

THEORETICAL ANALYSIS ON THE PATRIMONIAL RIGHTS OF PLASTIC WORKS¹ CREATORS

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Copyright law gives the holder the legal possibility to use and dispose of his intellectual creation according to his own interests, but within the limits imposed by the law. Following the creation of intellectual works, moral and patrimonial rights are acknowledged to the authors.

Keywords: classical artwork; copyright; moral rights; patrimonial rights; resale right.

Concept and content of the copyright²

The analysis of the economic rights of creators of works of art has as its starting point the clarification of copyright and its content³. In the literature⁴ there are many definitions of this right⁵. A broad overview, far from complete, is that this right can be seen as all the legal rules governing and protecting social relations⁶ arising from the creation and use of works of art, regardless of their nature (literary, artistic, arts etc.) or other works of

¹Igor Chiroșca, *The work of plastic art -a source of potential conflict between author and the owner of the material support of the work in Romanian Journal of Intellectual Property*, no. 4/2008.

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² Rodica Parvu, *Copyright in Romania during 1996-2006*, in the Romanian Intellectual Property no.2/2006.

³ Ligia Danila, *Copyright Classification from the perspective of the New Civil Code*, the Romanian Journal of Intellectual Property, no. 4/2011.

⁴ Viorel Ros, D. Bogdan, O. Spineanu Matei, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p. 33.

⁵ Stanciu D. Cărpenaru, *Civil Law. Rights to intellectual creation. Succession*, E.D.P., Bucharest, 1971, p. 7.

⁶ Radu Romițan, *Moral rights of the author and their protection by means of criminal law in the Romanian Intellectual Property no.1/2004*.

intellectual creation, and the protection of the authors and their interests⁷. Copyright law gives the holder⁸ the legal possibility to use and dispose of his intellectual creation according to his own interests, but within the limits imposed by law⁹. Following the creation of intellectual works, moral and patrimonial rights are acknowledged to the authors¹⁰.

Therefore the content of the copyrights¹¹ is a complex¹² one, and refers both to moral rights and economic/patrimonial rights¹³. If in terms of moral rights, their recognition along the time, has been the subject to numerous debates; the patrimonial rights have enjoyed since the beginning, unanimous recognition, the copyright being considered a form of property¹⁴.

Moral rights of the authors¹⁵

Article 10 of Law no. 8/1996 on copyright and related rights¹⁶, acknowledges the following moral rights¹⁷:

- The right to decide if, how and when the work will be disclosed to the public;
- The right to claim recognition of authorship;
- The right to decide under what name will be brought opera to the public
- The right to the integrity of the work¹⁸, which gives him the power to oppose any changes, and any interference with the work, if it harms the honor or reputation¹⁹

⁷ John Macovei, *Treaty of intellectual property law*, CH Beck Publishing, Bucharest, 2010, p. 419.

⁸ Ligia Danila, *Copyright topics from the perspective of the New Civil Code*, the Romanian Journal of Intellectual Property, no. 1/2012.

⁹ Yolanda Eminescu, *Industrial property Treaty*, vol I, new creations, Romanian Academy Publishing House, Bucharest, 1982, p. 15.

¹⁰ Constantin Tufan, *Subject to copyright*, in the Romanian Intellectual Property No. 2/2005.

¹¹ Ionel Didea, *The Object of intellectual property rights*. Law proposal on the object of intellectual property rights in intellectual property Romanian Journal, no. 1/2005.

¹² PI. Demetrescu, *Copyright*, Scientific Annals of the "Al. I. Cuza" University, new series, Section III, Social Sciences, 1956, p. 379.

¹³ Ligia Danila, *Copyright and industrial property rights*, CH Publishing Beck, Bucharest, 2008, p. 5.

¹⁴ Victor Volcinschi, *Defining issues of the copyright*, in the Romanian Journal, no. 2/2007.

¹⁵ Ciprian Romițan, *Moral rights of the author under the rule of law no. 8/1996*, in the Romanian Intellectual Property no.1/2007.

¹⁶ Published in the Official Gazette of Romania, Part I, no. 60 of March 26, 1996, as amended.

¹⁷ Gabriel Olteanu, *Exercise of the moral rights of the author of the heirs*, in Romanian Journal of Intellectual Property, no. 1/2009.

