

THE ARTIST'S PERSPECTIVE
IN THE ACQUISITION, EXHIBITION, AND PRESERVATION OF NEW MEDIA WORKS

By Brooke Oliver

Summary:

New Media art, which is digital, internet, video, or other interactive or variable media art, poses unique challenges to artists and collectors alike in its acquisition, exhibition, and preservation. By design, some aspect of the art work itself changes, such as a moving display, compilation of source code, interaction with the viewer, or by virtue of the work's interplay with a networked or internet environment. Conceptual installation work may include parts that visitors may take home with them. As internet art work is played or displayed, underlying source code sometimes reaches out through the internet to incorporate images or sounds into a changing audiovisual display. The art itself often can be changed by the viewer as a participant in the evolving work, usually within parameters established by the artist. In that context, even defining the "original" work requires an expansion of traditional notions in the commissioning or acquisition of such works.

Because of the variable nature of the medium, New Media artists' concerns are often different than those of artists working in more traditional media. Many New Media artists release their works through the internet under copyLeft licenses that not only permit but encourage subsequent users to alter, modify, and build upon the works. They are less concerned about the work remaining as they created it than in being credited as the initiator of an evolving piece. The expressly limited United States Visual Artists Rights Act (17 U.S.C. § 106A, 113 "VARA") protects the artist's rights of integrity and attribution in the "original" piece of a work of visual art. However, unlike laws of many other nations, U.S. law excludes audiovisual works from the penumbra of its protection. Consequently, many New Media artists' rights of integrity and attribution are not statutorily protected here, though museums displaying work on the internet may be subject to the moral rights laws of other nations.

Given the statutory exclusions in VARA and the jurisdictional uncertainties of worldwide display and distribution of works over the internet, integrity and attribution rights are best addressed contractually. Commission or acquisition agreements must grapple with the question of what is the "integrity" of an artwork that changes. Preserving New Media artwork subject to copyLeft licenses and technological obsolescence also poses unique contractual challenges. A New Media acquisition or commission contract checklist is appended.

Questions of scarcity, value, and price are very different in the context of unlimited digital reproductions or iterations of a work. The New Media artist tends to be less concerned with the economies of scarcity that traditionally govern the value of original art, than with the interconnections and dynamism of the medium and its community of viewers. Nevertheless, the artists' concerns about how to make a living from their art remain timeless. These questions of value are also briefly addressed.

TABLE OF CONTENTS

Page¹

- I. WHAT IS NEW MEDIA ART?1**
 - A. CATEGORIES OF NEW MEDIA ART WORKS1
 - B. WHAT CONSTITUTES THE “ORIGINAL” IN A NEW MEDIA WORK OF ART1
 - C. WHAT IS ACQUIRED WHEN A MUSEUM ACQUIRES A NEW MEDIA WORK FOR ITS COLLECTION? ...2
 - 1) *Internet Art*.....2
 - a) Commissioned Works.....2
 - b) Preexisting Works Already Released, Perhaps Under the GPL, Creative Commons, or Free Art Licenses.....3
 - 2) *Video Art*.....3
 - 3) *Conceptual Pieces*.....4
- II. PROTECTING THE ORIGINAL: MORAL RIGHTS AND NEW MEDIA ART.....5**
 - A. MORAL RIGHTS DEFINED5
 - 1) *Integrity — Wholeness*5
 - 2) *Attribution — Giving Credit Where Credit Is Due or Disclaimer*.....6
 - 3) *Other Moral Rights in the European Union under Berne and Beyond*.....6
 - B. ARTIST PERSPECTIVES ON WHETHER MORAL RIGHTS ARE IMPORTANT TO NEW MEDIA WORKS.....6
 - 1) *Integrity — It’s Not As Big A Deal If The Art Is Hacked When It Is Digital Instead Of Marble*.6
 - a) Back Up Copies Make Restoration Simpler.6
 - b) Artists May Want To Change the Work During Restoration.....7
 - 2) *Attribution Is More Important*.....7
 - 3) *Moral Rights Claims May Arise in Conservation/Preservation of New Media Art*.....7
 - C. MORAL RIGHTS IN THE UNITED STATES8
 - 1) *VARA and the Exclusion of Audio-Visual Works under U.S. Law*8
 - 2) *VARA Coverage is Fact-Specific: Legislative History and Case Law Concerning the Artist’s Intent*.....8
 - D. POSSIBILITY OF MORAL RIGHTS CLAIMS ARISING IN OTHER JURISDICTIONS FOR WORKS CREATED IN THE U.S.9
 - 1) *Jurisdictional Considerations*9
 - 2) *Addressing Jurisdictional Concerns in an Agreement*10
- III. REPRODUCTION AND OTHER SECTION 106 COPYRIGHTS10**
 - A. THE BASIC BUNDLE OF SECTION 106 COPYRIGHTS10
 - B. REPRODUCTION AND CREATION OF DERIVATIVE WORKS NOT A MAJOR CONCERN FOR NEW MEDIA ARTISTS11
 - 1) *Open Source Value System and the CopyLeft Attitude*.....11
 - 2) *General Public License (GPL)*.....11
 - 3) *Creative Commons Licenses*12
 - 4) *Free Art License*.....13
 - 5) *What Obligations Bind The Museum When The Artist Incorporated Code Or Released Preexisting Works Under CopyLeft Licenses?*.....13

¹ Internal pagination

a)	Notice of Distribution under Those Licenses.....	14
b)	Disjunctive Licenses.....	14
IV.	EXHIBITION: DISPLAY AND MAINTENANCE.....	15
A.	LICENSE — WHAT, WHERE, FOR HOW LONG, AND WHAT THEN?.....	15
B.	MAINTENANCE AND ALLOCATION OF RISK OF LOSS	15
V.	CONSIDERATIONS FOR LONG TERM PRESERVATION IN THE INITIAL ACQUISITION.....	16
A.	EPHEMERAL MEDIA FORCES EARLY CONSIDERATION OF PRESERVATION ISSUES	16
1)	<i>If Works Are Not Fully Documented, Art History May Not Have the Option of Preserving New Media Works.....</i>	<i>16</i>
2)	<i>Who and What Decides Whether to Preserve: Role of the Institution, Role of the Artist.....</i>	<i>17</i>
a)	Decision of the Institution	17
b)	Artists’ Instructions and Degree of Flexibility Permitted	17
3)	<i>Documentation to Permit Preservation.....</i>	<i>18</i>
a)	Documentation in Other Media to Permit Archiving.....	18
b)	Does VARA Protect Still Photographs Of The Display?.....	18
4)	<i>VARA and Common Law Negligent Conservation Claims.....</i>	<i>18</i>
VI.	VALUE OF THE ART AND COMPENSATION FOR THE ARTIST	19
A.	WHO CREATES OR DETERMINES THE VALUE OF NEW MEDIA ART?	19
1)	<i>Value Based on Investment to Prevent Obsolescence</i>	<i>19</i>
2)	<i>Internet Exhibitions Juried by Peers</i>	<i>19</i>
B.	CAN AN ARTIST MAKE A LIVING WITH NEW MEDIA ART?	19
1)	<i>Commissions and Acquisitions.....</i>	<i>20</i>
2)	<i>Commercial Distribution vs. High Art</i>	<i>20</i>
3)	<i>Disjunctive Licenses for Innovations and Commercial Applications.....</i>	<i>21</i>
VII.	CONCLUSION	21
VIII.	APPENDIX A: CONTRACT CHECKLIST FOR NEW MEDIA WORKS	22

THE ARTIST'S PERSPECTIVE
IN THE ACQUISITION, EXHIBITION, AND PRESERVATION OF NEW MEDIA WORKS

By Brooke Oliver, Esq. with assistance from Pablo A. Manga, Esq.

50 Balmy Law P.C., San Francisco, California

© 2005 Brooke Oliver

I. WHAT IS NEW MEDIA ART?

A. CATEGORIES OF NEW MEDIA ART WORKS

“New Media Art” is contemporary art that uses emerging technologies in significant ways.² The term is generally applied to disciplines such as:

- [Audio Art](#)
- [Computer Art](#)
- [Digital Art](#)
- [Electronic Art](#)
- [Generative Art](#)
- [Hacktivism](#)
- [Interactive Art](#)
- [Internet Art](#)
- [Performance Art](#)
- [Robotic Art](#)
- [Software Art](#)
- [Video Art](#)
- [Video Game Art](#)

From the Wikipedia on-line encyclopedia at http://en.wikipedia.org/wiki/New_Media_art.

