

The Lost Mural of Bruno Schulz: A Critical Legal Perspective on Control, Access to and Ownership of Art

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Abstract When a forgotten mural painted by the Jewish-Polish artist Bruno Schulz was rediscovered in 2001 a string of legal issues were unravelled. Who could rightfully claim ownership to this work of art? Was it the Holocaust museum Yad Vashem in Jerusalem, because Schulz was a Jew killed by the Nazis, and because it is a museum that has the means, experience and know-how to restore and preserve the work properly? Or Ukraine on whose sovereign soil it had been found? Or Poland whose citizen Schulz had been? When five fragments of the newly discovered mural, which had already been restored to a certain extent by Polish conservationists, were taken to Israel by Yad Vashem representatives it resulted in political outrage. The incident illustrates how certain artistic works fall through the cracks in the law especially when it comes to the multi-faceted needs of the artworks in a globalised world. This article illustrates the weaknesses in various legislations dealing with ownership and access to art, mainly intellectual property law. It is argued that current regulation is sometimes ineffectual and must be discussed in order to cater for all the various aspects and needs of art and the public interest in it.

Keywords Intellectual property · Ownership of art · Access to art · Public interest

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Introduction

Bruno Schulz, a Polish-Jewish author, illustrator and painter was killed by a Nazi bullet on 19 November 1942. He was a sickly man who was trapped in a world plagued by war and injustice and immersed himself in sublime, wistful and spellbound works of art in order to cope with and understand the dreary reality surrounding him.

In February 2009 the fading, pale, remaining fragments of a mural—painted on the walls of a forgotten nursery thought forever to have perished—were exhibited for the first time to the public at Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority in Jerusalem. Following a belligerent diplomatic debate between the states of Israel, Ukraine and Poland a settlement was at long last reached that enabled the dream-like, painted fairytale to be made public. A colourful painting that had graced the walls of the nursery in Nazi Officer Felix Landau's house was the timeless mouthpiece through which Bruno Schultz spoke of the injustices surrounding him and through which he dealt with the difficult issue of creating in the middle of a devastating war.

After the German documentary filmmaker Benjamin Geissler unearthed the lost and practically forgotten mural in 2001 the controversy surrounding the ownership, control and access to it that ensued was inevitable. When five fragments of the mural, which had already been rudimentarily restored by Polish conservationists, were, depending on how one sees it, either smuggled or rescued by Yad Vashem representatives and taken to Israel, it resulted in international outrage. Who could rightfully claim to be the owner to this work of art? Was it Yad Vashem, because Schulz was a Jew killed by the Nazis, and because it is a museum that has the means and knowledge to restore and preserve the work? Or Ukraine, on whose sovereign soil the mural had been found and where Schulz's hometown Drohobych now is? Or Poland that controlled the territory at the time of Schulz's life and whose national he had been?

The incident in 2001 illustrates how issues surrounding ownership and control of certain artistic works of art can fall through the cracks in modern legislation and that proprietary laws, such as intellectual property (IP), can be inadequate when it comes to meeting the multi-faceted needs of works of art where the commercial interest plays in tandem with the issue of preserving and accessing cultural works in the best way possible. Irrefutably, there is a need to recognise that legislation surrounding ownership and access to works of art and cultural heritage artefacts could sometimes be ineffectual and needs to be discussed in order to cater for all the various aspects of culture in a more cohesive manner. In a globalised society, more often than not, current law such as intellectual property law appears outdated, lagging and inadequate when it comes to dealing with particular issues and problems surrounding art and culture, as well as access to and dissemination of works of cultural importance. This article explores this phenomenon.

Confronted by inadequate regulations, works of art are cornered, lost or mutilated due to ambiguities in law or in tug of wars between various parties who claim ownership. When a cultural treasure is unearthed, such as the lost mural of Bruno Schulz, the problems in law appear clearly. These occurrences illustrate that

when it comes to cultural works of a certain type, works that usually are difficult to categorise, laws in their present stage are not always sufficient or apt to deal with the more complicated issues surrounding control and ownership of culture.

It could therefore be very revealing to study the Schulz case and his recently rediscovered mural and to introduce the debate that arose in conjunction with the finding. Aside from serving as a tool to show particular shortcomings in law, and what that might mean on a larger scale, the incident also needs to be understood in order to shed light on the nature of Bruno Schulz's work and similar art. This article uses his mural and its story in order to raise questions about the weaknesses in legislation in the field of, for example, intellectual property and the significance of public access and ownership in these cases, above all in a multi-cultural global society.

It could be argued that Schulz's work is potentially among some of the more important works in European art and literary history, yet it remains exceedingly elusive, esoteric, almost hidden to the broader public. Whether or not this is due to the fact that Schulz's national belonging has been disputed for so long is unclear, but it has nevertheless resulted not only in an enormous loss for the collective European cultural heritage as such, but it has also left a dark hole in the history of both the Jewish and the Polish people. Most interestingly, from this article's point of view, the incident illustrates the latent weaknesses in modern laws and some of the difficulties the legislation is faced with when regulating within the cultural ambit.

