Legal Opinion: fundamental grounds for morality in Intellectual Property Law

Abstract

Intellectual property law is usually divided in two branches, namely industrial property, and artistic and literary property. There is a fundamental difference between those two: the application of the principle of morality. Whereas a morality standard was clearly established in industrial property law, artistic and literary property law has been designed on an amoral basis. Today, both industrial and artistic and literary properties are facing criticism. On the one hand, the "*ordre public*" and "morality" clause is assumed to be a paramount requirement for registration in industrial property (i.e. patent law, trademark law and design law). However, neither the legislator nor the courts have managed to clarify the meaning of these terms. As so, ambiguity has arisen and legal interpretations sometimes lack legal certainty. On the other hand, artistic and literary property is considered to be a means of expression and for that reason, is protected as a fundamental right with a very few narrow exceptions. Yet, artistic creations can revive modern social sensitivities. Some subjects cannot be approached freely, even by means of art. As it stands, artistic and literary property is amoral, meaning it is neither moral nor immoral. Nonetheless, a recent phenomenon calls out for alleged immoral artists, or immoral artworks and aims to restrain their works' accessibility. This worrying stance goes against the very cornerstones of artistic and literary property and echoes more or less past censorship systems.

TABLE OF CONTENTS

INTRODUCTION

> '*Maupassant obviously surrendered himself to the theory, which not only existed in his circle in Paris, but which now exists everywhere among artists, that for an artistic production we not only need have no clear conception of what is good and what bad, but that, on the contrary, the artist must absolutely ignore all moral questions, -- that in this does a certain merit of the artist consist. According to this theory an artist can and must represent what is true, what exists, or what is beautiful, what, consequently, pleases him or even what can be useful as material for "science," but it is not the business of the artist to trouble himself about what is moral or immoral, good or bad.*'[1]

Tolstoy's observation, above, reflects his view that the artistic creation process must be free of any moral constraints. If it is true that, in theory, artistic and literary property ignores matters of morality, industrial property is conversely impregnated with them. The industrial property domain thus involves two opposing approaches to morality.

The confrontation between morality and law, based on their interactions, proves that they are two distinct concepts. This affirmation is not obvious, as the distinction is relatively recent – the first legal rules were a combination of religious precepts and moral values. Thomasius highlights the clear difference between the two notions: morality refers to the subject's conscience, whereas the law is directed to others.[2] As such, morality aims at inner peace while law aspires to ensure social peace. Nevertheless, one could argue that the two are inseparably linked. Neither of these theories is absolutely true or false: if the law slowly becomes independent from morality, the two concepts will remain in some respect intertwined, as both are tools regulating society. In fact, they differ in three ways: their sources, their compulsory or no-compulsory nature, and their purposes. In regard to the first difference, morality draws from many sources, such as religious texts and commonly accepted values, whereas the law originates from the appropriate public authority. Second, while the mandatory nature of the law is clear, moral values are only

[1] Leo Tolstoy and Leo Wiener, *The Complete Works Of Count Tolstoy* (Estes & company 1904).
[2] Olivier Descamps, 'Ancrages Historiques', *Droit et morale* (Dalloz 2011).

coercive if they are supported by the law. Finally, the law targets stability of the social order and the pursuit of justice, while the purpose of morality is perfection in individual conduct. While there is no doubt that the two notions, morality and law, are interconnected, there is a question as to which is hierarchically superior. This question is illustrated in Antigone's dilemma, where Antigone feels morally obligated to bury her brother while the law specifically forbids it.[3] The main difficulty comes from the observation that morality is never completely right or wrong; it is a reference value at a particular moment. During the French Resistance, those favouring morality over the law were chased After the liberation, those who had complied with the law were judged and deemed collaborators. The role of morality in intellectual property law is at the very interaction of law and philosophy.

Ethical issues are abundant in industrial property law. For this reason, respecting morality criteria is an essential condition for the registration of patents, trademarks, and designs. In each of those domains, protection is denied to immoral objects. However, the interpretation and the implementation of morality and public order concepts create many practical difficulties and legal uncertainty. Some argue that industrial property should, as artistic and literary property does, hold to the principle of neutrality as paramount, especially in science-related fields. In this case, neutrality in trademark law would be useless. The same is true for design law, as the design may benefit from a double protection through artistic and literary protection. By contrast, the neutrality of science raises an interesting discussion regarding patent law. Patent law should not influence scientific research. However, the question of morality in patent law diminished as the major issues began to involve bioethics questions, more linked to human dignity considerations rather than strict moral values. Is that to say that the morality standard of industrial property law should be overthrown? This seems unlikely, especially in the absence of proper auto-regulation established by scientists, for scientists.

The discussion over the morality standard resonates differently in the era of the #MeToo movement, which highlighted the sexual harassment and assaults committed by internationally celebrated artists. The theoretical amorality of artistic and literary property is threatened by a new ideology that is seeking to apply subjective moral values onto

[3] Sophocles, *Antigone* (442 BC).

artistic creations. Wilde sought to address moralist critics and the risk of censorship by making 'the beautiful' and 'the ugly' alternative concepts to moral values,[4] where the only thing that should matter is if an artwork is beautiful, or if a book is well written. The moral conscience of an artist could be defined as his or her ability to distinguish right from wrong. The artist's work may be impregnated by his author's vision. Amorality of artistic and literary property can be perceived at two levels. Not only is the process of creation impermeable to morality, so is the exercise of the author's moral rights, which are non-economic exploitation rights. These rights are considered moral because they refer to the author's personality rights, as French and German laws consider that creations embody their author's personality. Consequently, the moral rights of the author and the amorality of the artistic and literary property are two separate concepts.

Many issues arise from artistic and literary property amorality. First, what is the right way to engage with immoral works? According to which standard is immorality assessed? Above all, what would be a proportionate response? Balthus painted lascivious pubescent girls, clearly expressing reprehensible moral values.[5] Nona was convicted for the rape of two teenage sisters; his work does not reflect any immorality, yet it was removed from public view.[6] If one considers that it is possible to precisely determine what is an immoral work, despite Wilde's position, one must then decide how to respond to these works. Should immoral works, and moral works from an immoral author, be treated equally? More radically, should the most reprehensible conducts or contents lead to censorship, or at least diminution of the author's rights? Can moral considerations make an artwork illegal?

In answering these questions, it this paper is arguing that artistic and literary property must remain amoral for several reasons. This study does not try to justify wrong behaviours, or to excuse them. Conversely, it aims to show that intellectual property law

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[4] Oscar Wilde, Preface To The Picture Of Dorian Gray *in Complete Works Of Oscar Wilde* (Collins 1969).

[5] Stephanie Nebehay, 'Balthus Show Revives Debate On Lolita-Esque Works' (*Reuters*, 2008) <https://www.reuters.com/article/us-art-balthus/balthus-show-revives-debate-on-lolita-esque-works- idUSL1458011220080813>.

[6] Martin McKenzie-Murray, 'Dennis Nona And Moral Questions About Criminal Artists' (*The Saturday Paper*, 2016) <https://www.thesaturdaypaper.com.au/news/law-crime/2016/12/03/dennis-nona-and-moral-questions-about-criminal-artists/14806836004048>.

is not fit to address moral issues. Each legal system possesses appropriate tools to reprimand disruptive acts, mostly through criminal law. Criminal law is unbiased, as it does not distinguish between defendants. Intellectual property law, and especially copyright law, should not, under any circumstances, endorse censorship. In addition, artistic and literary protection is not subject to any prior control, unlike protection of industrial property, which sets a registration requirement. In order to recognise morality in artistic and literary property, a control would have to be used, either *a priori* or *a posteriori*. An *a priori* control would be impossible to implement, as the author's rights emerge from their of the work. In the same vein, an *a posteriori* control would compromise legal certainty over works. An author could benefit from their rights for years before facing a retroactive annulation. This is not workable. Censoring immoral artworks would require granting a judge, or any other administrator, the power to make some works legitimate. Such power would be contrary to the essence of artistic and literary property and, hence, inevitably lead to its dysfunction.

With that being said, it is left to the public's discretion whether they choose to read a book, listen to a piece of music, or attend the theatre. Citizens can freely decide, as an individual initiative, to punish an artist or a piece of art by ignoring it. By the same logic, a publisher can freely refuse to publish a book if they believe that the book or its author are counter to their personal principles or the spirit of the company.

The main risk of taking morality into account in the literary and artistic world has already been experienced. Hiding behind morality principles has been, in many political systems, a way to enforce widespread censorship. Censorship is nothing more than a means to establish authority and repress contestation. As such, a morality standard would be antinomic to the freedom of creation. The control of artworks and written works has always been a way to control the people by monitoring the dissemination of ideas.

The first part of this dissertation (I) will provide the reader with the necessary knowledge to understand the application of the morality standard over industrial property fields, as well as the several practical and doctrinal difficulties arising from it. The second part (II) will explain, in detail, the ideological difference between industrial property and artistic and literary law, from the perspective of morality. From that, the reader will understand the importance of amorality in artistic and literary property, as one of its

essential traits. Then, the distinction between the immoral artist and the immoral work will be established, to refute the imposition of a morality standard on artworks. In the third part (III) a historical approach to religious and political censorship will be studied in order to clearly determine and illustrate the risks of imposing a morality standard on freedom of creation. However, this final part will also explore the weight of artistic creation by balancing it against fundamental rights, through a study of French media Law, which will prove that artistic creation can be limited on the grounds of freedom of expression, without necessarily leading to censorship or repression.