Although the majority of New Media Art is in digital or electronic media, the term is used to apply generally to art in any media where some aspect of its construction alters, is variable, or requires some sort of intervention. <http://variablemedia.net>. Examples of New Media work can be seen on-line at <http://rhizome.org/info/index.php>, <http://variablemedia.net>, <http://artport.whitney.org>, <http://gallery9.walkerart.org>, <http://www.adaweb.com>, http://www.guggenheim.org/internetart/internetart_index.html, and elsewhere.

B. WHAT CONSTITUTES THE “ORIGINAL” IN A NEW MEDIA WORK OF ART

What constitutes the “original” for a New Media work is often very different than an “original” oil painting or bronze sculpture. For digital works, there exists both the source code³ – the programming that makes the display work – and the display itself. Moreover, the display of many New Media works, such as *net.flag* by Mark Napier (<http://netflag.guggenheim.org/netflag/>), *Untitled (Public Opinion)* by Felix Gonzalez-Torres (<http://www.variablemedia.net/e/welcome.html>), or *Raygun* by Victor Liu (www.n-gon.com/Raygun), is modified by interactions with the viewer or the internet environment. Each display of the “original” may well be different than the last.

Copies, modified versions, and derivatives are also common for New Media works, particularly when such works are released by the artist under copyLeft⁴ licenses. This is also the case when a museum has copied, translated, emulated or taken other steps to preserve the

² http://rhizome.org/artbase/selection_criteria.rhiz. The Rhizome ArtBase displays works of New Media art, including ‘net.art’, software art, computer games, and documentation of New Media performance and installation, of potential historical significance. Rhizome.org is a site where many New Media artists first post their new works, both to achieve significant exposure of the work and to document the date of its original release and that the artist was the author of the original version.

³ A glossary of internet art terms is available at http://www.guggenheim.org/internetart/internetart_index.html.

⁴ CopyLeft is a term of art used to describe a group of licenses that permit users of the licensed software, documents, or artwork to freely copy, distribute, and modify the works and generally require that any such subsequent modifications are also governed by the original license. <http://en.wikipedia.org/wiki/CopyLeft>.

“original” work of art. Consequently, it may be most useful to define the “original” of a New Media work in the context of versions and time. Promulgators of the Free Art license (discussed below) posit the following definitions:⁵

The Original (the work's source or resource): A dated example of the work, of its definition, of its partition or of its program which the originator provides as the reference for all future updatings, interpretations, copies or reproductions.

This definition of the “original” is important in understanding exactly what a museum or collector acquires when it commissions or acquires a New Media work of art.⁶

C. WHAT IS ACQUIRED WHEN A MUSEUM ACQUIRES A NEW MEDIA WORK FOR ITS COLLECTION?

Acquisition is tied to what the “original” piece of art is. With works in more traditional media, like paintings or sculptures, it is pretty clear that what is being acquired is a tangible piece of personal property – the painting or the sculpture. It is also generally assumed that the painting or sculpture will remain as it was when the artist declared it complete and delivered it to the museum or collector. Not much attention is placed on defining the original in acquisition or commission agreements for works in traditional media.

With New Media artworks, given their ephemeral nature, the museum and artist need to mutually understand and agree upon what the original is, and how it can or should change. What is acquired and related concerns vary somewhat by the type of New Media art that is being acquired or commissioned. The following categories are illustrative and not exhaustive.

1) *Internet Art*

Key issues in the acquisition or commissioning of internet art include whether the source code resides on the museum’s server (or a server under contract to the museum), or whether the museum simply acquires a right to display a link on its website that links to the machine at the artist’s home where the art work is run or played. Another key issue is the degree of exclusivity the museum acquires.

a) *Commissioned Works*

(i) *Acquire the source code and exclusive rights to it*

Where a new work is commissioned by the museum, the institution and the artist can mutually agree in advance whether the museum will acquire both the source code and exclusive rights to display or distribute the work. They should also agree about whether the museum may reproduce, modify, create derivatives, or authorize others to do so.

Museum and artist must agree about whether the source code will be located on the museum’s server (or a server of a company with which the museum contracts) or whether it will reside on the artist’s computer or server provider. For example, both *net.flag* by Mark Napier

⁵ <http://artlibre.org/licence.php/lalgb.html>.

⁶ Defining the “original” is also key to determining what is protected, if anything, under U.S. and international laws that protect original works of art (the federal Visual Artists Rights Act 17 U.S.C. 106A, 113; the Berne Convention Treaty, and other national “moral rights” laws of nations in Europe and elsewhere), a subject discussed more thoroughly below.

and *Unfolding Object* by John Simon reside on servers under contract to the Guggenheim. Access to, maintenance, and display of the work, is entirely under the control of the museum, or its server provider. The museum typically acquires exclusive rights in such instances.

(ii) *Acquire a display right only*

In contrast, *Pris* by Victor Liu (<http://www.n-gon.com/pris>) and many other works commissioned, for example, by the Whitney for its Artport Gate Pages reside on the artist's server or on a server under contract to the artist.⁷ In such instances, the museum acquires a display and "link-through" right only when it commissions the work. That display and linking right is generally exclusive for a period of time, and the artist typically is permitted to display the work on their own website concomitantly.

The artist's obligations to the museum are to make the work available through those links and to keep the display working for a defined period of time, generally one to five years. In these instances, access to, maintenance, and display of the work is entirely under the control of the artist. The effort and expense involved in doing this, including regular virus scans, dealing with hacks, paying for server space or maintenance and parts for the computer equipment, paying for internet access, and maintaining the links for several years can be quite burdensome on the artist.⁸ The burdens of this long term and on-going maintenance and display obligation are only now coming to light as some of these commissions enter the second, third, and fourth years of their terms. They were too new a form for the practicalities of this to be fully anticipated by the parties at the time of the initial commissions.

b) *Preexisting Works Already Released, Perhaps Under the GPL, Creative Commons, or Free Art Licenses*

Acquisition of pre-existing works poses a more complicated set of concerns, in that those works may already have been released under a variety of free software or copyLeft licenses. Prior release under such licenses can restrict what the museum may do with the work and the degree of exclusivity and proprietary control it can exercise over even its own modifications or emulations of the New Media work. These copyLeft licenses are discussed in more detail below, but suffice it to say here that the museum and artist must confer about how the pre-existing work was previously released and under what terms, and how to accommodate for any pre-existing license restrictions in the acquisition agreement.

2) *Video Art*

Video art, like "TV Garden" by Nam June Paik (<http://variablemedia.net/e/welcome.html> - case studies past), poses other challenges for the museum and the artist in determining the scope of rights granted to the museum. Once a museum has a work of video art, the institution typically does not display the "original" video recording. Rather, if the museum puts the video art on display or loans it to another museum for exhibition, the museum which owns it makes a copy and displays or loans the copy. That raises the legal question: does the museum have the right to make such copies? Typical provisions reserving the copyrights to the artist and granting

⁷ Interview with New Media artist Victor Liu, <http://www.n-gon.com/> by authors, February 4, 2005.

⁸ Interviews with New Media artists Victor Liu, <http://www.n-gon.com/> and Natalie Bookchin, www.action-tank.org by authors, February 4, 2005.

the museum the right to reproduce the work for promotional purposes do not grant that right. The museum must secure the right to make such copies from the artist in the acquisition agreement, and establish parameters for use of the copy and storage of the original.

Other factors should also be considered. For example, is the museum required to destroy each copy after the exhibition or loan ends? What happens when the technology of the original video is obsolete? The museum needs to acquire the right, but not necessarily the obligation, to migrate, translate, or emulate the original in New Media. Such conservation efforts may be done with the best of intentions, but are a huge step to take without the artist's permission. Permission should be addressed in the acquisition agreement. The artist and the museum also need to agree about whether the migrated, translated, or emulated version then becomes the "original"?

Who shall own the copyrights in the copies the museum makes? Under copyright law, the person or entity that permissively affixes the derivative in a tangible medium of expression receives the copyright in the derivative, although the artist retains copyrights in the original work. From the artist's perspective, copyrights in all permitted derivatives, including adjustments of color, brightness, and so on should also be reserved by or transferred to the artist by means of the acquisition agreements.

3) *Conceptual Pieces*

With interactive sculptural conceptual pieces like *Untitled (Public Opinion)* by Felix Gonzalez-Torres⁹ what is acquired is more like a traditional sculpture, with a certificate of authenticity and all the more traditional acquisition contract concerns. Additionally, because such art by its nature and design changes, or elements of it are variable, the museum and artist need to agree upon other less traditional contract terms.

