



## TEACHER'S MANUAL: NOT FOR DISTRIBUTION

### Ecce Homo

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revised by William Fisher

Topic: Fairness and Personality Theories

*This case study explores a conflict between the personhood theory and the labor theory of intellectual property. In 2012, Spanish octogenarian Cecilia Giménez became an internet sensation for her botched “restoration” of a church fresco that left Jesus Christ looking like “an aghast ape.” The descendents of the original painter, Elías García Martínez, were mortified by Giménez’s work. But when thousands of tourists began paying for admission to the church to observe her humorous “restoration,” Giménez demanded royalties. This case study should give students an opportunity to consider whether Giménez is entitled to the fruits of her labor in light of her unauthorized modification (some might say destruction) of another artist’s work. The objective of this case study is not to teach the copyright law of any country, but rather to determine, normatively, what the law should be.*

For the essential facts of the case, see the student handout. Information on recent developments in the case can be found in Doreen Carvajal, “A Town, if not a Painting, is Restored,” *New York Times*, December 14, 2014, <http://www.nytimes.com/2014/12/15/world/a-town-if-not-a-painting-is-restored.html> -- a copy of which is in the case file.

#### **Rights of the Church and the Artist’s Descendents**

While authorities in Borja insisted that Giménez acted on her own, Giménez maintained that the priest had given her permission to make her restoration.<sup>1</sup> Whether or not Giménez acted with the church’s permission may make a substantial difference in how we approach this controversy, depending upon what rights, and whose, we wish to protect. For example, we might say that by painting the portrait directly on the wall of the church, García Martínez bestowed the painting upon the church, giving the church a pure property right in the physical painting. Even though García Martínez would retain copyright protection in the image of the work—at least, under United States law—the church would have the right to alter the physical painting, or authorize

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<sup>1</sup> [http://www.nytimes.com/2012/08/24/world/europe/botched-restoration-of-ecce-homo-fresco-shocks-spain.html?\\_r=0](http://www.nytimes.com/2012/08/24/world/europe/botched-restoration-of-ecce-homo-fresco-shocks-spain.html?_r=0)

Giménez to do so. Thus, had the priest given her permission, neither the church nor García Martínez's descendents would then have any recourse against Giménez under US copyright law.

Then again, personhood theory might suggest that the church's rights are irrelevant. Moral rights, for example, extend over the work even after the work is sold or given away. Under personhood theory, García Martínez did not waive his rights to his work by putting it in the physical possession of the church, and he reserves the right to prevent alteration of his work. Under this theory, the church would have had no authority either to alter the work itself or to authorize Giménez's alteration without the permission of García Martínez's descendents. Giménez's unauthorized alteration would therefore entitle García Martínez's descendents to relief.

But do García Martínez's descendents have any rights at all? Personhood theory purports to protect the personality and identity of the artist, but it is not clear to what degree these rights extend to the artist's legacy. Copyright duration varies among countries, but it often lasts for the author's life plus some specified number of years. (Note that Martínez died in 1934, so that if moral rights last just as long as other copyright entitlements, the rights of Martínez's heirs have now expired.) As discussed in the lecture for this week, personhood theory might suggest that copyright protection—or at the very least, moral rights—should last only for the duration of the author's life. Perhaps, then, García Martínez's descendents have no rights to assert. On the other hand, personhood theory could also support the contention that García Martínez's works are the permanent manifestation of his identity. If we conceive of an artist's work this way—as the legacy of his identity—survival of one's personality rights after death seems imperative.

An unrelated factor that further threatens the claims of Martínez's heirs: the creativity in the original painting is limited by constraints of the *ecce-homo* convention. Martínez' interpretation of that convention is surely sufficient to support copyright protection, but the extent to which he was merely recapitulating the traditional depiction of Christ may undermine, at least in part, the moral arguments of the heirs.

### **Argument Against Royalties for Giménez**

The basic tenet of personhood theory states that the artist defines himself through his art, entitling him to continuing control over his works to preserve his selfhood and identity. Personhood theory would posit that Giménez wrongfully altered a manifestation of García Martínez's personality and an extension of his identity by damaging his work.