Understanding Schulz

As an artist Bruno Schultz was unusually multi-skilled—he was a writer, painter and illustrator, and chose the mode of expression according to the subject matter at hand—although it is said that he preferred to express himself through writing. During his life he only finished two short-story collections called *Cinnamon Shops* (translated into English as *The Street of Crocodiles*) and *Sanatorium under the Sign of the Hourglass*. It is, however, rumoured that he was working on and maybe even finished a larger work, a novel called *The Messiah* which he is said to have given to one of his non-Jewish friends to look after in case something was to happen to him. What he dreaded the most eventually occurred, his life was cut short by a Nazi bullet, and the manuscript for *The Messiah*, unfortunately never (re)surfaced.

Ironically Bruno Schulz still remains comparatively unknown to the larger art and literary world, due to a number of reasons. Sadly, one can only speculate as to how much of his other work has been lost or hidden, held away from the public throughout the years. Thus, when the mural in the so-called 'Landau House' was rediscovered, it understandably served as a valuable find and an indispensable source of information regarding Schulz as well as the time and place in which he was living.

The Find

'As you will no doubt know,' said my father, 'in old apartments there are rooms which are sometimes forgotten. Unvisited for months on end, they wilt

neglected between the old walls and it happens that they close in on themselves, become overgrown with bricks, and, lost once and for all to our memory, forfeit their only existence. The doors, leading to them from some backstairs landing, have been overlooked by the people living in the apartment for so long that they merge with the wall, grow into it, and all trace of them is obliterated in a complicated design of lines and cracks. (Schulz 2008).

A documentary filmmaker, Benjamin Geissler, and his crew rediscovered the lost mural with the help of some locals who were old enough to remember, and willing to talk about and recollect Nazi Officer Felix Landau, his house and his artistic protégé Bruno Schulz. The search led the film crew to an apartment building in Drohobych, Ukraine. The old mansion that had once belonged to the Landau family had after all those years been developed into communal living space; the walls of the old nursery had long since been painted and repainted and were at the time of the discovery hidden behind a cupboard, unattended, cracked and decaying. The film crew was able to locate the original walls after numerous failed attempts by other people and to rediscover the mural that Bruno Schulz was supposed to have been working on during his last months of life. When it was finally found it was severely damaged through decay and humidity, it had been forgotten throughout the years and the walls had been re-painted several times. The mural resurfaced once multiple layers of paint were removed from the walls by art conservationists. The poignant find marked the beginning of the international dispute. The lost mural was not only an important addition to Schulz's known body of work up to that point, but also a testament and a subtle account of the society in which he lived.

An abhorrence and loathing of bureaucracy had often been the common denominator in all his other known works, hence the reason why this particular piece was significant was because it appeared to be a prominent diversion from that, and therefore added value and an additional layer to Schulz's portfolio. The mural had been created under the worst of all circumstances—the artist was decorating a Nazi's nursery, under what can only be described as coercion, in return for his life. Further, what made the mural particularly valuable and unique is that here Schulz was creating for an entirely different target audience than he was used to—he was painting for a young boy. This obviously marked a departure from his typically dark, tortured, mystical, Kafkaesque visual vocabulary and mode of expression, where he had frequently drawn upon or relied on explicit imagery of sexual humiliation presented behind illusory veils or in a sinister, phantasmagorical manner. Here, however, as a result of creating for a child he had been forced to divert from that and to use symbolical imagery instead in order to stay true to his own storytelling.

Interpreting the rediscovered mural and its illustrative fairytale is interesting, as at first glance it appears to be a beautiful, yet simple, tale of vaudeville magical characters—dwarfs, princesses and witches. However, underneath it, the hidden primal scream of an artist at the end of his wits can be discerned. A closer analysis of the mural's subject matter quickly reveals an underlying social criticism, for instance, Schulz's apparent self-portrait at the reins of one of the carriages in the

painting. It is worth noting that this was at a time when Nazi laws prohibited Jews from riding in or even driving carriages. The clearly un-Aryan features on kings, queens, princesses and princes can be emphasised as another example of the hidden critique—such symbolism was unheard of during Schulz's lifetime. Utilising this kind of allegory and symbolism must not only have constituted an act of disobedience but it also represents the artist's silent hopes for a better future and the freedom he must have been daydreaming about while working on the mural (Bronner 2009). The brutal reality surrounding him, experienced by Schulz first-hand and mediated allegorically to subsequent generations through this work, evolves in front of our eyes, transcending Schulz's private perception of his reality, and as such becoming a collective understanding of contemporary European history (Lukacs 1968, pp. 15 aa). Arguably, that should matter and play a decisive role when discussing the legal ownership of this work, particularly the public interest in it.

Some believe that Schulz was under the impression that he was going to be assassinated as soon as the mural was finished and there is some evidence that he was planning an escape from Drohobych at the time he was working for Landau. These facts must undoubtedly have coloured his state of mind and influenced his work on the mural. Because of that, it is claimed that he was stalling the completion of the mural until he was able to gather all the necessary escape papers for exile (Ficowski 2003, pp. 133 aa). Unfortunately, he never managed to finish the mural or to escape his hometown alive.