Part I. The inherent morality of industrial property law

The existence of industrial property rights is deeply linked to moral considerations. Patent law, trademark law, and design law are subject to a morality and public order control by relevant offices, administrators, or judges, to the point that it has

become a proper requirement for the validity of an object's protection, in addition to other legal criteria. Nonetheless, the morality standard can sometimes raise difficulties on many levels and is thus controversial in some aspects.

Chapter 1 – Morality in patent law

Patent law is deeply imbued with morality principles, as patentability almost always has limits based on human dignity and *ordre public*. However, recent discussions regarding the application of morality in bioethics patent law cases have shown that this principle can be controversial, from its interpretation to its implementation.

A. Historical background

In 1623, the English Statute of Monopolies, one of the first patent statutes, was established, and would allow patents provided that 'they be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient'[7]. Centuries later, this quite specific idea has been modernised and adopted by many countries though the TRIPS agreement, which states that members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health, or to avoid serious damage to the environment.[8]

In 2010, in a study led by Professor Lionel Bently, it was found that 67 of the 73 World Trade Organisation member states (minus Australia, Bangladesh, Canada, Guyana, Uganda, and the United States) have included explicit morality exclusions in their national laws.[9] A notable example of such a system is the European Union, which

[7] English Statute of Monopolies 1623 VI <https://www.legislation.gov.uk/aep/Ja1/21/3>.
[8] TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, Marrakesh, Agreement Establishing the World Trade Organization, article 27(2).
[9] Shamnad Basheer, 'The Ordre Public and Morality Exclusions' in Lionel Bently, Brad Sherman, Denis Boges Barbosa, Shamnad Basheer, Coenrad Visser and Richard Gold, *Exclusions for Patentability and Exceptions and Limitations to Patentee's Rights – a*

states in the European Patent Convention that 'European patents shall not be granted in respect of inventions the commercial exploitation of which would be contrary to *ordre public* or morality'.[10] In addition, the European Directive 98/44 on the Legal Protection of Biotechnological Inventions sets out a non-exhaustive list of inventions that trigger the morality principle, including processes such as those for cloning human beings; modifying the germ line genetic identity of human beings; use of human embryos for industrial and commercial purposes; and so on[11]. However, this list is not intended to challenge the general morality exclusion; rather, it specifies the types of technologies and activities that are perceived as immoral, and gives a relatively narrow flexibility to the patent examiners when examining patentability. That is not to say that European arbitrators will never have to consider morality – whenever an invention falls outside the scope of the Directive, the exclusion provided by Article 53(a), meaning *ordre public* and morality, must be examined.

B. Doctrinal discussion

The first issue with the general morality exclusion of Article 53(a) resides in its phrasing, which emphasises the commercial exploitation of the patent. Some scholars have argued that, following the letter of the article, patentability could be granted to a patent application that does not contradict *ordre public* or morality, but the commercialisation may not be authorised if it pursues an aim prohibited by law. For instance, a technology allowing drivers to spot speed radars could be patentable but never commercialised. One could question the need to emphasise commercial exploitation,[12] and also how to assess the morality of the exploitation. For instance, is it to say that the intended use of the invention shall not be immoral, or that the financial exploitation, meaning the benefits to the owner, shall not contradict morality principles or take advantage of immoral research proceedings? Thus far, the European Patent Office seems

Study prepared for the World Intellectual Property Organization (WIPO, Geneva, 2010).

[10] European Patent Convention (EPC) 1973 Article 53(a).

[11] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (Biotech Directive), OJ L/213, Article 6(2).

[12] Kathleen Liddell, 'Immorality and Patents:' in Annabelle Lever, *New Frontiers In The Philosophy Of Intellectual Property* (Cambridge University Press 2012).

to consider that the focus should be on the use of the invention, as shown in Harvard/Transgenic Animals,[13] where the opponents' points on animal cruelty during the invention process, and on the exclusive rights conceded to an individual person over the population of animals, were disregarded.

The second issue raised by scholars is regarding the standard of immorality itself. In a decision involving Article 53(a), the European Patent Office (EPO) chose to apply a utilitarian approach, employing a balance-based reasoning: '…would seem to depend mainly on a careful weighing up of the suffering of animals and possible risks to the environment on the one hand, and the invention's usefulness to mankind on the other'.[14] However, a few years later, another approach was elaborated by the EPO, suggesting that an invention will be considered immoral if it is controversial and if there is a public consensus over it:

> *A fair test to apply is to consider whether it is probable that the public in general would regard the invention as so abhorrent that the grant of patent rights would be inconceivable. If it is clear that this is the case, objection should be raised under Article 53(a); otherwise not.*[15]

This definition was clarified in a final decision, in which the EPO specified that the immorality standard mirrored 'conventionally-accepted standards of conduct' and 'deeply rooted beliefs' rather than an overwhelming public consensus.[16] While the EPO seems to have reached a certain level of clarity regarding the morality standard, it remains true that patent cases can involve many different scenarios. Thus, it can be argued that the balancing test is still preferable to use when it comes to animal manipulation.

In addition, one could question the adequacy of the EPO to rule on morality. As seen before, morality and *ordre public* are wide scope notions deeply intertwined with fundamental rights issues, legal concepts that are often difficult to comprehend. In this regard, one could argue that it would be most appropriate for a judge to address those

[13] T0315/03 HARVARD/Transgenic Animals (2005) EPOR 31.
[14] T19/90 HARVARD/Oncomouse (1990) Reasons 5.
[15] T0272/95 HOWARD FLOREY/Relaxin (2002) Reasons 6.2.1.
[16] T0356/93 PLANT GENETIC/SYSTEMS (1995).

questions *a posteriori*, rather than the *a priori* control applied by the EPO. Indeed, morality and fundamental rights are implemented in a manner that goes beyond the patent law domain, and demands uniformity and coherence to the point that the EPO may lack expertise when it comes to interpretation of morality.

However, an author criticised the proposal in which committees would assist patent offices in their interpretation of Article 53(a), arguing that both legal and ethical reasoning have similarities and differences to the point that such assistance would propagate confusion rather than precision.[17]

Nonetheless, as Burk and Lemley describe, Article 53(a) should be seen as a 'policy lever' to achieve the designated aim of patent law, i.e., the promotion of new technologies and inventions, rather than a simple legislative set of provisions and principles.[18] In this context, morality and *ordre public* must be interpreted in relation to the utilitarian goal of patent law, meaning that patentability should be granted to incentivise 'socially beneficial inventions' in a 'fair and just' society. In other words, technological progress should not be promoted recklessly with disregard for important democratic principles such as justice and equity. While this viewpoint has the advantage of clarifying the immorality standard *per se*, it confers judiciary and/or patent examiners wide discretion, hence creating uncertainty over patentability in practice.

In addition, the *ordre public* is also used to avoid imbalanced patents, or patents countervailing public interest matters, rather than to deny the patentability *ab initio*. In the 'fair and just' society described by Burk and Lemley, wide access to medical care and new use improvements made by researchers are at stake. In this regard, rather than refusing patentability based on ethics and morals, exceptions to the monopoly such as the Crown use exemption,[19] compulsory licensing,[20] and research use exemptions[21] were drafted. Again, the exceptions help to achieve patent law's inherent philosophy.

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[17] Elodie Petit 'An Ethics Committee for Patent Offices' in *Embryonic Stem Cell Patents: European Law and Ethics* (Oxford University Press 2009).
[18] Dan L Burk and Mark A Lemley 'Policy Levers in Patent Law' (Virginia Law Review 2003) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=431360>.
[19] Patent Act 1977 (UK) ss 55 8.
[20] Patent Act 1977 (UK) s 58A.
[21] Patent Aact 1977 (UK) s 60(5).

Immorality and *ordre public* have been questioned for years, if not decades. Some argue that the inevitable decline of these notions is linked to their own limits: the EPO insists on addressing only the use of the invention, as shown previously. In this respect, the particular use of an invention might be immoral but this is not to say that the invention will be excluded from patentability. An invention may have several uses, and some of these might be immoral. The patentability of firearms was never rejected on the grounds that they could potentially be used to kill people.[22]

Bioethics cases are a striking illustration of such decline.[23] Both EPO and European lawyers have shown themselves reluctant to address morality issues in such cases. For example, in a case concerning embryo-related inventions, the general morality exclusion was ignored. By avoiding questions of an ethical nature, the EPO fails to be precise in identifying in which contexts and for which purposes inventions are or are not patentable. The issue of bioethics cases arises from wording of the provisions: Articles 5, 6(1), and 2 of the 98/44 EU Directive[24] give a stipulative example against the 'use of the human embryos for industrial and commercial purposes' without referring to morality. By doing so, some have argued that the bioethics question was separated from the general morality exclusion. The EPO took this opportunity to avoid addressing morality in bioethics cases by hiding behind the scientific neutrality of the stipulative examples. As a consequence, the patentability of the human body, and the human dignity principle, have been distinguished. Without the confrontation of these bioethics cases with morality, the question of human dignity in patent law is entirely removed of its substance. Despite the remaining uncertainty over the immorality standard, morality and ethics still condition the access to patentability, and are at the core of the rationale for patent law.

