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*Propriété Intellectuelle, Communs et Exclusivité
Les nouvelles frontières de l'accès et de l'innovation partagés*

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***Property Rights, Copyright and
Abuse of Dominance :
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Work package 2 : « Du patrimoine tangible au patrimoine immatériel »

[2012]

**Property Rights, Copyright and Abuse of Dominance :
The Case of Museums and Photographers**

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(Preliminary version)

Abstract

On the recent period, higher financial and administrative barriers have been settled in many museums all over the world preventing amateur and professional photographers to take pictures of artworks ; museum picture library becoming the main way (if not the only way) to get reproduction of artworks. The purpose of this paper is to examine whether museum behavior is economically efficient or not. In other words, the question is to know who should own the reproduction rights on the photos taken of works of art exhibited in museums. We show that even it is efficient for museums to ask visitors to pay fees (club theory), discriminate visitors according the nature of their consumption (final or intermediary) decreases the social welfare. When museum ask higher fees to photographers, they get the consumer surplus but they lower the competition on a derivative market. We underline the costs of such a strategy. Beyond the social cost of the monopoly, we emphasize the loss of positive externalities (for the museum, the artist and the population) because of a lower viewing of artworks.

Keywords: copyrights, authors' rights, reproduction, museums, welfare, reputation, moral rights, externalities

1. Introduction

On March, 3 1860, French novelist Emile Zola sent a letter to one of his high school friends, the French post-impressionist painter Paul Cezanne, in which he praises the possibility offered to artists to copy any of the works displayed in museums like le Louvre or in the Luxembourg palace:

“Paris t'offre, en outre, un avantage que tu ne saurais trouver autre part, celui des musées où tu peux étudier d'après les maîtres, depuis onze heures jusqu'à quatre heures. Voici comment tu pourras diviser ton temps. De six à onze tu iras dans un atelier peindre d'après un modèle vivant ; tu déjeuneras, puis de midi à quatre tu copieras, soit au Louvre soit au Luxembourg, le chef d'oeuvre qui te plaira” (in Rewald, 1978, pp 67-69).

Indeed, it had been the case that, "during the 18th and 19th centuries, French museums, such as the Louvre and the Luxembourg, were widely opened to artists. At the end of the eighteenth century, the fifth and seventh days of the revolutionary 10-day period were even specifically reserved for artists to work in the Louvre. The admission was free and numerous artists came in order to reproduce masterpieces. In the middle of the 19th century, with the onset of photography, a change occurred and photographers promptly replaced painters as copyists of masterpieces in museums. Until recently, photographers have worked in museums without encountering any specific problems. As painters did in the nineteenth century, they were previously required to ask for allowances to make copies in museums. Generally speaking, they had to pay fees because of the trouble they caused."

However, recently, the attitude of museums towards copyists and, more specifically photographers, has changed. They are no longer as hospitable and open as they used to be. Taking pictures of the paintings and sculptures exhibited in (national) museums is more and more difficult and constrained. First of all, it is far from rare — so frequent, actually, that it would be impossible to give an overview and illustrations — that museums purely and simply prohibit photography in their galleries either for temporary exhibitions or not. The museums that do not go to that extreme nonetheless erect financial — asking for most of the time prohibitive fees to be paid to take

(professional) pictures — and administrative — obliging photographers to fill forms and to follow complicated and long procedures to be granted the authorization to photograph exhibited works of art — barriers. For instance, In Great Britain, The National Gallery threatens to sue a US citizen for posting on the Internet images from its gallery (DATE). Also, in June 2001 Magnin Museum in Dijon (France) took three months to answer the initial demand of a French photographer J. to take a picture in the museum. He was also told that a formal request should be made before a new letter will be sent to him indicating how long he has to wait before he could make his photos and, finally, that it would cost him 7622 euros for each picture taken. The same amount of money was asked in 2001 by the Fabre Museum in Montpellier if some handling was required — it was "only" 4573 euros for a simple shot but 15 245 euros if substantial handling was necessary. Complementarily, museums hire photographers and develop their own collection of pictures that any individual interested in the commercial use of a picture of a painting, including photographers, is obliged to use (Museum of Fine Arts, Tours (2003); Museum of fine arts Bordeaux (2002); Museum of fine arts Lille (2000), etc.¹ In addition, museums use to market derivative products under copyright label, even if these products involve old master reproductions for which the legal protection ended many years ago. This means that museums artificially increase the costs of reproducing the works they own and display — probably also of those they do not display — because they assume a control on the right to copy and reproduce a work of art because they own it. In other words, they do not distinguish between the right to copy and the property right.