The Confusion

Shortly after the mural had been discovered additional Polish and Ukrainian art experts, other than those already present, were summoned in order to approach the excavation and preservation of the precious and fragile remains properly. Yad Vashem was also informed about the discovery. The lost mural was not only an important addition to Schulz's known body of work up to that point, but also a testament and a subtle account of the society in which he had lived; a document of significant knowledge value as well as of evident artistic worth.

What happened was that soon after the discovery of the mural, five fragments of it, pieces already somewhat restored by the Polish conservationists, were removed from Ukraine and taken to Israel by Yad Vashem representatives, an act that resulted in confusion, disbelief and fury (Ficowski 2003, pp. 168 aa). The remainder of the mural was left behind in the Ukraine.

The circumstances still to this day remain rather unclear and disputed as to how and why these particular pieces of the mural were taken to Yad Vashem. The issue was finally resolved many years later in 2007 by way of a compromising settlement whereby the disputed pieces were given to Yad Vashem on a 'long term loan' by the Drohobychyna Museum in Ukraine. Yad Vashem, however, maintained throughout that their conduct was in accordance with law and in full collaboration with the

Ukrainian authorities. Nevertheless, the case opened up some forgotten wounds, left more questions unanswered and revealed certain inadequacies in (international and IP) law in the way certain works of art like this one are dealt with.

To understand the importance of what took place, and the significance that the incident with the mural has and will have on future dealings with socially significant works of art, it is imperative to present the weight of these artworks. While doing that, the problems law is faced with when dealing with such works can be analysed. Consequently, the starting point must be to look at the works of Bruno Schulz and his creative process in order to present the legal conundrum, and later to discuss control and ownership of cultural artefacts such as this mural in more detail. The legal implications from a critical perspective concern ownership, control and access to works of art of a certain stature.

Deconstructing Schulz

In the execution of his work, Schulz, even though he was a secular Jew, was highly influenced by traditional Judaism and the teachings of Kabbalah. Accordingly, he emphasised the multiple levels of meaning in his works, calling to mind the Derridian notions of reaching mediated meanings by deconstruction. The mural should therefore not only be understood as merely the images that rise from the surface of an old wall painting, but also needs to be approached at a more profound, deconstructed level so that all its layers may be extracted and studied (Agger 1991; Jay 1973, p. 176). It must be understood both in fragments and holistically, in order to grasp why Schulz communicated in this way, and how he had to make sure that every brush stroke would be interpreted and re-interpreted by future viewers and scholars, without posing an imminent threat to his life.¹ He utilised the subject matter of the mural to comment on the lack of justice and the laws of the society in which he was living, but had to do so on the subtlest of all levels in order to survive.

From a psychoanalytical point of view, the mural must have enabled Schulz to paint his private hopes, articulated on the mural as a painted enigma, in a secure code language. Goodrich addresses the meaning of enigmas quoting Jean de Corass as ‘hidden message[s] in the form of an image, an envelope or missive letter that contains a memory, a sign, a history, a picture of prior texts’ (Goodrich 2010). What was it Schulz wanted to say with his enigma?

While Freud never distinguished between daydreams and nocturnal dreams in psychoanalysis, Ernst Bloch in *The Principle of Hope* approached the daydream in a way that ties into such an approach and is interesting here as an aid in further understanding Schulz’s work on the mural. Bloch labelled the phenomenon the ‘Not Yet Conscious’ as opposed to Freud’s ‘No Longer Conscious’ (Bloch 1986, pp. 86 aa). The daydream, he claimed, represented in works of art an imagination or yearning for a better future and, in saying that, he restored ‘to radical theory a

¹ Another Holocaust survivor that addressed her surroundings through children’s painting in the same manner is Marianne Grant, for more information see Marianne Grant *I knew I was painting for my life: The Holocaust artworks of Marianne Grant*, Glasgow Museums, 2002.

See also <http://www.glasgowmuseums.com/venue/showExhibition.cfm?venueid=6&itemid=101>.

cultural heritage that is often neglected or dismissed as mere ideology' (Kellner 2010; see also, Douzinas and Gearey 2005, pp. 97–106). Here, Schulz's conscious daydream, his not yet consciousness as it were, has to be taken into account when analysing the importance of the mural.

The fairytale he painted for Landau's son was thus not one of the traditional 'Once Upon a Time' kind, it was rather a hidden violent act that hijacked the initial fairytale, turned it on its head and instead declared in its imaginary prologue: One Day...