Copyright regimes may give effect to personhood theory through the enforcement of moral rights. Generally, continental European countries recognize extensive moral rights, and in the US, authors of certain visual works have limited moral rights. One of these rights is the right to integrity—that is, the right to prevent mutilation or alteration of a work. News outlets across the world reported the incident using language that implicitly acknowledges this right. For example:

- “Elderly woman *destroys* 19th-century Spanish fresco by Elías García Martínez in botched restoration”<sup>2</sup>

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<sup>2</sup> <http://www.independent.co.uk/arts-entertainment/art/news/elderly-woman-destroys-19thcentury-spanish-fresco-by-elias-garcia-martinez-in-botched-restoration-8073267.html>

- “Art experts are trying to *salvage* a beloved Spanish fresco of Jesus Christ that was *disfigured* by an amateur restoration that went miserably awry.”<sup>3</sup>
- “Three separate photographs of ‘Ecce Homo’ by painter Elías García Martínez show extensive *damage* caused by an elderly woman.... [T]he unnamed woman attempted to restore the mural herself – at a *devastating cost*.... Years of carefully calculated *depth of expression* simply washed out by copious amounts of red and brown.”<sup>4</sup>
- “La restauration d'une peinture du Christ tourne au massacre” (“The restoration of a painting of Christ ends in a *massacre*.”)<sup>5</sup>

News reports about the incident overwhelmingly focus on what Giménez destroyed, rather than what she created, reflecting a global normative understanding that an artist has the right to prevent the unauthorized modification of his original work. The perpetrator of such a modification, one might argue, should have no rights to the resultant work and may even be liable for infringement. Even Giménez herself seems to have gotten the sense that she had violated the integrity of the original fresco, reporting herself to Borja’s cultural affairs council after realizing the extent to which she had altered the painting.<sup>6</sup>

### Argument for Royalties for Giménez

On the other hand, labor theory would suggest that Giménez is entitled to at least a portion of the church’s proceeds. As the theory goes, a person who works hard has a property right in the fruits of her labor, especially in the intellectual property context, where labor is usually the most valuable ingredient in the creation of a work.

Giménez’s labor undoubtedly resulted in a work of great monetary and social value. News reports of the restoration emphasized that the original painting had “a sentimental attachment” for the people of Borja, but “little economic value.”<sup>7</sup> By August 2013, a year after news first broke of Giménez’s restoration, the church had raised more than 50,000 euros (\$66,285) in admission fees.<sup>8</sup> Meanwhile, the “restoration” inspired a meme, a satirical Twitter handle, and a Tumblr page devoted to photoshopping the fresco’s head on other masterpieces.<sup>9</sup> One of the formal rationales of labor theory is that ownership of a finished product should track ownership of the most valuable component thereof—labor. Thus, the theory would posit that Giménez is entitled to the fruits of that labor in the form of any profits from her version of Ecce Homo.

It might also be said that Giménez’s labor added value to depictions of García Martínez’s *original* work. Some critics have pointed out the unusual power of Giménez’s restoration to elevate the original painting to international fame. In an op-ed for the *Guardian*, Jonathan Jones insisted that “Martinez is not a great artist and his painting Ecce Homo is not a ‘masterpiece.’ It

<sup>3</sup> [http://latimesblogs.latimes.com/world\\_now/2012/08/behold-the-monkey-amateur-art-restoration-goes-awry-in-spain.html](http://latimesblogs.latimes.com/world_now/2012/08/behold-the-monkey-amateur-art-restoration-goes-awry-in-spain.html)

<sup>4</sup> <http://www.telegraph.co.uk/culture/art/9491391/Elderly-woman-destroys-19th-century-fresco-with-DIY-restoration.html>

<sup>5</sup> <http://bigbrowser.blog.lemonde.fr/2012/08/22/holy-shit-la-restauration-dune-peinture-du-christ-tourne-au-massacre/>

<sup>6</sup> <http://www.bbc.co.uk/news/world-europe-19674622>

<sup>7</sup> [http://elpais.com/elpais/2012/08/23/inenglish/1345732300\\_844688.html](http://elpais.com/elpais/2012/08/23/inenglish/1345732300_844688.html)

