal bargaining power' in negotiating rights with publishers and marketers 'resulting in part from the impossibility of determining a work's value until it has been exploited.'" (quoting H.R. REP. No. 94-1476, at 124 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5740)).

21 17 U.S.C. § 202 (2006). Ownership of copyright as distinct from ownership of material object

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.

realm of tangible property law.[22] Thus, when an artist sells a painting or a sculptor a statue, the tangible object passes into the purchaser's possession, while the copyright in the painting or statue remains with the artist or sculptor.[23] The purchaser is then generally free to do what he or she wishes with the specific piece of art purchased.[24] However, because the author retains the copyright, only he or she is entitled to reproduce or transmit the work, or prepare derivative works based on it.[25] In contrast, goblins are concerned specifically with ownership of the tangible object itself, not merely of the rights in its design.

Another difficulty relates to the example of the goblin-made sword: is it eligible for protection under copyright law at all? The Copyright Act specifically excludes from its coverage "useful articles,"[26] which would seem to include a sword. However, the design for a useful article may be copyrightable "if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[27] Thus, if the design of the sword can be separated from its utilitarian purpose, it might be copyrightable. Given that swords are fundamentally utilitarian to begin with, and that the primary value of goblin swords

> Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

22 *Id.*

23 Unless, of course, the copyright has also been transferred via contract.

24 Subject to the limitations of the artist's copyright in the work, as discussed *supra*, and of the artist's moral rights in the work, as discussed *infra*.

25 17 U.S.C. § 106(1), (2), (5) (2006). As noted above, although the copyright holder retains the right to display the work, *id.* § 106(5), the purchaser of the work is permitted "to display that copy publicly . . . to viewers present at the place where the copy is located," *id.* § 109(c) (2006).

26 Section 101 of the Act defines "[p]ictorial, graphic, and sculptural works" to include "works of artistic craftsmanship insofar as their form *but not their mechanical or utilitarian aspects* are concerned." 17 U.S.C. § 101 (2006) (emphasis added). It goes on to define "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." *Id.*

27 *Id.*; *see also* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (exploring the "physical separability" and "conceptual separability" analyses for determining the copyrightability of design aspects of useful articles).

resides in their unique practical properties,[28] copyright protection seems unlikely. In any event, copyright law almost certainly would cover the goblin-made tiara that Griphook also covets.[29] The essential point therefore holds: copyright law, in at least some cases, recognizes a creator's ongoing interest in a creative work.[30]

[28] *See* DEATHLY HALLOWS, *supra* note 1, at 303–04 (discussing the special powers of goblin swords).

[29] *Id.* at 512, 517.

[30] Others have connected this goblin view of property to copyright law, albeit with different intent. Several bloggers have compared this goblin view with that of the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA") regarding digital rights management ("DRM") of music recordings. *See* Punditry by the Pint, Goblins and IP, http://pintpundit.com/?p=163 (Aug. 2, 2007) ("That strikes me as the approach taken by the RIAA and MPAA toward copyrights . . . ."); One Floridian's Blatherings, Of Goblins and DRM, http://onefloridiansblatherings.blogspot.com/2007/07/of-goblins-and-drm.html (July 25, 2007) ("Wow! Goblins invented digital rights management (DRM) and run the RIAA! Who knew?"); Posting of Devanshu Mehta to Science Addiction Blog, Harry Potter and the Goblin's Perpetual Copyright, http://www.scienceaddiction.com/2007/07/25/harry-potter-and-the-goblins-perpetual-copyright/ (July 25th, 2007 9:42 pm) ("These goblins sound like our friendly neighborhood MPAA/RIAA lawyers!"); Stefan Hayden, Harry Potter 7's Goblin DRM, http://www.stefanhayden.com/blog/category/books/page/2/ (July 23, 2007) ("This explanation of how goblins feel about their work is basically word for word how the RIAA and MPAA looks at the works they own."); Reply Posting of Brian to Asymmetrical Information Blog, http://www.janegalt.net/archives/009921.php#131285 (July 25, 2007 10:28 pm) ("'[Goblins] *view personal property closer to the way our society does intellectual property. (Minus the limited term and the ability to sell the underlying rights.)*' So, the way the RIAA or Disney views intellectual property?" (quoting a prior post)). Others have faulted the analogy. *See* Reply Posting of Kevin to Technology Liberation Front, The Goblin Industry Association of America, http://www.techliberation.com/2007/08/03 (Aug. 3, 2007 3:16 PM) ("The swords, etc. that goblins make are rivalrous. In fact, the reasons for including this characterization was that both Harry and a goblin wanted a sword. As you know, IP is easily enjoyed/used by multiple people."); Posting of jfpbookworm to Reddit.com, http://reddit.com/info/29i3x/comments (July 25, 2007) (response to Harry Potter and the Goblin's Perpetual Copyright, stating "No, it's not like the RIAA and MPAA. Geez, not every IP issue has to come back to that"); Posting of sblinn to Reddit.com, http://reddit.com/info/29i3x/comments (July 26, 2007) (response to Harry Potter and the Goblin's Perpetual Copyright, stating "This isn't even an IP issue, it's a 'real' property issue, that of the transferability of real property from one person to another"); Reply Posting of Mike S. to Asymmetrical Information Blog, http://www.janegalt.net/archives/009921.php#131293 (July 25, 2007 11:36 pm) ("Oh, the RIAA believes *very much* in the ability of creators to sell the underlying rights."). Still others have seen this passage and its follow-up as Rowling's *support* for the RIAA. *See* Reply Posting of JGiles to Science Addiction Blog, http://www.scienceaddiction.com/2007/07/25/harry-potter-and-the-goblins-perpetual-copyright/ (July 26, 2007 at 4:54 am) ("Now try discussing how she's done a bit of apologism for the bad guys in the series later, that's the real meat of it. 'Oh he's not a bad guy really, it wasn't his fault!' It's interesting watching Rowling as she indoctrinates a whole generation of kids. Pretty transparent if you're looking for it.").

One other potential point of divergence between goblins' views of property and Muggle intellectual—and tangible—property law merits discussion. Generally speaking, the rights discussed are personal to the creator of the work of art.[31] However, as noted above, one may interpret the goblin view of property as not so limited: Griphook appears to assert an ownership interest on behalf of all goblins for any object of goblin origin. While this argument lacks a strong basis in current intellectual property law, it actually is not unlike the assertions that various ethnic and national groups make on behalf of their cultural forebearers. This conception of a "cultural right" belonging to a group is discussed in the following Part.[32]

III
MORAL RIGHTS LAW

Moral rights present an even stronger recognition of the ongoing interest that the creator retains in a sold artistic object.[33] In contrast to copyright law, which is directed primarily toward protecting the economic interests of the creator, moral rights law is concerned with protecting the "personality" of the artist.[34] Like copyrights, some of these moral rights are limited to artistic rights and do not reach the artistic object itself. Other moral rights, however, extend to at least a limited control over that tangible object.