- The right to retract the work of publication, bearing the damages caused by this act of withdrawal

These rights come to show the indissoluble link between the author and his creation, about what your bike is based on the author's intellectual creation. Being vests in the author of these rights are inalienable, imprescriptibly and personal²⁰.

Patrimonial rights of the author

The concept and importance of patrimonial rights

The patrimonial rights of copyright are the rights to use and exploit the work and include also the resale right²¹.

For a better understanding of the rights resulting from the implementation of plastic work, it is required a summary of patrimonial rights, so that to further highlight the uniqueness of resale right, a right specific to the creators of plastic works.

Patrimonial rights are those subjective rights that rise from the author's exercise of the moral right to disclose the work, and their content can be expressed and valued in money²².

In the literature it was considered that copyright rights are divided into absolute and relative rights, depending on their degree of enforceability²³. True nature of these rights comes from the fact that the right holder is recognized all the attributes encountered in the real rights: *utendi jus*, *jus fruendi*, *jus abutendi* and *possidendi*. So these rights are binding, without fulfilling any format, but by law, to all participants in the legal life (*erga omnes*).

When these rights of authors of works of plastic arise from unilateral or bilateral legal acts of the third party's wrongful act causing damage, they take the nature of debt instruments.

The characteristics of patrimonial rights in the copyright

Patrimonial rights have the following legal characteristics:

- they are personal

¹⁸ Rodica Bucur, *The rights to the integrity of the work*, in the Romanian intellectual property, no. 2/2005.

¹⁹ Gabriel Olteanu, *Moral right to the integrity of the work*, in the Romanian intellectual property, no. 3/2009.

²⁰ CR Romanita, *Moral rights of the author*, Legal Universe Publishing, Bucharest, 2007, p. 119.

²¹ Art. 12 and 21 of *Law no.8/1996 on copyright and related rights*, amended several times.

²² Ligia Danila, *Copyright and industrial property rights*, CH Publishing Beck, Bucharest, 2008, p. 86.

²³ *Ibidem* 10.

- they are exclusive
- they are temporary

The personal character of the author's rights is clear from the wording of Article 1 of Law no. 8/1996 which provides that copyright vests in the author. Since the text of the law does not distinguish between the two categories of rights that make up copyright under the "Ubi lex non distinguit, nec nos distinguere debemus" there is no basis leading to the idea that the laws do not consider also the relationship between copyrights and the author.

The personal nature of copyrights is resulting also from other reasons. Given the transmission institution of these rights, and in case of moral rights transfer is possible only by way of exception, the economic/patrimonial rights of copyright can be transferred by virtue of their personal character, both by inter-vivos acts and by acts mortis causa and in some cases *ope legis*.

This character shows once again the link between the author and his work one indestructible, which notes that the legislature can not differentiate between moral attributes and heritage in terms of their protection²⁴.

Regarding the exclusive nature of property rights, it has two aspects: on the one hand the author sovereign right to decide if, how and when his work can be exploited, and on the other hand the right to decide whether he will exploit the work himself, or will grant his consent to another person to exploit it. In the latter situation is irrelevant in terms of the author's consent if the work is first published or has other previous publishing. Also, this character does not exclude the author's possibility to decide that his work to be exploited with other persons.

This characteristic reveals that the author has a monopoly in the exploitation of his intellectual creation throughout the legal protection enjoyed by the work and its author. So, only exceptionally, and with the author's agreement the work can be exploited by third parties²⁵.

Article 25 of Law no. 8/1996 establishes that the patrimonial rights of the copyright extend along with the life of the author, rights can be transferred after his death by civil law heritage; the protection being different based on the type of the work, the way to make it public, and the way to produce the work.

The text of this law is limiting such rights in time. therefore these rights of the author are temporary²⁶.

²⁴ See for details John Macovei Treaty of intellectual property law, CHBeck Publishing, Bucharest, 2010, p.453.

²⁵ See for more details, Viorel Ros, D. Bogdan, O. Spineanu Matthew, Copyright and Related Rights, All Beck Publishing House, Bucharest, 2005, p.260.

²⁶ See Yolanda Eminescu, Industrial property Treaty, vol I, new creations, Romanian Academy Publishing House, Bucharest, 1982, p.167.