Chapter 2. Morality in trademark law

[22] Jean-Michel Bruguière 'La propriété intellectuelle au risque de l'ordre public' in Michel Vivant *Les grands arrêts de la propriété intellectuelle* 2015.
[23] *Brüstle v Greenpeace* Case C-34/10 2011 CJEU, Opinion of the Advocate General
[24] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (Biotech Directive), OJ L/213, art 5, 6 (1) and (2).

The place of morality in trademark law might be, in some respects, even more special than in patent law. Yet, the application of this principle has revealed some limits. It is perhaps in trademark law that *ordre public* and morality principles apply more clearly, and provisions make some room for a wide implementation of these principles.

A. The principle

EU law has many grounds for refusing the registration of a trademark, one of which is the morality principle. Article 3(1)f of the 2008/95 Directive on trademark law's harmonisation states that, 'trade marks which are contrary to public policy or to accepted principles of morality' shall not be registered, or shall be declared invalid.[25]
The World Intellectual Property Organisation (WIPO) treaty for the Protection of Industrial Property asserts approximately the same principle, either denying or invalidating the registration of trademarks:

> *When they are contrary to morality or public order, and in particular, of such nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.*[26]

It should be noted that this last provision explicitly assimilates public order requirements to the prohibition of deceptive trademarks, being those of such a nature as to deceive the public, yet the provision distinguishes contrariety to public order from proper contrariety to the law, except when the law concerns public order.

Thus, it can be said that both international and European prohibitions are quite general and relate to any clear signs that could be in conflict with *ordre public* or morality. Based on this understanding, any subversive slogans, those inciting violence or hatred, for instance, could be refused trademark protection. Such provisions aim to protect both the economic order and the consumer. As an illustration, French law has an entire

[25] Directive 2008/95/CE of the European Parliament and of the Council to Approximate The Laws of the Member States Relating to Trade Marks, 22 October 2008.
[26] Paris Convention for the Protection of Industrial Property (WIPO) 1979 Article 6 quinquies B iii.

industrial property legislative arsenal, which regulates the publicity of tobacco and alcohol.[27]

B. Practical difficulties

The first issue relates to the difference between what is contrary to public order and morality, and what is contrary to public policy. Both the Paris Convention and the 2008/95 Directive make this distinction. A trademark can either be contrary to morality or public order on the one hand, and, on the other hand, it can be contrary to law. Although morality and public order are distinct legal concepts, the jurisprudence and doctrine use them interchangeably. As such, it has become usual for judges to rely on the public order principle over morality and public policy contrariety, a habit that leads to great confusion. In several cases, courts have ruled that a trademark was in breach of the law because it disregarded public order. By doing so, the courts treated as equivalent two substantially different legal concepts. It seems obvious that something can be contrary to law but not necessarily to public order, and vice versa.[28] In a French case, the judges found that the risk of confusion between a public service and a trademark could affect public order.[29] One could argue that the facts of this case described more the deceptive nature of the trademark than the public order concern. This is even truer that the Paris Convention makes a clear distinction between a trademark contrary to public order and to public policy. All of these confusions show how the place and use of the public order concept has expanded and changed in trademark law. One could argue that it is easier for a judge to pronounce the nullity of a trademark on the grounds of public order than on other grounds, as it is a vague notion. Indeed, a refusal on the grounds of public policy must be justified by some objective criteria, such as official laws and statements. Conversely, the assessment of public order and morality requires more subjective criteria and thus leaves the judge with a broad margin of discretion.

[27] Intellectual Property Code Article L.711-3 (France).
[28] Jean-Michel Bruguière 'La propriété intellectuelle au risque de l'ordre public' in Michel Vivant *Les grands arrêts de la propriété intellectuelle* 2015.
[29] Cour de cassation Chambre Commerciale (28 June 1976) n°75-10.193 Bull civ II n°217 ; JCP G 1977.

The second issue deals with the interpretation and assessment of the morality principle made by the judge. In a recent case, the Court of Justice of the European Union (CJEU) ruled that the sign of a mark could be regarded as being in 'bad taste', yet this does not necessarily mean that it is also contrary to the 'accepted principles of morality'. In this case, the Court stated that, 'an examination of all the elements specific to the case' must be carried out 'to determine how the relevant public would perceive such a sign if it were used as a trade mark for the goods or services claimed.'[30] The standard used by the court was the relevant public one and that of a reasonable person with average sensibility and tolerance, on the basis of the 'fundamental moral values and standard of society as they exist'. In addition, the Court confirmed that this examination must take into account an important factor, freedom of expression, which is part of the European Charter of Fundamental Rights. This case demonstrates that the morality principle cannot be assessed through an abstract consideration; the approach taken by judges ought to be comprehensible and take into consideration several contextual factors, such as fundamental rights, moral values, and so on.

Two French cases illustrate the contextual factors that a judge should consider. In the first case, a beer is trademarked under the sign 'Cannabia'.[31] In the second case, a perfume is named 'Opium'.[32] Both expressly refer to drugs; however, the courts' assessment of the morality principles led to two different solutions. Whereas Cannabia was perceived by the judges as something that the relevant and reasonable public would immediately associate with a drug, the use of which is forbidden by the law, Opium was described as a word widely used in literature to the point that the public would be familiar with it and consider it as a metaphor for escape from reality. One might question what justifies these different solutions. First, 20 years separate these two rulings; it is possible that drugs are judged less severely now. Furthermore, opium consumption is not a major issue in today's society, unlike cannabis. Second, the two products do not have the same destination or the same market: one is a common beverage, whereas the other is a luxury cosmetic item. As such, they do not target to the same relevant public. It is not the sign on its own that is assessed by the judges, but the sign viewed in the context of the

[30] *Fuck you Goethe* Case C-240/18 P 2020 CJEU.
[31] Cour d'Appel de Paris, (18 octobre 2000) : *RJDA* 2001/4, n° 519, p. 467.

[32] Cour d'Appel de Paris, (7 mai 1979).

product's destination. One could reasonably argue that a perfume could feasibly be named 'Cannabia' but a beer could not be registered as 'Opium'. These rulings are interesting because the provisions never refer to the products or the relevant public in regard to morality principles. However, this goes against the textual requirements of the European and international provisions, which require that the sign be analysed in an abstract manner to determine if it is contrary to morality or *ordre public*.[33] The wide margin of discretion given to the judge in relation to the multiple contextual factors and the vagueness of the public order and morality concepts, gives rise to the risk of unequal treatment in different member states.

Morality issues can also arise differently from what was studied so far. Activists recently accused major brands to be involved in significant human rights violations, as they allegedly would be benefiting from the Uyghurs and other Muslim minority groups' forced labour in China.[34] The US State Department estimates that two millions Muslim have been, since 2015, imprisoned into camps and accuses the Chinese government of crimes against humanity, including torture and massive sterilisation of women. More than 180 global organisations called out brands and retailers for their implication into this scandal.[35] Many brands, such as Calvin Klein, already addressed the issue and committed to end within twelve months their commercial relationships with the incriminated Chinese suppliers. [36] Because these accusations do not have anything to do with the trademark's sign, trademark law itself is powerless to engage with these outrageous immoral practices. One could submit that such brands should be imposed financial penalties by international jurisdictions for they have been directly participating into modern day slavery.

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[33] General Court of the Court of Justice of the European Union (13 septembre 2005) in *Propriété industrielle* 2005, n° 11, 87.

[34] Michelle Toh, 'Activists Are Urging Big Brands To Eradicate Traces Of Human Rights Abuse In Xinjiang From Their Supply Chains' (*CNN*, 2020) <https://edition.cnn.com/2020/07/28/business/uyghurs-xinjiang-forced-labor-brands-intl-hnk/index.html>.

[35] <https://enduyghurforcedlabour.org/news/402-2/>.

[36] Elizabeth Paton and Austin Ramzy, 'Coalition Brings Pressure To End Forced Uighur Labor' (*Nytimes.com*, 2020) <https://www.nytimes.com/2020/07/23/fashion/uighur-forced-labor-cotton-fashion.html>.

Chapter 3. Morality in design law

Design law is a hybrid notion, sitting in between industrial property law and literary and artistic property law. The unity of arts principle allows the combination of the protections granted by artistic and literary property and design law; however, the morality principle applies in design law, unlike in artistic and literary property. Directive 98/71 expressly states that, 'A design right shall not subsist in a design, which is contrary to public policy or to accepted principles of morality'.[37] French law provides a double barrier to prevent the registration of immoral designs. First, Article 511-7[38] states that design models contrary to *ordre public* or morality principles are not protected; second, Article L.512-2 of the Intellectual Property Code[39] states that the registration of the design will be denied if its publication would jeopardise *ordre public* or morality principles. This double protection may seem redundant: how could the publication of a registration application threaten public order or morality if the design itself is not contrary to these? Furthermore, the double protection is specific to design law; there are no similar provisions in patent law or trademark law.

The jurisprudence and doctrine about morality in design law are less abundant than in patent and trademark law. The same issues exist: the vagueness of the notion, and the uncertainty of judgements due to the margin of discretion given to judges. The place of morality in design law is not really challenging. At the most, it can be surprising, but the stakes are relatively low: if a design is denied the protection of design law on the basis of morality, it can still benefit from the artistic and literary protection, which is more comprehensive and easily granted.

