THE *SINE QUA NON* OF COPYRIGHT

by DEBORAH M. HUSSEY*

INTRODUCTION

"The *sine qua non* of copyright is originality."[1] Though the originality requirement for copyright is not explicit in the Copyright Clause,[2] it has been expressed in the Copyright Act of 1976[3] and described by the U.S. Supreme Court as the "bedrock principle of copyright" and the "touchstone of copyright protection in directories and other fact-based works."[4] In *Feist*, the question of originality was troubled, in that the Rural Telephone Company's directory for which copyright protection was sought was a compilation of facts, which are in themselves uncopyrightable. Though in *Feist* the Court held the directory uncopyrightable for insufficient originality, the Copyright Act does provide for copyright even in compilations of individually uncopyrightable facts.[5]

That even factual compilations may be subject to copyright suggests that copyright vests all the more tenaciously in works of art. Nonetheless, the question of originality persists with respect to works of art that are produced in series, or using composite methods that may involve the work of others in addition to that of the signatory artist. This article examines the status of the originality of "Rodin" bronzes, in an attempt to discern the realm of the original that subtends copyright and alternative intellectual property rights with respect to works of art.

Auguste Rodin died on November 17, 1917. Yet, through his heirs, he continues to produce bronze sculptures. The status of the posthumous bronzes inspires lively debate in the art world. Some take the position that all posthumous bronzes are fakes, or at best, reproductions of art but not

*J.D. Stanford Law School 2003; Ph.D. Interdepartmental Program in Biophysics, Stanford University 1998; Associate, Cooley Godward LLP; Visiting Assistant Professor of Chemistry and of Women's Studies, Oberlin College 1999–2000; Science Fellow, Institute for International Studies, Stanford University 1998–1999; Graduate Fellow, Stanford Center on Conflict and Negotiation, 1998. Thanks to Profs. John H. Merryman and Paul Goldstein for their support.

1 Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

2 U.S. CONST. art. I, § 8, cl. 8.

3 17 U.S.C. § 102(a) (2000).

4 *Feist*, 499 U.S. at 347.

5 17 U.S.C. § 101 (2000).

art in themselves, because "Dead men don't create art . . .!"[6] Nonetheless, when the bronzes are cast in accordance with legal and artistically appropriate processes, they tend to be regarded as legitimate, authentic, original Rodins by French law, U.S. Customs law, and the international art market. What is at the heart of the debate over the status of Rodin's posthumous bronzes, and why do the people engaged in it care about its outcome?

I. THE TERMS OF THE DEBATE

Some of the terms already used must be clarified in their application to bronze sculpture. Unlike directly carving in stone a unique, finished piece, sculpting in bronze is what Jean Chatelain calls a "compound art," one in which the artist employs craftsmen to realize his work in a finished form.[7] The artist creates a model (maquette), usually in a pliable medium like clay, wax, or plaster. One or more plaster versions of the model are then made: those kept by the artist are called "studio plasters," while those sent to the foundry for use in casting are called "foundry plasters." Rodin viewed his studio plasters as "finished, original, independent work[s] of art, the form in which he liked to show his work" to potential buyers.[8] Bronzes are cast from the foundry plasters. Often a foundry will make its own duplicate of a plaster, so that it can conveniently continue producing casts even if the plaster is damaged; foundry plasters often become distorted since discoloring, softening substances may be applied to them to facilitate their use in the bronze casting process.

Bronzes can be cast from any of these plasters, and multiple bronzes can be cast from any single plaster. A bronze that emerges from the plaster at the foundry is rough, requiring chasing (filing off odd edges and other undesirable artifacts of the casting process) and patination that may be done by the artist or by others. Sometimes an artist will send a plaster to the foundry and cease to be involved closely, never seeing the finished sculpture.

II. ORIGINAL REPRODUCTION

After the creation of the maquette, each step in the production of a bronze lends itself to multiple production, sometimes confusingly called

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[6] Gary Arsenau, Deception 7 (updated May 25, 2000) (self-published manuscript) (on file with Bernard Barryte, Chief Curator, Cantor Center for Visual Arts, Stanford University).

[7] Jean Chatelain, *An Original in Sculpture*, *in* RODIN REDISCOVERED 275 (Albert E. Elsen ed., 1981). Although Chatelain implies that an artist *must* employ craftsmen to finish a work of compound art, that is not necessarily the case; it is certainly the norm.

[8] Aida Edemariam, *I Think, but I'm Not Quite Sure Who I Am*, THE GUARDIAN, Oct. 2, 2001, at 12, *available at* http://www.guardian.co.uk/Archive/Article/0,4273,4268162,00.html.

"reproduction." Which of the many objects produced at the many steps of the process of casting a bronze should be called an original? The *Oxford English Dictionary* ("*OED*") defines "original" as: "1. Of or pertaining to the origin, beginning, or earliest stage of something; that belonged at the beginning to the person or thing in question; that existed at first, or has existed from the first: primary, primitive; innate; initial, first, earliest."[9] Applying this definition to this process, it is clear that the maquette is original: it is of the earliest stage of the process, it first belonged to the artist, and the rest of the entire process proceeds from it, i.e., is secondary to and was made later than the maquette. All of the subsequent steps on the way to the bronze are necessarily not of the earliest stage and have not existed from the first step in the process, so they do not seem to fit under this definition of "original."

The dilution of originality into multiplicity under sense 1 of "original":

maquette →	plaster model made by artist: "studio plaster" or "foundry plaster" →	often, duplicate plaster model made by craftsmen to use in casting, while protecting the plaster that was sent to the foundry: "foundry plaster" →	bronzes, cast from any of the plasters
unique	there may be > 1	there may be > 1	there may be > 1
originality, time → → → →	→ → → →	→ → →	→

The other most relevant modern usages of "original" are:

> 4. Produced by or proceeding from some thing or person directly; not derivative or dependent; a. Proceeding immediately from its source . . . not arising from or depending on any other thing of the kind; underived, independent. [Examples of this usage are given.] b. Made, composed, or done by the person himself (not imitated from another): first-hand. [Examples of this usage are given.]
>
> 5. Having the quality of that which proceeds from oneself, or from the direct exercise of one's own faculties, without imitation of or dependence on others; such as has not been done or produced before; novel or fresh in character or style.[10]

All of these criteria apply to the maquette.

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[9] THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2010 (1971) [hereinafter OED].

[10] *Id.*

The studio plaster or foundry plaster made by the artist, though derived by him from the maquette, is also produced by him directly, and does not depend on any other thing of the kind, i.e., any other plaster model. These two senses of "original" seem applicable to a plaster model made by the artist, though it is not from the original step in the process, and thus is not captured by sense 1.

Interestingly, none of these definitions — even sense 1 — turns on uniqueness. Though uniqueness might be inferred from the usage of terms like "primary," "initial," "first," "earliest," "not derivative or dependent," and "novel," it is conceivable that two or more objects could at once be first, as when a sphere is sliced in half and two equivalent, interchangeable hemispheres are produced at the same instant, so that both could be called original hemispheres (and an infinite number of such slices could theoretically be made at once, producing multiple original sections). Hence, one could meaningfully employ the phrase "an original multiple" to describe one of these equivalent sections.

In the process of plaster molding or bronze casting, just as in that of giving birth to twins, however, such simultaneity is not attained: if two models are made by the artist from the maquette, one is made first, just as one twin emerges some time before the other. One reading of sense 5 suggests that simultaneity is required for multiple originality: the object must be such as has not been done or produced *before*. However, this kind of distinction suggests that in producing a set of multiples, the artist has actually originally created only the first that happened to be realized, and then merely imitated the original in producing the others. This distinction seems a bit absurd, and for the most part falls below the resolution of scholarly and documentary scrutiny of artistic processes as a practical matter. Perhaps if the artist were to make two models in quick succession, and note on the first (one hopes, for the sake of accuracy), "I made this one first," and on the second, "I made this one second," the first might be considered more original than the second because of sense 1, and hence more valued. The more likely response to this unlikely scenario would be that if any difference in the quality of these two models were detected, that of better quality would be the more valued, while they would both be viewed as original because they were produced directly by the artist, in strict accordance with sense 4. Production by the artist is the key to sense 4 (and arguably, to sense 5) of "original," whereas the exact moment of production is the key to sense 1. Sense 4 is more pertinent to discussions of bronze sculpture in the art world, and still allows the phrase "original multiple" to have meaning.

Furthermore, an obsolete sense 2 of "original" is that of "[h]aving the same origin; sprung from the same stock, or native of the same place,"[11] so that one thing could be "original with" another, as a person is original with someone born in the same town. That this usage is obsolete may indicate that in modern times we favor originality in a stricter sense, but it also indicates that the term has been able to accommodate much greater breadth than sense 1 allows.

If multiple studio plasters (and plasters made by the artist for the foundry) can be original in sense 4, what about plasters made by the foundry, and the bronze casts themselves? They do not proceed directly from the artist's hand: they are derivative of his plaster(s), which for foundry-made plasters are other "things of the kind," so that they fail to satisfy sense 4.a. Upon initial comparison, it appears that these objects do not fit neatly into sense 4, and hence may not be original multiples.

If one were to examine the process of creating a bronze sculpture step by step, perhaps it would be accurate to describe the maquette as the original, or first step, and to describe the bronze as a reproduction of the maquette. "Reproduction" is most pertinently defined as: "2. A copy or counterpart; in recent use *esp.* a copy of a picture or other work of art by means of engraving or some other process,"[12] and "copy" as: "II. A transcript or reproduction of an original. . . . 3. A picture, or other work of art, reproducing the features of another."[13] If there is only one original, as there is when sense 1 of "original" is applied, that original is the maquette. Plasters may come under the definition of "reproduction" as counterparts; they are also part of the means of reproduction, as engraved plates are in producing prints. The cast bronze is a copy that reproduces the maquette's features. From this view, *any* cast bronze can be only a reproduction, and never an original, even were the artist to perform the entire process of its production himself (as did Barye[14]).