<sup>8</sup> <http://www.today.com/entertainment/botched-fresco-t-shirt-anyone-art-disaster-gets-merch-deal-6C10913892>

<sup>9</sup> <http://www.latimes.com/entertainment/arts/culture/la-et-cm-botched-art-restoration-earns-fans-20120827,0,2113759.story#axzz2pxB2bMNI>

is a minor painting in the dregs of an academic tradition.”<sup>10</sup> Jones went on to suggest that Giménez be “turned loose on a couple of works that actually matter” as a way of bestowing global attention upon more deserving works of art. Thus, just as Locke’s farmer adds value to the land through his work upon it, Giménez might be said to have added value to *Ecce Homo* through her own labor. This argument is particularly strong if, for the reasons suggested above, Martínez’s painting is deemed to have passed into the public domain by the time Giménez modified it.

Application of labor theory to Giménez’s case aptly demonstrates the ambiguousness of the meaning of some of labor theory’s key concepts and provides a useful backdrop for discussing those ambiguities. For example, is “labor” defined purely as time and effort, or is it defined as some action that creates social value? If we define labor as time and effort, we might consider apportioning Giménez’s royalties based purely on the proportion of her effort to García Martínez’s. García Martínez’s inscription declares that the painting is “the result of two hours of work for the Virgin of Mercy.”<sup>11</sup> While it is unknown how much time Giménez spent “restoring” the fresco, the proportion of her time input to García Martínez’s two hours could yield an appropriate proportion for dividing up royalties.

On the other hand, the social value approach could heavily favor Giménez. As observed above, García Martínez’s work was relatively unknown and fairly artistically unimportant before Giménez picked up her brush; now it is internationally known and has been hailed as a “masterpiece” in major news outlets throughout the world. Giménez’s version, meanwhile, is a source of humor that has spawned millions of fans throughout the globe. Giménez has created a new work of immense social value while elevating the social value of an old work; if the creation of such value is how we measure labor, one might argue that Giménez deserves substantial compensation.

## Outcome

In August 2013, Giménez and the local council settled their controversy with a deal to split the profits from *Ecce Homo* merchandise. The deal gives Giménez 49% of the proceeds from plates, postcards, t-shirts and other merchandise decorated with Giménez’s *Ecce Homo*. The rest of the proceeds will go to the local council.<sup>12</sup>

García Martínez’s family hired a University of Valencia art historian to restore the painting to its original state, but the Borja town council, custodians of the piece, wish to retain Giménez’s version in order to continue generating tourist income for Borja.<sup>13</sup> As of the signing of the merchandising deal, Giménez’s work appears to be intact.<sup>14</sup>

The debate over what to do with the painting raises the question of whether Giménez should be able to protect *her* personality rights to her own *Ecce Homo*. Jonathan Keats believes that Giménez took “an uninspired academic painting by a minor 19th Century artist” and turned it

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<sup>10</sup> <http://www.theguardian.com/commentisfree/2012/aug/23/great-art-restoration-disasters>

<sup>11</sup> [http://elpais.com/elpais/2012/08/23/inenglish/1345732300\\_844688.html](http://elpais.com/elpais/2012/08/23/inenglish/1345732300_844688.html)

<sup>12</sup> [http://www.huffingtonpost.com/2013/08/14/botched-fresco\\_n\\_3755433.html](http://www.huffingtonpost.com/2013/08/14/botched-fresco_n_3755433.html)

<sup>13</sup> <http://m.nydailynews.com/1.1178142>

<sup>14</sup> <http://www.ibtimes.co.uk/ecce-homo-spain-painting-christ-monkey-cecilia-500845>

into “an intensely personal expression of religious faith.”<sup>15</sup> A Change.org petition to preserve Giménez’s work has over 22,000 votes and describes Giménez’s work as “daring,” “a clever reflection of the political and social situation of our time,” and “a subtle critique of creationist theories of the church.”<sup>16</sup>

### Teaching the Case Study

I would begin by explaining the background of the story, using the Powerpoint slides to show students the “evolution” of the painting and its rise in popularity both on the Internet and among tourists. It might be helpful to conduct a poll asking students whether they think (a) the church deserves damages; (b) García Martínez’s descendents deserve damages; (c) Giménez deserves royalties; or (d) the painting should be returned to its original state. Ask a student in each camp to explain why he or she chose that answer, and use their responses to springboard into a review of the personhood and labor theories. (Given the differences between US and European law related to moral rights, it might be useful to note whether students from different geographical origins respond differently to the controversy.)