If we consider that the asset side of copyright can be exploited by author personally and by a third party who has granted this right by the author of creation, we recognize that these rights are transferable. These rights may be subject to agreements between living or completed acts upon death²⁷. Practice has proved that these rights can be transferred in some cases and by law²⁸.

Classification and analysis of patrimonial rights

Regarding the classification of patrimonial copyrights (according to several articles of Law No. 8/1996), authors have the following patrimonial rights:

- the right to use and exploit personally the work;
- the right to consent the use of the work to others
- the right to resale.

The right to use and exploit personally the work is a complex and patrimonial right recognized to its owner, according to which the author can legally use its work according to its needs and expectations and exploit it in order to obtain a material advantage.

This is an exclusive right of the author, who decides whether and how to exploit the work personally or through third parties.

Article 13 of Law no. 8/1996 provides for the use of the work and its exploitations in order to gain material advantages by copyright holder.

The use and exploitation of plastic works in order to gain a material advantage, may be done in different ways: reproduction of the work, work distribution, importation for domestic marketing of children made with the consent of the author, after work, public communication, directly or indirectly work by any means, including through the work to the public, so that it can be accessed at any location at any time individually by the public (exposure within galas, openings, or exhibitions), rental as teaching material for highlighting certain qualities; exhibit in order to highlight the qualities of the author, in order to attract clients, to produce new works, for decoration of public spaces for added value; marking social events, and the development of derivative works etc.²⁹. All these forms of usage have as "center" the plastic work itself, and they bring an economic benefit to its author without that work to lose value.

The right to consent the use of the work to others is the way of obtaining economical gain, material benefits from the intellectual creation without any deterioration or obsolescence to the intellectual work, by persons

²⁷ See art. Article 39. (1) of Law no. 8/1996.

²⁸ Ioan Macovei, op.cit., p. 453.

²⁹ Article 13 of Law no. 8/1996 also provides two ways to use the work but are not works of art possible. These forms relate to broadcasting and relaying works cable operator which is impossible in the case of works of art.

other than the author or owner of the work. He who uses the work in different ways this time is not the author or owner of the work, but a third party, who, for such use, creates, at his turn, an advantage to the first. Use by third parties is possible under a rental agreement, limited in time, and which creates rights and obligations for both parties. If the author or owner of the work is obliged to provide to third party the work, for a period of time, and to guarantee a peaceful use of the work, the third party is obliged to pay for this, to use it for its intended, not to destroy or to alter its shape / structure without the author's special consent, and to return it to its owner at the date agreed in the contract.

*Reproduction concept*³⁰

Reproduction³¹, according to art. 14 of Law no.8/1996, is the process of making all or part of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including realization of a video and temporary storage of these electronic materials³².

If, there are no problems with copying a work for resale and a profit, it could be a problem with the video reproduction means. Here, I believe that these copies can be used, mainly as teaching material, in the learning processes techniques or methods to fine art when the original copy is not available.

Reproduction is considering the material form of the work, and is difficult to accept that a plastic work may be reproduced by means of the video, while the audio ones are really excluded. The most common methods for plastic reproductions are casting, engraving, drawing.

Reproduction, regardless of how it is done, must be based on consent, the consent of the author³³, as this process is to the author's original work to be reproduced. Reproduction or copying work is always preceded by fixing the original creation by the author on a support (statue, painting, layout, and so on).

Another form recognized by the legislator in the use and exploitation of the work is the distribution.

Distribution concept

Distribution³⁴ comprises the sale or transfer by any means, whether by onerous title or grace of the original or copies, and offering them to the public, with the consent of the author of a work of art or holder of their

³⁰ *Ibidem.*

³¹ Rodica Bucur, *Reproduction rights in Romanian Journal of Intellectual Property*, No. 2/2005.

³² Yolanda Eminescu, *op.cit.*, P 167.

³³ Ioan Macovei, *op.cit.*, p. 454.

³⁴ *Art 14' alin .1 of Law no.8/1996.*

ownership. Distribution involves first reproduction of the work and then holding control of the commercial exploitation of the work.

Regarding imports, as a way to use the work³⁵, is the process of introducing domestic order marketing of the original or legally made copies of a work of art (attached to any kind of support). Import shall be deemed lawful if this operation is accepted by the author³⁶.