Confronting the Past

Born a subject of the Austro-Hungarian empire and later a citizen of independent Poland, Schulz found himself living briefly under Soviet occupation at the beginning of the war and was murdered because he was a Jew in the Third Reich [...] Remarkably, this is the story of a man who spent most of his life in one place. (Paloff 2004/5)

Schulz's assiduous work on the mural undoubtedly carries some aspects of the Blochian 'utopianizing strengthening with which the day dream ego supplements itself and what is commensurate within it. In fact it must supplement this whenever the daydream is not expended on chimeras like Circe and Midas, or even on private excesses, but attains the commonly binding progression: to painting a better world' (Bloch 1986, p. 91). And what is more, decades after this mural's creation, it proved equally relevant at the time of its unearthing in 2001. Prior to its discovery, it had arguably fallen victim to a combination of collective oblivion and oppressed knowledge—something Liljefors refers to as 'sociosymbolic sleep' (Liljefors 2006). However, when it resurfaced it forcefully re-awakened Poland, Ukraine and Israel collectively from their sociosymbolic slumbers and spawned a discussion regarding the still very much present issues. One of those, for example, was Poland's pre-war Jewish heritage and coming to terms with its past and present relationship with its Jewish population. Faced with a work of art resurrected some 60 years after its creation, yet still unpredictably apposite, pried open some of the contemporary taboos buried deeply within the social oblivion. These still unresolved and unhandled problems illustrate how Schulz's work has significance even outside the Jewish community. A wider group, a cultural commons, was demonstrated to have a legitimate claim to at least the right of access to the mural. All that ought to be taken into account when discussing ownership. Schulz's make-belief reality presented through a painted fairytale is momentous. But who does it belong to?

Scenes of Crime

[...] Atget, who, around 1900, took photographs of deserted Paris streets. It has quite justly been said of him that he photographed them like scenes of crime. The scene of a crime, too, is deserted; it is photographed for the

purpose of establishing evidence. With Atget, photographs become standard evidence for historical occurrences, and acquire a hidden political significance. They demand a specific kind of approach; a free-floating contemplation is not appropriate to them. They stir the viewer; he feels challenged by them in a new way. (Benjamin 2007)

Schulz's mural can be approached as crime scene evidence. Albeit rather unusual, it still serves as a crucial testimony of the events that took place. Much like ordinary crime scene evidence, it reveals stories that might initially not seem accessible or understandable. However, these stories can gradually be elicited through careful analysis and once understood they provide detailed accounts of the victim, offender and the circumstances in which the crime was committed. Art is said to possess that particular social function apart from its inherent aesthetic value.

Adorno, for instance, wrote about artworks with a social function, 'authentic art'. For him this was art that has the ability to free itself from the restraints and fetters of its own time. Although difficult to define, Adorno held that the authentic work of art is essential due to the fact that it remains autonomous in an otherwise administrated society and as such provides indispensable insights into the totality of society from which it stems (Benjamin 2007, p. 93). He privileged therefore certain artworks as particularly important, and claimed that they were often overlooked sources of social knowledge and social commentary (Kellner 2001). These lines of thought assist in understanding Schulz's mural in its original context as well as the role it plays for modern society today. In this article some aspects of Adorno's argumentation about authentic art are utilised when approaching Schulz's mural. Could it be said that, by virtue of being knowledge-based and socially significant, such works attain a higher 'dignity'? In that case, there is a higher public interest in them than in other works of art, such as mass culture. Should this be reflected in law?

The advent of mass culture, Adorno wrote further, threatened the existence and significance of authentic art by way of, for example, standardisation or what he called 'pseudo-individualisation' that takes place in the consumer society; namely, the process of commodification. This process can reduce many culturally and socially significant artistic works to merely a fraction of their social value, excluding their knowledge potential, through various mechanisms, for example, law. Intellectual property law, arguably, favours a packaged commodity-esque artwork that can easily be exploited on the market, and if a work of art does not fit such definitions, it is excluded; defined as something other than art. Hence, a standardisation of artworks takes place and becomes an integral part of the culture industry through the use of law and, accordingly, by way of, for example, industrialisation and mass production, diversity in cultural works of art is gradually lost, excluded or silenced. Below, I discuss further what effect such a process that takes place in law has had on Schulz's work in particular, and public access to these kinds of artworks in general.

Before I do that, it needs to be stressed that in a post-modern globalised society the clear division that Adorno propagated between the authentic work of art and the mass cultural work of art may be difficult to adopt today, particularly in the digital

sphere where the 'original' or the 'unique' has an increasingly smaller significance when assessing the work's public importance. Therefore, I use the Adornian argumentation to illustrate instead that all works of art contain both authentic and mass-cultural aspects, some of them more of the one than the other, of course. The authentic aspects in art are gradually being silenced in law. For that reason, when referring to Schulz's mural as 'authentic art' I refer to the 'knowledge' aspects in it, something in which the public has an interest.

Disrupting the Illusion of Reality: The Aura of Art

We know that the earliest art works originated in the service of a ritual—first the magical, then the religious kind. It is significant that the existence of the work of art with reference to its aura is never entirely separated from its ritual function. In other words, the unique value of the 'authentic' work of art has its basis in ritual, the location of its original use values. The ritualistic basis, however remote, is still recognisable as secularised ritual even in the most profane forms of the cult of beauty. (Benjamin 2007)

The approach to Bruno Schulz's mural is thus twofold—on the one hand it has to be understood and analysed in its original context, that is as an artwork with a number of 'authentic' qualities, which was created for a nursery that belonged to the son of a Nazi officer; but on the other hand it must equally be acknowledged as a distorted, fragmented piece of art that is divided between two countries and whose ownership is disputed and unclear. From a public interest perspective, what that means has to be discussed: the fact that the work has been distorted and that it cannot be viewed in its entirety, as well as the fact that it is exhibited elsewhere, away from its 'original' context. What happens to such works of art when they are taken out of their original context and distorted? Does the work of art lose its knowledge value and become reified; does it lose its authentic qualities all together? What role does law play in these circumstances?