Moral rights find their roots in the continental European tradition. The leading country in the development of moral rights is France,[35]

31 They may also in some cases be heritable or devisable by the creator. *See, e.g.*, 17 U.S.C. § 203(a)(2) (2006) (describing the passage of the termination right).

32 *See infra* Part III.D. The goblin view of societal ownership may also fit into a related modern critique of intellectual property law generally, which asserts that "all creations are largely a product of communal forces," and thus attributing them to particular individuals is an incoherent and improper exercise. MERGES ET AL., *supra* note 20, at 10 (citing THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992)).

33 One blog poster has also recognized this analogy. *See* Posting of jfpbookworm to Reddit.com, http://reddit.com/info/29i3x/comments (July 25, 2007) (response to Harry Potter and the Goblin's Perpetual Copyright, stating "It's more like an extreme version of the (European?) conception of moral rights.").

34 *See* MERGES ET AL., *supra* note 20, at 519.

35 *See* Amy L. Landers, *The Current State of Moral Rights Protection for Visual Artists in the United States*, 15 HASTINGS COMM. & ENT. L.J. 165, 169 (1992); *see also* Susan P.

where the concept originated and is known as the *droit moral*, a phrase with no literal English translation but "'spiritual,' 'non-economic' and 'personal' [right] convey something of the intended meaning."[36] Moral rights are an incarnation of the idea that artistic works are embodiments of the artist's personality, and the works therefore deserve protection against appropriation or distortion by others.[37] As such, moral rights are often deemed inalienable and unwaivable.[38] Furthermore, "[i]n some countries moral rights are perpetual, lasting at least theoretically forever."[39]

Such conceptions are largely alien to the traditions of the common-law countries such as the United States, and thus moral rights are relative latecomers to these countries.[40] Indeed, the United States'

Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41 (1998).

[36] SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 456 (1987), *quoted in* Landers, *supra* note 35, at 166 n.4; *see also* Liemer, *supra* note 35, at 41–42 ("The French, the acknowledged leaders in this area of the law, generally call these 'droits morals,' which loosely translates as 'moral rights.'" (footnote omitted)).

[37] Historically, European nations created the concept of moral rights to protect works of the mind by recognizing that a work embodies an author's personality. Moral rights protect this right of personality by protecting the artist's work, which is seen as "an emanation or manifestation of [the artist's] personality, as his 'spiritual child.'" . . . [T]he artist has a legally protectible [*sic*] interest if that work is distorted or misrepresented by another.

Landers, *supra* note 35, at 169 (first alteration original) (footnote omitted) (quoting RICKETSON, *supra* note 36, at 456). Another commentator has stated the rationale for moral rights this way:

> The unique relationship between an artist, the creative process, and the resultant art makes an artist unusually vulnerable to certain personal harms. The art an artist produces is, in a sense, an extension of herself. The [artist's] connection to her art is much more personal and simply qualitatively different from the relationship of most other people to other objects and activities.

Liemer, *supra* note 35, at 43 (footnote omitted).

[38] Liemer, *supra* note 35, at 44 ("In some countries, an artist cannot waive moral rights.").

[39] *Id.* at 45 (footnote omitted) (further noting that "[i]n practical terms, they probably last as long as the art does").

[40] *See* MERGES ET AL., *supra* note 20, at 519; *see also, e.g.*, Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67 (2007) ("It has long been a basic tenet of comparative copyright theory that American and European copyright systems differ primarily in their attitudes towards the protection of moral rights of authors, evidenced by the striking discrepancy between the rights traditionally granted to authors under the copyright statutes of most common law jurisdictions and the rights granted to them under the copyright statutes of many civil law countries."); Leimer, *supra* note 35, at 42 ("Those schooled in the United States may find moral rights to be quite a foreign concept."); Elliott C. Alderman, *Resale Royalties in the United States for Fine*

reluctance to acknowledge moral rights was a major reason that for nearly one hundred years it refused to join the Berne Convention, the primary international copyright treaty, which contains a requirement that member nations recognize certain moral rights in copyrighted works.[41] The United States finally acquiesced and joined the Berne Convention in 1988. But Congress did not immediately enact any new intellectual property laws after joining the Convention because it believed that an existing patchwork of laws in the Copyright and Lanham (Trademark) Acts, coupled with existing state-law protections, were sufficient to meet the Convention's requirements. In 1990, however, Congress finally put moral rights on a firmer footing by enacting the Visual Artists Rights Act ("VARA"),[42] which explicitly recognized limited moral rights for "work[s] of visual art."[43] In addition to this limited federal moral rights regime, many states recognize stronger forms of moral rights, with California being especially active in this area.[44]

The basic moral rights, as required by the Berne Convention and recognized in section 106A of the Copyright Act, are the rights of attribution and integrity.[45] Article 6bis(1) of the Berne Convention provides:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[46]

Section 106A of the Copyright Act implements this provision by providing protection for these two basic moral rights. However,

Visual Artists: An Alien Concept, 40 J. COPYRIGHT SOC'Y U.S.A. 265, 267 (1992) ("The resale royalty [one type of moral right, discussed *infra* Part III.C] . . . is a foreign concept born of different social and legal systems, and is antithetical to the Anglo-American tradition of free alienability of property.").

41 Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on Sept. 28, 1979), art. 6bis(1), S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

42 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128–33 (1990) (codified in scattered sections of 17 U.S.C.).

43 17 U.S.C. § 106A (2006).

44 *See* Landers, *supra* note 35, at 181, 183.

45 Two other rights are generally added to this list of basic rights: the right to control disclosure and the right of withdrawal. *See* Landers, *supra* note 35, at 170; Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985).

46 Berne Convention art. 6bis(1).

section 106A protects only "work[s] of visual art," defined in section 101 as:

> a painting, drawing, print, [still photographic image produced for exhibition purposes only], or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.[47]

The definition goes on to exclude "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication," as well as "any work not subject to copyright protection under this title."[48]

A. Right of Attribution

The right of attribution is the artist's right to have all his or her works and only his or her works attributed to him or her: "[T]he author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[49] As a corollary of this right, the author also has the right "to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."[50]

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[47] 17 U.S.C. § 101.

[48] *Id.* Thus, as discussed *supra*, if the goblin sword were not protectable under copyright law, it would not be entitled to federal moral rights protection. The tiara, however, would likely qualify as a work of visual art in the form of a sculpture.

[49] *Id.* § 106A(a)(1).