From a legal point of view, such a confusion is questionable. Under any intellectual property right regime, ownership does not imply a right on copies and reproductions. Thus, artists retain the right to duplicate the painting, the sculpture or whichever form under which their work was produced and this remains so even after having sold their work—and this implies that he is the only person who can determine who may copy his artwork². Of course, as it is the case with all general rules, there are exceptions to

¹ These cases are recorded by the SNAPIG French National Association of General Illustration Photographic Agency.

² See for example, title 17 of the United States Code § 202. Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the

this law. Some countries settled special rules for artworks displayed in public areas or in areas accessible by the public. For instance, in Germany, according to § 59 of the Urheberrechtsgesetz, the Act on Copyright and Neighboring Rights, one can photograph freely artwork without breaching copyright under two conditions: 1) the photo is taken from a public area or open to the public (i.e. museum) 2) the artwork is at permanent display³⁴. But the regulation is less permissive in other countries such as, for instance, in the United Kingdom where the rule concerns mainly 3-D artworks (building and sculpture) but not 2D works such as paintings, drawings and prints (Section 62 of the UK Copyright, Designs and Patents Act 1988). In the United States, the law recognises an exception just for buildings according to 17 USC 102 (a). Normally, photography of artworks, even located in public spaces is submitted to the approval of the copyright holder of the artwork. Nevertheless, public artwork installed before 1923 is considered to be public domain, and any public artwork installed before 1978 without a copyright notice also belongs to the public domain. In France, the copyright prevails if the artwork is the main subject of the photo. Consequently, one can shoot artwork when it is accessory on a photo (cf. court of cassation 2005 567⁵).

The situation is not so different with artworks that are no longer protected by copyright and that are in the public domain. The general rule is that the owner of a thing does not possess an exclusive right over the image of this thing; he only can oppose the usage of an image if it induces an abnormal disturbance to him. Therefore, artworks that are in the public domain and that are displayed in museum can normally be photographed — under the condition that it does not create an abnormal disturbance for the owner of the good.

object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

3 Nevertheless, in some cases of ephemeral works whose lifetime is limited by natural conditions (e.g. ice, sand sculptures, chalk paintings on streets or also graffiti on exterior walls) are considered permanent, what matters is the intended, not the actual duration of the presentation.

4 Thus, in the Christo trial about the "Wrapped Reichstag", the Court ruled in favour of the artist, claiming that, although the event was open-air, it was a special exhibition of limited duration.

5 In the Buren case, the artist pursued photographers because they sold postcards of his artwork located in place des Terreaux in Lyon without asking any authorization. The Court has noticed that, as it was shown in the incriminated images, the works of Mr X... and Z... blended into the architectural ensemble of the Terreaux plaza, of which it was a mere element, the appeals court correctly deduced that this presentation of the litigious work was accessory to the topic depicted, which was the representation of the plaza, so that the image did not constitute a communication of the litigious work to the public.

Finally, and interestingly enough, a copyright does not prevent the copy with a more or less wide openness of artworks displayed in public areas — with differences between countries. Moreover, copyright requires a real originality for giving a protection. For instance, in Great Britain, copyright law apparently gives a new copyright to someone producing an image of an artwork belonging to public domain because of a broader conception of originality. The situation is quite different in other European countries of in the US.

Thus, museums do not own the right to reproduce the works they exhibit and that they have no legal right to prohibit or limit photography of the works exhibited in museums. Certainly, certain legal decisions were made in favor of photographers — for instance, in France a recent judicial decision⁶ asked the Museum of French Revolution to allow professional photographers to shoot displayed artworks due to freedom of industry and trade. But, this remains an exception rather than a rule. And, despite the complaints of photographers, museums keep on preventing and prohibiting or banning photography in their galleries.