The artist needs to prepare a detailed description of the work so that its integrity can be maintained even with new installations, or as it changes according to the structure and within the parameters of its original concept and design. The artist needs to prepare detailed technical specifications and detailed installation instructions. The artist and museum need to agree upon how closely the museum must follow those instructions, and how far it can go in making adjustments or substitutions. For example:

- If the manufacturer stops making the brand of candy the artist originally used in *Untitled (Public Opinion)*, may the museum replace it with another brand of candy? The museum likely needs some sort of power of substitution for obsolete or irreplaceable parts.
- Does the artist need to be present and approve every future installation, or is the artist's approval of floor plans of the new installation sufficient? If differences over how the piece should be installed cannot be resolved by the artist's review and comment on the floor plans, may the artist then insist upon attending the new installation? If so, who pays for the artist to attend and assist?
- Are all esthetic decisions reserved to the artist, or is the museum obligated only to accommodate the artist's reasonable concerns?

⁹ An installation comprised of a variable pile of candy, viewable at <http://variablemedia.net/e/welcome.html> - case studies past.

- Are these rights cut off at the artist’s death, since it is likely by that time that the museum will know and understand more about the work than the artist’s heirs? Or, do the rights survive the artist? Under the federal Visual Artists Rights Act, artists’ rights in works created after VARA’s effective date do not survive the artist.¹⁰ However, since VARA does not cover many of these works, common law or contractual rights could survive unless expressly limited.

II. PROTECTING THE ORIGINAL: MORAL RIGHTS AND NEW MEDIA ART

A. MORAL RIGHTS DEFINED

Moral rights laws typically protect the “original” work of art or limited editions of a work. Internationally, there are four main types of moral rights: the *droit de divulgation* (right of divulgation or right to withhold), which allows the author to decide whether and when to publish his work; the *droit de retrait ou de repentir* (right to repent or retake), which gives the author the right to withdraw his work from publication or modify his published work; the *droit a la paternite* (paternity or attribution right), which gives the author the right to be credited with his work or to refuse to permit his name to be used with altered or damaged versions of the work; and the *droit au respect de l'oeuvre* (integrity right), which prevents third persons from altering, mutilating, or destroying the author's work. The Berne Convention mandates only the attribution right and the integrity right.¹¹ Consequently, those are two rights focused upon in this paper. Under U.S. law, audio-visual works are excluded from VARA’s limited definition of “works of visual art” and its limited protections of such works, meaning that most digital works would not be protected in this country.¹² Nevertheless, such works are not necessarily excluded from the moral rights laws of other nations.¹³

1) Integrity — Wholeness

The integrity right concerns “integrity” in the sense of the wholeness of the piece, not its truth or honesty. It concerns the wholeness and finiteness of the particular material expression of the artist’s personality as embodied in a work of art, and it concerns who has the right to make decisions about whether it should remain in that original condition.¹⁴ With New Media art, the artist’s conception of the integrity of the piece can be attached to a variety of different aspects of the piece. Does the artist consider the piece, in its wholeness, to be the “look and feel” of the display as originally released? Or, is it the piece’s function and the manner in which the work can change according to interactions with the viewer or the broader internet environment? Or does the integrity of the work reside only in the source code, which code constitutes the rules and structure for the changes in the work that appear on the display? For example, the viewer can change which flag colors and symbols are assembled in the internet *net.flag* using colors and

¹⁰ 17 U.S.C. § 106A(d)(1).

¹¹ Visual Artists’ Rights in a Digital Age, 107 Harvard Law Review 1977, 1981 n.24 (1994).

¹² 17 U.S.C. § 101.

¹³ Visual Artists’ Rights in a Digital Age, 107 Harvard Law Review 1977, 1981 n.24, and at 1988-89.

¹⁴ See 17 U.S.C. § 106A(a)(1).

symbols from flags around the world, but the viewer cannot add in bunnies or duckies. Those are not included in the artist's predetermined set of interactive possibilities.

2) *Attribution — Giving Credit Where Credit Is Due or Disclaimer*

The right of attribution is the artist's right to be properly credited as the author of a work, or to disclaim authorship in the event they no longer want their name associated with an art work.¹⁵ This right to be credited or to disclaim credit was recently affirmed by the United States Supreme Court, which also clarified the substantial limits placed on that right under U.S. law.¹⁶

3) *Other Moral Rights in the European Union under Berne and Beyond*

As compared with VARA, moral rights regimes in other nations may be more stringent when applied to technological manipulation of works.¹⁷ Museums that distribute internet art works internationally should be aware of the possibility of falling under the stricter moral rights laws of other countries. In one Italian case, for example, filmmaker Pietro Germi's son successfully sued a television company for interrupting Germi's movie "Serafino" for commercial breaks. The Italian court held that "even a single commercial break in a film constitutes an alteration of the work's integrity and therefore violates the director's moral rights."¹⁸ While it is unlikely museums will interrupt New Media works for a commercial break about an upcoming show, this ruling demonstrates that traditional moral rights give a significant advantage to the party who wishes to prevent digital alteration of a work.¹⁹ France particularly protects the moral rights of artists.²⁰

B. ARTIST PERSPECTIVES ON WHETHER MORAL RIGHTS ARE IMPORTANT TO NEW MEDIA WORKS

1) *Integrity — It's Not As Big A Deal If The Art Is Hacked When It Is Digital Instead Of Marble*

a) *Back Up Copies Make Restoration Simpler.*

For New Media works, artists typically permit derivatives and often invite changes or improvements to the work itself as part of an open source approach to their work. Moreover, the existence of back up copies of the art means that the work can usually be restored fairly quickly in the event it is hacked, damaged by virus, or otherwise harmed. Restoration does not require the months of work that repainting or resculpting requires, and so New Media artists are less concerned about damage or harm coming to the "original." New Media works are more

¹⁵ 17 U.S.C. § 106A(a)(1) and Cal. Civ. Code §987(d).

¹⁶ VARA provides that the author of an artistic work "shall have the right . . . to claim authorship of that work." 17 U.S.C. § 106A(a)(1)(A). That express right of attribution is carefully limited and focused: It attaches only to specified "works of visual art," § 101, is personal to the artist, §§ 106A(b) and (e), and endures only for "the life of the author," at § 106A(d)(1). Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003).

¹⁷ Visual Artists' Rights in a Digital Age, 107 Harvard Law Review 1977, 1989 (1994) (*citations omitted*).

¹⁸ 107 Harvard Law Review 1977, 1989 (1994)(citing Jennifer Clark, *Italo Court: TV Ad Breaks Violate Moral Rights of Pic's Helmer*, VARIETY, Oct. 18-24, 1989, at 6, 6).

¹⁹ Id.

²⁰ Id. at n24.

indestructible in the short term, but more ephemeral in the long term than works in more durable mediums of expression.

Although New Media artists often release a work for unfettered modification or improvement, most artists working in New Media still believe that the original version of their piece should continue to exist as created, even if as nothing more than a reference or starting point for subsequent works. The artist wants to maintain the integrity of the original iteration of a New Media work, even when it is created so others can interact with or modify it. That desire should be addressed in commission or acquisition agreements.

b) *Artists May Want To Change the Work During Restoration*

The context of free development of an art work also impacts how an artist relates to the work once it is acquired by a museum. Since the medium is more fluid and changeable than bronze, oil, or marble, the artist may want to continue to work on or change the artwork after acquisition. This often arises when the museum is working with the living artist to migrate or translate the piece into a less obsolete medium or technology. However, the very notion of the artist coming in and changing the “original” after acquisition is perhaps a bit shocking to the museum and its curators.

Nevertheless, change is often a central theme or aspect of New Media art. The artist’s desire to continue to develop and evolve the piece, whether by intervention or by the nature of the piece itself being something that reaches out and pulls other images and information into itself from the internet or through the interactivity of viewers, like *Raygun* or *net.flag* or *Unfolding Object*.

This poses challenges and conflicts with some of the traditional notions of conservation and often creates a divide between the curators and conservators. It also challenges the notions of what is a museum: is the institution’s function primarily encyclopedic and archival, to preserve the history of the development of New Media art, or is it an institution for which art and its message are the most important, thus permitting the evolution of the art and the message.

The artist may or may not care about their ongoing involvement in the piece of art, but particularly in the case where the work resides on the artist’s server in the artist’s studio, the question of whether the artist can change the work during the term of the license should be raised in the commission agreement and addressed in a mutually satisfactory manner.

2) *Attribution Is More Important*

New Media artists remain very concerned about being properly credited for their work. New Media artists often establish that they were first to do that particular piece in that particular medium by posting it on Rhizome.org. Even with freely permitted derivatives, many artists would like to see a credit line stating that a work is a derivative of their original piece. This is a provision of both Creative Commons and Free Art licenses, and proper attribution is an essential element of any commission or acquisition agreement.