[50] *Id.* § 106A(a)(2). Violations of VARA are treated as copyright infringements and therefore evoke the same remedies. *See* 17 U.S.C. § 501(a) ("For purposes of this chapter [5—Copyright Infringement and Remedies] . . . , any reference to copyright shall be deemed to include the rights conferred by section 106A(a)."). The right of attribution generally is enforced by an injunction requiring the defendant either to associate or disassociate the artist's name with the work as appropriate under the circumstances. For example, in *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990), the court applied the New York's Artists' Authorship Rights Act, which has provisions similar to VARA, and concluded that presenting only unrepresentative fragments of an artist's work in a pamphlet presented the work in an "altered, defaced, mutilated or modified form." *Id.* at 134–41. As a remedy, the court awarded: (1) an injunction prohibiting distribution of the pamphlet in a way that suggested that the fragments represented the whole of the work; (2) an injunction requiring a "corrective

Although *Deathly Hallows* does not discuss a parallel right directly, Griphook's attitude certainly suggests that the goblins would insist that goblin-made objects be attributed to them, and that they would object to non-goblin-made objects being attributed to them.

B. Right of Integrity

The right of integrity is more directly parallel to the goblin conception of a continuing ownership interest in a tangible artistic object. Under section 106A of the Copyright Act, the artist has the right

> (A) to prevent any intentional distortion, mutilation, or other modification of that work [of visual art] which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) 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.[51]

The right of integrity thus grants the creator some control over the tangible artistic object itself, even after it has been sold.[52] The creator's control is limited to prevention of certain types of "distortion, mutilation, or modification" and "destruction," with "destruction" applicable only to "a work of recognized stature."[53] Thus, the creator's control is much weaker than the goblin right of return of the work upon the death of the purchaser.[54] However, the right of integrity again is consistent with the goblin notion that a

communication" to "disattribute" the pamphlet from the artist; and (3) damages, limited to nominal damages of one dollar because the artist had not shown the amount of damage to his reputation. *Id.* at 148–49.

[51] 17 U.S.C. § 106A(a)(3).

[52] Like the right of attribution, the right of integrity generally is enforced by an injunction against destruction or damage. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 337 (S.D.N.Y. 1994) (enjoining defendants from "(1) distorting, mutilating, or modifying plaintiffs' art work . . . ; (2) destroying this art work; and/or (3) removing this art work, or any portion thereof"), *rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995). If the work has already been harmed or destroyed, the artist may be entitled to collect damages. *See* Martin v. City of Indianapolis, 4 F. Supp. 2d 808, 811–13 (S.D. Ind. 1998) (awarding artist statutory damages of $20,000 for city's destruction of artist's work of recognized stature, as well as costs and attorney's fees), *aff'd*, 192 F.3d 608 (7th Cir. 1999).

[53] 17 U.S.C. § 106A(a)(3)(A), (B).

[54] Although one possible remedy for threatened destruction is return of the work to the author.

creator, by virtue of the act of creation, maintains a link to and a degree of control over the created work, regardless of with whom the tangible work currently resides.

C. Droit de Suite

One final moral right that deserves mention is the *droit de suite*, also known as the resale royalty; indeed, this right perhaps comes the closest to the goblin conception of property, or at least to the individualized version Bill describes. Pursuant to the *droit de suite*, an artist is entitled to a portion of the proceeds any time his or her fine artwork is resold.[55] These resale royalties are typically limited to works of fine art sold for above a threshold price, and they can be based on the entire resale price or on only the increase in value.[56] This right again is strongly rooted in the continental European tradition[57] and has had difficulty gaining traction in the common-law countries. Different rationales have been presented for the *droit de suite*, including that the right to profit from resales gives artists an increased incentive to produce works of fine art;[58] creators of works of fine art are at a disadvantage compared to authors and composers, who can profit by selling many copies of their works;[59] fine artists enhance their reputations, and hence the value of their existing works,

[55] *See* MERGES ET AL., *supra* note 20, at 933.

[56] *See* Channah Farber, *Advancing the Arts Community in New Mexico Through Moral Rights and Droit de Suite: The International Impetus and Implications of Preemption Analysis*, 36 N.M. L. REV. 713, 720 (2006) ("German artists are given one-fourth of the difference between the present and prior selling price, as opposed to a set percentage of the resale price, as in France." (footnote omitted)); Alderman, *supra* note 40, at 279.

[57] *See* Alderman, *supra* note 40, at 276 ("This [*droit de suite*] concept fits easily within the European natural law systems . . . ."). The European Union has issued a directive requiring that all its member countries recognize such a right. Council Directive 2001/84, 2001 O.J. (L 272) 32–36, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0084:EN:NOT (last visited June 4, 2009) [hereinafter E.U. *Droit de Suite* Directive].

[58] *See* Alderman, *supra* note 40, at 268 ("Since it has been argued that works of fine art are exploited with each sale, whether or not there is a profit, resale royalties rest on the desire to encourage artistic production by guaranteeing creators compensation, as with other economic rights." (footnote omitted)); *id.* at 272–73 ("One can argue that the potential for increased remuneration is a potent incentive for further creation.").

[59] *See id.* at 273–74 ("Authors and composers receive royalties through reproduction and performance rights for all the copies of their works that are exploited. Visual artists, on the other hand, are paid only for the initial sale of their works and have commercially insignificant reproduction rights. And unfortunately, they lose their most remunerative right—that of public display—once they sell their creations." (footnote omitted)); *see also id.* at 269–70 (attributing this rationale to French law).

by producing later works, and they are therefore entitled to compensation for this increase in value;[60] and allowing the purchaser to reap all the benefit of the increased value of the work is a form of unjust enrichment that comes at the expense of the original artist.[61]

In the United States, only California has fully recognized such a right, in the form of the Resale Royalty Act.[62] The California Resale Royalty Act applies to works of "fine art," defined to be "an original painting, sculpture, or drawing, or an original work of art in glass."[63] Under the Act, "[w]henever a work of fine art is sold . . . , the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale."[64] The right is inalienable[65] and persists for the life of the artist, then "inure[s] to his or her heirs, legatees, or personal representative" for an additional twenty years.[66] However, the right is limited and does not apply to "the resale of a work of fine art for a gross sales price of less than one

[60] *See id.* at 270 ("The artist's royalty in Germany is premised on the belief that the increased value of a creation was always latent in it, and that increases in individual works are also due to the artist's continuing body of work. Thus, the increase in value in a particular work over time is what the artist should have received originally. Artists are exploited, in this view, because a work's true value is not realized until many years after its original sale, and without resale royalties the creators do not share in any appreciation." (footnote omitted)).

[61] *See id.* at 271 ("In Belgium, the contract principles of changed circumstances and unjust enrichment underlie the royalty right. Based on the continuing relationship between the artist and those who purchase his work, it is believed that a subsequent seller should not benefit unjustly from any increased value in an artist's work. Changed circumstances and unjust enrichment presuppose that value increases are not the result of any specific activity or ability of the owner of a work who, therefore, should not benefit at the creator's expense." (footnote omitted)). Alderman is generally critical of all these views, and opposed to the resale right. *See generally id.*; *see also* Farber, *supra* note 56, at 731 (discussing criticism of California's *droit de suite* law (citing 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 233, 238 (2d ed. 1987))).