The Benjaminian concept of the 'aura' of the artwork, i.e. the sense of veneration and admiration experienced when confronted by a piece of art through the ritual function of an exhibition and the importance of its location of origin, is interesting here. The implication for the authentic aspects in the work of art and its 'aura' when taken out of such context is a question where opinions differed within the Frankfurt School itself. Horkheimer/Adorno saw the aura as an inherent aspect of a work's authenticity; the powerful aura of an authentic work of art, they claimed, violently grabs hold of the spectator and demands of him as it were not only contemplation but also praxis (Jay 1973, p. 179; Adorno 1981, p. 225). Benjamin, on the other hand, stressed the potential not in the aura itself but rather in the act of destroying and shattering it, and thus freeing the work of art from the magic and ritual aspects to it, revealing its authentic qualities through brutal and violent acts such as copying or fragmentation. Benjamin wrote that this could also be done through, for instance, mechanical reproduction. In doing so, shattering the aura in one way or another, both the 'context' and 'uniqueness' of the work are questioned and,

Benjamin claimed, not only is the dissemination of the work to the wider public facilitated, thus democratising access to it, but the act itself also reveals additional layers of meaning and significance in the artwork.

In the case of Bruno Schulz this is particularly relevant in relation to the issue of whether the five fragments, by being taken to Yad Vashem, were rendered ‘soulless’ and ‘inauthentic’ or, on the contrary, whether the act itself shattered the aura of the work and freed it from the burdens of its past, its original location, and unleashed its true potential, emancipating it from its given (perhaps often constraining) context. What significance, if any, does this have for the legal debate around control, ownership and access to those works, particularly from a public interest perspective? It can be argued that by taking it to Yad Vashem the mural attains its ultimate potential in that it can be studied independently of its original context, it can be viewed by larger numbers of people, be properly preserved and can also be understood as relevant from multiple angles. Does this argue in favour of the fact that Yad Vashem, after all, has a legitimate claim on ownership and control of the mural?

Moral Rights

As access to authentic works of art such as this one must be seen as significant given the analysis above, the problems with positive law and issues concerning control and (legal) protection and ownership of works of art must be presented at this point. In Schulz’s case, the inherent dichotomy in works of art is perfectly illustrated—the social significance vis-à-vis the proprietary structure that is facilitated by IP law. This renders the ownership issue particularly interesting in cases where works of art, which are important for reasons other than commercial ones, are in question from a legal point of view. It is an issue that requires weighing up and balancing the interests and intentions of the original rights owner, potential subsequent owners, as well as the public interest in an accessible and unfettered cultural heritage and, with that, a healthy and growing cultural commons.

To search for answers within law itself by solely utilising traditional legal methods proved instantly unhelpful. The work was created in the course of employment or under commission. The first problem that I was confronted by was in which legislation to search. Polish law from the 1940s? Current Ukrainian law? International law? I had a look at modern Ukrainian law in order to attempt to understand how similar issues are generally handled on the national level. Much like most other European and Western legislations, Ukrainian Law on Copyrights and Related Rights stipulates in Article 16.2 that works of art created during employment or by commission are to be vested in the employer. Interestingly though, Ukrainian law, unlike most other European IP legislation, goes further in its protection of the creator and also protects moral rights of the author in courses of employment. Let me return to that in a moment.

In a press statement after the removal of the five pieces from Ukraine to Israel the following was issued by Yad Vashem:

Unfortunately it is a fact that from the around 3.5 million Jews who lived in Poland before the Shoah, today there are only a few thousand Jewish inhabitants. Despite the fact that today most of the Holocaust survivors live in Israel, the remnants of the vibrant Jewish life and the suffering both of the victims and the survivors are scattered all over Europe. Therefore Yad Vashem has the **moral right** to the remnants of those fragments sketched by Bruno Schulz.²

The term ‘moral right’ caught my attention particularly in the way it was used in the press statement by Yad Vashem. From an IP law perspective this is an interesting choice of words, as the legal concept ‘moral right’ is not (directly) applicable. Moral right, as a legal concept, is intentionally separated from the proprietary aspect of copyright in legislation and considered fundamentally different from copyright: non-commercial; serving to protect certain softer aspects of the creation; closely linked to the author, for example, through the right of integrity, and so on. In contrast to proprietary copyright, moral rights are created in order to protect the personality and reputation of the creators themselves (see also Bruncevic 2009). Moral rights are not only non-assignable but they also die with the author; to be exact, the right cannot be inherited *post mortem* of the original creator. Simply put, moral rights protect the sides of the work of art that are part of the creator’s self, his ‘soul’, and are as such inalienable from him/her. The author in the Ukrainian Copyright Act is today narrowly defined as ‘an individual who created a work by his creative effort’ (Section 1, Ukraine Law on Copyright and Related Rights).