However, the process in question is that of creating a bronze sculpture, not simply that of creating a maquette. If the artist had the production of a bronze in mind as he created the maquette and the plasters, these "may be viewed as *preliminary versions* of the bronze which then becomes the finished work or art and hence the original."[15] The term "original"

11 *Id.*

12 *Id.* at 2501 (italics retained).

13 *Id.* at 555.

14 Sylvia Hochfield, *Problems in the Reproduction of Sculpture: 'Flagrant Abuses, Pernicious Practices, and Counterfeit Sculpture Are Widespread'*, ARTNEWS, Nov. 1974, at 20, 24.

15 The College Art Association, *A Statement on Standards for Sculptural Reproduction and Preventive Measures to Combat Unethical Casting in Bronze, appendiced to Legal and Illegal Counterfeiting of Art in America, in* THE PENAL PROTECTION OF WORKS OF ART 414 (Shoshana Berman ed., 1983)

may be salvaged to distinguish some bronze casts from others. For instance, if the artist had performed every step in the process of producing a bronze cast, from making the maquette to applying the patina, it could be meaningful and useful to call the bronze an original of that artist. Under sense 4 the maquette is a unique original, the plaster is original (and, if there is more than one, they are multiples), and any bronze cast by the artist is original (and, if more than one, multiples) as well. Colloquially in the art world, however, original multiples in bronze are often called "reproductions," so that the confusing phrase "original reproduction" is actually used to denote an original multiple.

Originality and multiplicity are compatible under sense 4. For example, in the limiting case in which the artist performs the entire process:

maquette	→ plaster models made by artist and used in casting	→ bronzes, cast by artist from any of the plasters
unique	there may be > 1	may be > 1

originality remains constant

Thus, in principle, under the strict, black-and-white, plain English definition 4 of "original," plaster models made from a maquette, and bronze sculptures made from those plasters, may legitimately be called "original," even if there are many of either. In common practice, however, artists did not personally cast the bronzes from their plasters, and foundries as a matter of course made their own plasters from the artist's plaster, to protect that sent by the artist. This collaboration was the norm — perhaps because not all sculptors were skilled founders, but also because bronze casting is very costly; Barye went bankrupt as a sculptor casting his own work.

Collaborations occur in all compound arts: in the production of fine prints, e.g., the artist engraves the plate, and the printer produces the final images from the plate. Requiring the artist's presence at every step in the production of a work of art bars all compound art from originality. Because the term "original" could still have a useful meaning with respect to the status of compound art in the art world — such as that of distinguishing between legitimate sculptures (or prints) and forgeries — "original" takes on meanings that are adapted to the context of the compound arts, meanings of which some commentators seem unaware.

If such adaptations of these terms seem arbitrary, that is no call to abandon their use all together. It is important to bear in mind that ambiguity is inherent in language, as is evident even in the venerable *OED*, which traces the development of our language over centuries and is an

(International Institute of Higher Studies in Criminal Sciences, Quaderni di Scienze Criminali) (emphasis added).

authoritative reference for its proper usage. For example, in another (though much less used) sense of "copy," it denotes an original: "IV. That which is copied. 8. The original writing, work of art, etc. from which a copy is made."[16] It can be no less called for to adapt terms to the context of their use than to use them in their strictest but most contradictory senses.

Alternatives to the further, careful definition of "original" in these contexts are: deciding that all works of compound art are illegitimate because they are not original as defined by the *OED*, or making up or adapting another word. It is important in discussing significant sectors of the art market, and to the historical rigor and accuracy of our understanding of art, to distinguish legitimate from illegitimate works of compound art. It seems sensible to employ the terms already used for that purpose — even though they are potentially confusing — in order to prevent even greater confusion. Awareness of the special senses of "original" and "reproduction" used in these contexts does much to clarify the debates over the status of posthumous bronzes.

As these terms are contested in the art world, professionals work to develop definitions appropriate for their fields and to develop consensus around those definitions. For printmaking, e.g., the Print Council of America defines an original print as:

> a work of art, the general requirements of which are: 1. The artist alone has created the master image in or upon the plate, stone, woodblock, or other material for the purpose of creating the print. 2. The print is made from the said material by the artist or pursuant to his directions. 3. The finished print is approved by the artist.[17]

The cited authors discussing this definition have noted that generally, these adapted definitions of "original" have been too broad, or else become quickly outmoded by artists who challenge the categorization of art into originals and reproductions.

III. AUTHENTIC

The debate over whether or not a work is original is actually part of a more fundamental debate over whether or not a work is *authentic*. While bronze sculpture and printmaking can be characterized as "reproductive

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16 OED, *supra* note 9, at 2010.

17 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 793 (3d ed. 1998) (quoting PRINT COUNCIL OF AMERICA, WHAT IS AN ORIGINAL PRINT? PRINCIPLES RECOMMENDED BY THE PRINT COUNCIL OF AMERICA (1967)).

arts"[18] and we could debate over whether even Barye's bronzes that he himself cast are originals, reproductions, or original reproductions, the controversy that matters is over whether a cast is authentic, legitimately to be associated with the artist. The *OED* pertinently defines "authentic" as: "3. entitled to acceptance or belief, as being in accordance with fact, or as stating fact; reliable, trustworthy, of established credit. . . . 6. Really proceeding from its reputed source or author; of undisputed origin, genuine. (Opposed to *counterfeit, forged, apocryphal.* . . .).[19]" Because sense 4 of "original" can be read into sense 6 of "authentic" — both of which are most pertinent to art works — when scholars debate over whether a Rodin bronze is "original"[20] they are simultaneously trying to win the debate over whether it is authentic.

However, "original" is also somewhat distinguishable from "authentic": while originality depends upon being produced by someone *directly*, proceeding *immediately* from its source, and being made by the artist *first-hand*, authenticity depends only upon "*really*" proceeding from its reputed source, and thus being entitled to acceptance or of established credit. Whether or not production by the artist is first-hand or direct, and whether or not the work proceeds from its source immediately, is outside the scope of the definition of authenticity to the extent that those qualities are distinguishable from "real."

Since the decision whether something is authentic is at least partly a political decision,[21] scholars attempt to win the debate on the seemingly more objective ground of the original. However, as we have seen, the choice of a definition of "original" to apply can be in turn a political

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18 Chatelain, *supra* note 7, at 278.

19 OED, *supra* note 9, at 143.

20 As for example, in the symposium "What Is the Original?" held in conjunction with the exhibition, *From Plaster to Bronze: The Sculpture of Auguste Rodin*, at the MacLaren Art Centre, Barrie, Ontario, Canada on Nov. 6, 2001.

21 For, as Monique Laurent notes, the decision that the first twelve original multiples will count as authentic, while the thirteenth that is in all other respects the same will be a reproduction, is arbitrary. Monique Laurent, *Les Éditions de Bronze du Musée Rodin*, *in* RODIN ET LA SCULPTURE CONTEMPORAINE 13, 16 (Musée Rodin ed., 1983). Such arbitrary line-drawing is a political process. Here, the interest of obtaining higher prices for scarcer works (*see id.*) is balanced against the greater dissemination of Rodin's œuvre. *See also* Chatelain, *supra* note 7, at 277: The "material difference existing between an original edition and those that come after . . . is not imposed by material limitations but willfully decided by men," and:

> [R]arity . . . arises out of the purely arbitrary decision to limit examples to a given number. . . . [A]nything is more valued when it is rare. . . . [I]t is quite normal for this formula of rarefaction to be used to boost the value of arts which might otherwise by underestimated due to the very fact that they are reproductive arts, producers of multiples.

Id. at 278.

choice: many definitions are available and all have different implications for the debate.

Various definitions of "originality" and their implications for authenticity:

Definition:				
"original" is defined so that only the maquette is original, and not the bronzes	→ maquette, studio plaster and foundry plaster are original if the artist made them; bronzes are original if he personally finished or approved them	→ bronzes are original only if made from artist's plaster under his personal supervision	→ bronzes are original only if made from artist's plaster with his authorization, with or without his personal supervision	→ it doesn't matter whether bronzes are original; they are authentic if they represent the artist's idea
Implication:				
since all bronzes are reproductions, there is no "original" bronze: either originality does not enter the question of their authenticity, or it does and no bronze can be authentic	bronze may or may not be an original: the question of its originality and authenticity remains open	bronze may or may not be an original: the question of its originality and authenticity remains open	bronze may or may not be an original; question of its originality and authenticity remains open	since originality does not enter the question of their authenticity, whether or not bronze is "original" is moot

originality

For scholars using the middle three definitions of "original," the question of authenticity depends in part on the answer to the question of originality: an original bronze will more readily be regarded as being entitled to acceptance, or as bearing established credit. I now turn to the great debate over what counts or should count as an authentic Rodin bronze, and the interests of various players in the art world in its outcome.