[62] CAL. CIV. CODE § 986 (West 2007). Puerto Rico also recognizes this right. *See* Farber, *supra* note 56, at 731 (citing 31 P.R. LAWS ANN. § 1401). Georgia recognizes a limited form of the right in art purchased by the state, if the right is provided for by contract. *See* GA. CODE ANN. § 8-5-7(a)(3) (2008) (providing that the artist retains, "[i]f provided by written contract, the right to receive a specified percentage of the proceeds if the work of art is subsequently sold by the state to a third party other than as part of the sale of the building in which the work of art is located").

[63] CAL. CIV. CODE § 986(c)(2).

[64] *Id.* § 986(a). The obligation is on the seller or his or her agent to "withhold 5 percent of the amount of the sale, locate the artist and pay the artist." *Id.* § 986(a)(1).

[65] *Id.* § 986(a) ("The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.").

[66] *Id.* § 986(a)(7).

thousand dollars"[67] or to "resale of the work of fine art for a gross sales price less than the purchase price paid by the seller."[68]

The *droit de suite* thus incorporates many of the features that Bill attributes to the goblin view of ownership interests in works of art. The creator maintains an ongoing economic interest in the work,[69] as subsequent sales of the work require a direct payment to the creator.[70] Since goblins "consider our habit of keeping goblin-made objects, passing them from wizard to wizard without further payment, little more than theft,"[71] a system that requires payment of a royalty on each such transfer fits splendidly with their view of property, although they would probably want more than California's five-percent royalty.

D. Cultural Rights

Recently, interest had been growing in a proposed collective moral right, termed a "cultural right." Under the aegis of such a cultural right, Native Americans have demanded the return of artistic and cultural artifacts residing in U.S. museums, and the Greek government has demanded that the British government return the "Elgin Marbles" friezes and statuary taken from the Parthenon in 1806.[72] In these cases, it is not the actual artists, or even their direct

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[67] *Id.* § 986(b)(2).

[68] *Id.* § 986(b)(4). Note that if the sale price is greater than the purchase price by less than five percent, the seller will actually take a loss on the transaction.

[69] *See* Alderman, *supra* note 40, at 267 ("The resale royalty, or *droit de suite*, . . . [posits] a continuing remunerative relationship between a visual artist and his creation, surviving the sale of the material object embodying the work . . . ."); *see also id.* at 276 ("This [*droit de suite*] concept fits easily within the European natural law systems that recognize a continuing relationship between an artist and his work, even after sale. Consistent with this view, possession of art is not like owning a widget: even after a work is sold it remains under the influence of its creator." (footnote omitted)).

[70] Although by its terms the Resale Royalty Act applies only to actual resales (and exchanges for other fine art, *see* CAL. CIV. CODE § 986(b)(5)), the logic of the Act suggests that it should apply to any transfer of the property, such as via a will, just as tax laws do.

[71] DEATHLY HALLOWS, *supra* note 1, at 517.

[72] *See, e.g.*, Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995); Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 293 (1999) [hereinafter Harding, *Cultural Heritage*] ("The work that has been done on understanding and justifying repatriation, while addressing the important connection between community and culture, tends to focus on the rights of cultural groups or the political value of cultural heritage. The advocates of this approach argue that the disposition of cultural heritage is an issue for culturally affiliated groups without interference from others."); Sarah Harding, *Justifying*

descendants, who are making the claim; instead, a government or activist group is asserting the claim on behalf of the ethnic or national group of which the artists were members. The cultural right postulates that certain older artifacts are so tightly linked to particular cultures that they should be returned to the current-day members of those cultures, regardless of who owns the artifact under the traditional laws of tangible property. Thus, even if a museum or collector has an iron-clad claim of ownership in an important cultural object, with a chain of legitimate transfers of title,[73] that object should nevertheless be returned to the descendants of the originating group.

Commentators have proposed various definitions for cultural property, accompanied by a similar variety of rationales for its protection. According to Professor Patty Gerstenblith,

> "cultural property" refers to those objects that are the product of a particular group or community and embody some expression of that group's identity, regardless of whether the object has achieved some universal recognition of its value beyond that group. . . .
>
> . . . .
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> To achieve the purposes of the personality theory of property ownership [adopted in the article] and to ensure that the group has

Repatriation of Native American Cultural Property, 72 IND. L.J. 723, 743–73 (1997) [hereinafter Harding, *Native American Cultural Property*] (discussing possible philosophical bases for recognizing cultural rights); Anna Kingsbury, *Protecting Indigenous Knowledge and Culture Through Indigenous Communal Moral Rights in Copyright Law: Is Australia Leading the Way?*, 12 N.Z. BUS. L.Q. 162 (2006); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (arguing for cultural rights to create "property for grouphood," by analogy to Margaret Radin's "property for personhood" (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)), and also arguing that rights based on this theory should be inalienable); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993) (collecting and summarizing U.S. laws protecting cultural property); Michael J. Reppas II, *The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the "Elgin Marbles" Must Be Returned to Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 911 (1999). *But see* Harding, *Native American Cultural Property*, *supra*, at 750–53 (criticizing Moustakas). Professor Harding also cites the Dead Seas Scrolls as another example of cultural property. *See* Harding, *Cultural Heritage*, *supra*, at 295 & n.13.

[73] Such an orderly transfer of title is not typical for the works usually under discussion—the Elgin Marbles in particular have a rather dicey history. *See* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1881–84, 1895–1902 (1985) (discussing the history of the Elgin Marbles and the complexities in determining whether Britain can legitimately claim title to the pieces). Gryffindor's sword is the subject of similar discussions regarding its rightful ownership. *See* DEATHLY HALLOWS, *supra* note 1, at 505–08 (goblins and wizards arguing over whether Gryffindor commissioned the sword from the goblins or whether he simply stole it from them).

> the opportunity to define itself autonomously, the cultural group must provide the definition of its cultural property.[74]

She then goes on to identify the grounds for protecting such property:

> Once a group designates items of property as cultural property, the rights of cultural groups may be founded on three ideas. First, because the identity of the group is bound up in the object (and similarly, the identity of the object relies on recognition by the group), the group acquires ownership rights over that object. Second, because the property is so closely tied to the identity of the group, it should be inalienable "because future generations are unable to consent to transactions that threaten their existence as a group." Finally, group ownership may also be premised on a Lockean theory. Cultural groups have rights in their cultural property because such property is the product of the group.[75]

The most significant international treaty on cultural property, the United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention"),[76] states "[f]or the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to [particular designated] categories."[77] The designated categories include specimen collections, artifacts of historical interest, archaeological discoveries, parts of monuments, artistic works and manuscripts, and archives.[78]

The Preamble to the UNESCO Convention lays out the considerations that justify the protection of cultural property: "[T]he

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[74] Gerstenblith, *supra* note 72, at 569–70.