In this paper, we would like to adopt an economic perspective on this debate about the attitude of museum towards the copy, reproduction of the works of art they own and/or exhibit. Our analysis rests on the various functions and characteristics of museums that we try to relate to the legitimation of the attitude of museums towards reproduction. We show that none of those possible legitimations actually hold or holds under very restrictive conditions.

2. Public goods, exclusion and discrimination

Even if artworks are rival and excludable items -owning a Picasso in your house decreases the stock available for other collectors- the cultural services provided by artworks enter into public goods category when artwork are displayed in areas widely accessible.

“The stock of *tangible* cultural capital assets exists in buildings, structures, sites and locations endowed with cultural significance (commonly called 'cultural heritage')

⁶ Judgement by Nantes Administrative Court of appeal, France, May 4th 2010 N° 09NT00705

and artworks and artefacts existing as private goods, such as paintings, sculpture and other objects. These assets give rise to a flow of services, that may be consumed as private and/or public goods entering the final consumption immediately, and/or they may contribute to the production of future goods and services, including new cultural capital” (Throsby, 1999, p.7).

When artworks are displayed in museums, usual constraints prevailing for the provision of public good are lowered as museum can be represented as "clubs", after the name given to Buchanan (1965) to those devices aimed at exclude from the consumption of certain public goods the consumers who have not paid a certain fee.

While on a private market, prices are usually the same for all consumers, who signal their preferences through the different quantities they purchase, in the current case, that are quantities which are fixed. Then, in order to be able to provide the optimal provision of public good, museums have to set different fees, depending on visitors preferences. Indeed, even if visitors consume the same amount of the public good provided by the museum (same size of the exhibition for all consumers) they derive different levels of utility from this consumption. Then, price discrimination offers a way to reach optimal provision for artworks and to enhance social welfare. In practice museums are not able to set perfect discrimination because they ignore what are real individual preferences. Nevertheless, a solution exists, it has been theoretically shown that “third degree pricing discrimination and average cost pricing could be justified” in cases of public goods with use exclusions, (Norman, 2004). If the results of Norman demonstration can be used to justify practices such as fixing different fees according to the social status of visitors (or the period they visit the museum), it cannot be used to justify that museums ask different fees for simple visitors or photographers. Discriminating consumer according the 'personal use' they get from the public service provided by the artwork is not fair. Discrimination can be economically justified when it concerns a final consumption, as it is the case with discrimination based upon the period of the visit or upon the social category of the visitor⁷. The case is quite different when it concerns an intermediary consumption as it is the case when the visitor is a photographer. In this situation, the consumption of the

⁷Under some hypotheses, it is shown that a third degree discrimination monopoly lead to a higher social surplus by comparison to a simple monopoly pricing.

public service provided by the artwork lead to a new market. When museum discriminates visitors according the use they do of the public service -final consumption or intermediary consumption- they erect barriers and lower the competition on the market for reproduction. Such a situation is economically questionable and appears to be reprehensible because the erected barriers offer a potential monopoly to the museum.

3. Museum and the market for copies

Simple Intermediaries or monopolist?

Are there other economic rationale besides museum desire to corner the market that could justify the fees required by museums to professional photographers and, more radically the interdiction to take picture for visitors (*e.g.* Orsay museum) ?

We precise in the introduction that when a museum hold a property right on an artworks (property rights), the copyright remains the property of the artist. Then, for works of art for which there exists a property right (either because artists are alive or because their heir still benefit from copyright), one could argue that it would be too complicated, that is too costly to organize transactions on a case by case basis for each photographer, be them professional or amateurs, who wants to take a picture of a work of art owned and/or exhibited by a museum. As it is too costly to organize this market for copies in such a way, that are museum who are in charge of the organisation of the market for copies: they set a general rule of interdiction and only allow people who pay fees to take pictures.

Nevertheless this argument cannot be supported. Indeed, for artworks which are protected by copyright, an exception of the law stand that a person can freely photograph artworks for its private use.