IV. THE ARTIST: RODIN'S POSITION AND INTERESTS

To determine how Rodin regarded his bronzes and why, we may examine the records of his production. Rodin produced his bronzes in a variety of ways. He always collaborated with founders: there are records of his collaboration with twenty-eight foundries of various prominence.[22] Wanting to disseminate his works, he customarily authorized unlimited production of his bronzes, while to please certain collectors, he would also

[22] Laurent, *Éditions de Bronze du Musée Rodin*, *supra* note 21, at 14.

agree to make only one cast of a purchased work and to destroy the plaster.[23] His level of involvement in his collaborations with the foundries varied: Albert Elsen writes, "[Rodin] was particularly concerned with the first casting of a major work. Thereafter, he expected his assistants to follow his standards."[24] Antoinette Romain, General Curator of Sculptures at the Musée Rodin, opines that particularly for large editions, it is unlikely that Rodin personally supervised the finished casts.[25] Reduced multiples of *The Kiss*, of which 319 were produced with Rodin's blessing between 1898 and 1918, were cast, finished and sold by the foundries without Rodin's further involvement.[26] Patination was often carried out not by Rodin, but by specialists who did not necessarily work at the casting foundry (e.g., Jean Limet, whom Rodin particularly trusted, patinated most Rodin bronzes cast between 1900 and 1915). A former curator of the Musée Rodin cautioned that "the notion of strict control of the casts and the patinas by Rodin himself needs to be shaded, at least from [i.e., since] 1900."[27]

Some of Rodin's writings reveal his attitude towards posthumous bronze casts of his works. On April 1, 1916 he donated to France all of his works of art and the attendant right of their reproduction. The only time Rodin himself imposed a limit on the number of bronzes to be cast was in this instrument, in which he reserved to himself a limited reproduction right for the remainder of his life: to produce no more than ten casts of the same work (a right which he never exercised).[28] In his will dated April 25, 1917, he entrusted the organization of the museum that would be created to assume custody of his works to Léonce Bénédite, who was then the Curator of the national museum of Luxembourg. This museum, the Musée Rodin, was created by decree of the French government on March 12, 1919.[29] In a letter Rodin wrote to Bénédite in September of 1916, he

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[23] *Id.*

[24] Albert E. Elsen, *On the Question of Originality: A Letter*, 20 OCTOBER 107, 108 (Spring 1982). This is analogous to printmaking, in which an artist will approve a proof as ready to pull, and then entrust the printing to the printers.

[25] Telephone Interview with Antoinette Romain, General Curator (Sculptures), Musée Rodin, Apr. 26, 2002 [hereinafter Romain Interview].

[26] Laurent, *Éditions de Bronze du Musée Rodin*, *supra* note 21, at 15; the number 319 is from Sarah Milroy, *Rodin: Truly, a Bust*, GLOBE AND MAIL (Toronto), Sept. 22, 2001, at R15.

[27] Monique Laurent, *Observations on Rodin and His Founders*, *in* RODIN REDISCOVERED, *supra* note 7, at 285. "From" is probably a translation of "depuis," which also (and more appropriately here) means "since."

[28] Laurent, *Éditions de Bronze du Musée Rodin*, *supra* note 21, at 15; Laurent, *Observations on Rodin and His Founders*, *supra* note 27, at 285.

[29] Monique Laurent, *Vie Posthume d'un Fonds d'Atelier: Les Éditions de Bronzes du Musée Rodin*, *in* LA SCULPTURE DU XIX[e] SIÈCLE, UNE MÉMOIRE RE-

expressed his wish that, to the extent the revenue from the exercise of his rights of authorship would allow, his works that existed only as plasters in his studio at Meudon be cast in bronze, so that his entire œuvre definitively could be realized.[30]

From this information we can infer that Rodin wanted to disseminate his works so that he would have a large audience, that he wanted to please collectors so that they would pay well for his works, that he wanted to control the quality of his bronzes so that his reputation as an artist would be great, that he wanted his works to be preserved through time, and that he wanted the œuvre he had envisioned — but had not the time nor resources to complete — to be realized. Perhaps he limited his own production to editions of ten when he donated his works to France because he was trying to reserve for himself only personal use while he still lived.

The artist's interests in having a large audience and in having his œuvre realized posthumously are in tension with his interests in quality control, in fetching greater prices for rare or unique works, and in preserving his œuvre as he himself envisioned it. As is clear from his 1916 letter to Bénédite, he balanced these interests in his own mind, and decided to entrust quality, preservation, and price control to his heirs so that he could reach a greater audience over time. In discussing Limet, Laurent points out that Rodin was generally reluctant to trust others with his artistic execution. However, it follows that since he was clearly capable of such entrustment even while he was alive, he would likely be all the more prepared to entrust his work to his heirs after his death. Perhaps Rodin's donation of his works to the state reflect his concern for the broader

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TROUVÉE. LES FONDS DE SCULPTURE, RENCONTRES DE L'ÉCOLE DU LOUVRE 245, 246 (1986) [hereinafter *Vie Posthume*].

30 "Je voudrais autant que le permettront les resources de mes droits d'auteur, que mes œuvres qui n'existent qu'en plâtres à Meudon soient réalisées en bronze pour donner un aspect définitif à l'ensemble de mon œuvre," *quoted in* Monique Laurent, *Éditions de Bronze du Musée Rodin*, *supra* note 21, at 18.

John Tancock of Sotheby's New York wrote that, because Rodin tended to fiddle with multiples of his plasters, "Rodin explained to Sir William Rothenstein that his plasters were plasters and were not suitable for casting in bronze. Once this is done the work, as it were, leaves the artist's hands and is fixed for eternity. Degas felt this and so did Rodin." John Tancock, *Rodin Is a Rodin Is a Rodin*, ART & ARTISTS, July 1967, at 38. However, while Degas expressly did not want his works to be cast in bronze, at least while he was alive (*see* Hochfield, *supra* note 14, at 29 (quoting Degas: "Bronze is for eternity. You know how I like to work these figures over and over. When one crumbles, I have an excuse for beginning again."), Rodin clearly did. Perhaps Rodin reasoned that since he would not be able to tinker with his plasters any more at any rate, he would prefer his works to be fixed for eternity rather than to languish without ever being realized in a more enduring medium.

French cultural context to which his works contribute, and his judgment that the state would be in the best position to make the most of his contribution to that culture. Since he wanted the whole of his work definitively realized posthumously, his position vis-à-vis his posthumous casts is most likely that they are authentic if made from his plasters (and he was very careful to recover those he sent to his foundries[31]) under the supervision of his heirs.

V. THE ARTIST'S HEIR, THE STATE, AND A MUSEUM: THE POSITION AND INTERESTS OF THE MUSÉE RODIN

Rodin left his studio and its contents to France, which created the Musée Rodin as a hybrid of the public and private museum: a national museum whose financial autonomy is essential to its existence.[32] The Musée depends on income derived from the contents of Rodin's studio, especially his plasters. The Musée Rodin's position in the debate is that bronzes are authentic Rodins if made from his plasters under his authority, which has devolved to the Musée as his heir. While the "Musée Rodin is not Rodin himself,"[33] the Musée strives to be faithful to his vision, of which it is better informed than anyone.[34]

The Musée Rodin bears Rodin's moral rights as an artist, which are general and perpetual under French law and include rights of integrity of or respect for the work, its paternity or attribution, divulgation or withholding, withdrawal and modification.[35] It holds his rights of reproduction, which are the rights to produce additional bronzes from plasters cast during his life (in addition to his right of divulgation, which is that of producing casts from plasters that have never been cast). It also held his copyright until it expired in 1982, and will continue to exercise copyright over newly divulged works for fifty years from the date of their divulgation, in accordance with the French law on literary and artistic property of March 11, 1957.[36]

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31 Laurent, *Observations on Rodin and His Founders*, *supra* note 27, at 292.

32 "[L]e fonds d'atelier de Rodin . . . est à l'origine d'un élément essentiel de la vie du musée, son autonomie financière." Laurent, *Vie Posthume*, *supra* note 29, at 245.

33 Romain Interview, *supra* note 25.

34 "I am the curator in charge of the Rodin sculptures. So I spend my life among the plasters of Rodin and I think that I am the person who knows them better than anyone else." Antoinette Romain, General Curator (Sculptures), Musée Rodin, *quoted in The Rodin Controversy* (CBC News Online: Katie MacGuire & Owen Wood, Carol Off, Reporter (aired Aug. 16, 2001)) [hereinafter *Rodin Controversy*].

35 MERRYMAN & ELSEN (3D ED.), *supra* note 17, at 235, 237.

36 Laurent, *Vie Posthume*, *supra* note 29, at 250.

Besides the donation, letter and will discussed above, Rodin left no detailed instructions about which plasters should be cast posthumously, nor how many.[37] Monique Laurent, a former curator of the Musée, has admitted that the Musée did not always carry out its responsibilities impeccably: at various times during its earliest years and through the end of the Second World War, its records were often not well kept, its external sales manager was engaged in forgery, its exclusive foundry before 1926 (Rudier) may have sold casts from its plasters without the Musée's authorization (and without keeping its own records of such sales), and the occupying force during World War II conducted its own production and sales of bronzes.[38] Adding these uncertainties to the fact that Rodin did not limit production of his bronzes while he was alive (except when a particular collector required him to do so for a particular piece), it is unknown how many bronze sculptures could be considered authentic under the criteria of being made from his plasters and under his authority.

Arguably, any and all casts from Rodin's studio plasters produced under the authority of Rodin or his heirs could be considered equally worthy of being accepted as authentic. However, for purposes of maintaining the scarcity that will protect their investment value,[39] at first the Musée and later French law imposed a limit on the number of otherwise equivalent casts that legally could be authorized. This number is arbitrary in that it is not derived from some physical difference between casts that fill the edition and those that would otherwise be authentic but for the fact that the edition has been filled.[40] In February 1946, the Musée limited the number of casts it would authorize to those that would fill out an edition of twelve of any previously cast work, and kept better documentation to help it keep track of how many casts had been made.[41] After about 1950 when it began to divulge bronzes from plasters that had never been cast, these were numbered one to twelve, with an additional proof "0" to be retained by the museum.[42] A French decree of 5 September 1978 declared that the Musée Rodin would sell only original editions of bronze sculptures, cast from models realized by Rodin under the Musée's direct control, so that no more than twelve casts would be made from any one

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37 Romain Interview, *supra* note 25; Laurent, *Vie Posthume*, *supra* note 29, at 248.