3) *Moral Rights Claims May Arise in Conservation/Preservation of New Media Art*

The risk of litigation is mitigated by many New Media artists’ embrace of open source philosophy. However, damage to their original iteration or version in the course of maintenance, conservation, or preservation activities could give rise to moral rights claims. Moreover, moral

rights claims could arise for noncompliance with the artist's preservation or installation instructions in the form of a negligent conservation claim,²¹ unless liability is disclaimed or expressly limited on the questionnaire and in the contract. A best efforts provision may satisfy both the artist and the institution.

Without these contractual safeguards, however, a museum could be subject to VARA or the moral rights laws of many nations. A more detailed explanation of those laws follows.

C. MORAL RIGHTS IN THE UNITED STATES

1) VARA and the Exclusion of Audio-Visual Works under U.S. Law

The underlying premise of VARA is that there can be no intentional modification or destruction of a work of visual art without the artist's consent.²² An artist may waive those rights or consent to modification, but it is not permitted without the artist's control and consent.

Under VARA, a "work of visual art" is limited to a painting, drawing, print, sculpture or photograph produced for exhibition, existing in either single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.²³ A work of visual art does not include any motion picture or other audiovisual work, data base, electronic information service, electronic publication, or similar publication, or any portion or part of any such item.²⁴

"Audiovisual works" are works that consist of a series of related images and sounds, if any, which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, regardless of the media, such as films or tapes, in which the works are embodied. A "device," "machine," or "process" is one now known or later developed.²⁵

So, many New Media works, especially internet and other digital art works, are not covered by VARA because most of them are audio-visual works. However, many conceptual and installation works, such as Felix Gonzales Torres' works (e.g. stacks of posters of variable height, piles of candy of ideal weight) qualify as sculpture, and so are covered by VARA. Whether or not a particular New Media is covered will be a fact-specific inquiry.

2) VARA Coverage is Fact-Specific: Legislative History and Case Law Concerning the Artist's Intent

"Congress instructed courts to 'use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the

²¹ Discussed in more detail below. Current New Media preservation strategies focus on the artist's intent and ask the artist to establish parameters for migrating their works into new platforms as the original technology becomes obsolete or unpreservable, and new technology and media become available to archive the works and continue to make them available to the public. <http://variablemedia.net/e/welcome.html>. A questionnaire developed by the Variable Media Project solicits extensive information from the New Media artist. The questions are primarily directed at how to maintain the integrity of the original art work across platforms, equipment, languages, and/or media. <http://variablemedia.net/e/welcome.html>.

²² 17 U.S.C. § 106A. However, these rights are significantly limited under VARA. A discussion of all of the limitations is beyond the scope of this article.

²³ 17 U.S.C. § 101.

²⁴ *Id.*

²⁵ *Id.*

definition [of a 'work of visual art'],' and explicitly stated that 'whether a particular work falls within the definition should not depend on the medium or materials used.'"²⁶

The artist's intent concerning whether the work should be preserved will weigh heavily on a court's determination of whether a particular work is covered by VARA. Whether a work is protected "will often depend upon the work's objective and evident purpose. VARA's protections are limited depending on the purpose of the work."²⁷

Courts are likely to give due "regard to whether such works were ever intended as 'art' or whether they were intended to be displayed as art or were otherwise intended to be preserved for posterity as works of artistic merit."²⁸ An admission that the artist suffered no financial injury as a result of its destruction could weigh heavily against an artist's claim based on moral rights.²⁹

Given New Media artists' open source propensities, and the intentionally ephemeral media of much New Media work, this legal precedent may make it difficult to establish coverage under VARA even for works that are not audio-visual. As a result, contractual provisions concerning preservation of the art's integrity and attribution of the artist are essential. From the museums perspective, a carefully drafted contractual partial waiver of VARA and a statement that the preservation and attribution provisions of the contract expressly modify the artist's moral rights provide the museum with desired certainty.

D. POSSIBILITY OF MORAL RIGHTS CLAIMS ARISING IN OTHER JURISDICTIONS FOR WORKS CREATED IN THE U.S.

1) *Jurisdictional Considerations*

The fact that many New Media works are published and displayed on the internet raises the question of foreign jurisdiction over alterations or modifications that harm the artist's moral rights. In general, the question of whether an artist has rights abroad depends on the existence of a treaty to which both countries belong and which protects the particular work and rights involved. However, some countries, such as Germany and France, protect the moral rights of foreign authors from countries with which they do not have treaties.³⁰ Furthermore, it should be noted that although the European Union has adopted a directive to harmonize copyright protection amongst the member states, the Copyright Directive³¹ does not reach moral rights, which remain under the legislation of the member states and relevant treaties.³²

²⁶ *Pollara v. Seymour et al.*, 344 F.3d 265, 269-70 (2nd Cir. 2003) (citing *Carter II*, 71 F.3d at 84 (quoting H.R. Rep 101-514, 101st Cong., reprinted at 1990 U.S.C.C.A.N. 6915, 6921)).

²⁷ *Id.*

²⁸ *Pollara v. Seymour et al.*, 206 F.Supp 333, 337 (N.D.N.Y 2002).

²⁹ *Id.*

³⁰ Paul Goldstein, *International Copyright: Principles, Law, and Practice* § 4 (2001).

³¹ DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf.

³² According to Section 19 of the European Copyright Directive, "the moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive." DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE

Berne Convention Article *6bis* requires protection of the moral rights of paternity/attribution and integrity, but does not have a procedure for enforcing that requirement. Rather, it is the duty of each member country to enact and enforce laws consistent with Berne.³³ In the United States, the moral rights protected by Berne are embodied in VARA. Berne, like most international copyright treaties, is based on the principle of national treatment for works by authors of other member states.³⁴ This means that each member state must treat the works of foreign authors (from other member states) the same as its own authors. For example, where an internet artwork by an American artist is modified or altered in Spain, the American artist is entitled to all of the protection of moral rights that Spanish law extends to its own authors and artists, and which protection may be greater than is afforded to the artist in the U.S.

Similarly, when a foreign artist's work is acquired by a U.S. museum, claims by the artist against the museum for alteration and modification of the work within the United States are governed by VARA, which may provide narrower protection than the moral rights laws of the artist's home country.

In both of these examples, the violation of moral rights is presumed to take place within a certain jurisdiction. Nonetheless, global display of New Media art on the internet raises the question of whether the artist may be able to bring moral rights claims—and the museum or others defend them—in jurisdictions where the modified or altered work is merely displayed.

2) *Addressing Jurisdictional Concerns in an Agreement*

Museums and artists can agree to choice of law and venue provisions, providing that U.S. copyright law will apply in addition to the standard state law choice of law terms that appear in most contracts. Additionally, applicability of moral rights laws can be expressly modified. While in the United States these rights can be entirely waived, complete waivers will not necessarily be upheld under VARA and in other nations.³⁵

III. REPRODUCTION AND OTHER SECTION 106 COPYRIGHTS

A. THE BASIC BUNDLE OF SECTION 106 COPYRIGHTS

Under U.S. federal copyright law, the copyright owner of a work of art has the exclusive right to reproduce, prepare derivative works, distribute copies, perform audio-visual and other performance-type works, display, and transmit digital audio of the art work.³⁶ These rights apply to the original, copies, and derivative works.³⁷ Artists who work in more traditional media like painting or sculpture tend to consider the Section 106 reproduction, display and distribution

COUNCIL of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf.

³³ Article *6bis*(3).

³⁴ Article 5.

³⁵ Waiver of Moral Rights in Visual Artworks. <http://www.copyright.gov/reports/exsum.html>.

³⁶ 17 U.S.C. § 106.

³⁷ This contrasts with the more limited federal rights of attribution and integrity (VARA) discussed above, which apply only to *original* and *limited edition* of some works of visual art, and not to copies or derivatives of those. 17 U.S.C. 106A. Others cannot make copies or derivatives without the artist's consent, but they may destroy or modify copies or derivatives.

rights to be very important to their ability to survive and flourish as professional artists, restricting reproduction licenses to those that they feel enhance their reputation and prestige as artists and/or provide sufficient economic incentives. Most take great care to ensure that the extent and quality of the reproductions permitted do not undercut the value of their original works.