Museum monopoly : social cost and benefits

Regarding specifically the market for copies, the problem is that, by

artificially creating a monopoly right on derivative works and on photographs, in particular, and therefore by artificially increasing the costs to be paid to copy works of art, museums behaviours generates a loss for the society. Such a loss can be accepted in the short term only if some benefits can be expected in the future that will balanced the initial loss. Nevertheless, while the costs induced by the existence of a monopoly on the market of reproduction are obvious, the benefits are more difficult to assess.

First, let's see the costs. The costs induced by such a situation are well documented in economic theory and refer to the deadweight of the monopoly: in order to maximise his profit the monopolist charge a higher price and restrict the total output comparing to what he would have done if he had been on a competitive market. Doing so, he captures a part of the consumer surplus, nevertheless it remains a loss that is not reassigned to any other economic agent. Thus, the welfare of the society (consumer and producer surplus) is lower in monopoly than in competition. In other words the loss is represented by, or results from, the utility and gains that individuals would have received from the possibility to have (and even to resale after) a photograph of a work of art at a lower price.

What about the potential benefits? A monopoly situation can be desirable when the production is submitted to increasing returns because of heavy fixed costs or when there is a risk of sub-production in the long term as it is the case with the provision of public goods because of lack of incentives.

Nevertheless, these arguments can't be supported for museums, mainly for the following reasons : 1) Even if museums have to recover fixed costs, it does not seem that their level are such so that the production of photos benefit huge increasing returns to scale. 2) Even if photos present characteristics of public goods, there is no risk of sub-production. Indeed, on the one hand the technological improvement of photographic material and the decreasing cost of material allows visitors to take the pictures they wish with a very low disturbance for museums. In most cases, not all the artworks displayed in a museum are available in its library, so that photos taken by visitors can better fit their preferences. Moreover, when taking photos of artworks not available in banks photographers create an additional value. Indeed, the photography creates a value out of a good that the photographers does not own but to which the

owner does not attribute any value or does not want to exploit the value it attributes to it (The value the owner attribute to his or her possession is inferior to the costs implied by the marketing of the work of art). By photographing it, the photographer increases the collective surplus. One could argue that a photographer who earns money by selling pictures of something that he does not own deprives the owner from potential income. But this is precisely the point: the owner does not perceive the possibility to make money out of his possession, while the photographer does. The latter acts as an entrepreneur who understands that possibilities of profit indeed exist | or at least takes a risk because he anticipates possibilities of gain.

Furthermore, we have to notice that museum aim at 'cornering' the market of reproduction at different stages. Not only they prevent other people to take photographs in museums but also they act as if the pictures they propose were protected by a copyright. Nevertheless, photos provided by museums are not new creation: they aim at reproducing faithfully the artwork, thus do not fulfil the originality criteria so that they cannot pretend to be protected by a copyright⁸. For that matter, according to the American copyright rule, in 1999 the judgement in the case *Bridgeman art library ltd.v corel corp.* held that the marketing of photographic copies of two dimensional public domain master artworks, without adding anything original, cannot constitute public infringement when the underlying work is in the public domain”.

Tu sum up, the monopoly of museum on the market for reproduction is costly in term of social welfare and cannot be justified when focussing on its directs effects, *i.e.* on the reproduction market, whatever we consider the short or the long term. Nevertheless, a complete analysis requires to take also into account associated effects, notably externalities.

4. Externalities induced by photos reproduction

Photographies taken by photographers, be they professional or not, not only impact

⁸ Indeed, for being protected by copyright, a creation need to be fulfil the originality criteria according to the law in The United States or in France. The situation is slightly different in Great Britain where it is not originality that prevails for obtaining copyright protection but the sweat of the brow and skill and knowledge.

the market for reproduction (*cf.* Supra) but also bring on externalities. These externalities affect museum, artists, and the community through the general level of education. Depending on the nature of these externalities, it could justify (or not) a protection for museum.