38 Laurent, *Vie Posthume*, *supra* note 29, at 248-49.

39 "[L]a numérotation des tirages est tout à fait moderne et . . . émane de la notion de rareté lieé à la spéculation sur les œuvres d'art[.]" *Id.* at 246.

40 "[L]a notion de limitation de tirages à des chiffres nécessairement arbitraires, est moderne et . . . résulte de préoccupations commerciales, en rapport avec la notion de rareté." Laurent, *Les Éditions de Bronze du Musée Rodin*, *supra* note 21, at 16.

41 Laurent, *Vie Posthume*, *supra* note 29, at 249-50.

42 *Id.* at 250.

model.[43] A decree of March 3, 1981 declared the legal definition of an original edition of bronze sculptures: it would be composed of twelve casts, eight numbered in Arabic numerals from 1/8 to 8/8 for the art market, and four that are like artist's proofs, which the Musée has decided to label with Roman numerals from I/IV to IV/IV for permanent public presentation in cultural institutions.[44]

This legal decree defining "original" Rodins literally definitively settles the question of originality under French law, and therefore in the eyes of the French state (and therefore in the eyes of the Musée Rodin). Because the law also confers the entitlement of acceptance upon bronzes that fit the legal definition and establishes them as creditable Rodins, it effectively confers authenticity upon them as well. This latter function of the law is the conferral of "legitimacy," whose definition in the *OED* is "the fact of being legitimate," where the most pertinent definition of "legitimate" is "2. Conformable to law or rule; sanctioned or authorized by law or right; lawful; proper."[45] When questioned about the status of posthumous bronzes, John Tancock of Sotheby's New York said, "Of course, the Musée Rodin casts are legitimate."[46]

Thus, the Musée Rodin views only the posthumous bronzes it produces in accordance with French law as original, authentic, and legitimate. When the authorized number of casts from a plaster has been exhausted, any additional casts made by the Musée are not legitimate, and hence not accepted as authentic nor defined to be originals, and must be labeled as reproductions. Since copyright has expired for divulged works, those may be reproduced by others; such reproductions are clearly reproductions or copies in the very conventional sense that they were not made by the artist or his authorized collaborators, and there is no question of their originality or their authenticity (unless of course they are exact copies that are *not* clearly labeled as reproductions, which could become confused with authentic Rodins). Unauthorized, exact copies not designated as reproductions are forgeries.

Since the Musée Rodin is simultaneously a museum, the artist's heir and an instrument of the state of France, it has diverse interests. To serve its interest in sustaining its financial independence it must act as art-producer and dealer, while as a museum it must serve its curatorial interest, and as his heir has an interest in enforcing the artist's copyright on re-

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[43] Chatelain, *supra* note 7, at 281 n.1 (quoting Article 1 of a joint decree by the French Ministries of Culture and Finance, Sept. 5, 1978).

[44] Laurent, *Vie Posthume*, *supra* note 29, at 250-51.

[45] OED, *supra* note 9, at 1600. The first sense of "legitimate" applies to children.

[46] Telephone Interview with John Tancock, Senior Vice President and Senior Specialist of Impressionist and Modern Art, Sotheby's New York, Apr. 23, 2002 [hereinafter Tancock Interview].

cently divulged works, as well as his *droit moral.* Laurent describes this as a strange mission, in which, for example, as a museum it would be obliged to stop the export of an important Rodin work by a collector, whereas as a dealer, it may hope to sell such a work to a buyer who would want to export it.[47] This situation is clearly a conflict of interests, which gives the Musée yet another interest: to separate diligently its commercial and curatorial functions to protect its own legitimacy and authority.

Its reputational interest often comes under attack by those who also want to derive economic or their own reputational benefit from Rodin's œuvre, so that the Musée makes a point of pride of the acceptance of its posthumous bronzes by the Metropolitan Museum of Art in 1986.[48] The Musée's reputational and economic interests are also served by its scholarly interest in learning all that can be known about Rodin's art: the more documentation and expertise it can develop, the more its position will be respected in the art world, and the more value may be attached to its bronzes.

Interestingly, as Rodin's heir, this institution also has a filial interest, which when served, in turn supports its reputational interest. For example, the Legion of Honor in San Francisco, California, has an amazing collection consisting entirely of bronzes cast during Rodin's lifetime, and has no immediate interest in the status of posthumous bronzes. If anything, one might surmise that their collection would be all the more valuable if all posthumous bronzes were delegitimated. Nonetheless, Lee Miller, its Curator of European Decorative Art and Sculpture, says that she follows the Musée Rodin's opinions, because "the Musée Rodin has great integrity." She was present for a ceremony held by the Musée on the anniversary of Rodin's death at his grave at Meudon, and felt that the Musée's personnel had great personal respect for him. Though "they are faced with a quandary" as to what exactly he would want divulged and how exactly he would like his works to look, she "trusts their judgment, would never doubt their judgment."[49] Mrs. Miller made this comment after I recounted to her part of my interview with Mme. Romain, who told me that Rodin used to sand-cast his bronzes, but now the Musée employs the lost-wax method of casting. This change from Rodin's own practice was made

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[47] "[I]l faut noter l'insolite, pour un conservateur qui, par ailleurs n'est pas déchargé de ses autres activités professionelles, d'avoir à exercer cette étrange mission qui consiste à vendre des œuvres d'art! La vigilance est nécessaire pour assurer la compatibilité de cette doble fonction et veiller à séparer nettement les activités commerciales des obligations patrimoniales." Laurent, *Vie Posthume*, *supra* note 29, at 252.

[48] *Id.* at 253.

[49] These three quotes are from a telephone interview with Lee Miller, Curator of European Decorative Art and Sculpture, Legion of Honor, Apr. 30, 2002 [hereinafter Miller Interview].

because the lost-wax method is "much more faithful to the plaster"; the Musée decided that this change would be an improvement that would allow them to be more faithful to the artist.[50] I asked whether Rodin might have preferred the lower resolution of the sand-casting method, and her reply was that the method itself is not as important as the result: "the main thing is to work with a good model, and we have Rodin's."[51] I also surmise that it is perhaps most likely that Rodin would have preferred to cast his bronzes using the lost-wax method, but resorted to sand-casting because it was cheaper, and its lower costs would enable him to cast more works. Mme. Romain reported that the *Gates of Hell* and *Balzac* were cast only posthumously, because Rodin lacked the financial resources to have them cast himself.[52]

Rodin's vision of a financially self-sustaining museum that would fully realize, disseminate, and preserve his works is itself being realized: the commercial, patrimonial and curatorial interests seem to have converged. In 1986, for instance, the production of well documented, clearly marked, legitimate, posthumous bronzes generated 70% of the Musée Rodin's income.[53]

Both private and public law in France protect the most important interests of Rodin and his heir by enabling the Musée Rodin to exist and sustain itself through the completion of his œuvre, so that it is both disseminated and preserved without dilution, the quality of his works monitored and his reputation protected and promoted: the instrument of Rodin's April 1, 1916 donation to the state, his will of April 25, 1917, the March 12, 1919 decree creating the Musée Rodin, the Law of 11 March 1957, No. 296 that fixes the moral rights of the author / artist in perpetuity and declares it inalienable but heritable, the decrees of September 5, 1978 and March 3, 1981 that regulate the original edition of bronze sculpture, and Rodin's copyright have all served to promote these interests. The artist, heir, museum, dealer and state have all coalesced in the Musée Rodin.

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[50] Romain Interview, *supra* note 25.

[51] *Id.*:

> Author: "How would you characterize any differences between authorized posthumous casts and bronzes made during Rodin's lifetime?"
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> Antoinette Romain: "There is no difference, no real difference. There is only a historic difference; it is older if made during his lifetime."

[52] *Id.*

[53] Laurent, *Vie Posthume*, *supra* note 29, at 252. "Enfin, ces fontes posthumes sont les instruments de la diffusion de l'œuvre de Rodin, mission fondamentale de l'établissement." *Id.* at 253.

VI. OTHER MUSEUMS: THE POSITION AND INTERESTS OF THE MACLAREN ART CENTRE AND THE ROYAL ONTARIO MUSEUM

The MacLaren Art Centre in Barrie, Ontario, a small town north of Toronto, pulled together a collection of dozens of plasters and bronzes attributed to Rodin, and began a tour of an exhibition of this collection at the Royal Ontario Museum ("ROM") on September 20, 2001. When the Musée Rodin learned of this exhibition, it became quite concerned that the pieces were unauthorized — hence, inauthentic — and of poor quality, so that the exhibition's public would come away with an inaccurate and impoverished sense of Rodin's art. The plasters exhibited and used for casting were mostly foundry plasters[54] in poor condition: a spokesperson for the Musée Rodin said, "[Rodin's] plasters are beautiful, are white, are very sensitive. And the plasters which I have seen in Venice last November are not at all like that."[55] The Venice Exhibition featured Gruppo Mondiale plasters and (unauthorized) casts; the MacLaren has acknowledged that many of its plasters came from the Gruppo Mondiale,[56] and so do eleven of the bronzes.[57]

The MacLaren (which captions itself, "people to art") was affronted, and sought to defend its collection with an expert opinion and the argument that since the foundry plasters were "authentic steps in the translation of an original plaster to an original bronze,"[58] displaying them would educate the public about Rodin's artistic process. Citing the inherently "reproductive" (multiple-productive) nature of bronze casting to emphasize similarities between their plasters and bronzes and those that the Musée Rodin (i.e., France) considers authentic, the MacLaren and the ROM claimed that their exhibition should not trouble the Musée Rodin, and that the "Musée Rodin overreacted."[59] The position of the MacLaren is that it has done nothing illegal nor wrong, but is trying to educate the people of Canada about Rodin's work. "The MacLaren's interest is in education. People can touch [the bronzes]; they couldn't interact with the

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54 "That most of the works are 'foundry plasters' coincides with the conclusion of the Musée Rodin." David Schaff, Ltd., Notes on Authentication of Rodin [C]ollection for the MacLaren Art Centre (Jun. 18, 2001) (on file with Bernard Barryte, Chief Curator, Cantor Center for Visual Arts, Stanford University).