B. REPRODUCTION AND CREATION OF DERIVATIVE WORKS NOT A MAJOR CONCERN FOR NEW MEDIA ARTISTS

1) *Open Source Value System and the CopyLeft Attitude*

New Media artists who work in digital media tend toward an open source value system with respect to reproduction, display, distribution, and creation of derivative works. In this value system, which comes from the world of open source software development, artists encourage others to build on and develop new works from their original work. These artists often release their work under one of several copyLeft licenses rather than simply releasing them into the public domain. <http://en.wikipedia.org/wiki/CopyLeft>. Where a work is put into the public domain, subsequent users can make downstream modifications proprietary. <http://www.gnu.org/copyleft/copyleft.html>. Under the copyLeft approach, the original author releases the work subject to a grant of rights that precludes conversion of modifications from free works to proprietary works if any of the original copyLeft protected material is included.³⁸ In other words, the original author or artist is still establishing the rules under which reproductions and derivatives are made and distributed, but they are granting others extensive rights so long as those others grant the same rights to those who come after them.

There are three main types of copyLeft licenses applicable to artwork: the GPL (along with its less limited corollaries), the Creative Commons license, and the Free Art license.

2) *General Public License (GPL)*

The GNU (pronounced *guh-noo*) General Public License (“GNU GPL” or simply “GPL”) is primarily applicable to free software, also known as open source software—and to the manuals documentation accompanying such software. “Originally written by Richard Stallman for the GNU project (a project to create a complete free software operating system), it has since become one of the most popular licenses for free software.” http://en.wikipedia.org/wiki/GNU_GPL. “Linux” operating system software is the most widely known example of software distributed under the GPL. The GPL provides for free copying, distribution, and modification of software code under the license, and all subsequent modifications, and restricts those rights from being taken away.³⁹

GNU General Public Licenses are designed to make sure that users have the freedom to distribute copies of free software (and even to charge for the service of distributing those copies if they want to), that users receive source code or can get it if they want it, that users can change the software or use pieces of it in new free programs. It is also designed to make sure people know they can do these things. <http://www.gnu.org/copyleft/gpl.html>.

³⁸ <http://www.gnu.org/copyleft/copyleft.html>.

³⁹ http://en.wikipedia.org/wiki/GNU_GPL.

The GPL imposes restrictions that forbid anyone to deny subsequent users these rights or to ask others to surrender the rights.⁴⁰ If a New Media artist distributes copies of a GPL program, whether gratis or for a fee, they are required to give the recipients all the rights that they have. The artist must make sure that recipients, too, receive or can get the source code and the terms of the GPL.⁴¹ Releasing a work under the GPL assures everyone the effective freedom to copy and redistribute the work, with or without modifications, either commercially or noncommercially. <http://www.gnu.org/licenses/licenses.html#FDL>.

In order to release an artwork under the GPL, the artist must attach a copy of the license to the program along with a notice stating, in part, that “this program is free software; you can redistribute it and/or modify it under the terms of the GNU General Public License.” <http://www.gnu.org/copyleft.gpl.html>.

3) *Creative Commons Licenses*

Whereas the GNU licenses apply principally to software and documents, Creative Commons licenses apply to other forms of content such as music, photographs, film, and art. An artist or author can publish and distribute copies of art work under a Creative Commons license which specifically defines acceptable uses of their work by others. <http://creativecommons.org>. Like the GPL license, Creative Commons licenses are designed to permit broad copying, distribution, public display and modification of creative works while reserving some rights to the creator. Works published online under a Creative Commons license include a link to the license that says “Some Rights Reserved” as opposed to the traditional “all rights reserved.”

Certain baseline rights and restrictions apply in all Creative Commons licenses. Provided that the licensee abides by conditions chosen by the artist, every license grants the licensee the right to (1) copy the licensed work; (2) distribute it; (3) publicly display or perform the work; (4) make digital public performances of it (e.g. web casting); and (5) shift the work into another format as a verbatim copy. <http://creativecommons.org/learn/licenses/fullrights>.

Creative Commons licenses allow the artist to pick and chose from four restrictions that can be combined in eleven different combinations:

- Attribution. You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give you credit.
- Noncommercial. You let others copy, distribute, display, and perform your work — and derivative works based upon it — but for noncommercial purposes only.
- No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.
- Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work. <http://creativecommons.org/about/licenses/>.

⁴⁰ See Section 6 of the GPL at <http://www.gnu.org/copyleft.gpl.html>.

⁴¹ *Id.*

4) *Free Art License*

The Free Art license is an example of a copyLeft license that can be applied to any work of art. http://en.wikipedia.org/wiki/Free_Art_license. The Free Art License authorizes the user “to copy, distribute and freely transform the work of art while respecting the rights of the originator.” <http://artlibre.org/licence/lalgb.html>. It does so by preserving the original artist’s right to be attributed as the author of the original. The Free Art License defines the “original work of art” as the artwork created by the initiator of a communal work, of which copies will be modified by whosoever wishes. It defines “subsequent works” as additions put forward by the artists who contribute to the formation of the work by taking advantage of the right to reproduction, distribution and modification that the Free Art license confers on them.⁴²

The “original (the work's source or resource)” is a dated example of the work, of its definition, of its partition or of its program which the originator provides as the reference for all future updatings, interpretations, copies or reproductions.” <http://artlibre.org/licence/lalgb.html>. This definition of the Original defers to the artist to make the selection of which version of the “original” is an expression of the artist’s intent and personality, but inherently contemplates that there will be subsequent versions by the original artist or others.

New Media artists often want their original piece to exist and be recognized as the source of subsequent derivatives, but want others to modify and improve upon their original. In that manner, their contributions to the evolution and creativity of New Media Art is recognized and respected, while permitting copies and derivatives.

5) *What Obligations Bind The Museum When The Artist Incorporated Code Or Released Preexisting Works Under CopyLeft Licenses?*

When a museum acquires or acquires rights to a preexisting work already released under a copyLeft license, the museum is bound to the terms of that license (i.e. to allow free distribution, reproduction, and creation of derivatives). That can significantly restrict a museum’s right to restrict copies and derivatives from being made, and may in fact require any of the museum’s additions or improvements to be distributed freely rather than retained as proprietary. This could be true for an emulated or translated version, and for the software used to accomplish that, if any. A museum that desires to avoid that result must be very careful in drafting its license agreements to make them proper disjunctive licenses if that is possible. Disjunctive licenses are discussed in more detail below.

When a museum commissions a work, it must also be aware of whether the artist desires or intends to release the work under a copyLeft license, and to negotiate that with the artist such that the original is not released under a copyLeft license, or the release is made under a disjunctive license. On the other hand, and to accommodate the artist’s open source desires, the museum could agree to accept the open source restrictions that release under an open source license imposes.

⁴² <http://artlibre.org/licence/lalgb.html>.

a) *Notice of Distribution under Those Licenses*

How does the museum know whether a New Media work has been released as such? Obviously, it must ask the artist, and there are indicia linked to the released version which the museum can review prior to approaching an artist with a purchase proposal. Generally, a work that is released under any of the copyLeft licenses will have a prominent notice to that effect. Each of the licenses described above provides instructions on how the author or artist should provide notice of the license. In fact, GNU, which requires that software or documentation released under the GPL include a copy of the license, urges users of the Creative Commons license to “include a copy of the license with the work, for every work, all the time” (<http://www.gnu.org/licenses/licenses.html#FDL>) rather than selecting the option of simply referencing the license with a link to a URL because of the chance that the link will not function ten or fifty years in the future, at which point the work would be separated from the permissive grant and people would not know how to use it.

b) *Disjunctive Licenses*

When a work has been released under one of the copyLeft licenses, the acquiring museum is bound to the terms of those licenses, and may not be able to make all the same uses of one of these works as it might with other works it acquires. *See generally* <http://www.gnu.org/licenses>. Moreover, modifications, emulations, translations, or other reproductions of the work may also be subject to the terms of the copyLeft license under which the original was released. This means that even proprietary technology of the museum developed in the course of emulation, translation, or other preservation efforts may actually be required to be “free” under the terms of the GPL, Creative Commons, or Free Art Licenses. <http://www.gnu.org/licenses/gpl-faq.html#DoesTheGPLAllowMoney>. Although this is sometimes an unanticipated or undesired result from the museum’s point of view, the artist may very well desire for that to be the case.

Both may be satisfied if it is possible to acquire the piece under a disjunctive license. Under a disjunctive license, which must be carefully drafted, museums and artists can specify what modifications and improvements will remain subject to the GPL or other copyLeft license, and what the museum may retain as proprietary. Planning this in advance and in coordination with the artist is essential, because a great deal depends on exactly how the original source code is labeled and distinguished from later modifications. To do this validly, both must make sure that the free and non-free programs communicate at arms length, and that they are not combined in a way that would make them effectively a single program. <http://www.gnu.org/licenses/gpl-faq.html#DoesTheGPLAllowMoney>.