To allow students to test the limits of each theory, I would reveal details left out of the student handout (the theory that Giménez might have chipped paint away intentionally [see below]; the fact that García Martínez only spent 2 hours on the work; the relative insignificance of the original work to the artistic tradition; etc.) and ask students if these facts change their analysis in any way. I would especially encourage discussion of issues that call into question the practical application and viability of both theories—for example, whether García Martínez’s personhood rights should survive him (and, if so, for how long), or whether the painting should be returned to its original state. The discussion questions below, some of which appear in truncated form on the Powerpoint slides, should encourage conversation about these issues.

### Discussion Questions

- Do you think Cecilia Giménez deserves royalties for admission to the church? For reproductions of her work on merchandise? Or do you think she is liable for her damage to the painting?
- Did Giménez’s labor add to or detract from the value of *Ecce Homo*? Is this relevant to determining who pays whom? Is it relevant to determining what should happen to the painting?
- Some theorize that the speckling of the paint apparent in the July 2012 photo of *Ecce Homo* was not natural damage, but intentional preparation by Giménez for her “restoration.”<sup>17</sup> How, if at all, does this change your opinion? (Point out that according to labor theory it might count as more labor deserving of compensation, while according to personhood theory it might signify an even more egregious violation of the artist’s work.)

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<sup>15</sup> <http://www.forbes.com/sites/jonathonkeats/2012/09/27/why-every-church-should-be-blessed-with-a-muralist-as-uncouth-as-cecilia-Gimenez/>

<sup>16</sup> <http://www.change.org/es/peticiones/ayuntamiento-de-borja-zaragoza-mantenimiento-de-la-nueva-versi%C3%B3n-del-ecce-homo-de-borja> (in Spanish)

<sup>17</sup> <http://www.independent.co.uk/arts-entertainment/art/news/elderly-woman-destroys-19thcentury-spanish-fresco-by-elias-garcia-martinez-in-botched-restoration-8073267.html>

- Should it make a difference that Giménez seemed to initially regret her work and reported herself to the cultural affairs council?
- Does the extent of the restoration's fame affect your opinion of what, if any, compensation Giménez deserves? Giménez's work attracted thousands of visitors (and therefore thousands of euros), but do you think she would be as entitled to royalties if the visitors only numbered in the hundreds and her work had not been widely disseminated as an Internet meme?
- Giménez claims that the priest gave her permission to retouch the painting; the church claims she did not have permission. Assuming Giménez did her work with the priest's go-ahead, do you think he had the right to give that permission? Or did García Martínez (and his descendents) retain the right to control the work? In other words, do you think an artist should retain personhood rights after a first sale?
- Should an artist retain personhood rights after death? Is it more or less important to protect the artist's identity after his or her death?
- Would it have made a difference if Giménez had not painted over the original work, but instead painted a re-creation of García Martínez's work on her own canvas? Should García Martínez's descendents have legal rights against her in such a situation?
- Imagine that Giménez's restoration was flawless, but García Martínez's descendents were nevertheless angered that she retouched the painting without their permission. Should they have recourse? What if the restoration looked exactly the same as the original, but Giménez used materials or techniques that García Martínez expressly rejected in his own artwork?
- What, if anything, should happen now? Do you think the painting should be restored to its original state, or should Giménez's restoration be left intact? Assuming Giménez also has personhood rights in *her* work, whose rights should we prioritize when the personhood rights of two artists are in conflict?
- Who deserves to be paid by whom? Should the church receive compensation for the destruction of its property? Should García Martínez's descendents receive compensation for injury to the artist's personhood? Or should Giménez receive compensation for her work?

## **Additional Resources**

PowerPoint Presentation

Student handout