To conclude, patent law, trademark law, and design law all have in common the application of the morality principle and *ordre public* requirements. Still, the morality standard is specific to industrial property and design law and does not apply in artistic and literary property law. This raises the question of how to explain the duality between the different branches of intellectual property from the perspective of morality.

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[37] Directive 98/71/EC of the European Parliament and of the Council (13 October 1998) on the legal protection of designs Article 8.
[38] Intellectual Property Code Article L.511-7 (France).
[39] Intellectual Property Code Article L.512-2 (France).

Part II. Artistic and literary law's disregard for morality

Artistic and literary property is in principle amoral, meaning it is neither moral nor immoral. As so, an artwork will be protected without regard for its moral values. This fundamental difference with industrial property is internationally admitted. Yet, many aspects of this so-called 'amorality' can be questioned.

Chapter 1. An ideological divergence from industrial property law

While industrial property law is subject to morality requirements, as seen previously, artistic and literary law is, in theory, amoral. In this regard, it seems that artistic and literary law benefits from favourable treatment compared with the other areas of intellectual property. This difference can be explained through both practical and philosophical reasoning.

First, from a practical perspective, artistic and literary rights deal with the protection of a work that has been expressed in an essentially final form. Its content – as opposed to its spirit – is itself never protected, because of the fundamental principle of non-appropriation of ideas. The scope of protection in industrial property is opposite to this: the content is protected. For instance, patent law aims to protect industrial inventions regardless of their form. In trademark law, both form and content are subject to protection.

Second, artistic and literary law and industrial property law each set different requirements in order to obtain protection. On the one hand, in industrial property law, mandatory deposit is a legal obligation. Rights arise after an administrative phase of examination of several documents. On the other hand, in both *droit d'auteur* and copyright systems, these rights arise automatically upon the creation of an original work. It would be hard to imagine how artistic and literary law could enforce morality without any control prior to the creation of rights. Such control *a posteriori* would be problematic and uncertain on many levels. Some authors would lose their legitimacy in court and see their rights lapse, sometimes after years of good faith application of them. It is, therefore, understandable that industrial property law is, because of its administrative rigour, subject to compliance with public order and decency.

Third, from a philosophical perspective, artistic and literary law and industrial property law target different goals. The essence of industrial property law can only be understood by studying its economic dimension, which, when it comes to artistic and literary law, varies in importance mostly depending on the legal system used. Copyright systems adopt a more utilitarian perspective on author's rights, whereas *droit d'auteur* systems are based upon natural and personality rights. This argument over the economic dimension of artistic and literary law has become more and more debated over time. New

challenges, such as artificial intelligence, show how legal systems can adapt themselves with greater plasticity when it comes to the protection of valuable forms of art. Capital movements generated by art are now comparable to what is been generated by industrial invention.

However, industrial property law was originally drafted to organise the economy surrounding it, by encouraging investments in research and development. The financial impact of such systems conferring monopolies was and still is the most significant driver for inventions. The ultimate purpose of patent law is to ensure that the inventor receives financial rewards for making the work public, and making it available to society. Without this important economic reward, scientific research would be discouraged. Patent law must be analysed through the lens of common interest; a different logic applies to trademark law: the morality requirements seen previously are of paramount importance in order to protect the customer. It is not necessary to protect the public or a spectator in the same way that a customer must be protected.

As far as artistic and literary law is concerned, the enforcement of a moral requirement would be incompatible with artistic liberty and the freedom of creation. The principle of freedom of creation is what allows art to blossom; it guarantees authors' and creators' emancipation. This aspect of artistic and literary law is crucial: restrictions on freedom of creation subsequent the power of censure. Invoking morality has always been a reliable way to control the diffusion of ideas, and a means of repression. By monitoring what can be considered a work of the mind, authorities can easily prevent the dissemination of ideas, especially if these ideas contravene the religious or political ideology upheld by the state.

Chapter 2. The historical construction of the amorality principle in artistic and literary law

The concept of morality has no place in artistic and literary law. National and international provisions exclude value-based judgement. Such exclusion has a broad scope: neither the quality of the work nor its moral worth should be taken into consideration; hence, any work fulfilling the copyright protection requirements, such as originality and fixation, must be protected regardless of its so-called morality.

A. The Berne Convention

The Berne Convention is the major international agreement ruling on artistic and literary works. Since 1886, the Convention has provided a common set of harmonised provisions to ensure a minimum protection to authors, regardless of their nationality. However, the Berne Convention remains, up to now, silent on the matter of morality in artistic and literary law. When the Convention was first drafted, morality issues were not the primary concern of states. However, the initial text has been modified several times to widen its span and to enact certain essential principles. The absence of provisions involving morality is surprising, to say the least. Yet, it would be a great mistake to consider that this absence authorises signatory countries to estimate the moral value of a work. In this regard, WIPO published in 1978 a guide to the Berne Convention[40] for the attention of developing countries. Reviewing Article 2 of the Convention, which stresses the irrelevance of the mode or the form of the expression, the Guide specifies that 'the value or merit of a work, essentially a subjective value judgement, is also of no account'.[41]

In addition, Article 17 (originally Article 13 in the 1886 version) of the Berne Convention states that:

> *The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.*[42]

One can understand from the interpretation of the relevant provision that governments are indeed permitted to enact a control over artistic and literary works. Nevertheless, such control must relate to the author's rights and not to the existence of the work itself. On that matter, the WIPO guide specifies the scope of Article 17, in the spirit of the 1886 version, clarifying that:

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[40] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) WIPO <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.
[41] ibid § 2.4
[42] Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) Article 17.

It covers the right of governments to take the necessary steps to maintain public order. On this point, the sovereignty of member countries is not affected by the rights given by the Convention. Authors may exercise their rights only if that exercise does not conflict with public order. The former must give way to the latter. The Article therefore gives Union countries certain powers of control.[43]

The Guide goes on to admit that this provision has been subject to debate:

During the Stockholm discussions (1967) it was generally agreed that the Article dealt mainly with censorship and the powers to permit or prohibit the dissemination of the work were exercisable to that end. The Article did not allow the creation of a regime under which works might be disseminated by virtue of compulsory licences. Where the author's consent was required before a work is made publicly available, it should not be possible for a country to override that consent (except, for example, to allow the police to publish or broadcast a photograph of a wanted criminal).[44]

If Article 17 indeed provides a right to censor to the benefit of the member states, such censorship can only deal with the exercise of rights and not with the primary existence of the author's rights.

The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) and the WIPO Treaty both require non-members to the Berne Convention to accept and respect the majority of the latter's provisions. The World Trade Organisation also took the opportunity to discuss the scope of Article 17 in a report on the protection and enforcement of intellectual property rights.[45] This report states that the article 'does not permit Members to deny copyright protection to authors in their respective works' and

[43] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) WIPO § 17.2.
[44] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) WIPO § 17.3.
[45] World Trade Organisation (WTO), 'China - Measures Affecting The Protection And Enforcement Of Intellectual Property Rights' (2009) <https://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf>.

'does not allow limiting exclusive rights or even exempting works from protection.' Thus, while public order can represent a legitimate limitation on authors' rights, under no circumstances does it allow a content review system in which the enforcement of copyright protection is denied. Moreover, tis study of national legal systems confirms the idea that artistic and literary law is indifferent to the merit of the form and of the expression, including its perceived morality.

B. Comparative study of artistic and literary law in national legislations

§ 1 – The French system: *le droit d'auteur*

French law, as with international law, does not explicitly recognise the principle of amorality in *droit d'auteur*. Article L.112-1 of the Intellectual Property Code[46] states that the Code, 'shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.' The judge cannot evaluate the merit of a work, and moral concerns are related to merit. This can be easily understood: the judge is not an art expert; the appreciation of a work leads undoubtedly to an estimation of its author's value. In addition, impartiality is one of a judge's main responsibilities.

The essence and core of the *droit d'auteur* system is the recognition of a strong bond between an author and their work, despite its divulgation. The author of a work of the mind shall enjoy, by the mere fact of its creation, of an exclusive right to their property. This principle makes an evaluation of morality *a priori* difficult.

§ 2 – Comparative analysis of the merit estimation

For some countries, the indifference of merit is obvious, and hence does not have to be explicitly enacted.[47] In this spirit, the Turkish Criminal Code represses 'indecency', but makes an exception for work of the mind with an artistic and literary value – provided that it cannot be accessed by minors.[48] The United Kingdom, in its Copyright, Design and

[46] Intellectual Property Code Article L.112-1 (France).
[47] Claude Colombet, *Grands Principes Du Droit D'auteur Et Des Droits Voisins Dans Le Monde* (Litec 1992).
[48] Turkish Criminal Code Article 226 available at: <https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf>.

Patent Act of 1988, defines what an artistic work is and specifies that protection is due 'irrespective of artistic quality.'[49]

Many countries explicitly exclude merit as a protection requirement, for instance in Algeria, and Venezuela. Others refer to the 'value' of a work to exclude its influence, as in Tunisia. African countries, because of their history of colonisation, have often been subject to occidental provisions. Moreover, as mentioned previously, international institutions such as WIPO have helped developing countries in the late 20th century to implement their own artistic and literary legislation based on most international treaties and agreements.