Where identifiable sections of a subsequent work are not derived from the GPL program, and can be reasonably considered independent and separate works in themselves, then the GPL does not apply to those sections when they are distributed as separate works. If the two programs remain well separated, like the compiler and the kernel, or like an editor and a shell, then they can be treated as two separate programs, one proprietary and the other remaining under the GPL. But, it must be done properly. <http://www.gnu.org/licenses/gpl-faq.html#DoesTheGPLAllowMoney>. Where the New Media work is not based in source code, these general principles can be applied to the different media work and the terms of the Creative Commons or Free Art licenses under which the work was originally released.

IV. EXHIBITION: DISPLAY AND MAINTENANCE

A. LICENSE — WHAT, WHERE, FOR HOW LONG, AND WHAT THEN?

New Media commission or acquisition contracts must include many other provisions in addition to the normal and customary terms and provisions of a standard acquisition or commission contract. The issue of specifying exactly what is being acquired requires careful attention, defining the original and whether it has been released under any prior license.

Typically, they must include an expanded grant of rights that details where the “original” will reside, and how long it must survive on display. The artist must provide detailed instructions about the piece and its proper display and installation, including permitted alterations. Parameters concerning how much flexibility the museum has in following those instructions should also be mutually agreed upon, with the artist typically wanting more involvement and control than the museum would like.

The contract for internet art must spell out a host of technical specifications such as the service provider on whose servers the piece will reside, the URL at which the work may be accessed, the number of files involved, information about which browser is required or preferred to view the work, whether plug-ins or other software are required to do so, and whether links to those required plug-ins will be furnished on the site. The contract may also specify whether links to other work by the creator will be maintained live on the museum’s site, and whether the artist is responsible for maintaining links from and back to the museum’s website. This is particularly true where the piece’s source code will remain on equipment under the artist’s control or on servers under contract with the artist. However, similar matters concerning links and source code and browser must also be addressed when the “original” will reside on servers under the museum’s control.

B. MAINTENANCE AND ALLOCATION OF RISK OF LOSS

Running a virus scan, cleaning off spy ware, or defragmenting a hard drive are essential components of conserving digital media, yet are often overlooked in acquisition or commission contracts. Regular computer maintenance like this, which we have all become accustomed to in our business computer systems, is also required for the systems on which New Media works are run and displayed. Allocation of responsibility for this is driven by who has access to and control over the server where the work resides. When it resides in the artist’s studio, this can be a time-consuming activity, and the cost in time and resources required to do that maintenance should be built into the acquisition or commission price.

Who is responsible for making and keeping back up copies of the work? Museums that commission or acquire work without addressing this are at peril of losing their art by hacking, virus, or otherwise. Recourse to an artist whose studio has burned down or flooded or whose server has been hacked will often be limited, even where display and accessibility over a number of years is contractually required. Even where onsite and offsite backups exist, responsibility for spending the time and money required to reinstall or restore a work after it has been damaged must be allocated between the artist and the museum. And, may the artist make changes or additions to the piece in the course of doing the reinstall, or must they restore it exactly as it was in the back up?

Even without catastrophe, New Media artists are finding that it is difficult for them to keep a server functioning and connected to the internet for a period of years, facing challenges of both time and money. These burdens of maintenance and risk of loss must be allocated between the artists and the institution.

V. CONSIDERATIONS FOR LONG TERM PRESERVATION IN THE INITIAL ACQUISITION

A. EPHEMERAL MEDIA FORCES EARLY CONSIDERATION OF PRESERVATION ISSUES

At the time of creation, neither the artist nor the museum know whether a New Media work will merit the investment required to preserve the work for posterity. Because a New Media work may become obsolete in only a few years, artists and museums do not have the luxury of leaving a preservation decision to art history. Both the artist and museum need to consider the possibility that a work may merit preservation in advance and create documentation of the creative process and of the work. Doing so preserves at least the option to preserve the piece itself through translation, emulation, or other New Media preservation strategies.⁴³

1) *If Works Are Not Fully Documented, Art History May Not Have the Option of Preserving New Media Works*

Whereas it was possible to wait to decide whether to wash the grime off the ceiling of the Sistine Chapel hundreds of years after the commission, New Media works may be entirely unrecoverable only five or ten years after their creation. The programs in which such works are written may no longer be available (who remembers Word Star?). The media in which they are embodied: magnetic video or audio tape, hard and floppy disks, even CD's and DVD's, may lose their integrity, or equipment on which to play them may no longer be available on the market (remember 8-tracks and reel-to-reel tapes? Vinyl records?).

Pieces that depend on the internet for some of their content, as the environment that the piece interacts with changes, can become obsolete, so it simply would not work anymore. For example, Heath Bunting's *ReadMe* functions now with the web as it is. http://www.irational.org/heath/_readme.html. *ReadMe* is text in html on a white on white screen. The text is from a magazine article describing the artist. It was created when everyone started buying their domain names, when everything on the web started going commercial. Each word in the text has been made into a link – “go” is a link to go.com, “is” is a link to is.com and so on. As each link is clicked, it changes color, becoming visible because it is now owned. The piece is about the attitude that one must own property in order to be visible. However, the pieces exist as the net is now. When the web is something else, the artwork likely will no longer function.⁴⁴ The only way to preserve it is to document it through older media like recordings, photographs, and even paper print outs of the display and the source code.

⁴³ Detailed documentation about the preservation strategies for such works can be found at the Guggenheim's Variable Media Network (<http://variablemedia.net>), which emerged from the Guggenheim's efforts to preserve its collection of conceptual, minimalist and video art.

⁴⁴ Interview with New Media artist Natalie Bookchin, www.action-tank.org, on February 4, 2005.

2) *Who and What Decides Whether to Preserve: Role of the Institution, Role of the Artist*

a) *Decision of the Institution*

Many New Media artists are less concerned about preservation of their works than they are with the development and evolution of their techniques and work. Particularly given the tremendous cost of overcoming obsolescence, many artists are willing to leave the decision about what merits preservation to museums.⁴⁵ However, if an institution decides to invest the sums required to preserve a work, the artist is concerned that the preserved work, in whatever form, remain true to the original, even if that original is variable in many respects. Because of the typically more ephemeral nature of New Media works, the determination of whether to preserve the work is made more often during the artist's lifetime than for works in longer lasting media, where except in the case of disaster, the artist often has passed away before any major conservation or preservation of a work is required. The extent of the artist's involvement, if any, in the preservation activities should be addressed in the original contract.

From the standpoint of art history and an institution's deciding which pieces merit the investment required to emulate or translate rather than merely archive them, it may be that the purely coincidental aspects of an artist's work, or aspects of it that the artist did not purposefully or knowingly create are the things most worth preserving. This is particularly true in the case of the significance or meaning of the artwork. However, it is not true with respect to the integrity of the work of art itself, which must be preserved to the greatest extent possible in order to preserve even the unanticipated results of the work.

<http://variablemedia.net/e/seeingdouble/home.html>.

Emulation is one approach to rescuing New Media art from the ravages of time. The Guggenheim's "Seeing Double" exhibition features a series of original art installations paired with their emulated versions. Both art experts and the public can compare both versions directly and decide whether the re-creations capture the spirit of the originals. Much of the exhibit can be seen on-line at <http://variablemedia.net/e/seeingdouble/home.html>.

b) *Artists' Instructions and Degree of Flexibility Permitted*

In the acquisition or commissioning of New Media work, the artist's instructions about the intent of the work, its operation, its installation, the techniques used to create it, and their view of the essential integrity of the art work provide essential guidelines for preservation of the piece. Contracts for the acquisition or commission of New Media should be clear about how closely the museum must adhere to the artist's instructions. The artist may feel that once the original computer on which the work is displayed dies, the work should forever be put to rest, that death being an essential element of the piece itself.⁴⁶ A museum that acquires such a piece may disagree. If the computer itself is an essential component of the art, then the equipment and how to handle it must be part of the acquisition or commission contract, unless the museum intends only to acquire a display for a period of time. If the museum wants to be able to archive the work after its exhibition, these technical issues must be fully resolved. Who keeps it, where,

⁴⁵ Interview with New Media artist Victor Liu, <http://www.n-gon.com/> by authors, February 4, 2005.

⁴⁶ *Id.* concerning the computer on which *Pris* is running and connected to the internet.

for how long, who maintains it, who pays for maintaining it, and what happens when parts are no longer available are key questions for the contract to answer.