[75] *Id.* at 570 (footnotes omitted) (quoting Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURIS. 249, 263 (1993)). Professor Gerstenblith concludes her article with a model statute for the comprehensive protection of cultural property in the United States. *See id.* at 641–70; *see also id.* app. A at 673–88 (draft text of a Model Statute for the Treatment and Protection of Cultural and Archaeological Resources).

[76] United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 234–36, *reprinted in* 10 I.L.M. 289, 289–90 (1971), *available at* http://portal.unesco.org/en/ev.php-URL_ID=13039 [hereinafter UNESCO Convention]. The history of the UNESCO Convention is discussed further *infra* notes 122–23 and accompanying text.

[77] UNESCO Convention, *supra* note 76, art. 1.

[78] *See id.*

interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations," and "cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."[79] The Preamble then concludes that "it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export," and that "to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations."[80] Article 2 of the Convention goes on to declare:

> The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.[81]

Article 3 contains the primary substantive provision of the Convention: "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."[82] The rest of the Convention then specifies the conditions under which the import and export of cultural property is legal or illegal.[83]

Professor John Merryman states the definition this way: "The term ['cultural property'] refers to objects that have artistic, ethnographic, archaeological, or historical value."[84] He adds that "[m]ost nations control cultural property in the interest of its retention, preservation, study, enjoyment, and exploitation."[85] Professor Merryman takes a

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[79] *See id.* Preamble.

[80] *Id.*

[81] *Id.* art. 2.

[82] *Id.* art. 3.

[83] *See id.* arts. 4–26.

[84] Merryman, *supra* note 73, at 1888.

[85] *Id.* Professor Merryman explores this notion further, explaining that

> These interests may reinforce each other: for example, Mayan sites in Mexico are more likely to be preserved if monumental Mayan sculptures cannot be exported

different view from most commentators in the cultural rights field on why and how to protect cultural property. Instead of a "cultural nationalism" view of the rights, under which a culture or nation has a group right to demand the return of its cultural property,[86] he favors "cultural internationalism," under which cultural property should be protected because it is important to the cultural identity of all humankind, not just to the group that created it.[87] On this theory, there is no particular rationale for favoring the originating culture over any other; rather, the important consideration is who is in the best position to preserve the property.[88]

Another view of cultural rights, which is not necessarily inconsistent with the previous views, is that they are needed to fill gaps in the coverage of traditional copyright and moral rights laws.[89] In many indigenous cultures, knowledge and creation are viewed as communal in nature, and therefore no individual "author" can be identified, as required for both copyrights and moral rights.[90] Further, many indigenous works are not written or otherwise "fixed in any tangible medium of expression,"[91] again as required by copyright and moral rights law.[92] In response, there have been proposals to create what have been termed "Indigenous Communal Moral Rights."[93]

> to foreign markets. There are situations, however, in which the preservation of cultural objects is actually endangered by retentive legislation: objects that would be well-housed and preserved abroad are allowed to deteriorate in warehouses or inadequately maintained and staffed museums or, often worse, at unprotected and unexcavated sites at home. In such cases the retention and preservation interests work against each other.

Id. at 1888–89 (footnote omitted).

86 *See id.* at 1911–16.

87 *See id.* at 1916–21.

88 *See id.* He therefore favors a principle of "repose," under which an artifact should remain where it currently resides unless there is a good reason to move it. *See id.* at 1911; *see also id.* at 1921 (applying cultural internationalism and repose to conclude that the Elgin Marbles should remain in Britain).

89 *See* Kingsbury, *supra* note 72, at 163–64 & *passim*.

90 *See id.* at 163.

91 17 U.S.C. § 102(a) (2006). Section 101 defines "fixed": "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (2006).

92 *See* Kingsbury, *supra* note 72, at 163.

93 *See id.* at 168–70 (discussing proposed legislation in Australia that would recognize rights under this name). Although the author criticizes the Australian legislation for being too limited, she does note that:

Such proposals recognize the communal nature of these creations and protect them with communal moral rights.

The cultural moral right is not necessarily in line with Bill's assertion of what goblins believe, in that his description reflects a primarily economic motive in wanting another fee paid for each transfer of the artistic object. Nevertheless, the right is perfectly consistent with what Griphook demands when he says that the sword "is a lost treasure, a masterpiece of goblinwork! It belongs with the goblins!"[94] He is asserting the right in what he sees as an important cultural artifact, the sword (and, presumably, the tiara), on behalf of the goblins as a cultural or racial group, much as the Native Americans demand the return of tribal artifacts on behalf of the tribe or the Greek government demands return of the Elgin Marbles on behalf of the Greek people. Thus, Griphook appears to be demanding recognition of the goblins' cultural rights in their historical artifacts.

IV
ARE WE BECOMING GOBLINS?

The current law of intellectual property, and even more so the law of moral rights, thus bears some significant parallels to the goblin view of property, albeit with some important differences. These parallels raise the interesting question of whether we are in the process of eroding away those differences and moving toward a more "goblinish" view of artistic property.

The overall thrust in intellectual property clearly has been in the direction of expanding intellectual property rights, especially in the area of copyrights and other artistic rights.[95] The same trend appears

> Despite the limitations of the draft Bill, Australia has taken an important initiative in pioneering Indigenous Communal Moral Rights. Australia has effectively reconceptualised moral rights (admittedly in this limited context), so that they protect not the author but the community. This is a concept far removed from the original author-centred notion of moral rights in civil law systems. It demonstrates the flexibility of the moral rights framework, and its ability to deal with cultural rather than economic harm.

Id. at 171 (footnote omitted); *see also* Reppas, *supra* note 72, at 932–34 (arguing that the Greeks have a group moral right of integrity in the Parthenon that requires Britain to return the Elgin Marbles so that the monument may be restored properly).

94 DEATHLY HALLOWS, *supra* note 1, at 506.

95 Along with many others, the author of this Article has made this point before. *See* Gary Pulsinelli, *Freedom to Explore: Using the Eleventh Amendment to Liberate Researchers at State Universities from Liability for Intellectual Property Infringements*, 82 WASH. L. REV. 275, 357 & n.443 (providing examples, including the increase in copyright

in moral rights;[96] indeed, the United States did not formally recognize such rights until VARA in 1990. Furthermore, many commentators argue that even VARA does not meet the requirements of the Berne Convention, and that the United States therefore should expand its recognition of moral rights to align more completely with the continental moral rights tradition.[97] More states are creating their own moral rights regimes, or are expanding existing regimes.[98] If this

term); *id.* at 360–63 (discussing copyright specifically, and citing such examples as the addition of protection for sound recordings and architectural works, new rights in digital sound recordings, and the Digital Millennium Copyright Act).