§ 3 – The evolution of Chinese law regarding morality

Former Chinese law stated that:

> *Works the publication or distribution of which is prohibited by law shall not be protected by this Law.* *Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.*[50]

Based on this law, protection was denied to any work that did not respect national law, and any such works were subject to government censorship. Any work endangering national sovereignty, integrity or unity, spreading obscenity or superstition, was considered reprehensible. In practice, the scope of this law was so broad that the Chinese government was able to fully control the state of art. Deprived of protection, censored works could be freely reproduced and copied, though their exploitation was prohibited. In 2009, after several negotiations, and facing a reluctant opponent, WTO asked China to align its legislation with the TRIPS. To comply with the most basic requirements of the Berne Convention, China was expected to grant authors minimal protection rights. Such rights were impossible to enforce there because of the denial of protection *ab initio,* which occurs without prior any judicial control. China was in breach of its international obligations. Chinese copyright legislation was modified and now states that:

> *Copyright holders shall not violate the Constitution or laws or jeopardise public interests when exercising their copyright. The State shall supervise and*

[49] Copyright, Design and Patent Act 1988 section 4, 1 a.
[50] Copyright Law of The People's Republic of China 7 September 1990 Article 4(1).

administrate the publication and dissemination of works in accordance with the law.[51]

Under this new law, the simple fact that a work might be illegal cannot justify its censorship, or a denial of protection *ipso jure*. Authors of illegal work now have the ability to defend their creations and seek justice. However, the Chinese government is still widely restraining freedom of creation by censuring many works on the grounds of illegality.

To summarise, the amorality of artistic and literary law is an essential and universal principle. Yet, it is predominantly enforced when it comes to the existence of the work itself. Regarding the exercise of the author's rights, national and international legislations are more nuanced.

Chapter 3. Immoral works versus immoral artists

A. The immoral artist

People who can be considered 'bad' in themselves are a minority. For the purpose of this study, no clear distinction between 'bad behaviour' and a 'bad person' will be drawn. As seen previously, immorality depends on contextual factors, such as moral and social values, and the spatial and temporal framework. To assess the immorality of a trademark, courts have applied the standard of a reasonable person, in relation to fundamental moral values and societal standards. By transposing this interpretation to art, the immoral behaviour of an artist can be recognised when a reasonable person would condemn their actions under established and accepted principles. With the same reasoning, one could conclude that the immoral artist is necessarily the one whose immoral actions are common knowledge. This is problematic, as many individuals, even artists and public figures, may act badly without anyone knowing. For example, Harvey Weinstein was for years one of the most respected producers in Hollywood; has the recent controversy, followed by his condemnation[52], automatically made him an immoral artist? Was he not immoral before

[51] Copyright Law of The People's Republic of China 26 of February 2010 Article 4(1) amended.
[52] Jan Ransom, 'Harvey Weinstein's Stunning Downfall: 23 Years In Prison' (*NY Times*, 2020) <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html>.

his actions were made public? How does his behaviour influence the quality of the films he was celebrated for?

§ 1 – Personality rights and material copy

A majority doctrine distinguishes the immaterial work from its material copy. This theory is useful in regard to moral and economic rights, especially for works made by multiples authors. However, as Jonathan Barrett explains, 'the unique artefact is not simply one copy of the artistic work; once the artefact is created, they are inseparably one and the same thing.'[53] As an example, Barrett takes the UK Copyright Act of 1968, which states that the destruction or mutilation of a work may equal a prejudice to the author's honour or reputation.[54] It follows that the artistic work, as an intangible thing, can only be destroyed if it is intertwined with its singular copy. As Wilson posits, 'There is not much point trying to separate artist from their art, since the two have long been inseparable.'[55] In addition, moral rights (as opposed to economic rights) are based upon the personality rights of the author. It is considered that the artist's mind and soul in some way combine with their work. This observation leads to an injustice: convicted criminals do not see their professional skills questioned – except in some particular cases. Why would artists be distinguished from the rest of the society? One could argue that artists have an active and essential role in a society's culture; as such, they are expected to be righteous. Yet, again, what is the level of contribution expected of a person for them to be considered an artist? A virtuous circle is created: by questioning the impact of immorality on art, a dead-end appears, as there is no contribution requirement for a work of art to be considered as such. In certain respects, every citizen contributes to the society's cultural development. In addition, adding signatures to artworks became usual during the Renaissance;[56] before this, artists were generally unknown. As Erin Campbell writes:

[53] Jonathan Barrett, 'Moral Rights and Immoral Artists' Presented at the Asian Pacific Copyright Association Conference, Wellington, New Zealand (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479567>.
[54] Copyright Act 1968 s195AK.
[55] Ashleigh Wilson, *On Artists* (Melbourne University Publishing, 2019).
[56] Albrecht Dürer, 'Portrait Of The Artist As An Entrepreneur' (*The Economist*, 2011) <https://www.economist.com/christmas-specials/2011/12/17/portrait-of-the-artist-as-an-entrepreneur>.

> *The elevation of the visual arts from mere mechanical labour to the status of a liberal art is central not only to the development of Renaissance art, but also to the values of Western culture, the formation of the canon, and the evolution of the discipline of art history.*[57]

As a result of the attitudes of that time, the cult of individual artists began. They emerged as professional artists, as geniuses rather than simple artisans. Consequently, the public began to learn about these artists as people, including their private lives and habits. This cult is still relevant today: Jeff Koons is considered a 'superstar' artist but is also known for his morally questionable labour practices.[58]

Artist anonymity allows disengagement with moral questioning. Banksy is a world famous street artist, whose art is politically involved, advocating for peace, defending minorities, and denouncing racism. However, the identity of Banksy remains, to this day, unknown. What if Banksy were, in their private life, an awful human being? It would be pointless and unfair to draw a distinction between unknown artists and celebrated ones: if a morality criterion was to exist, it would have to apply to everyone. As it is impossible, it should not emerge.

§ 2 – Conscientiousness and temporal relativism

The main issue in the debate over the place of morality in literary and artistic property law is that censoring artists who have done wrong would be equal to establishing 'good behaviour' as a criterion for the exhibition of artistic works.[59] As Wilson rightly reminds us, 'once we start removing paintings from walls, where do we stop?'[60] Another significant risk of labelling some artworks immoral is temporal relativism. The Nazi

[57] Erin J Campbell, 'Artisans, Artists and Intellectual' (2000) 23(4) *Art History* 622, 626.
[58] Eileen Kinsella, 'Jeff Koons Lays Off Over a Dozen Staffers After They Tried to Unionize', *ArtNet News* (Web Page, 19 July 2016) <https://news.artnet.com/art-world/jeff-koons-lays-off-staff-members- 563018>.
[59] Janna Thompson, 'Friday Essay: Separating the Art from the Badly Behaved Artist – a Philosopher's View', The Conversation (Web Page, 10 May 2019) < https://theconversation.com/friday-essay-separating-the-art-from-the-badly-behaved-artist-a-philosophers-view-116279>.
[60] Ashleigh Wilson, *On Artists* (Melbourne University Publishing, 2019) 9.

government declared certain important artworks to be immoral and degenerate.[61] An important part of the German society, at the time, agreed with this judgement and enthusiastically burned books and artworks. Nowadays, the reputations of these apparently immoral artists have been re-established and the people who participated in their censorship are considered to have fallen on the wrong side of history. In the same vein, some past artists are now being exposed as racists, though racism was a part of the society they grew up in. Less than thirty years ago, rape between spouses was not recognised, as sexual acts were considered to be a marital duty.[62] Could one blame an artist, at that time, for forcing himself on his wife? Undoubtedly, this behaviour would now be condemned as denying the spouse's dignity, but it was previously seen as normal by society. Clearly, morality is not a static concept, and is subject to constant evolution. One can hardly assert that their moral values are superior and will be so *ad infinitum*, without question. Consequently, allowing the censorship of an artist at one time could, years later, be proven to be a severe error of judgement.
In addition, as Barrett emphasises, 'what if the artist intends the worst misogyny through their abstract work but nobody recognises it as such? Conversely, what if an artist intends no harm but, in practice, humiliates a particular ethnic group?'[63] In criminal law, both *mens rea* and *actus rea* are required for liability. However, it seems that the intention of the artist matters less than how the public perceive it. Hitler painted watercolour artworks, largely considered to be inoffensive *per se*. What if he intended to represent racism and Hellenism in the works, but no one ever saw this? Would that mean that the watercolours are moral or immoral? Hitler, widely recognised as 'evil', produced 'moral' artworks – still, nobody ever collected or exhibited his work.

According to the Neoplatonists, a bad person cannot be a great artist.[64] This assertion is much debated: Salvador Dali was described as 'a good draughtsman and a

[61] Jean-Denis Lepage, *An Illustrated Dictionary Of The Third Reich* (McFarland 2014).
[62] *CR & SW v UK* 1995 ECtHR
[63] Jonathan Barrett, 'Moral Rights and Immoral Artists' Presented at the Asian Pacific Copyright Association Conference, Wellington, New Zealand (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479567>.
[64] Karen C Adams, 'Neoplatonic Aesthetic Tradition in the Arts' (1977) 17(2) *College Music Symposium 17*.

disgusting human being.'[65] Similarly, Picasso is believed to be one of the greatest artists of all times, but he is also known to have been a notorious misogynist, and some experts claim that some of his works reflect his misogyny. Wilson posits that, 'the nature of the offending matters, but so does the quality of the art,'[66] while Ford argues that 'the world would be fine without Picasso.'[67] This highlights the most challenging, and subjective aspects of this discussion. Picasso was not a 'good person', according to today's standards, and his work has been affected by his own failures. One could argue that, because of his inestimable contribution to human culture, society should turn a blind eye to his immoral behaviour. What should prevail, moral values or cultural contribution? On that specific point, reaching a consensus would be impossible.