Rental concept

Renting³⁷, as a form of use of the work is seen by the Romanian legislature as legal operation and material for making available for use, for a limited time and for trade and economic advantage, directly or indirectly, of a work³⁸.

Borrowing³⁹ is legal operation of making available for use, for a limited time and without seeking commercial or economic advantages, directly or indirectly, of a work through an institution that allows public access to that purpose⁴⁰.

The communication

Public communication is considered a way to exploit the economic rights of authors of works of art, if the operation is carried out directly or through technical means, in a public place, where the number of people exceeds the normal circle of a family and acquaintances that can be informed about the plastic work its characteristics (qualities).

Resale right⁴¹

The resale right requires special consideration since it is a right that arises only for authors of plastic works.

Thus, the resale right has its logical reasoning in the need to protect the author's economic interests at the beginning of his creative life, since he does not enjoy fame and public recognition, and his work is not known, most often not assessed and exploited in a way that allows authors to cover their needs⁴². Also regulating the resale right is intended to provide the authors of works the economic benefit brought by the success of their creations.

³⁵ Ligia Danila, *op.cit.*, P 87.

³⁶ Yolanda Eminescu, *op.cit.*, P 167.

³⁷ Viorel Ros, D. Bogdan, O. Spineanu Matthew, *op.cit.*, P 257.

³⁸ Article 14 paragraph 1 of *Law no.8/1996*.

³⁹ Ligia Danila, *op.cit.*, P 87.

⁴⁰ Ioan Macovei, *op.cit.*, p. 454.

⁴¹ Mirela Romițan, *Resale right*, in Romanian Journal of Intellectual Property, no. 3/2005.

⁴² Yolanda Eminescu, *op.cit.*, p. 169.

The need for material fairness gave therefore arise to the resale right under which an author of a work is entitled to receive a percentage of the resale price of the work and know the layout place of his work; so we notice the basis of this as is the idea of fairness: the author who gave his work for a low price can take advantage of some of the added value that it subsequently acquires.

In this respect, resale right means, the right plastic author works, graphic, photographic, to receive a share of the sale price obtained for any resale of the work subsequent to the first transfer by the author, and the right to be informed of the location of his work.

It is a relatively new patrimonial right, which was not foreseen in the Decree nr.321/1956 that, as mention before, is meant to reward the authors of works of art, works that grow in value over time.

According to Law no. 8/1996, resale right consists of two elements: a patrimonial right - the right of the author of a work of graphic or plastic art or a photographic work, which was resold after its first transfer by the author, to receive a percentage (maximum 5%), without exceed 12.500 Euros, from the sale price obtained for any resale act, and a personal right consisting of author's right to be informed about the location of his work.

The complex nature⁴³ of the resale right creates a double obligation to the owner of the work, namely: its duty to allow the author of the work to exercise the copyright without thereby altering the work itself or the interests of its owner or keeper, and the second obligation is the impossibility to destroy the work without previously refunding the author the counter value of the supporting materials on which it is attached and fixed.

Third parties involved in the sale of the work further on, are required to transfer the amounts calculated under the law to the author and inform the author within two months from the date of sale. According to art. 125, para. (3) of Law no. 8/1996, these obligations can be met also by the collective management bodies⁴⁴.

Resale right applies to all acts of resale of an original work of art, graphic or photographic regardless of the quality of the seller, buyer or

⁴³ T. Bodoaşcă, *Intellectual property law*, CH Beck Publishing, Bucharest, 2006, p. 45.

⁴⁴ Amount due poster may not exceed 12,500 euros or the equivalent in lei and a percentage of revenue from resale as follows:

- From 300 - to 3000 Euro-5%;
- From 3000.01 - to 50,000 euros, 4%;
- From 50,000.01 - to 200,000 - Euro-3%;
- From 200. 000.01 - to 350,000 euro -1%;
- From 350,000, 01 - from 500,000 to 0.5%;
- Over 500,000 euros - 0.25%.

broker. Limited numbers of copies made by the author are not considered original works so it recognizes the existence of such a right.