[96] *See* Rigamonti, *supra* note 40, at 67 (noting that the article explores the reasons behind "[t]he recent wave of moral rights legislation in common law countries"); Liemer, *supra* note 35, at 42 ("In the United States, moral rights are in a much earlier state of development and are currently undergoing an important transition. This transition may, in part, reveal changing cultural values . . . ." (footnote omitted)); Farber, *supra* note 56, at 747 ("As internationalization of the art world continues and the intellectual property law in the United States adapts accordingly, state [moral rights] law will continue to develop as well."). As noted above, the European Union has issued a directive requiring all its members to adopt the *droit de suite*. *See* E.U. *Droit de Suite* Directive, *supra* note 57.

> [T]he explosive growth of the Internet and online services and technological tools that allow users to access and manipulate creative works directly has resulted in growing international pressures on the U.K. and the U.S. to move toward greater recognition of, and respect for, moral rights, including for musical works. In accordance with these aforementioned international agreements, other common law nations, such as Canada, Australia, and New Zealand, have already adopted broader statutory schemes granting moral rights for creative works, including moral rights for music.

Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 215–16 (2006). It may be that this forced imposition of the *droit de suite* on a reluctant Great Britain is behind Rowling's exposition of goblin property rules. Even in France, the leader in the area of moral rights, the concept is only a little more than 100 years old. *See* Landers, *supra* note 35, at 169.

[97] *See generally, e.g.*, Landers, *supra* note 35 (criticizing various sections of VARA as too limited); Elizabeth Dillinger, *Mutilating Picasso: The Case for Amending the Visual Artists Rights Act to Provide Protection of Moral Rights After Death*, 75 UMKC L. REV. 897 (2007); Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105 (2006); Sarah C. Anderson, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869 (2006); *see also* Farber, *supra* note 56, at 741 (arguing that "[t]here is a strong possibility that Congress may indeed enact a federal resale royalty law," in light of recent harmonization of the right in the European Union).

[98] *Compare* Landers, *supra* note 35, at 183 & n.124 (identifying eleven states with moral-rights legislation prior to the enactment of VARA in 1990), *with* 6 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING & ARTS § 16:103 & n.1 (3d ed. updated August 2007) (identifying fourteen states—California, Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, and Rhode Island—with moral-rights

trend continues, it is likely to take us ever closer to a goblin-like view of artistic property, in which the moral rights of the creator overcome the traditional property rights of the purchaser.

What would be the implications of a full-fledged goblinish rights regime, in which the seller is entitled to the return of the work upon the death of the purchaser? One issue with such a regime would be the scope of the works covered. The conventional moral rights provisions are all focused on protecting the creative work of a single artist, or at most a small group of artists; indeed, the VARA definition of a protected "work of visual art" specifically excludes any corporate "work made for hire" from its scope.[99] Thus, a company like Tiffany's would not be able to regain possession of one of its fine necklaces or bracelets upon the death of the purchaser. Instead, the sort of works that might be included in such a regime would most likely be limited to highly individual pieces of fine art or craftsmanship—like a particularly fine sword or tiara.

Such a regime certainly would raise some interesting economic questions. If purchasers of works of art knew that the transactions were more like rentals than traditional purchase agreements, then they almost certainly would not be willing to pay the same price for the works as they would for an outright ownership interest. In this sense, such a view of artistic property rights might actually be disadvantageous to the artist, as he or she would receive less money up front. In theory, this disadvantage would be overcome by the right to make subsequent sales once the purchaser returns the property. However, such subsequent sales are far from a sure thing—the work might not change hands during the artist's lifetime, and even if it did, very few works increase in value or even hold their original value over time because fashions and tastes change.[100]

A goblinish regime would also raise some profound practical problems. As long as the artist was alive at the time of return of the work, then identifying the holder of the right would likely be

legislation in 2007), *and* Farber, *supra* note 56, at 731–32, 747 (identifying Montana and Utah as also having recognized limited moral rights, but omitting Illinois, Nevada, and Oregon; also arguing that "New Mexico should consider expanding its moral rights law to encompass a broader range of subject matter and to apply in contexts other than works of art that are incorporated into public buildings"). This number probably is less than it might otherwise have been because VARA includes a preemption provision that may have discouraged states from passing their own regimes. *See* 17 U.S.C. § 301(f) (2006).

99 *See* 17 U.S.C. § 101 (2006).

100 Similar arguments have been advanced against the *droit de suite*. *See, e.g.*, Alderman, *supra* note 40.

relatively easy.[101] But what if the artist had died in the interim? If the right was perpetual,[102] the passage of time would make tracking down the original creator, and then the successors in interest, progressively more difficult. And who would those successors in interest be? Traditional moral rights are inalienable, in large part due to their fundamental link to the personality of the creator, but also because making the rights freely assignable would effectively defeat their purpose—the purchaser of the work could, as a term of the purchase, demand transfer of the moral rights as well.[103] Indeed, the rights afforded by section 203 of the Copyright Act (providing for the termination of copyright assignment agreements) are not even devisable—they pass to the heirs of the artist according to strict rules spelled out in the statute.[104] Tracking the creator's rights through generations of the creator's descendents would likely prove impossible.[105]

One way around this difficulty is to make the right an individual right for the lifetime of the creator, plus perhaps some additional limited time,[106] and then make it a collective cultural right thereafter. Griphook's actual claim on the goblin sword would appear to be of this collective nature—he asserts the right on behalf of the race of goblins because he is a member of that race, not because he is a descendant of the actual creator. As noted above, such a claim is consistent with many forms of the proposed cultural moral right. In

101 Although finding him or her may not be so easy. For example, note the difficulty created by so-called "orphan works," works that are still under copyright but for which the owner of the copyright cannot be found. With no way to contact the copyright owner, potential users are left uncertain of their ability to use the work without liability. *See generally* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

102 The goblin right appears to be perpetual—as noted above, the sword at issue was at least 1000 years old (and the tiara is of a similar age), but Griphook asserted that it still belonged to the goblins.

103 They are, however, in some cases waivable. *See* 17 U.S.C. § 106A(e)(1) (2006) (providing for written waiver of the rights granted in that section).

104 *See* 17 U.S.C. § 203(a)(2) (2006).

105 In this sense, a corporate right might actually be more suited to this goblin property right because corporations have ongoing existences unrelated to the Muggles who own and operate them. On the other hand, corporations also dissolve and disappear with some regularity, which would raise even more complex questions about who would qualify as their "descendants."