From this point of view, Schulz’s mural is exceptionally problematic legally. Attempting to determine the ownership and the right of access and control to a work of art after the death of the author, the employer and with no apparent heirs to the copyright, particularly when the nationality or belonging of the author is being disputed, as well as the fact that the work had been created under undue circumstances, is almost impossible to do. The strongly protected non-proprietary, inalienable moral right in Ukrainian legislation brings forth an interesting argument that is not only relevant in this case, but that also serves to illustrate a variety of other insufficiencies in intellectual property legislation, especially when it comes to dealing with internationally, culturally and historically significant works of art that fall outside the margins of copyright law.

In the Schulz case, for example, moral rights are claimed *post mortem* not by the creator himself, obviously, but rather by an institution decades after his death when both the copyright and moral rights have expired. The grounds for claiming moral rights appeared to me as non-legal but were they irrelevant and otiose? What happens if claims regarding ownership of art fall outside law *per se* or when legal method cannot provide a just solution? How can law then deal with arguments that evoke a greater principle such as justice or democratic public access when the work of art in question appears to fall outside the law?

² Yad Vashem’s press statement from 2001 may be read in its entirety here: <http://www.ji-magazine.lviv.ua/inform/info-eng/yv-en.htm>.

The Bronze Mural Many Years Later Created Across the World

Contrastingly, by way of example, a similar case appeared in front of the Indian courts in 1995. A renowned sculptor by the name Amar Nath Sehgal was commissioned in 1959 by the Indian government to create an artistic piece for a significant and central part of a government building in the capital. Mr Sehgal's work resulted in an immense 40-foot high mural representing Indian customs, daily life, celebrations, clothing etc. The work won acclaim not only in India but also across the world because of its delicate depiction of Indian culture and, ultimately, became a cultural landmark.

In the 1970s the building that had housed the work was due for renovation and in 1979 the mural was taken off the walls by builders not properly trained to handle artistic works, dismembered and put into storage (Kalra 2007). Mr Sehgal brought a lawsuit against the Indian government for violation of his moral rights on the grounds that the dismemberment of the homogeneous blend of the pieces of each tile in the mosaic constituted an act of mutilation; that the action was prejudicial to the artist's honour and reputation; obliteration of the artist's name on the work, etc. (Kalra 2007).

Mr Sehgal won his claim and all the rights in his work were reverted to him, but the damage his mural had suffered and the loss to Indian cultural heritage, it was argued, could unfortunately not be rectified.

Extending the Concept of Moral Rights?

The difference between the Indian case and the case of Schulz is of course that Schulz was not alive at the time when the mutilation and destruction of his work took place and was thus unable to bring an action himself. Nor were there, more importantly, any questions of belonging/nationality present in the Sehgal case. One could also discuss further whether the Sehgal work can be deemed to have any authentic qualities at all: albeit highly important for Indian society, it could be argued that it lacks the additional 'utopian', knowledge or critical levels in order to be elevated to the status of 'authentic'. Nevertheless, the Indian example contrastingly illustrates how difficult the case of Bruno Schulz is to approach legally, and it is useful in demonstrating the complicated issues concerning works of art that come into existence during the course of undue or conflicting circumstances e.g. works created in wartime.

Interestingly, had Bruno Schulz been alive today he would probably have been able to bring an action for breach of moral rights due to the mutilation, fragmentation and destruction of his work. Yad Vashem as an institution was created in order to honour the people who lost their lives in the Second World War (WWII), but also to preserve as much as possible of the remains from the victims, so that the Holocaust would never be forgotten. Could it be argued then, that by virtue of being able to protect and preserve the works of victims of the Shoah, certain rights ought directly to be extended to, for example, Yad Vashem or similar institutions, where there are grave circumstances present at the time of the creation,

such as alienation, coercion or worse still—genocide? What would such a solution mean for the principle of public interest in works such as Schulz’s mural? Copyright law, and the concept of moral rights in particular, evade these complicated questions. However, in circumstances like these, they cannot be escaped—particularly in light of the international conventions surrounding cultural heritage, for example, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

Intellectual property law regulates within the sphere of the private domain. Therefore, it has to be asked, in view of all of the above, whether it should be at all possible to ‘own’ works of art such as Schulz’s mural, i.e. in the traditional sense of private, individual ownership. Ought, for example, a notion such as *force majeure* be incorporated into law when it comes to ownership, control and access to works of art that have been created under difficult circumstances and that, through disputing the ownership, the work itself runs the risk of destruction or peril, something that undoubtedly is a collective loss. Moral rights, extended or otherwise, are probably not the appropriate tool to make provisions for this problematic but they do reveal and draw attention to the stiffness and inadequacy of law in these situations.