The resale right corresponds to the following reciprocal obligations of the owners or possessors of works⁴⁵

- To allow the author the access to his work in order to exercise the copyrights according to the law
- To provide to the author of the work the cost of material or to permit the author to make a copy before the work is destroyed

From the interpretation of these laws and considering the reason for which the resale right was regulated by the legislature, the following legal characteristics appear to define the resale right:

- *The resale right* is the projected link between the author and his work, the character of the resale right is that the created work bears the mark of its author's personality, way of thinking, emotions, concepts, their occupations that distinguish the people; so that they cannot be found in the same form and structure in another person⁴⁶. These arguments show that the relationship between the author and his work is not only during life but also after his death, fact that must be guaranteed and ensured through recognition of the resale right.

- *Has a patrimonial character* - apparent from the material benefit that the author gets from a work of art when it is resold at a later date, after first transfer by the author⁴⁷.

This character is also based on conduct prescribed for the owner of a work that wants to destroy it, which, as noted above, is required to make available to its author at a cost equivalent the material that makes up the support of the work, and only if the author does not want the work at this price, the owner is free to destroy the work.

The doctrine considers that the obligation of the owner who wants to destroy the work should belong both the author of the work and to the societies of authors, when the author either does not want or cannot afford to purchase the work at cost of the materials, because it is considered that it would maintain the national cultural fund, consisting of works of art, richer, more valuable and harder to damage than before.

- *The resale right is inalienable* - Law. 8/1996 in Article 21, paragraph 7 prohibits the alienation or waiving of this right, regardless of whether it is realized against money or with free title⁴⁸.

⁴⁵ Ioan Macovei, *op.cit.*, p. 454.

⁴⁶ Yolanda Eminescu, *op.cit.*, p. 169.

⁴⁷ Viorel Roș, D. Bogdan, O. Spineanu Matei, *op.cit.*, p. 483.

⁴⁸ Ligia Dănilă, *op.cit.*, p. 117.

The purpose of this prohibition is to protect the author from any speculation and even from himself. Given that this feature is specific only to moral rights, not to the patrimonial ones, inalienability of the resale right is an exception to the rule.

- *The resale right has a fruity character*

The author of a work of art, both while it is in life and after his death, the holders of these rights during a period of time fixed by law, are entitled to reap the fruits (benefits), without to influence or degrade the substance of the work (for example, works of art that are exhibited in various exhibitions sale, where they obtain material benefits from exhibiting the work and from the eventual sale of the work).

- *Also, the resale right and temporary*

Copyright of literary, artistic or scientific work arises from the moment of creation, whatever the mode or form of expression. If the work is created in a time, in part, series, books and any other forms of creative development, the patent will be calculated for each of these components⁴⁹.

The person who, after the termination of copyright, notifies the public, legally, for the first time, a work not published before, receives a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the date when it was first brought to public attention, legally.

The duration of economic rights of works made public legally under a pseudonym or without mentioning the author, is 70 years from the date of disclosure to the public. If the author's identity is made public before the expiry of 70 years or pseudonym adopted by the author leaves no doubt about the identity of the author, the provisions of Article 25 of the law, namely the resale right applies and lasts throughout the life of the author.

As a related right in terms of copyright, also the Romanian legislation, namely Article 25 of Law no. 8/1996, as amended by Law no. 285/2004, O.U.G. nr. 123/2005 and Law no. 329/2006 such a right last for the author's lifetime and for a period after the author's death, 70 years for his successors in title. If there are no heirs, the exercise of this right is mandated to the collective administration organization during the life of the author, or without, without a special mandate, to the collective body with the largest number of members.

Time limiting the exercise of this right⁵⁰ is justified by ensuring optimal civil circuit to the works of art and the recognition of property rights

⁴⁹ Violeta Slavu, *Objectives, content and duration of copyright* in the Romanian intellectual property, no. 4/2011.

⁵⁰ Paul Buta, *Limitations in the exercise of copyright. Conditions involved in intellectual property*, Romanian Journal, no. 2/2007.

in all its powers, to those who legally purchase such works of art to a certain period from the first alienation of the work or from the author's death.

For the realization and exercise of this right, the seller is obliged to communicate the author's plastic resale information on the work, the price obtained and the location of the work within two months from the date of sale. Failure to appeal within seller's responsibility for damage caused by crime author and the payment of damages. The seller is obliged to withhold quotas percentage of the sale price or without adding other charges and payment of amounts due by the author.