Artwork safety

A first set of externalities consist in negatives effects photos can have for the safety and preservation of artworks. The effects of natural light for the preservation of artworks are well documented and museum are really careful about light exposure conditions. Surprisingly, few researches have been conducted to assess the effects of very brief, but intense, lights on artworks such as photoflash (Schaeffer, 2001). Nevertheless, whatever the precise effects of flashes on artworks preservation, it does not justify a prohibition for artwork photos but only a prohibition for a flash use. Moreover, it seems that in most cases, professional photographer can photograph artworks with flash without any damage. Indeed according Schaeffer study (2002) for the most sensitive artworks, the number of flash that can be tolerate without change on the artwork extends from 10 to 10 000. The artworks classified in this category corresponds to the artefacts classified in category 1 by Karen Colby. This expert proposed in 1991 an exhibition policy dividing paper artworks into three categories of sensitivity to light (Based on the British Blue Wool, standard for light-induced fading). Papers belonging to the first category have to be exhibited less than of 4 weeks per year at less than 75 lux. For papers belonging to categories 2 and 3 (paper) ten and twenty weeks of exhibition per year were allowed respectively at less than 100 lux. Then it appears that even some papers classified in the first category according Colby classification can be photographed up to 10 000 time without change in colour⁹, then it does not seem that professional photographers present any risk to damage the majority of artworks when photographing with flash.

9 “For example, is the unwanted change is with respect to color, then the objective would be to estimate the exposure to flash that would cause a color difference of no more than 1% of a CIE L*a*b*A E of 1, the difference of 1 being generally regarded as a just perceptible change in color” (Feller, 2002, p.185)

Reputation effects

A second set of externalities consists in the impact of the dissemination of reproduction on the artist and museum reputations or even the cultural reputation of a country. At this stage, it is necessary to separate the effects brought forth by good or bad quality photos.

The case of good reproduction is simplest to deal with. Good reproductions necessarily increase the reputation of artists and museums and galleries and those external effect are included in the number of visitors or in the price of the works that are sold. Indeed, the probability is low that a picture taken from any masterwork would endanger the pecuniary rights of the author or would impact significantly the attendance of the museums that display them. What is important for visitors is to precisely to visit the museums and see the original displayed.

What about poor quality copies or reproductions ?

First of all, it appears that in many situations, artistes (and their heirs) can avoid problems that could be induced by reproduction of poor quality on their reputation. In the U.S.A., the Visual Artists Rights Act is one of the most important form of this protection. It allows the "author of a work of visual art" "to prevent any intentional alteration to that work "which would be prejudicial" to the artist's "honor or reputation," and further decrees that "any intentional distortion, mutilation, or modification of that work is a violation of that right." (quoted in Lee, 2011, p. 8; emphasis added). In France, the moral right (inalienable, perpetual, inviolable) notably states the right to the respect of the work's integrity and the right to protection of honour and reputation. Hansmann and Santilli (1997, p. 95) even argue that the protection of the "honor and reputation" is the major justification of those rights or its main purposes, namely "to control reputational externalities to the potential benefit, not just of the individual artist, but of other owners of the artist's work and of the public at large." Indeed, "those works we label "art" commonly involve important reputational externalities, thus giving both the artist and others an unusually strong interest in protecting the integrity of individual works." (ibid.) Hansmann and Santilli, in one of the rare economic analysis of artist's moral rights, ground their

argumentation against the alienation or transfer of moral rights on the negative externalities that alteration of a work of art would create. Their argument is pecuniary and refers to the losses that would incur an artist because of the alteration of the work. From their perspective, the only possible means to internalize the externalities imposed on artists is to guarantee that moral rights remain in his or her hands or in those of the legitimate owners of the moral right (see Landes and Levine, 2006, p. 227)². No alienation or transfer also applies to museums. Therefore, the argument is against the possibility that museums could claim a property right on the reproductions and dissemination of works of art but in favor of artists.

Nevertheless, it is very costly for the artist to keep watch on all the photos to check whether they effectively respect its reputation. Situations can arise where poor quality reproductions are disseminate without his agreement. What can be the effect on its reputation. According the fair use doctrine and the moral right granted to the artist, the dominant hypothesis is that reputation depends on the nature or type of citations and copies. However, if we reason in economic terms and refer to cascades and bandwagon or snowball effects, it appears that reputation is independent from the type of citation that the work received or from the way it is used and reproduced. Any event, either positive or negative, will accelerate the cascade. Positive or negative { that is critical or "unfair" } citations of a work of art or of an artist contribute to increase his or her reputation, as can easily be demonstrated by the positive correlation that exists between scandals and the value of works of art. This is interesting and important because it implies that the reproduction and dissemination of a work of art under any form necessarily increase its reputation and undoubtedly that of his author. As a consequence, there is no a priori reason to limit the reproduction of a work of art.¹⁰ This also applies to photos. Therefore, even cheap copies (even unauthorized copies) will probably have positive consequences on the visibility of artists and then of the museums that own their works.