55 Antoinette Romain, General Curator (Sculptures), Musée Rodin, *quoted in Rodin Controversy*, *supra* note 34.

56 James Adams, *Art Centre Fires back over Rodin Criticism*, GLOBE AND MAIL (Toronto), at A14 (Aug. 17, 2001).

57 Milroy, *supra* note 26, at R15.

58 David Schaff, Ltd., *supra* note 54.

59 Telephone Interview with Mary Reid, Registrar and Curator, MacLaren Art Centre, May 2, 2002 [hereinafter Reid Interview].

plaster. We want them to interact with the works . . . especially kids and people with disabilities. . . . The plaster stands as a precious piece."[60] Some of these precious pieces were described by the Musée Rodin as "foundry plaster casts, coated with substances that made them easier to unmold — and softened them even more[.]"[61]

The ROM, the first host of the touring exhibition, took the same position as the MacLaren: that rather than flouting Rodin's moral rights, "Canada has embraced moral rights of the creator as few nations in the world,"[62] and wants to share with its audience part of his creative process, presented with clear contextual information. "'Moral rights' in France do not extend around the world more than 80 years after Rodin's death," wrote William Thorsell, President and CEO of the ROM.[63]

The Musée Rodin's main concern is the impression of Rodin's art that is being offered to the public, because they feel that the quality of the exhibited works misrepresents his œuvre. Such misrepresentation misleads the public, and harms Rodin's reputation. Mme. Romain described the plasters as "'worn out' and 'dirty' from multiple castings," and "'too far removed from the artist's hand.'"[64] "It's a wrong thing to come and see bad plasters. They should not show bad image of Rodin."[65] Accordingly, the Musée Rodin called for a boycott of the exhibition.

The Musée's concerns appear well founded: a reporter who seems actually to have examined the works and conducted research on the situation writes:

> [T]he exhibition, in fact, could leave even experienced museumgoers woefully addled about the distinctions between the very different objects on display.
>
> Plasters from the deeply distressed to the pristine, from the mechanically made to those modified by the hand of Rodin in the studio, are given the same star treatment. Earlier bronzes made under the guidance of the Musée Rodin are placed side by

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60 *Id.*

61 Jacques Vilain, *Proceed with Caution*, TORONTO STAR, July 31, 2001, at A21 (letter to the editor).

62 Letter from Meg Beckel, Chief Operating Officer, Royal Ontario Museum, to Dr. Jacques Vilain, Director, Musée Rodin (July 30, 2001) (on file with Bernard Barryte, Chief Curator, Cantor Center for Visual Arts, Stanford University).

63 William Thorsell, *Statues of Limitations*, GLOBE AND MAIL (Toronto), Aug. 13, 2001, at A9.

64 Catherine Osborne, *Rodins in Canada: Real or Fake?*, ARTNEWS, Sept. 2001, at 161 (quoting Antoinette Romain, General Curator (Sculptures), Musée Rodin).

65 Antoinette Romain, General Curator (Sculptures), Musée Rodin, *quoted in Rodin Controversy*, *supra* note 34.

> side with Gruppo Mondiale bronzes made last year, and all are bathed in the same sacral glow of museum lighting.
> Those searching for satisfying explanations from the exhibition's wall labels and didactic panels will find little to go on. Information ranges from the hopelessly terse to the downright fudgy. . . . Numerous plasters are indeterminately labelled in this way, as "studio or foundry plasters," though the distinction is critical. One, arguably, is a work of art, and the other is not.[66]

The MacLaren views the Musée Rodin's interests differently, as those of a monopolist trying to maintain a stranglehold on Rodin's art and on its own expertise and authority respecting his art. Regarding posthumous bronzes, Ms. Reid points out that "the artist's intention is to make a multiple," suggesting that since Rodin wanted his works disseminated far and wide, he would not have wanted the Musée Rodin to monopolize their dispersal throughout the world.[67] This ignores the fact that he entrusted the museum created by France with exactly that responsibility, expecting it to ensure that the quality of his œuvre would be maintained. Ms. Reid feels that the real contention between the MacLaren and the Musée Rodin is over money: that the Musée Rodin is actually concerned about tourism dollars that will be drawn to Barrie, rather than to Paris, to see Rodins. She feels that the MacLaren, "a tiny gallery north of Toronto . . . [that is] publicly funded" actually poses no threat, so that the Musée Rodin's reaction to their exhibition was unwarranted.[68]

Regarding expertise and scholarly authority, the attitude Ms. Reid attributes to the Musée Rodin calls to mind that of a corporation trying to maintain its market position by keeping its trade secrets secret. "The Musée Rodin is savvy and keeps Rodin as mysterious as possible: that's part of their commodification" of Rodin.[69] "Because their copyright is expired, it doesn't matter any more, the Musée Rodin is monopolizing authority on Rodin. Why can't someone else be [a Rodin expert]?"[70] "The Musée Rodin says it is the official custodian of the artist's work and it will decide what is a real Rodin," reports a journalist.[71] "There are other experts in the world," retorts William Moore, the Director of the MacLaren.[72]

As a practical matter, it would be extremely difficult for someone who has not spent a significant amount of time at the Musée Rodin to become

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66 Milroy, *supra* note 26, at R15.
67 Reid Interview, *supra* note 59.
68 *Id.*
69 *Id.*
70 *Id.*
71 *Rodin Controversy*, *supra* note 34.
72 *Id.* (quoting William Moore, Director, MacLaren Art Centre).

as expert as the Musée itself, simply because the Musée holds Rodin's studio and all its contents (including uncast plasters), decades' worth of his art works and records concerning them, his collection of others' art, his business and personal papers, and other effects that a Rodin scholar dearly would need to study.

It is laudable to endeavor to educate a broader public about the work of a great artist. However, miseducation does more harm than good. Someone who has never seen a Rodin, but is aware of his reputation, may come to the exhibition with high expectations of seeing truly great art. When this person is presented with stained, distorted plasters and unauthorized casts that the exhibition's supposed curator would not have shown because of their poor quality (*see infra*), she is likely to feel confused about how this œuvre could possibly be great, and disappointed that art is less amazing than she had imagined or hoped. She may well feel tricked. In lauding Nelson Rockefeller's production and sale of exact reproductions of art works — which Rockefeller touted as serving the public interest by making art more accessible to the people[73] — Edward Banfield fails to note that the public (like a young scholar at the Fogg Museum) is best educated about an artist's work by exposure to that work: we "thirst for direct contact with the past and the true."[74]

It seems most likely that the MacLaren could not afford a collection of authorized Rodins, and hoped to use this more accessible collection of unauthorized works, along with the artist's name, to attract the tourism dollars that Ms. Reid claims the Musée begrudges the MacLaren. Then, the MacLaren used its populistic interests — in this respect the position taken by the MacLaren is reminiscent of that of the Rockefeller Collection, except that the MacLaren's populist concerns may be genuine — to rationalize its use of the dubious plasters and casts from the Gruppo Mondiale: it is trying to bring people to art, and art to people. Self-described as a tiny, publicly funded gallery in Canada, it is itself the little guy, trying to keep the well endowed Musée Rodin from hoarding all the revenue and reputation afforded by Rodin's œuvre. However, disrespect for the artist's will, authority and œuvre is insupportable by this impulse that aspires to serve the public interest. By analogy to a stronger statement made by the College Art Association regarding the even more problematic situation of counterfeit works,[75] one might maintain that the argument

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[73] Edward C. Banfield, *Art Versus Collectibles: Why Museums Should Be Filled with Fakes*, HARPER's, Aug. 1982, at 28.

[74] Albert Elsen, *But Is It Art?*, HARPER's, Oct. 1982, at 4. Prof. Elsen also points out that the Rockefeller Collection reproductions were quite costly, often more so than authentic drawings or prints.

[75] "The argument that this form of replication increases the audience for an artist's work must be rejected on the grounds that what is made available is not

that this confusing sort of exhibition increases the audience for an artist's work must be rejected, on the grounds that what is made available actually misleads the public about the true quality of the sculptor's œuvre.

The MacLaren invited representatives of the Musée Rodin to participate in the symposium, *What Is an Original?*, held in conjunction with the exhibition's first stop at the ROM. The MacLaren also invited Gary Arsenau, an art dealer known for aggressively taking an extreme position in the debate: he argues doggedly that all posthumous casts are "fakes."[76] Ms. Reid, who organized the symposium, thinks that he is simply "gaining notoriety. The bottom line is money: we *paid* him to speak his point of view."[77] The Musée declined to attend, so as to avoid guaranteeing (by the presence of its representatives) the MacLaren exhibit, which it regards as treating Rodin's œuvre in an ethically dubious manner.[78]

One might speculate that the MacLaren also wanted Mr. Arsenau to attend because the Musée would not: Mr. Arsenau would be taking the position that the MacLaren collection are fakes in a manner that is perceived by many to be unpleasant, thus making his arguments easier to dismiss *ad hominem*. The symposium attendees might, then, be more likely to conflate Mr. Arsenau's position with that of the absent Musée Rodin, lumping together and dismissing wholesale their condemnations of its collection. However, their positions are quite distinct: Mr. Arsenau argues that the legitimate (by definition: e.g., sanctioned or authorized by law or right) Musée Rodin casts are fakes as well, based on the notion that dead artists can no longer create art (and apparently ignoring the compound nature of bronze casting, and the fact that Rodin did not personally finish or see every finished bronze cast during his lifetime).[79]

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an authentic work by the sculptor." The College Art Association, *Standards for Sculptural Reproduction and Preventive Measures against Unethical Casting*, *in* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 549, 549 (2d ed. 1987); *see also* Albert E. Elsen & John Henry Merryman, *Legal and Illegal Counterfeiting of Art in America*, *in* THE PENAL PROTECTION OF WORKS OF ART, *supra* note 15, at 54: "Well-intentioned museums, in their zeal to educate or "turn on" the public to art, are in some instances mass-producing ready-made works for fakers."