3) *Documentation to Permit Preservation*

a) *Documentation in Other Media to Permit Archiving*

If a work does not have sufficient value to translate or emulate, it often cannot be archived in its original media in any practical way. The media in which it is affixed or the equipment on which it is performed or displayed simply becomes obsolete or “dies” and can no longer be accessed. In that event, the work can be preserved only when it is well documented in other media. Most New Media works will simply be recorded using earlier technology with a longer life, such as photographs, film, or video of the output, and even print outs on the oldest medium of all — paper. This is one of the wonderful ironies of New Media art – it often is preserved in one of the oldest mediums: paper.

Museums already are accustomed to the concept of taking responsibility for storing something somewhere safe. Museums typically attribute value to the documentation surrounding a work of art and already eagerly gather what documentation the artist can provide. They view getting that documentation as a high priority if the artist has not created it as part of creating the piece. Given how ephemeral New Media works are, museums may be well advised to require such documentation as part of the contract, as was discussed in greater detail above.

b) *Does VARA Protect Still Photographs Of The Display?*

An interesting wrinkle arises when contemplating taking photographs of a New Media work. : VARA does not protect a photograph of a work of art that is covered by the statute⁴⁷, but it may protect a photograph of a New Media work that is not itself protected. If the original photograph is created for exhibition and in a limited edition of under 200 copies, and signed and numbered by the photographer, it would be protected by VARA.⁴⁸ A museum desiring to limit that legal possibility might do so by expressly stating in the contract that such photographs are intended solely for archival purposes, and that exhibition of them is permitted but not required.

4) *VARA and Common Law Negligent Conservation Claims*

Under VARA, an artist may assert a claim for grossly negligent conservation.⁴⁹ Since VARA does not apply to most New Media works, an artist may not be able to assert this statutory claim in the event s/he feels the museum was grossly negligent in its emulation, translation or other preservation strategy. However, where a work is not covered by VARA, the federal statutory standard of gross negligence would not preempt a common law negligence claim,⁵⁰ and so the museum may be at greater risk of a negligent conservation claim than for

⁴⁷ 17 U.S.C. 101

⁴⁸ *Id.*

⁴⁹ *Flack v. Friends of Queen Catherine, Inc.*, 139 F.Supp.2d 526, 535 (S.D.N.Y. 2001) (citing 17 U.S.C. § 106A(c)(2)).

⁵⁰ *Felix the Cat Prods. v. New Line Cinema*, 2000 U.S. Dist. LEXIS 21763 (C.D. Cal., 2000)(A state law is preempted by the Copyright Act if "(1) the work at issue comes within the subject matter of copyright; and (2) the state law rights are 'equivalent to rights within the general scope of copyright.'" *Dielsi v. Falk*, 916 F. Supp. 985, 991 (C.D. Cal. 1996); see also *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984). To survive preemption, the state cause of action must protect rights which are qualitatively different from those protected by copyright law. See *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989)).

covered works. This liability can be limited contractually by mutual agreement. Moreover, getting answers about the artist's intent and instructions concerning preservation, (e.g. the Variable Media Questionnaire) and being able to show compliance with them in conservation and preservation would similarly limit liability. However, if the museum has that information and does not follow it, an artist's claim would be stronger.

VI. VALUE OF THE ART AND COMPENSATION FOR THE ARTIST

A. WHO CREATES OR DETERMINES THE VALUE OF NEW MEDIA ART?

1) *Value Based on Investment to Prevent Obsolescence*

Measuring the value of a variable New Media work is difficult.

“It is possible, however, to hypothesize a Web site's putative value independent of its price tag in an exchange economy. That value would be the sum total of money a museum would be willing to spend over time reprogramming the site to ward off obsolescence (see Myth Number 8). Myth Number 9. Internet art will never be important because you can't sell a Web site. <http://www.guggenheim.org/internetart/welcome.html>.

While that may be helpful in valuing a museum's collection, artists are more concerned with how to make a living.

2) *Internet Exhibitions Juried by Peers*

Building on the New Media artists' tradition of posting their new works on sites like Rhizome, Natalie Bookchin has posited the idea of an internet exhibition of New Media works juried by peers as a means to create reputation and value without the economics of scarcity that traditionally fuel value through collecting scarce originals.⁵¹ This is an approach that uses the global audience of opinion and expertise available on the internet to self-evaluate, taking advantage of the broad democracy of the medium. It is not unreasonable to suppose that this type of valuation would affect the thinking and valuations in museums and galleries, since they are already playing “catch up” to this phenomenal new medium for artwork.⁵²

B. CAN AN ARTIST MAKE A LIVING WITH NEW MEDIA ART?

Most New Media artists are still keeping their day jobs. Much the New Media work is simply given away by release under broad copyLeft licenses.

“Beyond the numerous online communities and listserves dedicated to discussing and debating art, many of the best Internet artists reckon success not by the number of technical innovations, but by the number of people plugged in and turned on.” Myth Number 10. Looking at Internet art is a solitary experience. <http://www.guggenheim.org/internetart/welcome.html>.

⁵¹ Interview with New Media artist Natalie Bookchin, www.action-tank.org, on February 4, 2005.

⁵² “...to ignore online art could in the short term mean that museums would lose their relevance to an increasingly networked culture, while in the long term technologically obsolete artworks might slip through the cultural safety net into oblivion. Collecting Online Art, <http://www.guggenheim.org/internetart/welcome.html>.

However success is measured, the artists still need the financial wherewithal to survive and the resources required to permit their work to flourish.

The technology and open source value system of New Media art offer some interesting possibilities for artists. To the extent they reserve certain technical innovations as proprietary, their techniques and skills find a significant market as web site and game designers in addition to their fine art pursuits. The ability to simply cut and paste large sections of code offers significant time savings in the creation of new art works. Repeating patterns of code does not pose the same risk of triteness inherent in repeating patterns in paint or bronze, since the display that results can appear different even when large sections of the underlying code are identical. Moreover, the open source value system among New Media artists permits them to take elements from the work of others and build upon and improve it, without traditional inhibitions and concerns about copying. The New Media works are more a part of a developing conversation.

1) *Commissions and Acquisitions*

Commissions and acquisitions provide some limited funding for the development of New Media work. These are generally small commissions, and institutions necessarily factor in the ultimate costs of preservation when they are acquiring a piece. However, the opportunity to commission and license a piece for display for a limited period at a lower price makes it possible for institutions to commission many works. This appetite for new pieces is further motivated by a desire to keep up with new artistic expressions in this rapidly evolving medium. Smaller museums can avail themselves of these types of display licenses, particularly where the artist assumes responsibility for maintaining the work and keeping it available for the viewers. So, although the commissions may often be smaller, more of them may be available.

Most museums have yet to fully explore the potential of generating revenue from their on-line New Media art displays. While it is unlikely internet visitors will pay for tickets as do attendees at the brick and mortar facilities, it is possible they would contribute to support new commissions or memorialize their version of “Net flag” or otherwise provide support to perpetuate the art form.

2) *Commercial Distribution vs. High Art*

Because of the easily reproducible digital media, there is a potential for widespread distribution of New Media work at relatively low cost. That possibility could make a big difference to artists. It potentially frees those artists from the financial limitations and scarcity imposed by traditional notions of “high” art. For example, many of the New Media works could be downloaded for display on cell phones and digital televisions. This technology is already in use by cell phone carriers and cable systems for ring tones and simple still artwork, and the service providers are rapidly entering into licenses for fine art.

While this may initially shock the traditional notions of exclusivity and sophistication of the museum community, it already is not inconceivable in the current art market for high art to make mundane appearances. Prints and scarves of Monet’s Lilies or Van Gogh’s sunflowers are commonplace, and in fact are staples of museum store incomes. That is not a concern because those reproductions do not harm the value of the original because the original itself is still scarce. In the case of New Media, the original is nearly indistinguishable from the copy, not scarce. However, museums already offer downloads of a New Media screen saver, for example, and

without charge.⁵³ It is not a large step to consider the fee-generating potential of a New Media collection. Museums may be able to take advantage of these technologies and additional distribution channels, perhaps even making digital downloads available for a reasonable price on their websites and sharing the revenue generated with the artists. Wouldn't you rather have something like "net flag" on your cell phone than kittens, puppies, or ducks?

3) *Disjunctive Licenses for Innovations and Commercial Applications*

If such proprietary and commercial development of New Media collections is within the realm of possibility, museums and artists need to plan for them carefully in the initial creation and licensing of the art works. The New Media works that might be destined for such development and licensing must be created under either proprietary or disjunctive licenses with the code containing proper compartmentalization and separation of the modules or kernels that will be released commercially. This requires advance planning in the commissioning or accessioning the piece.