106 As with the copyright, which extends for the life of the creator plus seventy years, 17 U.S.C. § 302 (2006), or the California resale royalty, which extends for the life of the creator plus twenty years, CAL. CIV. CODE § 986(a)(7) (West 2007).

the modern world of globalism and increased sensitivity to other cultures, the recognition of such a right seems increasingly plausible. Indeed, recognition of cultural property is perhaps the most rapidly expanding area of moral rights law.[107]

In fact, recognition of such a moral claim occurred recently, albeit by private parties rather than a governmental body. Yale University recognized the claim of the Peruvian government to cultural artistic objects, including "silver statues, jewelry, [and] musical instruments,"[108] that had been collected from the Machu Picchu site in Peru and were residing in Yale's Peabody Museum.[109] Yale agreed to return the artifacts to Peru for display in a new museum to be built near the Maccu Piccu site. According to the parties' press release:

> Yale will acknowledge Peru's title to all the excavated objects including the fragments, bones and specimens from Machu Picchu. Simultaneously, in the spirit of collaboration, Peru will share with Yale rights in the research collection, part of which will remain at Yale as objects of ongoing research. Once the Museum and Research Center is ready for operation in late 2009, the museum

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[107] *See, e.g.*, Harding, *Cultural Heritage*, *supra* note 72, at 296–97 ("There are an increasing number of examples of cooperation between museums and claimants and between collecting and source nations. This cooperation is founded at least partially on a mutual understanding of the significance of certain objects and a sense of obligation to the integrity of the objects themselves." (footnotes omitted)); Reppas, *supra* note 72, at 959 ("An emerging norm in contemporary international law, in regards to the return of Cultural Property to its countries of origin, may be seen through an analysis of the numerous international treaties and agreements which expressly deal with this subject. These agreements show a trend in the world community to recognize the right of countries of origin to repatriate their Cultural Property which has been taken abroad, by establishing a procedure for and providing a means by which such property is returned."); Gerstenblith, *supra* note 72, at 565 ("[P]rotection of our indigenous cultures has become progressively stronger over the course of this century . . . ."); Phelan, *supra* note 72, at 64 ("[I]n recent years Congress and state legislatures have recognized the importance of identifying and preserving our cultural heritage and have enacted legislation to initiate and promote such an endeavor [i.e., to preserve objects and monuments of artistic, historical, literary, and anthropological interest]."); *see also* Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293 (1994) (proposing further expansion of cultural rights in the realm of *intangible* cultural property).

[108] Diane Orson, *Morning Edition: Yale Returns Peruvian Antiquities* (NPR radio broadcast Sept. 18, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=14495762.

[109] The Peruvian government also asserted a more traditional legal claim to the property based on agreements signed at the time the artifacts were excavated. Such claims are common in cultural rights cases, including that of the Elgin Marbles. However, the rules governing ownership of excavated artifacts in this older time were rather fluid, as are details of what actually went on so long ago, and so the moral rights claim is often more clear-cut.

> quality objects will return to Peru along with a portion of the research collection.[110]

Yale President Richard Levin stated that the arrangement was a "model for the handling of cultural artifacts that are important for scholarship on the one hand and important sources of national pride for the home country. . . . The key breakthrough, of course, is that we can at once recognize that the Peruvians are the owners of this material."[111] On the other side, Jose Keplan, a representative for the local government of Machu Picchu who was an advisor to the Peruvian negotiators, explicitly invoked the language of cultural rights, reportedly saying "repatriation of the antiquities goes beyond the technicalities of who possesses property. . . . It boils down to the ethical rights of the country of origin."[112] The parties went so far as to propose, "[t]his understanding represents a new model of international cooperation providing for the collaborative stewardship of cultural and natural treasures."[113] The parties thus recognized the growing importance of cultural rights and the trend toward recognizing the rights that cultural groups have in their artifacts.

Even earlier, the U.S. Congress recognized the cultural claims of Native American tribes in the Native American Graves Protection and Repatriation Act ("NAGPRA").[114]

> [NAGPRA] was enacted on November 16, 1990, as a way to correct past abuses to, and guarantee protection for, the human remains and cultural objects of Native American tribal culture. The Act addresses two main objectives: to protect Native American or Native Hawaiian ownership rights to items of cultural significance to them and burial sites on federal and tribal lands, and to provide for the repatriation of culturally significant items currently held by federal agencies and museums.[115]

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110 News Release, Yale University, Joint Statement by the Government of Peru and Yale University (Sept. 14, 2007), *available at* http://opa.yale.edu/news/article.aspx?id=2376.

111 Orson, *supra* note 108.

112 *Id.*

113 News Release, *supra* note 110.

114 Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170); *see generally* Harding, *Native American Cultural Property*, *supra* note 72 (using cultural rights theory to justify NAGPRA). For a synopsis of all U.S. laws relating to preservation of our cultural heritage, including NAGPRA, see Phelan, *supra* note 72, and Gerstenblith, *supra* note 72, at 586–641.

115 Deborah F. Buckman, Annotation, *Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act (25 U.S.C.A. §§ 3001–3013 and 18 U.S.C.A. § 1170)*, 173 A.L.R. FED. 585, 585 (2001) (citation omitted).

NAGPRA provides that "[t]he ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be [with Native American tribes]."[116] The primary focus of NAGPRA is human remains and associated funerary objects, but it also protects "cultural items" generally, defined to include "unassociated funerary objects," "sacred objects," and "cultural patrimony."[117] Furthermore, federal agencies and museums with collections of "Native American human remains and associated funerary objects" are required to inventory their holdings and, if possible, "identify the geographical and cultural affiliation of such item."[118] If agencies and museums are able to identify these affiliations, they must "upon the request of a known lineal descendant of the Native American or of the tribe or organization . . . expeditiously return such remains and associated funerary objects."[119] Thus, the United States has formally recognized cultural rights for artistic objects created by Native American tribes, at least with respect to items discovered on federal lands or held by federal agencies or museums. [120]

The issue of cultural property has also been addressed at the international level, resulting in a series of accords regarding the

116 25 U.S.C. § 3002(a) (2006). The statute then provides a hierarchy for determining which particular tribe or group receives the ownership right. *See id.*

117 *Id.* § 3001(3) (2006). "Cultural patrimony" is defined to mean:

> an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Id. § 3001(3)(D).

118 *Id.* § 3003(a) (2006).

119 *Id.* § 3005(a)(1) (2006).