Therefore, in both cases, good or poor photos, reproduction increases the visibility of the original work of art and its reputation. By increasing the visibility of the original

¹⁰As long as one does not destroy the original work of art and if there is an explicit reference to the original work of art | we thus exclude plagiarism|, there is no reason to doubt that any copy or any reproduction will deprive the artist from any income and will threaten his rights.

work of art, the photography increases the incomes it generates. Therefore, allowing the photographer to sell his pictures is a means to allow him to internalize the external effects the photography creates.

Another set of externalities, closed to the previous ones, arise because of the use of artworks in complementary products and derivative works. Lewin speaks of "the loss of complementary value" to designate the 'the loss of value' that occurs because use is not authorized for complementary products, like derivative works (movies, audio tapes, cartoons, sequels, etc.). We thus could refer to the "loss of reproduction value" that results from preventing a free reproduction of original works of art. Nevertheless, it is not clear at all that the alteration, mutilation or destruction and reproduction of a work of art generate negative externalities. The argument is of the same nature as the one presented in the preceding section: "what appears to be an externality may simply be a redistribution of wealth" (Ruston, 1998, p. 26), by which it is meant that the decrease in wealth because of the destruction of one work can be compensated either by the increase in the market value of works by other artists (Ruston, 1998, p. 26) or the market value of the same artist (Landes and Levine, 2006, p. 14)⁴. Therefore, it means that it is not legitimate to prevent the reproduction or copy of works of art on the ground that it will have bad consequences for the artist and, as a corollary, for the museums in which these works are displayed. To push the arguments made by Ruston and Landes and Levine, museums will benefit from the spread of cheap copies of some of the works they display either because of the impact on the value of the works of the same artist or of other artists.

Education effect

A last set of externalities consists in the positive consequence the education of people who are able to see a copy of an original work that they would otherwise never see. Then, allowing people to take freely photos of artworks help the dissemination of culture and favour an increase in the general level education. This is specially one of the main museum assignments. Then, when museum corner the market of photos, it seems it goes against one of their major assignments. Once again, one can argue that museum control the quality of reproduction while it is not necessarily the case with

other photographers. Nevertheless as we saw in the previous section, whatever the quality of photos, their dissemination favour the creation of informational cascades that will emphasize reputation, that will in turn attract new visitors into museum (à développer et justifier un peu...pas si sure de cela). On the contrary, with only one kind of image, the culture diffused is less diversified¹¹.

5. Conclusion

There exists the same relationship between creation and their physical instantiation as between science and technology. Now, as David and Dasgupta note, the distinction can be characterized in terms of rents: "[s]cience aims at increasing the stock of knowledge, while the goal of technology is to obtain private rents that can be earned from this knowledge" (1987, p. 529). Our reasoning leads us to a similar conclusion. Museum's behaviour regarding photographers is a means to benefit from rents on a derivative market provided by the exploitation of an initial creation. While such rents could be justified in the case of authors who create original artwork, because it favour diversity, it is not the case with owners of artworks such as museums. Indeed, both the direct effects on the market of this cornering are negative but also its indirect effects, *i.e.* reputation for museum and artist, education.

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¹¹In the same way, Varian stressed that in the case of software programs, "copyrights ... can serve as an entry barrier to new and potentially superior program" (2005, p. 125). We can thus say that preventing and controlling the reproduction of works of art serve as a barrier that prevents the establishment of new artists: the costs of switching to another work of art are too high. To illustrate our point, let us refer to La Joconde: the cost of switching to another major painting to see when visiting Le Louvre are high | actually, these are opportunity and utility costs that consist in going to Paris and not seeing La Joconde. By contrast, freeing the reproduction should reduce the excess of inertia that results from the monopolization of the rights. At least, it does not prevent the establishment of new artists.

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