The search for biographical elements in artwork is one key to understanding art.[68] However, many other factors ought to be taken into account, such as historical, experiential, theoretical, and market factors, among others. Always be looking for indications of the author's background in their art is perverse and might lead to misinterpretations. As Thompson explains, 'a work of art or a performance is supposed to have value and meaning in its own right.'[69] Biographical elements can give an insight into the work but should not impact its aesthetic value. Woody Allen stated, on the relationship between his work and life: 'movies are fiction. The plots of my movies don't have any relationship to my life.'[70]

In this sense, the only justification for banning a work of art is if there is a risk of danger or harm directly linked to the work's exhibition. However, this has no consequence for the qualification of a work of art itself. Thus, if a work of art contains

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[65] George Orwell, 'Benefit of Clergy: Some Notes on Salvador Dali' in *The Collected Essays, Journalism and Letters of George Orwell* Volume 3 (1943-1945) (Penguin, 1970).
[66] Ashleigh Wilson, *On Artists* (Melbourne University Publishing, 2019) 9.
[67] Clementine Ford, 'We Let 'Male Genius' Excuse Bad Behaviour – But What About The Loss Of Female Genius? | Clementine Ford' (*the Guardian*, 2020) <https://www.theguardian.com/commentisfree/2018/nov/06/we-let-male-genius-excuse-bad-behaviour-but-what-about-the-loss-of-female-genius>.
[68] Simon Morley, *Seven Keys to Modern Art* (Thames and Hudson, 2019).
[69] Janna Thompson, 'Friday Essay: Separating the Art from the Badly Behaved Artist – a Philosopher's View', The Conversation (Web Page, 10 May 2019) < https://theconversation.com/friday-essay-separating-the-art-from-the-badly-behaved-artist-a-philosophers-view-116279>.
[70] An Interview With Woody (Time Magazine 1979) <http://content.time.com/time/magazine/article/0,9171,723927,00.html>.

propaganda elements inciting hatred of a minority, it could be banned from public space but would still benefit from copyright protection. Thus, morality is not a requirement for artistic protection. When the artist explicitly intends to support an immoral ideology through their work, then the distinction between them and their work diminishes, if not disappears entirely. Leni Riefenstahl's films are a striking example of a talented artist using their skill and fame to support the Third Reich ideology.[71]

B. Immoral form

A conflict can occur between the amorality of artistic and literary property and other fundamental rights. This is the case when the material support of a work is clearly in breach of the law. A striking example of this is street art: affixing an artwork on somebody's wall is a violation of the latter's property rights. Sometimes, artistic creation can be in conflict with the respect of the dignity of the human person. For example, the Viennese Actionism during the mid 20th century was a movement of transgressive art, which caused public outrage and was considered to disturb both public order and the basic moral values of Austrian society. Actionists used the human body as a material support for their art through severely degrading treatments. Body art is not in itself immoral. Arsen Savadov is a Russian artist who published a photo book called the *Book of the Dead,* featuring unidentified human corpses.[72] The staging of the project denies human dignity, yet the amorality of artistic property persists.

Human dignity is a vague concept that constitutes an important limit to the fundamental rights of others, including the right to artistic and creative liberty. It was first recognised in 1945 in the preamble of the Charter of the United Nations.[73] Since then, many performances have become scandals: the artist Xiao Yu, in their work Ruan, used six month-old human embryos' heads with rabbits' eyes and birds' bodies.[74] One could

[71] United States Holocaust Memorial Museum <https://encyclopedia.ushmm.org/content/en/article/leni-riefenstahl>.
[72] Arsen Savadov, Book Of The Deads (2001) <http://savadov.com/projects/projects/dbook.htm>.
[73] United Nations Charter 1945 <https://www.un.org/en/sections/un-charter/un-charter-full-text/>.
[74] 'Scandale À Berne Autour D'une Oeuvre Chinoise' (*L'Obs*, 2005) <https://www.nouvelobs.com/culture/20050809.OBS5955/scandale-a-berne-autour-d-une-oeuvre-chinoise.html>.

argue that making art with human corpses is immoral and undignified. Human dignity is not lost in death, and corpses must be treated according to certain standards.[75] A French case, called 'Our Body', illustrates this conflict: the court had to decide whether the exhibition of a mutilated body, presented as an anatomic lesson, was lawful. The highest jurisdiction ruled that the exhibition, in using human remains for commercial purposes, neglected human dignity and basic decency. As such, the exhibition was cancelled. The court then added that *ante mortem* consent could not create an exception to human dignity, as it is an inalienable right.[76] Although artistic and literary property is, in essence, amoral, morality and public order considerations can limit the freedom of creation because of the amorality of the material support of the artwork.

To summarise, amorality is at the core of artistic and literary property; this principle is globally recognised in the various national copyright systems. Despite its wide recognition, the place of morality in art has been questioned on many levels, yet no consensus has been reached, and no adequate solutions exist. Thus, art must remain amoral to avoid censorship and arbitrariness.

Part III. The ongoing conflict between freedom of expression and freedom of creation

This part of the dissertation intends to demonstrate the risk of associating morality with artistic and literary property law. Such an association would necessarily lead to a single outcome: censorship. Whenever a society has forced authors to carry the burden of morality principles in order to access protection, it has resulted in major infringements of freedom of expression. Censorship can be defined as 'the suppression or proscription of speech or writing that is deemed obscene, indecent, or unduly controversial.' [77]

[75] Daniel P Sulmasy, 'Death and Human Dignity' *The Linacre Quarterly*, *61*(4), 27–36 (1994) <https://doi.org/10.1080/20508549.1999.11878278>.
[76] Cour de Cassation 1ère Chambre Civile, 16 septembre 2010.
[77] <https://legal-dictionary.thefreedictionary.com/Censorship>.

Governments and authorities have used censorship to repress unwanted ideas, either political or religious; yet, communication of new ideas is crucial for cultural development.

Chapter 1. Grounds for religious and political censorship

Heinrich Heine once wrote 'where they have burned books, they will end in burning human beings.' [78] The complex relationship between art, copyright, and censorship reflects and testifies to the historical construction of political cultures. The first traces of some kind of justification of censorship can be found in Plato's *The Republic*.[79] According to Plato, artists display an inaccurate representation of reality as they merely replicate what they consider truthful. This distorted version of reality is misleading for the public who admire artists. In Plato's view, the artist is deceptive in nature, as he pretends to have knowledge when he is only capable of imitation. Plato fears that artists, considered as ideal men, can dupe weak minds. As such, they should be banned from the public arena. Seneca observed that, 'One venerates the divine images, one may pray and sacrifice to them, yet one despises the sculptors who made them,'[80] which illustrates perfectly Plato's philosophy.

A. Religious censorship

When Christianity became hegemonic in Europe, religious authorities developed growing concerns regarding art for two reasons. First, the Catholic Church fought what was considered to be heretical art. Second, art was sometimes used as a tool to criticise and pastiche the religious power. In these societies, both religious and political powers were intertwined, which provided a strong foundation for censorship.

Religious representations have been sacralised for years, and the Catholic Church positions itself as a moral censor for artworks made outside of its supervision. In doing so, religious authorities were seeking to enforce an unwavering faith. For that reason, questioning the Church's powers, or religious beliefs, was considered heresy and

[78] Heinrich Heine, *Almansor: a Tragedy* (1823).
[79] Plato, *The Republic* (375 BC).
[80] Ernst Kris and Otto Kurz, *Legend, Myth, And Magic In The Image Of The Artist: A Historical Experiment* (Yale University Press 1979).

forbidden, and blasphemy laws flourished.

In 1863, Gustave Coubert painted *The return from the Conference*, which was censored on the grounds of causing outrage based on religious moral values. The painting depicted drunken ecclesiastics behaving badly. In his correspondence, Coubert wrote, 'I painted the picture so that it would be refused. I have succeeded.'[81] Because of the censorship, he gained useful attention and notoriety.

A Swiss priest, Ulrich Zwingli, stated that images are forbidden by God under the second commandment. As such, preachers have a duty to educate ignorant people.[82] This illustrates the mistrust of art and presage the period of large-scale destruction of artworks that followed.

Two major waves of Protestant iconoclasm occurred, from 1520 to 1530 in Switzerland and Germany, and in the 1560s in France, the Netherlands, and Scotland. These violent destructions aimed to prove the secular nature of art. In addition, the looting of churches and valuable artworks was useful in funding expensive wars under the pressure of proselyting.