The issues are also in line with the discussions on the topic of international conventions that regulate works of cultural heritage, folk art and folklore. Cultural property artefacts have been discussed widely in recent years (see, for example, Hemmungs-Wirténs 2004; Macmillan 2005, 2007; Bruncevic 2009). They are generally excluded from copyright and this is so under Ukrainian Copyright Law as well (Section 10(b)). This means that works of art that are deemed ‘folk art’ are considered almost as above or beyond the monopoly of copyright and personal moral rights. The problem in this case is that the concept of folk art is not wide enough to provide any tangible answers for the Schulz mural because it is not folk art as such either.

However, even though the mural does not directly fall under the folk art definition it is still worth lingering there for a moment for the sake of argument. In Roman law for instance we find the concept of *res communes*—things that cannot be owned and are open to everybody by their sheer nature (Macmillan 2009; Rose and Romans 2003). This concept is reminiscent of folk art. Folk art indicates works of art that collectively belong to a group, works that depict the history and culture of the people they stem from, something that is worth protecting both in the short and the long term, independent of the copyright aspect and its commercial uses.

Schulz’s mural evidently does not fit into any legal concept neatly, neither the copyright nor folk art concepts, demonstrating that works of art that are not captured by IP legislation or by folk art conventions in international law could be in danger by, in one way or another, being excluded from all existing legal protection. Dissimilarly, the Sehgal work mentioned above illustrates a work that fits the folk art definition (as well as falling within the ambit of both copyright and moral right). The Schulz mural, therefore, simply falls through the cracks in or between laws. As a result, it is rendered vulnerable and left unprotected as it is problematic (or undesirable?) to deal with it in law.

The Tensions and Problems in Current Law

Schulz created a work of art in order to beg silently for change and, if he had asked for change more vociferously, it would inevitably have meant an instant end to his life. How can such issues be captured in law as they are, at the core, issues concerning human suffering and justice? How can the ownership of a work of art that is created under the influence of Judaism—as well as Polish culture—in a Nazi-occupied territory—be reconciled in law today?

By deeming the work Jewish in whatever way (e.g. as Jewish folk art) and giving prominence to its Jewishness, it has to be asked whether the other identity, Polishness, is simultaneously being negated and, if so, whether it is at all possible for Bruno Schulz and his work to belong to both the Jewish and the Polish people at the same time? Could a work created under these conditions ever be said to belong to anybody at all or only to the people, who at the time of the artist's life and the time of the creation of the work, arguably did not consider him as one of their own? The law, as it stands today, is no doubt unequipped to deal with these questions. That is to say, even if one was to choose to interpret Bruno Schulz's work to be partly or wholly folk art, the kernel of the problem, i.e. which folk, which people it belongs to, still remains an enigma.

To answer this from a legal perspective, one is put in the rather awkward situation of having to define what Schulz was, and was not—a Polish Jew, or a Jewish Pole, or simply a European artist? This evidently cannot be addressed by merely using traditional legal method, international law or the narrow, commercial intellectual property law, or any other regulation for that matter. The law simply does not envisage or acknowledge such circumstances at all.

When the problematic is vaguely touched upon in international conventions on cultural heritage, the protection is not appropriate as such because the regulation is vague and exceedingly difficult to enforce. Furthermore, no international convention directly addresses this particular situation where a notion of collective ownership and control is discussed in terms of works of art that are created by alienated citizens or members of minorities in multi-cultural/multi-religious societies.

The question of Schulz's *Heimat*, his identity or non-identity, for that reason becomes central and telling in this case especially when it comes to attempting to solve the enigmatic equation legally.

Overcoming (Intellectual) Property in the Commons

Creativity and culture from a public perspective are rarely discussed. In law, what is often sidestepped when assuming that intellectual work is like any other tangible product, is the fact that once a cultural work has been created, there is an instant sense of public ownership, something the creator can neither fully take back nor preclude others from using and accessing. In this way, cultural works, surpass ownership and, debatably, can never be completely 'owned', at least not in the traditional sense of owning. Lawrence Lessig has for instance claimed that copyright legislation is destroying culture and harming the world's future

intellectual and cultural heritage by fencing off works of art for an unreasonable time and unreasonably strictly, condemning them in a way to solitary confinement in the private domain. One of the more poignant reverse examples of this is the case concerning artworks that were taken from the Jews during WWII that are now being returned to their original owners, or heirs of the original owners. Albeit legally and morally fully legitimate, many of these artworks are often being taken from museums once original ownership has been established, and returned to individual ownership (and the private domain!) where they no longer can be accessed by the larger public. More often than not, after these artworks have been returned to legitimate, original owners, they are passed on and sold to the highest bidder e.g. art dealers or private collectors. Such Holocaust Art³ exemplifies the level of difficulty, and highlights the struggle between various interests that need (ought/should?) be dealt with in the legal sphere, not to mention the difficulty of having to weigh these interests against one another.

In post-industrial society where the focus often lies on the consuming individual, on tailor-made individual enjoyment, on financially exploiting knowledge and intellectual/cultural work in ways never imagined before, it has to be asked whether these developments lead to what Zizek refers to as ‘privatisation of the general intellect itself’ (Zizek 2009). The Frankfurt School clearly demonstrated the distinction between commercial and cultural values in works of art. Even if that distinction may not be as easy to uphold today as it was then, it can nevertheless be used as a device to demonstrate that there are at least two sides to art. In many cases, when it comes to legislation, this fissure has been overlooked. So should we legislate in this unregulated area? How will this affect the free market?