76 Telephone Interview with Gary Arsenau, May 4, 2002 [hereinafter Arsenau Interview].

77 Reid Interview, *supra* note 59.

78 "[J]e tiens à vous indiquer que le musée Rodin ne cautionnera pas, par la présence de ses représentants, une opération parfaitement douteuse, au regard de la Morale et de l'œuvre de l'artiste." Letter from Jacques Vilain, Director, Musée Rodin, to William Moore, Director, MacLaren Art Centre (Oct. 8, 2001).

79 Arsenau Interview, *supra* note 76. Mr. Arsenau told me that his working definition of "reproduction" was a copy of an original made by someone other than the artist. At the same time, he regards all bronzes as reproductions,

VII. ANOTHER PRODUCER OF POSTHUMOUS BRONZES: THE POSITION AND INTERESTS OF THE GRUPPO MONDIALE

The Musée Rodin, which has the most complete and authoritative materials on Rodin, was barely aware of Dr. Schaff, the Rodin "expert" consulted by the MacLaren, who had worked with an exhibition by the Gruppo Mondiale ("GM").[80] Dr. Schaff:

> was surprised to hear himself described as "curator" of the [MacLaren-ROM] show and a "noted Rodin scholar" in the press materials for the show. "That," Schaff said, "would be a bit of an exaggeration," adding that if he were to have had control of the show, he would likely have narrowed the selection of plasters, jettisoning some of the most damaged ones, and eliminated the 1999–2000 [GM] bronze casts. These exclusions, he said, "would be about the condition of quality."[81]

The GM claims to recast Rodin bronzes "from Rodin's original plasters" using foundries in Italy, and offers these casts for sale.[82] The GM's position is that its activities are legal, since they are allowed by the copy-

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even those made by the artist: "'Cast' means to reproduce," and, "Casts are all reproductions." I attempted to pose a hypothetical to Mr. Arsenau twice, and got two versions of the same answer:

Author: "How would you regard the authenticity of a cast that was authorized by Rodin and made during his lifetime, but never seen or finished by him?"

Mr. Arsenau: "There's nothing wrong with their profiting during their lifetime with their authorization."

These were apparently regarded as authentic reproductions.

I attempted to pose another hypothetical:

Author: "What if the Musée Rodin were to cast a bronze from one of Rodin's studio plasters, with his authorization — would that be authentic?"

Mr. Arsenau: "The Musée Rodin is corrupt, because they make plaster reproductions of plasters . . . [their bronzes] can't even be called reproductions, because they're copies of copies, not originals."

I could not ascertain how he would view any differences between lifetime casts authorized, but never seen or touched by Rodin, and posthumous casts made under the authority and careful supervision of the Musée Rodin.

[80] From a letter to William Moore, Director, MacLaren Art Centre, Barrie, Ontario, from Jacques Vilain, Director, Musée Rodin (Aug. 23, 2000) (on file with Bernard Barryte, Chief Curator, Cantor Center for Visual Arts, Stanford University):

> I feel I must advise you that we know very little about Dr. David Scharf [sic], the person you refer to as a Rodin expert, other than the fact that he compiled the catalogue for the 1999 Venice Exhibition organized by the Gruppo Mondiale, and as such he would appear to be both judge and jury.

[81] Milroy, *supra* note 26, at R15 (quoting David Schaff).

[82] Gruppo Mondiale, *Auguste Rodin FAQ – Frequently Asked Questions*, *at* http://www.rodin-art.com/faq.htm (last visited Oct. 4, 2004).

right and moral rights laws of various countries including the U.S.A., and presumably Italy but not France, and because in any case Rodin's copyright has expired.[83] The GM also seems to suggest that its activities are ethical in that they serve a policy of copyright law, which allows the "public's interest [to] eclipse[ ] that of the artist's heirs or assignees over time[.]"[84] Thus, the GM puts itself in the position of the public, much as Nelson Rockefeller did when he began to sell exact reproductions of artworks through the Rockefeller Collection.[85]

It is troubling that the provenance for most of the GM works is a chain of three foundries followed by a private collection,[86] because Laurent writes that Rodin was very careful to retrieve his plasters from his foundries.[87] This suggests that the GM is using not Rodin's original plasters, but foundry plasters that have not been cared for and preserved — or if they are in poor condition, destroyed — by those who would serve the artist's *droit moral* above their own pecuniary or reputational interests. Indeed, the GM plasters exhibited in Venice were identified as foundry plasters by both its own consultant and the Musée Rodin.

Even if the GM's casts were to be considered legal outside of France, they would not legally count as authentic casts (original editions) under the French decrees of 1978 and 1981. Are the GM's activities unethical, for violating the laws of the state to which Rodin entrusted the future of his œuvre, and the artist's own intentions? Even if its activities are legally conducted in Italy or the U.S., the fact that they would be illegal in France should caution the GM against disrespecting Rodin's wishes and potentially distorting his œuvre, changing its artistic and historical meaning.[88] Confusion as to the nature of his art may ensue from reproductions that are not at first glance clearly distinct from authentic pieces, but also have not benefited from the institutional knowledge of the Musée Rodin, which grows from that of Rodin himself. The GM claims that "all the casts contain acurate [sic] attribution, thus respecting droit a [sic] la paternite [sic]

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83 *Id.* (citing authorization "by the laws of the United States, countries of the European Union, countries of South America, and Asia.").

84 *Id.*

85 Elsen, *supra* note 74, at 4.

86 "The provenance for most of the works in this collection is: 1) Alexis Rudier Foundeur [sic], Paris; 2) Eugene Rudier, Paris; 3) Georges Rudier, Paris; 4) Private collection (France) to Gruppo Mondiale Est." Gruppo Mondiale, *supra* note 82.

87 Laurent, *Observations on Rodin and His Founders*, *supra* note 27, at 292.

88 Walter Benjamin has written about the danger of recasting history as one from which "even the dead will not be safe." Walter Benjamin, *Theses on the Philosophy of History*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 257 (Hannah Arendt ed. & Harry Zohn trans., 1968).

and avoiding any confusion regarding the origins of each work."[89] While this information is a step in the right direction, the exact reproduction of art works should be outlawed because of their open invitation to forgery.[90]

Bernard Barryte, Chief Curator of the Cantor Center for Visual Arts at Stanford University, recounts that the Cantor was offered a GM cast. Mr. Barryte was interested in it as a specimen for study, since it represents part of the controversy over the authenticity of posthumous Rodin bronzes. His colleagues came to the consensus that while it bore some historical and scholarly interest, the Cantor could not accept it, because by accessioning it, the Cantor would give credibility to spurious GM casts, and the reputation of the Cantor's collection would fall.[91]

VIII. THE POSITIONS AND INTERESTS OF THE EXPERTS

Another ground upon which the authenticity debate is fought, besides originality and legitimacy, is quality. The *OED* pertinently defines "quality" as: "II. Of things. 9. Without article: a. That aspect of things under which they are considered in thinking or speaking of their nature, condition, or properties."[92] Determination of quality, this fundamental aspect that subtends an object's nature, condition, or properties, calls keenly for expertise. Rodin experts are expert in determining precisely this: To what degree does this object embody the quality of a work of art by Rodin?

Experts may base their professional opinions on whether a posthumous bronze is authentic entirely on the answer to this question. If the quality of "Rodin-ness" is present in a high degree, the work will be judged authentic, and if not, it will not. Not only does authenticity depend upon quality in this way, but quality, in turn, depends upon authenticity: an expert's intuition must be well informed by the study of numerous examples of authentic objects, and can be further educated by the study of objects that are known a priori to be inauthentic, for comparison. Thus, it is crucial to our understanding of an artist's œuvre that it be protected from the intrusion of unidentified counterfeits. As a cautionary tale, Elsen and Merryman write of a Harvard University Rodin scholar who was trained on the Fogg Museum's collection of Rodin drawings, and proceeded to authenticate counterfeit drawings by Ernst Durig as Rodins: as it turned out, the collection that had informed her expertise consisted

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89 Gruppo Mondiale, *supra* note 82.

90 *See, e.g.*, Albert Elsen & John Merryman, *Art Replicas: A Question of Ethics*, ARTNEWS, Feb. 1979 at 61; The College Art Association, *Standards for Sculptural Reproduction and Preventive Measures against Unethical Casting*, *in* MERRYMAN & ELSEN (2D ED.), *supra* note 75 at 550.

91 Interview with Bernard Barryte, Chief Curator, Cantor Center for the Visual Arts, Stanford University (Mar. 11, 2002).

92 OED, *supra* note 9, at 2383.

largely of Durig forgeries![93]

An œuvre of bronze casts is particularly vulnerable to exact, unauthorized reproductions, because even properly marked exact reproductions too easily can be confused with legitimate works after alteration of the markings.[94] Bronze casting is also very vulnerable to *surmoulage*, the practice of making a mold from an extant bronze cast, and casting a new bronze from this mold. The resulting cast will be slightly smaller and less well defined than the original bronze, but a nonconnoiseur will be especially vulnerable to mistaking the *surmoulage* (also called an "aftercast") for an authentic bronze. Guy Hain alone has used *surmoulage* to produce hundreds of Rodin forgeries over a period of at least fifteen years.[95] The interest of the forger, and of the foundry that would produce unauthorized exact reproductions, in the authenticity of posthumous casts is that of his own pocket: if he can get away with selling his forgeries, his work can be very lucrative. Guy Hain's position: "'Legally, I am in the right. All bronzes are reproductions anyway, so I am innocent.'"[96]

What is the quality, the "Rodin-ness," that distinguishes an authentic work of art from a forgery? Walter Benjamin discusses this quality in illuminating ways:

> Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. This unique existence of the work of art determined the history to which it was subject throughout the time of its existence. This includes the changes which it may have suffered in physical condition over the years as well as the various changes in its ownership. . . . [C]hanges in ownership are subject to a tradition which must be traced from the situation of the original.[97]

Interestingly, this suggests that provenance has much to do with quality, that quality is not only aesthetic, but historical. Art does perform a social function: it is a medium of communion between the artist and those re-

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93 Elsen & Merryman, *Legal and Illegal Counterfeiting of Art in America*, *supra* note 75, at 67.