VII. CONCLUSION

We have identified a number of issues presented by the collection, display, and preservation of New Media art works. We have suggested throughout that these issues are best dealt with at the time of the acquisition or commission of the work, and have recommended that they be memorialized in the acquisition or commission agreement. In particular, absent statutory protection, the integrity of the artwork and attribution for the artist must be protected contractually in commission or acquisition agreements. Such agreements also must include technical specifications and the artist's instructions for installation, exhibition, and preservation of the largely ephemeral works. Maintaining the integrity of New Media artwork and preserving it in the context of copyLeft licenses and technological obsolescence pose questions that should also be addressed in the initial agreement. These and the other concerns raised are summarized on the attached contract checklist for convenience.

⁵³ *May Day, 2001* a screen saver by Nancy Davenport, <http://www.guggenheim.org/exhibitions/virtual/>.

VIII. APPENDIX A: CONTRACT CHECKLIST FOR NEW MEDIA WORKS

▶ **Parties**

- Seller
- Buyer
- Agent, if any

▶ **Description of Original Work**

- Artist
- Title
- Date of Creation
- Medium and Materials
 - Storage Medium (media on which work is recorded or otherwise affixed, e.g. Video, Film, tape, CD, DVD, etc.)
 - Tangible Property: equipment, computers, televisions, props, etc.
- Dimensions or other technical specifications of Original
- Whether source code is included or excluded

▶ **Where Will the Original of an Internet Artwork Reside?**

- On museum's premises or website
- On artist's server or host server under contract to artist. If so, then
 - Required advance notice of changes in host server or link
 - Links to required plug-ins, if any, will be furnished on the site
 - Links to other work by the artist will be maintained live on the museum site and creator's site
 - Links from and back to museum's website will be maintained
 - Right to maintain links to the work in archived exhibition files that are publicly accessible, if technologically feasible
 - Coordination with host server providers concerning likelihood of increased hits for duration of exhibition period

▶ **Delivery Date and Conditions**

- Artist's right/obligation to keep an archival master, and any duty to back it up, provide museum with access to it in event museum's copy is hacked, destroyed?

▶ **Purchase Price**

- Conditions to be fulfilled before payment
- Time when payment will be made
- Any additional compensation from licensed uses (see below)

▶ **Artist's Specifications, Instructions, and Documentation Requirements**

- Certificate of Authenticity provided?
- Display/Exhibition/Installation Specifications – can be in an Exhibit or Schedule
 - For Internet Works:

- Service Provider/Host
- URL
- Number of files
- Browser information: Version, Preferred, Necessary
- Plug-ins or other software required
- For Installations
 - Specifics about the equipment on which the Work is played, displayed
 - Installation Plan and Floor Plans for Future Installations
 - Must artist be present for future installations, or is review of floor plans sufficient? What happens if floor plan isn't sufficient, may artist then come to installation? Who pays for artist's travel, food, and lodging?
 - Replacement parts availability and restrictions or flexibility in determining which replacement parts to use
 - Any power of substitution to the museum for obsolete or irreplaceable parts
 - Reasonable accommodation of artist's concerns or all esthetic decisions reserved to the artist
 - Do the museum's obligations to comply with artists instructions survive the artist's death?
- Documentation from artist about the source code or method of achieving the displayed result, detailed description of the work as intended by the artist in order to preserve integrity of the piece in the event obsolescence requires migration, etc.
- Documentation of the Work in other media (photographs, film, video, paper) to permit archiving
 - Who is responsible for creating that documentation – the artist or the museum?
 - If the artist, any additional fee for time and materials
 - Statement that such photographs are intended for archival purposes solely, and that exhibition of them is permitted but not required

▶ **Credit and sponsorship provisions**

- For museum on artist's website
- For artist, including right to disclaim authorship of modifications, if any

▶ **Warranties & Representations**

- Artist or Seller is the owner of the work
- Work is authentic and of the period stated in the "Date" above
- Work's exportation from any foreign country has been in conformity with the laws of such country and that its importation to the United States has been or will be in conformity with the laws of the United States
- The Work is free of programming errors or non-working links

- If the Work will be on the Artist's server, it will remain on the host server and in working order
- Work is free and clear of all liens, claim, restrictions, encumbrances and litigation, and particularly if it is a preexisting digital work, that it has not been released under a copyLeft license
 - If it has been released under a copyLeft license, then issues related to that and any restrictions imposed on the museum as a consequence need to be addressed in a separate schedule
- Work is original by the Artist and does not infringe upon the rights of any person or entity including trademark, copyright, privacy and publicity rights
- That the Seller has the full right and authority to enter into this *Purchase Agreement* and to grant the rights herein granted

▶ **Term (the length of the agreement)**

- If an internet work, term during which the Work will remain on exhibit on the internet
- Right to archive after exhibition and technological requirements or limits for access after the term, particularly in the event the piece is on the artist's server (how long will the artist be required/able to keep the equipment and internet access required for visitors to reach the piece)
- Right to withdraw from exhibition

▶ **Copyrights and Moral Rights**

- Reservation of copyrights to the Artist, except those expressly licensed, including the right to make further use of or derivatives of the source code
 - Artist's obligation to deliver an Archival Master identical to Artist's own Master, if any, along with a copy in an exhibition format, and any additional fee or charge for delivery of the multiple copy
 - Museum's right to make any submasters for preservation and integrity purposes
 - Museum's right to make duplicate copies for loans or the museum's exhibition
 - Museum's right to migrate, translate, or emulate the Archival Master, submasters, or duplication copies in order to preserve the work, and whether that version will then be considered the "original"
 - Disposition of the original "original"
 - Artist's guidelines for the creation of such copies and degree of flexibility museum will have in implementing the guidelines
 - Determination of who shall own the copyrights in the copies and migration, translation, or emulation...reservation of those rights to the artist is preferred by the artist
 - Any right to change or copy the source code?
 - If Work has been released or will be released under a copyLeft license, specifications concerning restrictions on the museum if any, and carefully

drafted disjunctive licensing provisions in the event the museum wishes any of its reproductions to be proprietary. Or, the museum could agree to release of the work under an open source license and accept the obligations to make its migration, translation, or other changes or improvements freely available.

- Integrity Rights- partial waiver- statement that the preservation and attribution provisions of the contract expressly modify the artist's moral rights. Alterations must be permitted in the event of migration, etc. to preserve the work
- Attribution Rights should remain unmodified by partial waiver
- No waiver of moral rights as to any third parties, so that Artist or museum could enforce them in the event a third party harms the integrity of the Work

▶ **What if any rights are being licensed?**

- Degree of exclusivity or non-exclusive.
- Scope of the license
 - Permitted uses, industry or purpose limitations, geographical scope
 - Any right to sell as or with fee-generating products, like downloads; May also preserve option pursuant to separate later agreement.
 - Prohibited uses
 - Rights to modify and combine with other products, if any
 - Rights to transfer, sublicense, resell, if any
 - Rights to source code
- Compensation and revenue streams from licensing
 - Any royalties to the artist from sale of fee-generating promotional products or downloads?
 - any advance, a one-time license fee and/or recurring payments such as royalties
- Reservation to artist of all other rights
- Terminating the license portion of the contract possible?

▶ **Acceptance, testing and training procedures**

▶ **Support and maintenance services, preservation**

- Allocation of responsibility for ongoing maintenance, probably based on who has access to and control over the server where the Work resides
- If it is the artist:
 - Creation and maintenance of onsite and offsite back ups
 - Regular defragmentation, virus and spyware scans and cleaning, degree of protection from firewalls or other security technology required.
 - Responsibility for spending the time and money required to reinstall or restore a work after it has been damaged.
 - May the artist make changes or additions to the piece in the course of doing the reinstall, or must they restore it exactly as it was in the back up?
 - Additional fees to artist for keep a server functioning and connected to the internet

- If it is the museum, then these issues need to be addressed in contracts with server providers under contract to the museum or with the museum's own IT department or risk negligent conservation claims
- Extent of artist's involvement, if any, in preservation activities such as emulation, translation, or migration

▶ **Limitations on liability**

- Limitations on the artist's liability for acts of the museum
- Limitations on museum's liability for acts of the artist

▶ **Nondisclosure of Confidential Information** (caution when piece has or will be released under a copyLeft license)

▶ **Indemnity** – each party indemnifies the other for the other's acts or omissions

- for infringement
- for breach of any CopyLeft license

▶ **Enforcement of remedies**

▶ **International jurisdictional concerns and choice of law**