Important cultural masterpieces have not escaped scandal. When Michelangelo was working on the Sistine Chapel, many detractors argued that the nudity depicted in the fresco was heretical. The Council of the Vatican decided to cover the naked bodies with paint; these interventions lasted until 1936. Today, this would constitute a severe breach of the author's moral rights. Though some artists were less fortunate than Michelangelo. Veronese, in 1573, was prosecuted by the Holy Office Tribunal for his representation of the Last Supper. He was convicted and was given three months to comply with the Church's requirements to modify his work. Boldly, he changed just one thing about the painting: the title. *The Last Supper* became *The Feast in the House of Levi*.[83]

When printing arrived in Europe, the different authorities, mostly monarchies,

[81] Letter to Leon Isabey, april 1963 in *Correspondance De Courbet* (Petra Ten-Doesschate Chu, Flammarion 1996).
[82] Ulrich Zwingli, *Brève Instruction Chrétienne* (Labor et Fides 1953).

[83] Thomas Schlesser, *L'art Face À La Censure, Cinq Siècles D'Interdits Et De Résistances* (Beaux Arts éditions 2011).

attempted to control the amount of printing that occurred, and especially what was printed. The main fear concerned the translation and the dissemination of the Bible, and so the censorship of writing began. In France, it was forbidden to publish a book involving religious matters without prior consent from the French Theology Faculty. A few years later, the printing of any book was made illegal and subject to the death penalty. In addition, importing books considered to be heretical, from several countries, was forbidden.

For years, the Church relied on the governing political authorities to intervene and take action against controversial artists. The transition to secularised societies did not erase religious censorship, but it began to be organised differently as religious powers no longer had the authority to censor artwork. This leds to the recent, worrying phenomenon of self-censure.

B. Secular and political censorship

§ 1 – Public order in times of war

The 19th century is known as a period of technological progress; however, the various wars that occurred created room for widespread and sometimes undesirable propaganda. Consequently, legislations curtailed freedoms.

Modigliani painted nude figures that were exhibited in a gallery in front of a police station. As the exhibition was successful, the police force threatened to prosecute Modigliani on the grounds of public decency.[84] This is surprising: nudity in art was no longer taboo. The reason behind the censorship was historical; during the First World War, women were left to assume the roles of men who had gone to the front. They were expected to participate widely in the war effort, and Modigliani's sexualised women were far from the image portrayed in official propaganda.

In times of war, artists are required to be patriots. Their art becomes tools of propaganda and used for public order; they must represent war in a way that glorifies their home countries. Malevitch was a Russian abstract painter whose art was appreciated in the USSR before he became a victim of censorship; he was arrested and tortured for

[84] Jeanne Modigliani, *Amadeo Modigliani, Une Biographie* (Broché 1998).

allegedly contesting the regime in his art.[85]

The censorship of the degenerate art movement was described as one of the worst operations of censorship under totalitarian tyranny.[86] The Nazi government fought against anything that was not a positive reflection of its ideology. Joseph Goebbels, in 1933 was appointed Minister of Public Enlightenment and Propaganda, and made it illegal for anyone who was not registered with the Chamber of Culture to create art. He organised an exhibition of 'degenerate art', within which were presented works by Chagall, Otto Dix, Emile Nolde, and others. Through this exhibition, the authorities wanted to show the public the kind of art that would now be prohibited. In 1938, the government confiscated every piece of 'degenerate' artwork, without any kind of indemnity. On 20th March 1939, more than 5,000 pieces of art were burned in the streets of Berlin. Many masterpieces, including some by Picasso, were destroyed. Heine's prediction was sadly accurate.

§ 2 – The influence of art on moral conduct

Many artists have paid a price for the moral values displayed by authorities. Charles Baudelaire's masterpiece, *les Fleurs du Mal*, led to him being criminally convicted and to the censorship of six poems.

Plato's justification of censorship has a paternalist logic behind it: protect the most vulnerable. Could works be used to justify certain amoral behaviour? In Stephen King's book *Rage*, a teenager kills his mathematics teacher before holding his classmates hostage. In 1992, a teenager shot his maths teacher and two classmates and tried to argue that he had been influenced to do so by King's book. King himself asked for his book to be withdrawn from circulation after this event.[87] Similarly, ISIS's propaganda is directly inspired by Hollywood blockbusters, filled with graphic violence. Is that to say that King's book and Hollywood films should be censored, as they have inspired tragedies? Perhaps not. If art has an unquestionable impact on the public, it is the state's duty to avoid deviant behaviour.

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[85] Frédéric Valabrègue, *Kazimir Sévérinovitch Malevitch* (Images en manœuvres 1994).
[86] Thomas Schlesser, *L'art Face À La Censure, Cinq Siècles D'Interdits Et De Résistances* (Beaux Arts éditions 2011).
[87] <https://www.franceculture.fr/emissions/le-tour-du-monde-des-idees/le-tour-du-monde-des-idees-lundi-15-janvier-2018>.

Artistic freedom is deeply linked to freedom of expression. This association is unquestionable: creation is a form of expression. In its relationship with freedom of expression, the diffusion of art is a necessity. In this regard, the European Court of Human Rights (ECtHR) considers that artistic freedom is a component of freedom of expression, as Article 10 of the Convention does not distinguish the different forms of expression. The Court stated that freedom of expression 'constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual', and that 'those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the state not to encroach unduly on their freedom of expression.'[88]

The South African Apartheid was a unique occurrence of extreme oppression and repression. In this context, censorship was largely used by the authorities to shut down political and cultural opponents. The authorities enforced censorship by hiding behind blasphemy and accusations of political destabilisation, but also did not hesitate to label some artworks as 'pornography', causing civil danger. This mechanism effectively eliminated the black voice, but also members of the gay community.[89] Through their censorship, the authorities tried to prevent any social or political change. Ultimately, this totalitarian system destroyed creativity, as artists had to alter their vision to fit the government's criteria. The Publications Act of 1974 allowed the government to censor artworks, films, books, entertainment programmes, and journalism. Nevertheless, the government rejected the accusation of censorship, stating that the press was completely free, as long as they stayed within the scope of the law. The law was vague enough to ensure control of the press. In 1987, the Home Affairs Minister was granted the right to shut down any controversial media for three months.[90] This self-censorship phenomenon became necessary to avoid wide-scale, forceful repression.

Since its cultural revolution, the Chinese government has never ceased to acknowledge the power of art as expression, and ultimately as a potential source of

[88] *Müller and others v Switzerland* 1988 no10737/84 ECtHR § 27 & 33.
[89] Raymond H Allard, *Arts And Censorship In South Africa, 1948-2000* (2000).
[90] Chrisopher Merrett, *A Tale Of Two Paradoxes: Media Censorship In South Africa, Pre-Liberation And Post-Apartheid* (15th edn, Critical Arts 2001).

controversy. Ai Weiwei is a contemporary artist who created an artwork in the memory of people who died in the Sichuan earthquake in 2008. The news of the earthquake was tightly controlled by the government. Weiwei was arrested multiple times, interrogated, and watched 24/7 by military forces. He stated that, 'the censorship in China places limits on knowledge and values, which is the key to imposing ideological slavery.' [91] Another Chinese photographer and poet, who created controversial nude photographs involving gender fluidity, eventually took his life after being harshly censored by the authorities.[92]

Artistic freedom is a fundamental right, yet it is still widely infringed on around the globe. Under public order and morality principles, governments find a way to repress creation in order to assert their authority. As stated previously, art contributes significantly to cultural development, which is sometimes feared by the ruling powers, who cite grounds of morality to censor artists, whereas in actuality they aim to prevent the emergence of counter views. By controlling creation, they manage to contain political and cultural dissidence. However, many democratic states, such as France, have drafted laws surrounding freedom of expression and press. How is that compatible with what has been studied in this paper so far?

Chapter 2. Case study: French media law

The French law of 29th July 1881 establishes the grounds for freedom of the press, stating that 'printing and publication are free.'[93] The law does not prohibit criticism, especially when it comes to freedom of expression. However, some acts, because they cause severe damage to individuals or group of persons, are assimilated to criticism and prohibited. The recent development of the Internet amplified voices and gave an audience to anyone, but also increased offences against honour and reputation. The name of this law is misleading: if it is about freedom of the press, all the offences described do not

[91] Ai Weiwei, 'Opinion | Ai Weiwei: How Censorship Works' (*Nytimes.com*, 2017) <https://www.nytimes.com/2017/05/06/opinion/sunday/ai-weiwei-how-censorship-works.html>.
[92] Irène Schrader, 'Chinese Artists Who Challenged Their Country'S Censorship' (*Affinity Magazine*, 2018) <http://culture.affinitymagazine.us/chinese-artists-who-challenged-their-countrys-censorship/>.

[93] Law on the Freedom of Press of 29 July 1881 (France) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>.

necessarily have to involve means of press. For instance, a person posting comments online could be found liable under the law. Similarly, some values have been highlighted as 'common values' and cannot be criticised with impunity. Consequently, if an author was to include forbidden parts in their work, their rights could be limited: removal of the incriminating parts, inclusion of the artist's condemnation, prohibition on publication, or destruction of copies. As such, the amorality of artistic and literary property can be limited when the artwork contains incriminating parts. French judges are generally reluctant to use these sanctions. The ban on publication, as one of the most severe punishments, can only be authorised in cases of extreme gravity. [94]

Article 29 of the 1881 Law regulates defamation, defining it as 'any allegation or imputation likely to be prejudicial to the honour or reputation' of the individual. Defamation can occur in artworks, as the law does not specify the mode of expression. In such a case, the defamation will be punishable, even though it forms part of a work. In 2006, an author wrote a book about a famous crime, the murder of Gregory Villemin, in which the author presented the mother as the guilty party. In addition to various financial remedies, the judges ordered the amputation of the work by suppressing the unlawful parts.[95] This case illustrates well how freedom of creation can be limited by other fundamental rights, such as human dignity and the right to reputation.