94 For example, Guy Hain obtained 250 reproductions from the Rudier foundry in a two-year period, ground off the labels indicating that they were reproductions, and altered the foundry marks to look like those from Rodin's lifetime. Nicholas Powell, *The $60 Million Scam*, ARTNEWS, Sept. 2001 at 158, 159.

95 *Id.* at 160.

96 *Id.* at 161.

97 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 222 (Hannah Arendt ed. & Harry Zohn trans., 1968).

moved from him by the stream of time. A counterfeit work changes history as we know it, putting us in communion with the wrong past, a past that did not exist as the artist's life.

Benjamin in translation seems to write that "the quality of [an actual work of art's] presence is always depreciated" by mechanical reproduction.[98] While this is true in that unauthorized exact reproductions (i.e., counterfeits or reproductions that can function as counterfeits) confuse the public, in the original German he writes of another pertinent aspect of quality. The title of his essay, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*,[99] has been translated as, *The Work of Art in the Age of Mechanical Reproduction*, while more accurately it is: *The Work of Art in the Age of Its Mechanical Reproducibility*.[100] Benjamin's thesis is not that its reproduction depreciates the quality of a work of art, but that its *reproducibility* does: in his time (1892–1940) mechanical means were increasingly being used to make all kinds of things, including art, and he seemed to celebrate the advent of mechanically reproduced (or to use the term I have more narrowly defined above, multiply produced) media like film, while romanticizing the unique art work created by the artist with his own hands. "The technique [that produces multiples] detaches the [multiply produced] object from the domain of tradition. . . . it substitutes a plurality of copies for a unique existence."[101] The work of art that is not mechanically produced as a multiple has something that the mechanically produced multiple does not: "One might subsume the eliminated element in the term 'aura' and go on to say: that which withers in the age of mechanical reproduction is the aura of the work of art,"[102] even when forgery is not implicated. This "aura" is an aspect of quality, of authenticity.

While "aura is tied to [the artist's] presence; there can be no replica of it,"[103] it can be present in varying degrees: it is not black or white. "Precisely because authenticity is not reproducible, the intensive penetration of certain (mechanical) processes of [multiple production] was instrumental in differentiating and grading authenticity."[104] Hence, the authenticity of a bronze that was made from a maquette and plaster made by Rodin, and whose casting was closely supervised by Rodin himself — i.e., a work for the execution of which he was most fully present — is greater than that of

98 *Id.* at 223.

99 Walter Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*, *in* ILLUMINATIONEN: AUSGEWÄHLTE SCHRIFTEN 1, 136 (1974).

100 Thanks to Thomas Freeland for calling this to my attention.

101 Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *supra* note 97, at 223.

102 *Id.*

103 *Id.* at 231.

104 *Id.* at 245.

an authorized work made from his maquette and plaster by a foundry with whom he had a history of working closely, but which for whatever reason he did not supervise directly. The latter is, in turn, more authentic than an unauthorized cast from his plaster by a foundry that has not carried on a traditional relationship with him.

Although "aura" has also turned out to be a new-agey word for something evanescent and incorporeal, "aura" in the sense derived from Benjamin is manifest in the art world. In the international art world, posthumous Rodin bronzes are judged by characteristics such as their provenance, patina, size, and quality, values reflected in the bronzes' prices on the art market, where provenance matters quite a bit: a definitively authentic Rodin *Eve* sold for "$4.8 million at Christie's New York in 1999. The same piece, but without this provenance, might only make $500,000."[105] According to John Tancock of Sotheby's New York, lifetime bronzes are more expensive than posthumous bronzes, and of the latter, those made closer to Rodin's lifetime are more valuable: for example, an authorized, recent, posthumous, thirty-three-inch cast of *The Kiss* might sell for about $1 million, while a 1923 cast of the same type was sold through Sotheby's for $2.2 million in November 2001, and a fine lifetime cast of the same type might fetch $3 million.[106]

The dilution of authenticity, aura and market value of bronze multiples:

TYPE OF BRONZE:			
lifetime cast finished under Rodin's close supervision	→ authorized cast made by foundry that habitually worked with Rodin, but not finished under Rodin's close supervision (lifetime or posthumous)	unauthorized cast made from plaster made by Rodin	→ unauthorized cast made from plaster not Rodin's, *surmoulage*, forgery
EXAMPLE:			
Rodin	lifetime authorized casts of *The Kiss*, authorized posthumous bronzes cast under supervision of the Musée Rodin	Gruppo Mondiale, Michael Gerson[107]	Nelson Rockefeller, Guy Hain
	time → → → →		

authenticity, aura, market value → → → → → → → →

*Though this trend has some continuous properties, this is where I draw the line between the authentic (to the left) and the inauthentic (to the right).

105 Georgina Adam, *Market Report: Art Bronzes. How Has the Hain Affair Affected the Market?*, 118 THE ART NEWSPAPER 68 (Oct. 2001).

106 Tancock Interview, *supra* note 46.

107 Deborah Trustman, *Abuses in the Reproduction of Sculpture*, ARTNEWS, Summer 1981, at 84, 88.

The impulse of the MacLaren in exhibiting GM casts also fits into Benjamin's framework: he describes "the contemporary decay of the aura" as arising from social circumstances, most notably "the desire of contemporary masses to bring things 'closer' spatially and humanly,"[108] which is part of the MacLaren's justification for its exhibition. In discussing cinema, Benjamin writes that "the unique aura of the person" (the stage actor as artist) is replaced by "the spell of the personality" (of the actor on screen) as a commodity.[109] This can account for the high prices brought by exact replicas of Rodins produced by the Rockefeller Collection. "Rockefeller's name has lent the venture cachet[.]"[110] The unique aura of the artist is remote so that the authenticity of Rockefeller Collection bronzes as Rodins is minimal, but this is somewhat counterbalanced in market value by the aura, or at least the spell, of Rockefeller's personality.

To the above figure can be added a third line representing those who take the position in the authenticity debate that the object described in the first line is an authentic work of art. The positions in the debate line up strikingly well with the parties' economic interests. This can be understood in terms of cognitive dissonance: one who performs or benefits from an activity, thus effectively condoning it, may be more inclined to develop a rationalization justifying it. Thus, Hain claims he is innocent because all bronzes are reproductions, in spite of the law to the contrary; the President of the ROM states that, "Replication doesn't devalue bronzes. The idea of art is so powerful, replication doesn't devalue it,"[111] although the effect of scarcity on the market is so well established that it is the source of the limit on the number of casts in an original edition authorized by French law, and as Elsen and Merryman have pointed out, "Exact reproductions of works of art devalue originals by creating confusion between originals and reproductions."[112]

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108 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *supra* note 97, at 225.

109 *Id.* at 233.

110 Trustman, *supra* note 107, at 84, 87.

111 Catherine Dunphy, *Museum Ready for Rodin, Casts Aside Objections*, TORONTO STAR, Aug. 17, 2001, at B5 (quoting William Thorsell).

112 Elsen & Merryman, *Art Replicas: A Question of Ethics*, *supra* note 90, at 61; *see also* Hochfield, *supra* note 14, at 25: "[D]ealers appreciate the economics of scarcity[.]"

The dilution of authenticity, aura and market value of bronze multiples:

TYPE OF BRONZE:			
lifetime cast finished under Rodin's close supervision →	authorized cast made by foundry that habitually worked with Rodin, but not finished under Rodin's close supervision (lifetime or posthumous)	unauthorized cast made from plaster made by Rodin →	unauthorized cast made from plaster not Rodin's, *surmoulage*, forgery
EXAMPLE:			
Rodin	lifetime authorized casts of *The Kiss*, authorized posthumous bronzes cast under supervision of the Musée Rodin	Gruppo Mondiale, Michael Gerson[114]	Nelson Rockefeller, Guy Hain
	time→ → → →		
TAKING POSITION THAT TYPE OF BRONZE IS AUTHENTIC:			
Rodin	Rodin, the Musée Rodin, France, CAA Standards, U.S. Customs Law, Legion of Honor*, Sotheby's, Los Angeles County Museum of Art[113]	Gruppo Mondiale, MacLaren Centre, ROM, Las Vegas Art Museum,[115] Michael Gerson	Nelson Rockefeller, Guy Hain

authenticity, aura, market value → → → → → → → → →

* Though all of the Legion of Honor's Rodins are lifetime casts — so that it could afford to take the leftmost position — it respects the authority and judgment of the Musée Rodin.

Of course, in addition to the historical aspects of quality are the aesthetic, and recognition of the aesthetic expression of the artist can develop into expertise as connoisseurship. The College Art Association Standards include the statement that, "There have been instances when posthumous castings have been superior to some produced by the sculptor himself," for instance, "when a sculptor did not have access to a good foundry[,]"[116] or perhaps when he could not afford a process that could have given him a

113 Kimberly McGee, *Rodin Exhibit Reopens Lively Authenticity Debate*, LAS VEGAS SUN, *at* http://www.lasvegassun.com/sunbin/stories/archives/2001/aug/31/512291509.html (Aug. 31, 2001) (citing Mary Levkoff, Curator of European Culture, Los Angeles County Museum of Art).