The persons entitled to resale right may require amounts due from vendors within 3 years from the date of sale. The right to claim payment of money from the seller starts after two months from the sale and expires in 3 years since the birth of this right.

The three year term is part of the general limitation period and is within the rights of proprietor who, due to abstinence in the exercise of this right is deprived of legal and lawful to carry it out anymore.

Author of works of art, based on the resale right, is recognized also other special privileges. Thus, the owner or possessor of the artwork is obliged to allow access to the author of the work and to provide its intellectual creation, whether this is required for the exercise of copyright. But, the author of the work is held to exercise this legal right without prejudice to the legitimate interests of the owner or possessor of his intellectual work. To defend their interests, the possessor or owner may request certain guarantees sufficient for security work, perpetrator, and insurance to equate the market value of the original work.

Another obligation which belongs to the owner of the work is that it does not destroy the work before making an offer to its creator, the cost price of the materials from which this work is done. However, if the return of the work would not be possible due to the nature of the works or other objective factors, the owner is obliged to allow the author to make a copy.

From the analysis of this specific right of works of art, but also from the purpose for which it was governed, one can notice that this right is inalienable, that this right cannot be renounced or alienated. In this sense the author is protected from any form of speculative acts against his work.

The nature of this right allowed the legislature to recognize its holder to exercise the privileges of that right not only throughout his life, but, also to transfer it.

In the final part of my approach I wish to highlight some aspects of international regulation of resale right.

Thus, for the further internationalization process of the Community market for modern and contemporary art, caused by the effects of the new

economy and given that few countries outside the European Union recognize the right of resale, the European Parliament and the EU Council point out that it is necessary the harmonization of the laws on the resale right.

The resale right is currently provided for in national legislation of most EU Member States. Such laws, regulations, while providing resale right, shows some differences, particularly in respect of works covered, their beneficiaries, the rate applied, the transactions subject to payment of the resale right.

Whether or not such right has a significant impact on the competitive environment within the internal market, as far as whether or not the payment obligation arising from the resale right is an element which must be taken into account by each person wants to sell a work of art. Therefore, this law is a contributor to distortion of competition.

Conclusions

After analyzing the rights that arise for creators of works of art⁵¹ several conclusions can be drawn.

A first conclusion is that after an author's own intellectual creation acquires a series of specific rights that enshrines the indissoluble connection of personality and work performed.

Legal nature of the rights⁵² resulting from creation of works of intellectual property is a specific complex containing interpenetration of the purely personal rights with the financial ones.

These rights can be exploited either directly or through third parties, but the use and exploitation of these rights is the manifestation of the will of the creator of the work.

Another conclusion is that a number of rights, whether personal or patrimonial that they are inalienable and cannot be subject to assignment or waived by the author. This protection finds its purpose in the scope for which the legislature has regulated the intellectual property, namely: protection of the work, its author and the interests of society.

The link between heritage and moral side of copyright content is another conclusion that emerged from this study. Moral rights cannot be analyzed separately from economic rights and vice versa.

The economic side of the exploitation of the works of art has more features. For starters must be noted that these works cannot be exploited by

⁵¹ Igor Chiroasca, *Works of art- movable or immovable assets*, Romanian Journal of Intellectual Property, no. 4/2011.

⁵² Gheorghe Gheorghiu, Cosmin Cernat, *Intellectual property law, university course*, Legal Universe Publishing, Bucharest, 2009.

any means recognized by law and that due to the nature of the work. They cannot be exploited by broadcasting and cable retransmission.

Also these works give rise to a right regulated by the Romanian legislature just for this class of work: the resale right.

This right, which in turn has a complex content, where, both sides: personal and patrimonial are found, is a protectionist right that comes to protect the interests of creators of works and to guard against various speculations until they have acquired notoriety.

In conclusion, we can say that the legislation achieves, by the resale right, the balance between the actual value of the work and the benefit that its author deserves, the resale right therefore appearing as a legal situation of unpredictability.

Undoubtedly, the theoretical analysis of art authors' rights wanted to highlight the specific characteristics of this form of intellectual property, the specific rights of the creators of these works as well as how they can be exercised.

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