In the same vein, some fundamental values have been established by the French legislator; these values are protected by law against infringements. Among those, are the interests of the Republic. Both the national anthem and the flag, alongside the Head of State, benefit from a specific protection from outrage. The Article 433-5-1 of the French Penal Code reprimands offences against the national anthem and flag. However, the Conseil Constitutionnel specified that this offence does not include copyrighted works.[96] Works of the mind are thus outside of the scope of outrage to the interests of the nation law.

Another protected value is religious beliefs. It is not unusual for a work to criticise faith and/or believers. Though blasphemy laws have been abolished in France, religion is

[94] Tribunal de Grande Instance de Paris, 10 February 2006 : Légipresse April 2006, n° 230 I.
[95] Cour d'Appel de Paris, 11e chambre, 18 December 2008 : Légipresse May 2009, n° 261 III.
[96] Case n°2003-467 DC Conseil Constitutionnel, 13 March 2003.

still at the centre of many conflicts. However, several international laws, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), recognise freedom of religion.[97] [98] For that reason, civilian associations are authorised to prosecute in order to defend morality principles. The judge has a major role when it comes to balancing fundamental rights; still, religious sensibilities rarely prevail over the *droit d'auteur*. Two European cases illustrate this conflict. In the Otto Preminger Institut case,[99] the ECHR ruled that the seizure and forfeiture of a film was not in breach of the freedom of expression. The Court held that, 'those who create, perform, distribute or exhibit works of art contribute to exchange of ideas and opinions and to the personal fulfilment of individuals,' however, 'it must also be accepted that it may be "necessary in a democratic society" to set limits to the public expression of such criticism or abuse,' to protect religious feelings. In addition, the Court emphasised that, in regard to morality, 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary,' and by doing so left a margin of discretion to states. In the Wingrove case,[100] the Court had to examine the legitimacy of a film board's refusal to issue a certificate for a film accused of blasphemy. Again, the Court held that religious sensibilities should prevail over freedom of expression and creation, recognising that 'in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions.' The Court established social stability and peace as a fundamental value that could conflict with freedom of expression, and especially of creation. However, by leaving this wide margin of discretion to states over what values are protected, the Court once again displayed a hesitation to enter deeply into the morality issue.

By contrast, the French courts are more reluctant to reach the same conclusion. In regard to Martin Scorsese's film, *The Last Temptation of Christ*, the highest Court stated that freedom of expression, including of creation, and the freedom of religion, have the same force, and the judge must balance them. However, the Court decided that there was

[97] European Convention on Human Rights (ECHR) Article 9-1.
[98] International Convenant on Civil and Political Rights (ICCPR) 1966 Article 18-1.
[99] *Otto Preminger Institut v Austria* 1994 no 13470/87 ECtHR (<https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57897%22>.
[100] *Wingrove v United-Kingdom* 2006 no17419/90 ECtHR.

no obligation to see the film and, as such, freedom of expression should prevail.[101] On the same grounds, the Court refused to convict the journalists of Charlie Hebdo for publishing the Mahomet cartoons, as they did not exceed the limits of what is acceptable.[102]

Not only does French law criminalise some specific forms of criticism, it also forbids the expression of certain ideas that go against interests that are protected by law. The 1881 law prohibits encouragement to commit crimes or offences, and particularly crimes against humanity, glorification of racism, and terrorism. The seizure and suppression, as well as the destruction of all copies, of any such works are permitted. As art is sometimes provocative, disturbing, and intentionally challenging, it can be subject to this offence. In a case involving the book *Pogrom*, the French Court ruled that the freedom of expression principle had to be broadly assessed in regard to freedom of creation, as the author needs a wider freedom in order to be able to express themselves, even on controversial subjects.[103]
In 1971, the French Court condemned the publication of a music disk containing Nazi songs.[104]

Surprisingly, the *droit d'auteur* can sometimes be used as a way to control an immoral work. *Mein Kampf* recently entered the public domain. Prior to this, the Land of Bavaria was responsible for the moral and economic rights of Hitler's book, and thus could control the conditions of its dissemination. Generally, the Land authorised the publication of the book provided that historical comments would be added to the edition.

Criminal law, because of its implication in freedom of expression matters, can limit artistic and literary property rights. Several offences can prompt a judge to consider that social peace should prevail over artistic creation. The amorality of copyright law has demonstrated its limits, where the ideas expressed in a work can lead to its censorship.

[101] Cour de Cassation 1ère Chambre Civile, 29 October 1990.
[102] Tribunal de Grande Instance de Paris, 22 mars 2007.
[103] Tribunal de Grande Instance de Paris, 16 November 2006.
[104] Cour de Cassation Chambre Criminelle 14 January 1971 n° 70-90.558.

CONCLUSION

While artistic and literary property is indifferent to any moral consideration, industrial property law applies the opposite principle: whether it be in patent law, trademark law, or design law, morality has a special place though several notions, such as public order, a morality standard, or human dignity. The reason behind this fundamental opposition in one specific field of intellectual property can be understood at two levels. The first reason is practical: the mandatory procedure of filing required for the creation of industrial property rights makes it possible to control morality *a priori*, whereas such a requirement does not exist in artistic and literary property. The second reason is ideological: the utopian vision of artistic and literary property has never permeated industrial property. The principle of scientific neutrality, according to which morality has no place in this field, could restore a balance between arts and sciences, and concede a scientific freedom alongside artistic freedom, as well as a capacity for self-regulation.

However, the so-called immorality of artistic and literary property seems unpractical. It is taken into account at an informal level. The inclusion of morality standards occurs during the exercise of the author's rights, when the idea behind the work

is deemed immoral or when its form threatens the fundamental values accepted by a society. Both freedom of expression and freedom of creation are not without limits, as shown previously. Many criminal provisions ensure the right balance is achieved between fundamental rights. As such, a work cannot violate privacy, or harm a person's reputation; furthermore, a work cannot convey dangerous ideas by glorifying crimes against humanity. Sometimes, a work will be judged immoral not because of the idea behind it but because of its form, especially when its material support hurts moral values and human dignity. Such limitations, which include destruction, clearly impact the author's rights, especially their moral rights. For these reasons, the amorality of artistic and literary property has to be put in perspective. Even though a judge does not apply restrictions to an author's rights based on morality issues lightly, such restrictions do exist and can sometimes be severe. Artistic and literary property in fact a part of a wider system, in which total amorality is difficult to enforce. Other legal fields can conflict with this amorality, which is not sovereign or completely autonomous.

Seneca rightly observed that 'one venerates the divine images, one may pray and sacrifice to them, yet one despises the sculptors who made them'.[105] This quote has a particular resonance, as it articulates the nuances behind the #MeToo movement and other criticisms that have called into question the role of the artist in today's society. This study has shown how subjective moral values are. An artist can behave wrongly their entire life without anyone knowing, or without expressing this through their art. By contrast, an artist can produce an immoral piece of art, entirely innocently. Both immoral artists and immoral works exist, but their existence is highly relative, according to the times but also to commonly accepted moral values. For these reasons, the way in which the society engages with immoral works or artists should be proportionate but should not, under any circumstances, deny historical facts or formerly accepted behaviours. One of the major responses should be education and discussion, as was done with *Mein Kampf*, which was published with historical comments and a warning. In addition, the distinction between morality and legality must be constantly highlighted.

As it stands, the recognition of a morality standard is too difficult to apply. It can be observed in the French media law case study: several criminal provisions are already extremely difficult to apply, and only involve a few fundamental rights. A massive admission of the artist's behaviours and moral values into their work would automatically lead to the artistic and literary property's dysfunction and, consequently, to the end of freedom of creation. The study of censorship systems, whether religious or secular, old or contemporary, provides a clear warning against an established morality control.

This study does not aim to legitimate wrongful behaviours or to diminish people's feelings regarding an artwork. It simply aims to shows that the difficult question of morality in art cannot be addressed by erasing artists or their works, as a punishment. Censoring and monitoring is contrary to the philosophical essence of artistic and literary

[105] Ernst Kris and Otto Kurz, *Legend, Myth, And Magic In The Image Of The Artist: A Historical Experiment* (Yale University Press 1979).

property. As Wilde stated, 'there is no such thing as a moral or immoral book. Books are well written or badly written.'[106] This observation crystallises the issue of morality in artistic and literary property: the only thing that should matter when it comes to the author's rights is the contribution made to society. Looking for perfectly moral art is, thus, antithetical. With that being said, society has a strong legal arsenal to punish wrongful individuals; whether they are artists or not should not matter at this stage. The public can hate an artwork, or praise it; the public can also despise an artist, but should never act as an almighty judge of morality. The pressure generated by social media is relentless, and has major downsides; it can end careers and discredit someone instantly and globally, sometimes without regard for fact checking and establishment of guilt. The modern artist must accept the burden of mediatisation, but their work should be protected from these considerations and remain accessible at any cost. The grounds for morality in intellectual property as a whole are the result of a robust historical construction and should not bend to social pressure.

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