120 Australia and New Zealand, two other common-law countries, also have dealt with the issue of the cultural rights of indigenous peoples, with Australia going so far as to propose the creation of "Indigenous Communal Moral Rights." *See generally* Kingsbury, *supra* note 72 (discussed *supra* notes 89–93 and accompanying text). The World Intellectual Property Organization ("WIPO") has also worked on the issue of cultural property at the international level, issuing a set of draft guidelines. *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE: REVISED OBJECTIVES AND PRINCIPLES (2006), *available at* http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_4.pdf.

treatment of such property. The oldest of these treaties is the Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was intended to prevent the seizure and/or destruction of important monuments and other cultural property during wartime.[121] This treaty was followed by what is probably the most significant international treaty on cultural property, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, enacted in 1970.[122] The UNESCO Convention requires member nations to ban the export of cultural property without the authorization of the country of origin. The United States ratified the UNESCO Convention with the Convention on Cultural Property Implementation Act in 1983, which permits the president to enter into bilateral agreements to implement the export restrictions of the UNESCO Convention.[123]

Other international agreements aim to foster international cooperation to protect cultural rights using a variety of different, largely hortatory, approaches. These agreements include the Convention Concerning the Protection of World Cultural and Natural Heritage[124] and the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.[125] More recent attempts include the Convention on the Protection of the Underwater Cultural Heritage,[126] the Convention for the Safeguarding of the Intangible Cultural Heritage,[127] and the

121 Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13637. The convention has an accompanying protocol, *available at* http://portal.unesco.org/en/ev.php-URL_ID=15391, which was updated in 1999, *available at* http://portal.unesco.org/en/ev.php-URL_ID=15207. The United States is a signatory to the Convention but not to either protocol.

122 UNESCO Convention, *supra* note 76. The provisions of the UNESCO Convention are discussed *supra* notes 76–83 and accompanying text.

123 Pub. L. No. 97-446, § 302, 96 Stat. 2329 (1983) (codified at 19 U.S.C. §§ 2601–2613 (2006)).

124 Nov. 23, 1972, 27 U.S.T. 37.

125 June 24, 1995, 34 I.L.M. 1322. The possible application of these agreements to the Elgin Marbles is discussed in Reppas, *supra* note 72, at 959–61. Reppas also argues that "Collectively, . . . these treaties, in conjunction with other international agreements, establish a peremptory norm in contemporary international law which cannot be ignored by any country, irrespective of whether or not they are a party to these agreements." *Id.* at 962.

126 Nov. 2, 2001, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13520.

127 Oct. 17, 2003, *available at* http://portal.unesco.org/en/ev.php-URL_ID=17716.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[128] Indeed, cultural property has become so significant a part of the international legal landscape that it now has its own dedicated journal, the *International Journal of Cultural Property*.[129]

However, broad cultural rights also present some practical difficulties. One such difficulty lies in the effect on the future viability of museums. The collections of many important museums would be drastically impoverished if cultural rights forced museums to submit to the demands of governments and ethnic groups for the return of their cultural artifacts.[130] Thus, increasing the recognition of the importance of other cultures may create the ironic result of decreasing the ability to learn about those cultures because the decline of museums' collections would close a major cultural educational avenue.[131]

Broad cultural rights also may implicate constitutional rights of private citizens. If the U.S. government extended the NAGPRA concept to create a similar action for artifacts discovered on private lands or held by private citizens, it would have to contend with the argument that such an action amounts to a taking under the Fifth

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[128] Oct. 20, 2005, *available at* http://portal.unesco.org/en/ev.php-URL_ID=31038. A listing of the international agreements regarding cultural property, with links to the text of the agreements themselves, may be found at the UNESCO web site, http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (last visited July 8, 2009).

[129] *See* http://www.journals.cambridge.org/action/displayJournal?jid=JCP.

[130] *See* Merryman, *supra* note 73, at 1895. According to Professor Merryman:

> [T]he [Elgin] Marbles dramatically illustrate an important fact: the Metropolitan Museum in New York, the British Museum in London, the Louvre in Paris, the Hermitage in Leningrad and indeed all of the great Western museums contain vast collections of works from other parts of the world. If the principle were established that works of foreign origin should be returned to their sources, as Third World nations increasingly demand in UNESCO and other international fora, the holdings of the major Western museums would be drastically depleted.

Id.; *see also* Reppas, *supra* note 72, at 978–79 (acknowledging the risk, but dismissing its importance).

[131] There is an international interest in the accessibility of cultural property to all people. That policy is advanced by distribution, rather than retention in one place, of the works of a culture. If all the works of the great artists of classical Athens were returned to and kept there, the rest of the world would be culturally impoverished.

Merryman, *supra* note 73, at 1920–21 (footnote omitted).

Amendment.[132] This possibility raises the general issue of compensation to the current owner: Should the cultures demanding return of their artifacts be required to pay some approximation of market value (assuming such a value could even theoretically be determined for unique antiquities) to get back the items? Or should these cultures have an absolute right in the object that entitles them to return without payment?

Another important issue is time limits: How old does an object have to get before it becomes a "cultural artifact"? At what point should the cultural right be recognized? Declaring an object of relatively recent vintage, whose creator is still alive or has been dead a relatively short time, a "cultural artifact" might seem strange, unless the object had attained some sort of special recognition or status in the culture. On the other hand, works of indigenous peoples following ancient methods of craftsmanship might quickly attain the "cultural artifact" status.

Finally, there is the issue of who then controls the collective cultural right. The idea of a cultural right exercised by a cultural group may be acceptable in the case of indigenous peoples with a strong cultural identity, such as Native American tribes. The idea may also be acceptable in a case such as the Greek government claiming the return of Greek artifacts. However, the concept becomes more elusive when the creator does not clearly belong to a particular group—for example, are there such things as "U.S. artifacts"?[133]

While we may be becoming more goblinish in recognizing ongoing rights in artistic objects, including allowing the artist to collect a commission on subsequent resale of the work, practical and social considerations suggest that we are unlikely to go as far as granting creators permanent personal rights that lets them reclaim their objects after a sale or other transfer. However, we may be moving closer to

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[132] *See* Gerstenblith, *supra* note 72, at 661–70 (discussing the takings issue and exploring rationales under which the repatriation of cultural property may be deemed not to be a taking).

[133] *But see* John Nivala, Droit Patrimoine*: The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477 (2003). Nivala claims that the Barnes Collection of art, as a complete set, is the cultural property of the United States and that breaking up the collection would cause cultural harm. He argues that it should therefore be protected as an intact set via some form of cultural rights, which he calls a "collective *droit patrimoine*." *Id.* at 481. The French *droit patrimoine* corresponds to what is in English called the right of attribution, the right to claim authorship or "patrimony." *See also* Craig M. Bargher, *The Export of Cultural Property and United States Property*, 4 DEPAUL-LCA J. ART & ENT. L. 189 (1994) (arguing that the United States should tighten its export laws to preserve its cultural property).

recognizing at least some form of the collective right that Griphook actually seems to demand—a cultural moral right in important cultural objects that enables the descendants of that culture as a group to demand the return of the object. Thus, our Muggle law is growing ever closer to goblin law, perhaps more rapidly than we realize.