As Negri and Hardt argue in *Multitude* the ‘free market’ is already not that ‘free’, but rather heavily regulated and dependant on legal structures in order to function. The only question is in what way law should intervene in the market principles of the culture industry. Until now it has been by way of IP law, tax law, corporate law, contract law, trading regulation, supervising bodies, etc. (Hardt and Negri 2004). Interestingly, Negri and Hardt also argue that the globalised open market as such has not meant a ‘lessening of [...] legal control over corporations and economic markets but indicates rather shifts in the kinds of control’ (Hardt and Negri 2004).

This is the reason why public interest in, for example, a collective ownership of certain works of art could and maybe ought to be extracted from intellectual property, because it does not fit in with the concept of IP, and all forced use of it within the IP realm causes problems. As Adorno demonstrated, certain elements of art often serve as reflections and/or critics of society and that can be hard to combine and unite with market principles that require quick and easy exchange with as few transaction costs as possible. Simultaneously, IP law itself might also benefit from being freed from certain unnecessary fetters that have been forced upon it by way of, for example, moral rights or exclusions in infringing uses.

³ In this context, ‘Holocaust Art’ simply refers to valuable artworks owned by the Jews that were forcefully taken from them by the Nazis during WWII; it does not refer to art created by the Jews during WWII such as Schulz’s mural.

In this context, cultural heritage or knowledge art such as Schulz's mural has to be presumed or implied as weak. The legal framework, as has been shown many times, favours the commercial/private over the public/common, constructing laws that more often than not focus merely on free market principles. Intellectual property law as one such example creates in effect a black hole that remains unregulated and that can have severe consequences on not only art but also on science and knowledge that ought to be made available in the public domain or in the commons. Interestingly and by way of comparison, Ghanaian Copyright Law from 1985 includes 'scientific knowledge' in the definition of folklore (Blakeney 2006). Is there a lesson to be learned there when approaching artworks such as Schulz's mural legally, works of art which are simultaneously a document of their time and indispensable knowledge sources, but with little or no private/commercial value?

The Divine

Schulz's case proves that the legal machinery, in order to deal with the complexity of the reality and in the course of the commodification process that takes place in, for example, law, produces uncomfortable solutions that do not solve various significant problems concerning public interest. Undoubtedly this affects control, ownership and access to works of art. This is a consequence of the inconsistency between 'art' when represented in law, and Art in-itself. In other words, IP rights, such as copyright and the moral right, are not always sophisticated enough to deal with this problem, as concepts have to be simplified or assumed in order to make the wide plethora of complicated and complex issues that are inherent in artworks fit within law. This is done, for instance, by assuming that art is always created under uniform and clear conditions and that particular ideas such as what constitutes a work of art, who the artist is, who the state is, and so forth, exist and are definable. These assumptions (that all of those elements always will inherently form a socioeconomic unity) are obviously problematic when it comes to the absence of such unity and presence of plurality. Such thinking endangers diversity in the short run, and seriously wounds the already weak public interest in the long run.

This is particularly well illustrated in certain works of art created for instance by minorities and/or in times of social unrest—as in the case of Schulz. With such works it appears to be a question not of *Res Communae* but, bluntly, to borrow another term from Roman Law, *Res Divini Juris*—things that are unowned by any human being because they are sacred, holy or Divine (Rose and Romans 2003).

The World as one Whole Picture

Justice is not fully of this world. It is caught in an unceasing movement between knowledge and passion, reason and action, this world and next, rationalism and metaphysics. (Douzinas and Gearey 2005)

The tale of Bruno Schulz's mural is conclusively one of publicly and socially significant art, created under oppressive and conflicting circumstances, with the backdrop of territorial and religious tensions. The plot of this drama is played out in a part of Europe that has belonged to several nations since the birth of the artist, which complicates the story of the mural and naturally leads to the controversy that it led to in terms of where it should be kept, who could claim the right to control and own it, and ultimately, who ought to have access to it.

It must be stressed that what happened after the finding of Bruno Schulz's mural is unusually complicated and can only be viewed holistically, in light of history, law, religious struggles, territorial issues, wars etc. The solution to this particular problem has been provisionally reached on a diplomatic and not on a legal level, but there are still both many Polish and Jewish voices that are dissatisfied with the current compromise. And, looking into the crystal ball, there are glimpses on the horizon of more conflicts yet to come that will be similar to this one.

Law is not yet of help, but could potentially be in the future, when it comes to clarifying issues of ownership, preservation and public access to all works of art, including those similar to Schulz's mural. It has to be acknowledged that authentic aspects in artworks play a significant role in the development of a society and should be preserved regardless of any remaining archaic views that linger in law, and regardless of the identity of the creator or where he/she might or might not belong. Arguably, the public has a moral right to certain works of art, works that can never be completely owned by any one human being alone. The author's *Heimat* and belonging must never play the deciding role in the battle of ownership, because ultimately, it really is a wider question, one that touches on the Divine.

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