114 Trustman, *supra* note 107, at 84, 88.

115 "Rodin's plaster molds are the originals and anything done, by him or otherwise, from these molds is a Rodin." *Id.* (quoting Marianne Lorenz, Executive Director, Las Vegas Art Museum).

116 The College Art Association, *Standards for Sculptural Reproduction and Preventive Measures against Unethical Casting*, *in* MERRYMAN & ELSEN (2D ED.), *supra* note 75, at 550.

result that he would have preferred. This supports the insight that the aesthetic and historical aspects of authenticity are distinguishable, so that it should not seem absurd that an exact reproduction could be a counterfeit. Though aesthetic quality is decisive for some scholars, the entire question of authenticity does not turn on aesthetics alone.[117]

Determining the quality of the true Rodin can be challenging even for the most experienced and learned experts. The most extreme challenge in this regard was left to the Musée Rodin by Rodin. Given that he entrusted the definitive realization of his œuvre to the Musée without leaving any more specific instructions, it is "faced with a quandary" (as Mrs. Miller put it[118]), a void (as Laurent put it[119]), as to what exactly he would want divulged. Rodin used to cast multiple plasters from his maquettes and continue to work with and rearrange them. Some were "transformed into works of art in their own right. Others were completed and once deemed finished, were cast into bronze or carved into marble."[120] I asked Mme. Romain how these difficult decisions are made, and she indicated that they were extremely delicate determinations made with much careful consideration by several Musée Rodin experts working together. The main question seemed to be, "Was the work finished in Rodin's mind? Today people like unfinished works, but we make a difference between things finished in *his* eyes. [For example, we ask whether the work was] given to someone else or sold or exhibited: *Balzac* was exhibited," so it was deemed finished.[121]

How is this situation different from any other expert, or for instance, the Gruppo Mondiale, trying to guess how Rodin would have finished a bronze? The key difference is that the Musée Rodin stands in the shoes of Rodin, legally and in accordance with his wishes, and is in the best position to make these determinations, practically: Rodin entrusted the Musée with exactly these decisions, and empowered it to make them by willing them to exercise his *droit moral* over his œuvre, which under French law is heritable.

Scholarly experts are interested in truth, historical accuracy, aesthetic quality, and the integrity of their field, of art as an institution. Differences

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117 "[A]esthetic philosophers . . . focus on aesthetic questions. Leaving historical concerns to others, they inquire whether a well-made copy is not *aesthetically* the equivalent of the original. This allows the unwary reader to infer (and some unwary aestheticians to imply) that authenticity does not matter. . . ." John Henry Merryman, *The van Meegeren Problem*, *quoted in* MERRYMAN & ELSEN (3D ED.), *supra* note 17, at 814.

118 Miller Interview, *supra* note 49.

119 Laurent, *Vie Posthume*, *supra* note 29, at 248.

120 Flyer for the exhibition of *From Plaster to Bronze: The Sculpture of Auguste Rodin* at the Royal Ontario Museum, Sept. 20–Dec. 23, 2001.

121 Romain Interview, *supra* note 25.

not only in how the terms of the debate are defined, but in how they are valued, results in some diversity among their positions. These differences in approach and emphasis can be the result of scholarly focus — as that of aestheticists on aesthetics — and can be influenced by the context in which the expert is providing his opinion. Generally, art experts care about the meaning and integrity of art, though they may believe it is best served by various means.

IX. ART AND THE LAW

John Searle discusses social facts as those for which the attitude we take toward them partially constitutes them: a "token" example (pertaining to a single object) of a social fact is that a particular five-dollar bill counts as money; a "type" example is that five-dollar bills in general count as money.[122] His framework for thinking about social (institutional) facts can be applied to art: one might question whether a particular bronze is a fake or counts as a work of art, or whether posthumous bronzes in general count as art. The art world collectively imposes the function of "being art" onto objects, where the function of being art "cannot be performed *solely* in virtue of the object's physical features,"[123] as is illustrated by the fact that an unauthorized exact reproduction is not regarded as a work of art.

Institutional facts have the structure of constitutive rules: "X counts as Y in C," where X is an object that satisfies certain conditions, "counts as" confers or imposes the status of being Y on X, and being Y does not depend exclusively on the physical features of X.[124] In Searle's example, a bit of paper that is X because it has certain physical characteristics, *and* is also "issued by the Bureau of Engraving and Printing under the authority of the U.S. Treasury," counts as Y: it bears the status of being money (in C, the U.S.).[125] Similarly, a bronze cast issued by the Musée Rodin under the authorities of Rodin and the French state, counts as art: the fact is that such a cast bears the social status of being an authentic (and original) Rodin, at least in France, and wherever Rodin's and France's authority are recognized.

As the Gruppo Mondiale and the Royal Ontario Museum point out, France's law is not everyone's law. Even signatories to the Berne Convention for the Protection of Literary and Artistic Works are not required to enforce French law in their countries: Art. 6^{bis} specifically grants an author's right to object to any derogatory action that "would be prejudicial to his honor or reputation," but provides that this right "shall be exercisable by the persons or institutions authorized by the legislation of the coun-

122 JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 32-33 (1995).
123 *Id.* at 39 (emphasis added).
124 *Id.* at 43-44.
125 *Id.* at 46.

try *where protection is claimed*," and that "the means of redress for safeguarding the[se] rights . . . shall be governed by the legislation of the country where protection is claimed" as well.[126]

The Musée Rodin is aware that "the law is different in every country" and feels that "Justice is stronger in France than in the U.S."[127] Under Canadian law the artist's *droit moral* expires fifty years after his death,[128] while U.S. law guarantees the artist's *droit moral* only during his life.[129] The conferral of the *droit moral* to heirs is governed by intestacy laws in Canada,[130] and not addressed by the U.S. Visual Artists Rights Act ("VARA"); the instrument for the transfer of Rodin's *droit moral* is the French donation decree of April 1, 1916, which is not recognized as law in Canada[131] or the U.S. Other laws of the U.S. do not address the situation more strongly than does VARA. For example, while not banning the import of unauthorized casts, the U.S. Customs law provides only that "Original sculptures and statuary, in any material" may enter the country free of duty, where "original sculptures" do not include "mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists."[132] "Original sculptures" do include:

> not only original sculpture made by the sculptor, but also the first 12 castings, replicas or reproductions made from a sculptor's original work or model, by the sculptor himself or by another artist, with or without a change in scale and whether or not the sculptor is alive at the time the castings, replicas or reproductions are completed.[133]

The terms in this statute still clearly require significant interpretation for enforcement. For example, does a *surmoulage* from an original Rodin bronze count as one of the ten reproductions that could be imported duty-free? A law like California's fine print statute, which was amended to apply to multiple sculptures in 1983, takes a step in the right direction by

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126 Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6^{bis}, 1986 U.S.T. 160 (emphasis added).

127 Romain Interview, *supra* note 25.

128 Letter to unidentified recipient from E.M. Agnew, Agnew, Gladstone LLP (Jun. 15, 2001) (on file with the MacLaren Art Centre).

129 Visual Artists Rights Act, Pub. L. No. 101-650, § 603(a), 104 Stat. 5089 (1990), *codified at* 17 U.S.C. § 106A(d) (2000).

130 Letter to unidentified recipient from E.M. Agnew, Agnew, Gladstone, LLP (Jun. 15, 2001) (on file with the MacLaren Art Centre).

131 *Id.*

132 19 U.S.C. § 1202 (2000); UNITED STATES INTERNATIONAL TRADE COMMISSION, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Ch. 97: Works of Art, Collectors' Pieces and Antiques (2004).

133 *Id.*

requiring a very detailed certificate of authenticity to accompany a bronze through various transactions.[134] Only the interests of those trafficking in unauthorized sculptures are served by the lack of the required information (including, e.g., the artist's name, authorization, process, and whether the work is a multiple). The statute goes even farther to discourage such traffic by requiring dealers to warranty the information they provide in the certificates.[135]

Searle notes that determining the conditions that an object must satisfy to be X, so that the status Y can be conferred, is a matter of convention. The convention (in fact, the law) in France is that posthumous Rodin bronzes sold by the Musée Rodin are original, authentic works of art, because that is what Rodin wanted. Basic respect for the artist calls for the recognition of legal Musée Rodin bronzes to be regarded as authentic: as entitled to acceptance or belief, as being in accordance with fact, as being reliable, trustworthy, creditable, as really proceeding from its reputed source or author. It is ironic that one would purport not to only respect but to celebrate an author by ignoring his authority, his expressed wishes, and proceeding to exhibit unauthorized works as his own. Similarly, those who want to respect the artist so much that they would discredit works that he wanted to have carried out posthumously, fail to respect his judgment, his own balancing of the factors favoring and disfavoring their production, and so they fail to respect the artist after all.

CONCLUSION

The Musée Rodin is not only the state of France, but Rodin's heir, and one may recognize its bronzes as authentic without having to implement French law in another nation. Ethical guidelines such as the College Art Association Standards, and disclosure laws like the rare California fine print statute should be adopted and practiced in the art world for its betterment as an institution, and to the good of all but would-be counterfeiters. Such institutional customs would be beneficial in themselves, and could serve as a stronger model and impetus for more formal ordering that would support the best practices of the institution as a whole.

In some sense the debate about the authenticity of Musée Rodin bronzes is like a contest among Rodin's children over their inheritance. While the work of a great artist becomes the cultural property of all — the public inherits from and is enriched by Rodin — the least we can do is to respect his wish that those he entrusted with completing his œuvre be the ones to do so, lest our collective inheritance be devalued.

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134 CAL. CIV. CODE §§ 1742(a), 1744 (Deering 1994).
135 *Id.* § 1744.7.